NOTES

"A SWORD IN THE BED": BRINGING AN END TO THE FUSION OF LAW AND EQUITY

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The procedural distinction between law and equity in the United States is largely a historical footnote in the present day. David Dudley Field, the notorious lawyer who advocated for the end to the distinction between law and equity, believed that there was no true substantive difference between the two disciplines beyond the different remedies that each could offer.[1] But equity has not gone gentle into that good night. For example, federal courts have recently struggled with the scope of injunctive relief, a traditional equitable remedy.[2] At present, the law grants to United States courts that hear cases in equity only the authority of "the English Court of Chancery at the time of the separation of the two countries [i.e., England and the United States]."[3] Further, the law dictates that equitable remedies must be granted according to "traditional principles of equity jurisdiction."[4] Regardless of whether Field's view that equity and law are functionally no different is correct, the principles behind the ancient system of equity still govern federal law today.

Equity has been a controversial area of the law for ages. Charles Dickens' novel *Bleak House* lampoons the system by depicting a case in chancery that goes on for generations, consuming several people's

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1 Kellen Funk, *The Union of Law and Equity: The United States, 1800–1938*, *in* EQUITY AND LAW: FUSION AND FISSION 46, 47 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019).

2 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (arguing that traditional principles of equity accord no right to issue a "universal injunction[]"); United States v. Texas, 566 F. Supp. 3d 605, 645 (W.D. Tex. 2021).

3 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

4 *Id.* at 319.

lives and livelihoods in the process.[5] The Antifederalist author Brutus complained of federal judges sitting in equity that "in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them."[6] Even Joseph Story, the famed jurist and scholar of equity, thought that equity powers lent themselves easily to abuse.[7] Story did not think that this was inevitable, however, writing that "discretion is a science, not to act arbitrarily, according to men's wills and private affections; so that discretion which is executed here is to be governed by the rules of law and equity."[8] But reformers rejected this viewpoint. They did not agree that "discretion [was] a science," thinking instead that law and equity were "simply two sets of remedies, with no natural or necessary relationship between remedies and substantive rules or doctrines."[9] This misconception underlying the merger of law and equity has led judges and lawyers alike to misunderstand equity as either unfettered discretion to correct injustice or nothing more than a set of remedies available at law. Neither of these viewpoints is correct. Story refuted the former, and the Supreme Court refuted the latter in *Grupo Mexicano*:

> This expansive view of equity [i.e., that equity allows courts the power to provide any remedy not available at law] must be rejected. Joseph Story's famous treatise reflects what we consider the proper rule, both with regard to the general role of equity in our "government of laws, not of men," and with regard to its application in the very case before us . . . . "'It is said,' [Blackstone] remarks, 'that it is the business of a Court of Equity, in England, to abate the rigor of the common law. But no such power is contended for.'"[10]

Because the merger of law and equity papered over the important, if subtle, rules of equity, it created a serious concern that went largely unconsidered by early proponents of merger: if lawyers and judges are trained to think of equity as no different from law, what will happen to the guardrails created to prevent the abuse of equitable powers? Equity is a massive and powerful field of law that dates back to the 1300s;[11]

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5 *See* CHARLES DICKENS, BLEAK HOUSE (Patricia Ingham ed., Broadview Press 2011) (1853).

6 Essays of Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 420 (Herbert J. Storing ed., 1981).

7 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 13 (Little, Brown, & Co. 14th ed. 1918) (1836).

8 *Id.* (quoting Cowper v. Cowper (1734) 24 Eng. Rep. 930, 942; 2 P. Wms.. 720, 753).

9 Funk, *supra* note 1, at 47.

10 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 321 (1999) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 12 (1836)).

11 *See* Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 219 (1994).

to ask judges, who are already legal generalists, to become intimately familiar with such an intricate system is to court disaster.

Those who called for the fusion of law and equity have, throughout the years, argued that the existence of a parallel court system for equity would be inefficient and confusing for parties.[12] While there is limited merit to this viewpoint, the United States has been willing to create courts of limited jurisdiction to hear cases of a highly specialized or technical nature in other areas of the law (for example, tax and bankruptcy). This Note argues that the specialized-courts approach is viable as it relates to equity and that it is, in fact, preferable to the current system. This Note will also serve as a valuable resource for future scholars of equity. Despite a recent groundswell of academic interest in equity, no work has conducted a fifty-state survey on the history of state equity courts, nor has any work collected sources about these courts. This Note will provide a collection of such sources and will feature brief discussions of certain states' approaches to equity. Part I will provide a collection of arguments for and against equity courts throughout the history of the United States. Part II will provide technical details of state equity jurisdictions throughout American history and will demonstrate (1) that total merger is less common that is commonly thought, and (2) that states that have rejected total merger have managed to do so in a way that has been tenable for parties. Part III will argue that the costs imposed by merger are substantial enough to justify incurring the costs needed to undo it.

I. AMERICAN DEBATES ON EQUITY

Americans have feuded over equity since well before the Declaration of Independence, and they show no signs of stopping. Prominent statesmen, scholars, and lawyers have appeared on both sides of the divide. The Antifederalists, David Dudley Field, and Roscoe Pound opposed equity as a distinct field of law; Alexander Hamilton, Antonin Scalia, and Henry Smith were in favor of it. As one might suspect of a debate that has been around for over three hundred years, the debate over equity has not always been over the same issues. Broadly speaking, it can be broken up into three historical periods, within which the debate had a relatively uniform character: early America, where the

12 *See* Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 257, 270 (Donald Fleming & Bernard Bailyn eds., 1971) (saying that an early letter from Pennsylvania contended that the establishment of equity courts "would through [sic] everything into Confusion"); John J. Watkins, *Law and Equity in Arkansas—Or, Why to Support the Proposed Judicial Article*, 53 ARK. L. REV. 401, 433 (2000) ("[T]he dual system is 'a cumbersome relic which still breathes.'" (quoting Dalrymple v. Simmons First Nat'l Bank of Pine Bluff, 758 S.W.2d 5, 6 (Ark. 1988))).

debate centered around connections to the tyranny of the British crown; the merger era, where the debate centered around the necessity—or lack thereof—of keeping law and equity separate; and the present, where the debate focuses on whether the fact that equity is antiquated is a benefit or a drawback.

Early American criticisms of equity focused on its undemocratic nature. The colonists resented colonial chancery courts because the chancellor was frequently also the royal governor, who sometimes ran afoul of colonial sensibilities by abusing his discretion.[13] The colonists were also concerned that the chancery could enable royal infringement on their rights as Englishmen.[14] It is little wonder why the colonists, when establishing their own judiciary systems, came to prefer unitary courts of law and equity overseen by the legislatures.[15]

Around the time of the passage of the Constitution, the Federalists and Antifederalists took up the issue of federal equity jurisdiction. The Antifederalists picked up where the pre-Revolution colonists had left off, contending that equity lent itself all to easily to abuse, that giving the federal judiciary a general power to hear cases in equity would upset the bounds of federalism, and further, that equity itself was inherently unconfinable by any sort of principles.[16] Alexander Hamilton, speaking for the Federalists, disagreed. He analyzed the ways in which local court systems handled jury trials and equity, and concluded that they were so disparate as to make the Antifederalists concerns irrelevant as they related to federal courts:

> [I]t appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for

13 *See* Katz, *supra* note 12, at 278–82 (discussing a New York case in which Governor William Cosby was accused of abusing his power as chancellor to grant a large tract of land to political supporters).

14 *Id.* at 280–81 (referring to an English precedent in chancery as a "royal scheme . . . to establish 'a despotick Power in the King over the Rights and Liberties of the Subject'" (quoting William Alexander et al., The Petition of Some of the Proprietors of Part of the Lands Lately Taken out of Connecticut, and Added to the Province of New-York (Oct. 22, 1735), *reprinted in* N.Y. WKLY. J., Nov. 24, 1735, at CVIII)).

15 *Id.* at 264–65.

16 *See* Essays of Brutus XI, *supra* note 6, at 420 ("The same learned author [i.e., Blackstone] observes, 'That equity, thus depending essentially upon each individual case, there can be no established rules and fixed principles of equity laid down, without destroying its very essence, and reducing it to a positive law.'" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 61–62 (Oxford, Clarendon Press 1765)).

> a standard, as by omitting a provision altogether and leaving the matter, as it has been left, to legislative regulation.[17]

Hamilton also addressed the older concerns about courts of equity, admitting that a court of equity could easily "permit the extension of its jurisdiction to matters of law," but arguing that attempting to subsume equity into law would be "unproductive of the advantages which may be derived from courts of chancery" and would "undermine the trial by jury, by introducing questions too complicated for a decision in that mode."[18]

As time moved onward toward 1848, proponents of the fusion of law and equity changed direction: the issue wasn't that equity was inherently dangerous, it was that equity was inherently no different from law.[19] Interestingly, those fusionists argued that even if equity was created distinct from law, it "had become indistinguishable from law in its precedent-bound jurisprudence."[20] Some fusionists even argued that a separate equity jurisdiction was not just unnecessary, but constituted an active encroachment on the law; indeed, at the Field Code debates conducted in the New York legislature, New York fusionist Charles O'Conor argued that "[t]here was not at present any such thing recognized in jurisprudence . . . which the law did not define and declare."[21] The fusionists had a powerful ally in their fight: Blackstone, who wrote that, however law and equity may have been created, both "are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode[s] of their proceedings."[22]

However, as more and more states fused law and equity, opponents of fusion began to appear. Some argued that the fusion of law and equity was unconstitutional, including both the legislature of Iowa[23] and the New York Court of Appeals.[24] Judge Selden expressed the argument succinctly in *Reubens v. Joel*:

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17 THE FEDERALIST NO. 83, at 503 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18 *Id.* at 505–06.

19 *See* Funk, *supra* note 1, at 56–57 ("[T]he distinction between law and equity 'has no foundation in the nature of things', as Field put it. 'Its existence is accidental, and continues till now only because we have been the slaves of habit.'" (quoting *The Convention—Reports of the Judiciary Committee*, EVENING POST, Aug. 13, 1846)).

20 *Id.* at 57.

21 S. CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION, FOR THE REVISION OF THE STATE CONSTITUTION 443 (Albany, Albany Argus 1846).

22 3 WILLIAM BLACKSTONE, COMMENTARIES *434.

23 REVISION OF 1860, CONTAINING ALL THE STATUTES OF A GENERAL NATURE OF THE STATE OF IOWA 447 (Des Moines, Iowa, John Teesdale 1860) [hereinafter REVISION OF 1860] (discussing, though disavowing, this stance).

24 Reubens v. Joel, 13 N.Y. 488, 495 (1856).

> It is, in my judgment, clear that the legislature has not the constitutional power to reduce all actions to one homogeneous form; because it could only be done by abolishing trial by jury, with its inseparable accompaniment, compensation in damages, which would not only conflict with art. 1, § 2 [of the New York Constitution], which preserves trial by jury, but would in effect subvert all jurisdiction at law, as all actions would thereby be rendered equitable; or, by abolishing trial by the court, with its appropriate incident, specific relief, which would destroy all equity jurisdiction and convert every suit into an action at law.[25]

But the Court of Appeals did not carry the day. In 1848, the state of New York formed a commission "to revise, reform, simplify, and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this State."[26] David Dudley Field, the well-known reformer, took a seat on this commission, and was so instrumental in shaping its reforms that the modernized code that New York ultimately passed was commonly known as "the Field Code."[27] Among other things, the Field Code abolished separate proceedings in law and equity in favor of a single, streamlined system.[28] The Field Code was ultimately adopted by a majority of states, sweeping away the separate state courts of equity.[29]

Even after the passage of the Field Code across the United States, equity's defenders continued to take the position that the Constitution required separate proceedings in law and equity in order to preserve the right to a trial by jury.[30] This argument found friendly ears in the former Northwest Territory and its neighbors, as states like Michigan, Kentucky, and Iowa adopted the view.[31] Different states handled this in different ways: the Michigan Supreme Court, for example,

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25 *Id.* at 495. Judge Selden later averred that this was "to be taken as [his own] individual opinion merely" and not controlling precedent, because procedural issues in *Reubens* rendered the constitutional issue moot. N.Y. Ice Co. v. N.W. Ins. Co. of Oswego, 23 N.Y. 357, 360 (1861).

26 *See* Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Post-bellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 174 n.10 (2008) (quoting N.Y. CONST. of 1846, art. VI, § 24).

27 *Id.*

28 *Id.*

29 *See id.*; Funk, *supra* note 1, at 47.

30 It is important to note here that the Supreme Court has not yet incorporated the Seventh Amendment, which guarantees a trial by jury, against the states. *See* Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 852 (2013) (citing McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010)). However, the "great majority of state constitutions" have incorporated the right, so any arguments here will be equally applicable to the Federal Constitution. *See id.*

31 *See, e.g.*, REVISION OF 1860, *supra* note 23, at 449; Brown v. Kalamazoo Cir. Judge, 42 N.W. 827, 830 (Mich. 1889); Johnson v. Holbrook, 302 S.W.2d 608 (Ky. 1957).

acknowledged that "there are various kinds of interests and controversies which cannot be left without equitable disposal without either destroying them or impairing their value" and that the right to equitable remedies was "as sacred as the right of trial by jury."[32] The court then addressed the Michigan state constitution's then-new command to merge law and equity "as far as practicable," saying that it applied only to "merely formal" distinctions of procedure (and not any substantive matter) because "[a]ny change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the [C]onstitution as one which should give the courts executive or legislative power vested elsewhere."[33] Other state courts agreed with the aforementioned distinction between form or procedure and substance. Indeed, Kentucky kept the distinction even after it abolished its chancery courts in 1891.[34]

In more modern times, caused in part by certain states' refusal to abolish their courts of chancery and their separate forms of pleading, fusionism came again to the forefront. Supporters of merger at this point expressed frustration with what they viewed as an ancient and ossified system that was inefficient and wasteful.[35] The fusionists also often stressed, as Field and others did over 100 years before them, that the distinction between law and equity was largely procedural, and that "[t]he day will come when lawyers will cease to inquire whether a given

32 *See Brown*, 42 N.W. at 830.

33 *Id.* at 830–31. The right to a trial by jury was allegedly first called a "sword in the bed" separating law and equity by Professor Zechariah Chafee. *See* Fredal v. Forster, 156 N.W.2d 606, 612 & n.5 (Mich. Ct. App. 1967) (quoting an unpublished lecture of Chafee's). The underlying idea enjoys substantial support in the modern era. *See, e.g.*, Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 451 n.134 (2003); *see also* Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 242 (1922) ("The most important limitation upon a federal union of the two kinds of remedies in one form of action is the [jury trial] requirement of the Constitution . . . .").

34 On the matter of Kentucky's lingering distinction between law and equity, see *Holbrook*, 302 S.W.2d 608, 610 (Ky. 1957) ("This Rule and other Rules we need not mention, while permitting legal and equitable claims or defenses to be fused for purely procedural purposes, did not abolish, and certainly were not intended to abolish, the time-honored distinction between remedies applicable to a legal cause of action or to one sounding in equity."). For Kentucky's abolition of its courts of equity, see Heller v. Heller, No. 2008-CA-000113, 2009 WL 485011, at *4 n.4 (Ky. Ct. App. Feb. 27, 2009) (Taylor, J., concurring in the result only) (citing KY. CONST. of 1891, sched. 3).

35 *See, e.g.*, Frank W. Donaldson & J. Michael Walls, *Merger of Law and Equity in Alabama—Some Considerations*, 33 ALA. LAW. 134, 148 (1972) ("A purpose of the rule is to remove the former expensive and time-consuming requirement of two separate suits in order that the litigant have his jury as well as his equitable relief."); Watkins, *supra* note 12, at 401 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." (quoting O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897))).

rule be a rule of equity or a rule of common law[:] suffice it that it is a well-established rule administered by the High Court of Justice."[36]

Equity's modern supporters, on the other hand, appeal to equity's broad function as a gap-filler and a corrective for the legal system. They argue that the complexity of the modern world requires a robust system of equity to achieve justice where law failed to foresee certain scenarios.[37] Further, they argue that equity cannot serve this function except as a system with some level of separation from law, and that by merging equity into law almost completely, this function is lost in the modern age.[38]

II. HISTORICAL STATE EQUITY COURTS

Although equity's very existence was controversial in the colonial era, equity jurisdiction in the states survived the Declaration of Independence. As the United States expanded westward, it was rare to see true courts of chancery established in the new states, but the new states still had equity jurisdictions and separate forms of pleading for law and equity. But the fusionists were not satisfied with this. They argued that fusion was necessary for a well-functioning judiciary and that retaining separation would lead to nothing but interminable lawsuits and inefficiency. Clearly, the legal community found these arguments persuasive, because once the Field Code was passed in New York, fusion swept the country like wildfire. But some states were not so eager to fuse their courts, and indeed, two states even found it necessary to make law and equity *less* fused for a time. Most of those states that did not fuse their courts in the aftermath of the Field Code still maintain some degree of separation today, suggesting that the fusionists' dire pronouncements were overblown at least and completely false at most.

Even in the colonial era, formal chancery courts were rare.[39] Cases in equity were handled by the colonial governor (sometimes in conjunction with his council), by the legislatures, or by courts modeled on the English Court of Chancery.[40] After the Declaration of

36 F.W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW 20 (A.H. Chaytor & W.J. Whittaker eds., 1909).

37 *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1056 (2021) ("[M]ultiplex interactions lead to hard-to-foresee results. It is exactly here that law . . . is at its weakest."); Main, *supra* note 33, at 491 ("[T]raditional equity interfered to offer relief in cases where common law processes were defective or too complicated.").

38 Main, *supra* note 33, at 478 ("[T]he legacy of equity is unfulfilled in a unified procedural system if the procedural apparatus administering jointly the substantive principles of law and equity is not itself subject to the moderation and correction of the jurisdiction of equity.").

39 Katz, *supra* note 12, at 262.

40 *See id.* at 263–64.

Independence, the colonial governments under which those systems of chancery were established were rapidly replaced: nine of the former colonies ratified state constitutions within three years.[41] All of these state constitutions mention the establishment of courts,[42] and seven specifically mention courts of equity.[43] As a general rule, the state constitutions, when they established tribunals, established only the highest court, leaving the creation of inferior courts as a matter for the legislature.[44] When the state legislatures did establish court systems for their states, the ways in which they handled equity could be divided into three broad categories[45]: the establishment of separate courts of chancery,[46] the establishment of courts with separate law and equity "sides"

41 Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 780, 819 (2020). Connecticut elected to follow its old colonial charter "so far as an adherence to the same will be consistent with an absolute independence," and Rhode Island did not pass a state constitution until 1842. *Id.* at 786 (quoting H.R. Res., Gen. Assemb. (Conn. 1776) (as passed Oct. 10, 1776), *reprinted in* THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 3 (Hartford, Case, Lockwood & Brainard Co. 1894)).

42 THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION BETWEEN THE SAID STATES; THE TREATIES BETWEEN HIS MOST CHRISTIAN MAJESTY AND THE UNITED STATES OF AMERICA 71–72 (Philadelphia, Francis Bailey 1781) [hereinafter STATE CONSTITUTIONS] (New York); *id.* at 81. (New Jersey); *id.* at 95–98 (Pennsylvania); *id.* at 109–12 (Delaware); *id.* at 137–39 (Maryland); *id.* at 143–44 (Virginia); *id.* at 152 (North Carolina); *id.* at 167 (South Carolina); *id.* at 182–84 (Georgia).

43 *Id.* at 71–72 (New York); *id.* at 97 (Pennsylvania); *id.* at 111 (Delaware); *id.* at 138 (Maryland); *id.* at 143 (Virginia); *id.* at 152 (North Carolina); *id.* at 167 (South Carolina).

44 *See id.*; *see also* DIGEST OF STATE CONSTITUTIONS (J.H. Newman ed., 1912). The earliest state constitutions occasionally refer to courts that they do not themselves establish (for example, Massachusetts' constitution, which discusses regulations for the probate court) demonstrating that in some cases, the courts in existence during the colonial period were simply retained. STATE CONSTITUTIONS, *supra* note 42, at 33.

45 States which were incorporated around or after the beginning of the fusion movement frequently established a unitary judiciary with no distinction between law and equity. *See, e.g.*, Civil Practice Act, 1866 Mont. Laws 43.

46 There were thirteen states that established separate courts of chancery at some point after the Declaration of Independence: Alabama, Arkansas, Delaware, Florida, Kentucky, Michigan, Mississippi, New Jersey, New York, South Carolina, Tennessee, Vermont, and Virginia. A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 334–50 (C.C. Clay ed., Tuskaloosa, Marmaduke J. Slade 1843) (Alabama); EDWARD W. GANNT, A DIGEST OF THE STATUTES OF ARKANSAS 852–53 (Little Rock, Little Rock Printing & Publishing Co. 1874) (Arkansas); DEL. CONST. of 1792, art. VI, § 14 (Delaware); LESLIE A. THOMPSON, A MANUAL OR DIGEST OF THE STATUTE LAW OF THE STATE OF FLORIDA, OF A GENERAL AND PUBLIC CHARACTER 44, 450 (Boston, Charles C. Little & James Brown 1847) (Florida); 1851 Ky. Acts 99–108, 205–210 (Kentucky); RULES AND ORDERS OF THE COURT OF CHANCERY OF THE STATE OF MICHIGAN 3 (J.S. & S.A. Bagg Detroit, J.S. & S.A. Bagg 1839) (Michigan); MISS. CONST. of 1832, art. IV, § 16 (Mississippi); N.J. CONST. of 1844, art. VI, § 4 (New Jersey); N.Y. CONST. of 1821, art. V, § 5 (New York); 1840 S.C. Acts 208 (South Carolina); Russell Fowler, *A History of Chancery and Its Equity: From Medieval England to Today's Tennessee*, 48 TENN. BAR

or "divisions,"[47] and the establishment of what could be called "modern" courts, featuring unified courts of law and equity with no procedural distinction between the two.[48] These three forms can be thought of jointly as a series of greater degrees of unification: separate courts of chancery are the most separate that law and equity can ever be, a unified court with separate forms represents a unity of place and of judges with a division of procedure, and unified procedure is the least

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J., Feb. 2012, at 20, 24 (Tennessee); 1 THE LAWS OF THE STATE OF VERMONT, DIGESTED AND COMPILED 117–118 (n.p., Sereno Wright 1808) (Vermont); 1 THE REVISED CODE OF THE LAWS OF VIRGINIA 196 (n.p., Thomas Ritchie 1819) (Virginia).

47 There were seventeen states that originally implemented some form of a unitary court system with (1) both equity and law powers and (2) a distinction between the two: Arkansas, Connecticut, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, West Virginia, and Wisconsin. Gitelman, *supra* note 11, at 236 (Alabama); 1821 Conn. Pub. Acts 142 (Connecticut); A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA 467 (Thomas R.R. Cobb ed., Athens, Ga., Christy, Kelsea & Burke 1851) (Georgia); THE STATUTES OF ILLINOIS, EMBRACING ALL OF THE GENERAL LAWS OF THE STATE 138 (Samuel H. Treat, Walter B. Scates & Robert S. Blackwell eds., Chicago, D.B. Cooke & Co 1858) (Illinois); 1843 Ind. Acts (Rev. Stat.) 831 (Indiana); 1838 Iowa Acts 130 (Iowa); 1 LAWS OF THE STATE OF MAINE 213–14 (Portland, Thomas Todd & Colman, Holden & Co. 1834) (Maine); THE REVISED LAWS OF THE STATE OF MARYLAND 78 (Bel Air, Md., John Cox 1859) (Maryland); 1838 Mass. Acts 498–500 (Massachusetts); THE REVISED STATUTES OF THE STATE OF MISSOURI 506 (Saint Louis, Chambers, Knapp & Co. 2d ed. 1839) (Missouri); THE REVISED STATUTES OF THE STATE OF NEW HAMPSHIRE 340 (Concord, John F. Brown 1851) (New Hampshire); ACTS OF A GENERAL NATURE, CHARTED, REVISED AND ORDERED TO BE RE-PRINTED, AT THE FIRST SESSION OF THE TWENTY-SECOND GENERAL ASSEMBLY OF THE STATE OF OHIO 50 (P.H. Olmstead rev. ed. 1824) (Ohio); JOHN W. PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA 425 (Philadelphia, McCarty & Davis 1831) (giving authority "as the . . . exchequer, at Westminster . . . may or can do" in Pennsylvania)); THE PUBLIC LAWS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 101–104 (Providence, Miller & Hutchens 1822) (Rhode Island); THE AMENDED CODE OF WEST VIRGINIA 695 (John A. Warth ed., Charleston, W. Va., Kanawha Gazette Book & Job Rooms 1884) (West Virginia); THE REVISED STATUTES OF THE STATE OF WISCONSIN 413 (Southport, C. Latham Sholes 1849) (Wisconsin); *see* THE FEDERALIST NO. 83, *supra* note 17 (North Carolina). Some states (e.g., Maine) granted original jurisdiction in equity cases to the highest court in the state, though the states that did so eventually granted equity jurisdiction to lower courts as demands on the court systems rose. *See, e.g.*, 1 LAWS OF THE STATE OF MAINE, *supra* at 213–14; ME. STAT. tit. 4 § 252 (2022).

48 The remaining nineteen states (Louisiana is excluded; due to its unique Code Law system, Louisiana never had a conception of equity as the English and the other states would have understood it) instituted a form of what this Note will refer to as the "one form" rule—either a direct quote or a paraphrase of part II, title I, section 62 of the Field Code of New York (originally codified at chapter 379 in the New York Code):

> The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.

CODE OF CIV. PROC. OF THE STATE OF N.Y. § 554 (COMM'RS PRAC. & PLEADINGS 1850).

separate form of law and equity. Indeed, for the eight states[49] which had originally had separate courts of chancery but ultimately abolished them, three of them united law and equity in a single court before they united legal and equitable procedure.[50]

The first state to abolish the procedural distinction between law and equity was New York, when it passed the Field Code in 1848.[51] As it relates to equity, the Field Code's major intervention was the institution of the "one form" rule, which abolished the distinction between legal and equitable procedure and allowed plaintiffs to plead both legal and equitable causes of action in a single form.[52] Several states adopted their own versions of the Field Code and its "one form" rule within fifteen years of its passage in New York.[53] The Field Code formed a sort of unofficial barrier; no territory incorporated nor state admitted to the Union after its passage ever had separate chancery courts, though some had separate proceedings for law and equity. Notably, when Congress officially constituted territories after the Field Code was passed, it did not yet prescribe for the territories any specific form of merger, but instead vested the state courts with jurisdiction in both law and equity—the same form that federal courts used until the passage of the Federal Rules of Civil Procedure implemented merger on the federal level in 1938.[54]

An outlier in this pattern was the state of Arkansas, which initially had a unified court system with separate law and chancery divisions but established its first chancery court in 1855—the only state to do so after

49 Delaware, Mississippi, and Tennessee still had separate courts of chancery at the time of writing. *See* William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, DEL. CTS. (1993), https://courts.delaware.gov/chancery/history.aspx [https://perma.cc/XAM5-NP37]; *About the Courts,* STATE OF MISS. JUDICIARY https://courts.ms.gov/aboutcourts/ aboutthecourts.php [https://perma.cc/4MFZ-2QG6]; *About the Trial Courts*, TENN. STATE CTS., https://www.tncourts.gov/courts/circuit-criminal-chancery-courts/about/ [https://perma.cc/BDD2-AWAP].

50 *See, e.g.*, CODE OF ALA. § 6464 (1923); Paul S. Gillies, *The Vermont Court of Chancery*, VT. BAR J., Feb. 2012, at 10, 10 (on Vermont's 1969 merger); Simon H. Scott III & W. Everett Lupton, *Announcing a New Virginia "Civil" Union: The Marriage of Chancery and Law*, VA. LAW. REG., Feb. 2006, at 34, 35 (on Virginia's 2006 merger).

51 *See* Masferrer, *supra* note 26, at 174 n.10.

52 *See supra* note 48 and accompanying text.

53 *See, e.g.*, 1851 Cal. Stat. 51 (California); 1852 Ind. Code 361, 367 (Indiana); 1852 Ohio Laws 191 (Ohio). Generally, any state which was admitted to the Union after 1848 and the passage in New York of the Field Code adopted said code as an original matter. *See, e.g.*, Civil Practice Act, 1866 Mont. Laws 43.

54 *See, e.g.*, The Kansas-Nebraska Act, ch. 59, § 9, 10 Stat. 277, 280 ("[T]he said supreme and districts courts, respectively, shall possess chancery as well as common law jurisdiction."). *See also* FED. R. CIV. P. 1.

the creation of the Field Code.[55] In so doing, Arkansas decided to establish a single court of chancery due in large part to the failure of the state-run Real Estate Bank.[56] The governor wanted to put the bank into receivership in order to address the issues caused by its failure, but the existing court system was not addressing the problem as quickly as the governor desired.[57] The legislature then established a chancery court in Pulaski County (but nowhere else) in order to expedite the process of establishing a receivership.[58] By 1903, the legislature had established courts of chancery around the state.[59] Arkansas would retain its separate courts of chancery for longer than any other state,[60] but eventually a movement began within the Arkansas bar to modernize its court system by merging its legal and equitable jurisdictions.[61] Though Arkansas would ultimately abolish its chancery courts by constitutional amendment in 2001,[62] it is important to note that the Arkansas fusionists did not argue that the chancery courts were harmful or inefficient, merely that they were antiquated.[63]

Florida, too, evidently found the need to separate law and equity rather than fuse them. Florida adopted the Field Code in 1870, but then repealed it just three years later.[64] The historical record is conspicuously unclear as to the exact reason for the sudden about-face.[65]

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55 *See* Morton Gitelman, *The First Chancery Court in Arkansas*, 55 ARK. HIST. Q. 357, 357 (1996). *See also* notes 42–49 and accompanying text.

56 Gitelman, *supra* note 55, at 365.

57 *Id.* at 370, 372.

58 *Id.* at 373, 381.

59 Gitelman, *supra* note 11, at 240–41.

60 Not including, of course, those states which still have separate courts of chancery. *See supra* note 49.

61 For examples of scholarly works calling for merger in Arkansas, see Gitelman *supra* note 11, at 247; Watkins, *supra* note 12, at 402.

62 ARK. CONST. amend. LXXX, § 6.

63 *See* sources cited *supra* note 63.

64 Patrick O. Gudridge, Essay, *Florida Constitutional Theory (for Clifford Alloway)*, 48 U. MIA. L. REV. 809, 879 (1994). *See also* Am. Bar Ass'n, *Report of Committee on Uniform System of Legal Procedure*, 5 AM. LAW. 259, 262 (1897) ("In Florida . . . [a] noteworthy feature is that the Field Code was adopted in 1869, and meeting with no favor was repealed in 1873. This is the only instance of such repeal which has been brought to our notice.").

65 The author could not locate any scholarly articles nor any legislative history from the interim period discussing the merger of law and equity in Florida at all, let alone detailing its failings or other issues. The most apt contemporaneous reference seems to be from the 1897 ABA Committee Report, saying simply that the Code "[met] with no favor." *See* Am. Bar Ass'n, *supra* note 64, at 262. The lack of information around this issue is illustrated rather strikingly by the fact that the ABA Report incorrectly relayed the year in which the Field Code was enacted in Florida. *See id.* (listing the year of passage as 1869). *Contra* S. JOURNAL, 3d Sess., at 83 (Fla. 1870) (establishing that the bill had not yet been passed by the Florida Senate as of January 21, 1870). It is possible that the Field Code was repealed due to general anti-Reconstruction sentiment, due to the Code's strong association with

Later attempts to institute Field Code-style modernizations in Florida were met with resistance by the state supreme court, which found that it did not have the authority to regulate its own forms of proceedings.[66] Florida's supreme court explicitly cited the distinction between law and equity as a reason that it could not institute these modernizing reforms.[67] This meant that Florida did not institute the "one form" rule until 1967, following an explicit legislative grant of rulemaking authority to the Florida Supreme Court.[68]

Even among states which enacted partial mergers, there was some resistance to fuse completely. One of these states, Iowa, adopted the "one form" rule in 1860, but also established that equitable proceedings are different from "ordinary" proceedings.[69] Iowa achieved this by creating separate "ordinary" and equitable dockets, and the Code explicitly allowed for an action to be moved to the appropriate docket if it happened to be filed on the wrong one.[70] Iowa's reason for creating this unusual split system was that the state legislature believed that the United States Constitution required separate equity and law jurisdictions, according to a report made by the Iowa committee tasked with researching a civil code.[71] The committee itself disagreed with this contention, arguing that the distinction was substantive rather than procedural, and grounding its analysis in the history of chancery in England[72]:

> Inasmuch as all rights were included as legal or equitable, and both were needed to make the sum of justice, it was deemed best to use both lest it might be thought that while a man's right to sue for damages was secured to him by the constitution, his right to ask for a specific performance of a contract was not.[73]

New York. *See* E-mail from Tech. Servs. Libr., Fla. Sup. Ct. Libr., to Brooks Chupp, Notre Dame L. Sch. (Nov. 9, 2021) (on file with author). In fact, Florida had repealed laws before and would repeal laws after its repeal of the Field Code for this exact reason. *Id.*

66 *See* Herbert S. Phillips, *Should the Rules of Federal Civil Procedure Be Adopted in Florida?*, 26 ABA J. 873, 875 (1940).

67 Petition of Fla. State Bar Ass'n for Adoption of Rules for Prac. and Proc., 21 So. 2d. 605, 609 (Fla. 1945) (en banc).

68 FLA. R. CIV. P. 1.1040.

69 REVISION OF 1860, *supra* note 23, at 440–48.

70 *Id.* at 443–48.

71 *Id.* at 447.

72 *Id.* at 447–48. The history that the commission provides is extremely dubious. *Compare id.*, *with* JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 105–25 (Oxford Univ. Press 5th ed. 2019).

73 REVISION OF 1860, *supra* note 23, at 448.

Regardless of the committee's position, the state legislature never changed its position, and Iowa maintains this process of handling suits at equity to the present day.[74]

Like Iowa, South Carolina has formally merged law and equity in accordance with the Field Code, but it maintains an unusual distinction that in practice keeps law and equity separated. The office of "master-in-equity," established prior to the signing of the Declaration of Independence,[75] was not one where the holder was a judge, but rather a referee, to whom circuit court judges could send cases.[76] In most respects, though, a master-in-equity would have the same powers as any other judge sitting in equity.[77] Prior to South Carolina's merger of law and equity, the master-in-equity was evidently a very constrained office, possibly only allowed to exist in Charleston (though there is some uncertainty over this).[78]

When South Carolina merged law and equity, it did not officially disestablish this office, though it also made very clear that all cases pending in chancery at the time of passage were to be moved to the Courts of Common Pleas.[79] However, ten years after merger, the state legislature reversed course, abolishing trial by referee and officially reestablishing the office of master-in-equity in the counties of Charleston, Orangeburg, and Richland.[80] In the following years, the South Carolina legislature evidently could not decide whether it wanted masters-in-equity or referees, at times expanding the masters-in-equity law

74 *See* IOWA CODE §§ 611.3, 611.4 (2022); Garrett v. Colton, 896 N.W.2d 785 (Iowa Ct. App. 2017) (unpublished table decision) ("Joinder of legal and equitable causes is not forbidden by our present rules of civil procedure, but our statutes still recognize two kinds of civil proceedings—ordinary and equitable." (quoting First Nat'l Bank in Sioux City v. Curran, 206 N.W.2d 317, 320 (Iowa 1973))).

75 *See* Jasper M. Cureton, S.C. Ct. of Appeals, History of the Office of the Master-in-Equity in South Carolina, Speech to the Equity Court Council of South Carolina (May 15, 1998) (transcript available at https://www.charlestoncounty.org/departments/master-in-equity/history.php [https://perma.cc/S4R4-3NKB]) (mentioning reference to the office being found in an act passed in 1746).

76 *See* H. Guyton Murrell & Reginald P. Corley, *Master of His Domain: The Equity Court—Yesterday and Today*, S.C. LAW., Mar. 2009, at 27, 27 (quoting a case where the court held that the master-in-equity was "nothing more than an ancillary to the judges, by performing the minor duties of the court, where no legal talent or exercise of the mind is required[,]" and further analogizing the office to that of sheriff (first quoting Hunt v. Elliott, 8 S.C. Eq. (1 Bail. Eq.) 90, 91 (1830); and then citing Houseal v. Gibbes, 8 S.C. Eq. (1 Bail. Eq.) 482, 484 (1831))); Hal S. Robinson & Daniel J. Crooks III, *Master-in-Equity 101: A Primer*, S.C. LAW., Mar. 2009, at 34, 36 (mentioning that masters-in-equity can be constrained at the whim of the circuit court judge who refers the case).

77 *See* Robinson & Crooks III, *supra* note 76, at 36.

78 *See* Cureton, *supra* note 75.

79 *Id.* (noting that the 1870 Code of procedure still allowed for trial by referees but arguing that it nonetheless disestablished the office of master-in-chancery).

80 *See* Act of Mar. 22, 1878, No. 537, 1878 S.C. Acts 608, 608–10.

to the whole state, at times abolishing it and returning to the referee system.[81] In 1973, it looked as though the office of master-in-equity would be permanently abolished, after the South Carolina Constitution was amended to overhaul the judicial system.[82] In 1976, the state legislature officially abolished the office (with the abolition to take effect in 1979), along with several other inferior courts.[83] However, due to substantial organizing and lobbying from the legal community, the state legislature reestablished the office a mere fifteen days after it was abolished.[84]

Today, South Carolina law requires a master-in-equity to be appointed in any county with a population of at least 130,000.[85] The master-in-equity now has all the powers of any circuit court judge, including the power to enter final judgments.[86] Even though this arrangement resembles a separate court of chancery, masters-in-equity are substantially limited in their jurisdiction. For example, though the Code refers to an "equity court," this "court" is not truly a separate court but merely a division of the circuit court.[87] Despite having all the powers of a judge, masters-in-equity still retain many of the limitations imposed on the office. For example, masters-in-equity are not life-tenured but serve only for a term of six years.[88] They can be either full-time or part-time masters, and interestingly, part-time masters may still practice law, so long as they do not appear in front of any other masters-in-equity.[89] Further, masters-in-equity still may only obtain jurisdiction over a case when a circuit judge refers it to them.[90]

Among states which fused law and equity, Illinois presents a particularly interesting case. Illinois refused to follow the reformist trend of its neighboring states during the period immediately following New York's passage of the Field Code, causing its judicial system, and particularly its system of pleadings, to appear outdated and ancient by comparison.[91] For example, even after the turn of the twentieth century, bills in chancery were still required to end with the phrase "[a]nd your Orator will ever pray, etc." where the *et cetera* replaced "for the salvation of your Lordship's soul," a recitation that dated back to the

81 *See* Cureton, *supra* note 75.
82 *See* S.C. CONST. art. V.
83 *See* Cureton, *supra* note 75; Murrell & Corley, *supra* note 76, at 28.
84 *See* Cureton, *supra* note 75; Murrell & Corley, *supra* note 76.
85 S.C. CODE ANN. § 14-11-10 (2022).
86 *Id.* § 14-11-15.
87 *Id.*
88 *Id.* § 14-11-20.
89 *Id.*
90 Robinson & Crooks III, *supra* note 76, at 36.
91 *See* Harry N. Gottlieb, *Illinois Civil Procedure*, 19 CHI.-KENT L. REV. 342, 358 (1941).

early days of the English Court of Chancery.[92] Illinois undertook several reforms of its judicial system over the years, but it retained the old system of writ pleading and a system of separate pleadings for law and equity until 1933.[93] Leading up to the passage of the Civil Practice Act of 1933, Illinois took a patient, scholarly approach to the modernization of its pleadings, as it (1) took four years to pass a bill after the Chicago Bar Association created a committee to research "alleged defects in the operation of [Illinois] courts,"[94] and (2) sought out leading academic scholars to consult on the drafting of the Act.[95] This Act overhauled the Illinois judiciary in all aspects, not merely pleadings and procedure.[96] Illinois specifically declined to adopt the Field Code due to defects it perceived in its drafting, and the Code of Civil Procedure that was ultimately codified in 1933 was therefore less radical than the supporters of merger thought wise.[97] Illinois did institute a version of the "one form" rule,[98] but it retained several distinctions between law and equity nevertheless.[99] Whether or not Illinois' approach is distinct from the way in which other states functioned is a matter of scholarly debate,[100] but it is generally agreed that the text of the Illinois

92 *Id.* at 357 (quoting Horace Kent Tenney, *Equity Practice*, 11 CHI. BAR ASS'N REC. 188, 191 (1928)).

93 Illinois passed Practice Acts in 1819, 1827, 1845, 1872, and 1907, each of which enacted certain modernizing reforms. *Id.* at 348–58 (describing the various reforms).

94 *See id.* at 359.

95 *See id.* at 361 & 361 n.19 (describing how Professor Edson Sunderland, alongside the University of Michigan's Legal Research Institute, consulted on and eventually wrote the first draft of the Civil Practice Act of 1933).

96 *Id.* at 364–67.

97 For an example of criticisms of the manner in which Illinois merged law and equity, see Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 211 (1933) ("A major difficulty, it is feared, will be found in the gingerliness, not to say timidity, with which the draftsmen have approached the fundamental question of the abolition of forms of action and the union of law and equity.").

98 *See* Gottlieb, *supra* note 91, at 364; *see* JONES ILLINOIS STATUTES ANNOTATED 672–74 (Palmer D. Edmunds ed., 1935) (establishing that actions requesting relief both at law and in chancery were to be heard as a "single equitable cause of action" and that they would be "decided in the manner heretofore practiced in courts of equity.").

99 The Civil Practice Act of 1930 instructed lawyers to mark actions as being either "at law" or "in chancery," despite the abolition of distinct forms of action, *see id.* at 672–73, and allowed plaintiffs to sever legal claims from equitable claims and have them tried at law and in equity, respectively, see *id.* at 674–75.

100 Dean Clark was of the opinion that Illinois' reforms were behind other states. *See* Clark, *supra* note 97, at 211–12 (contending that the Field Code went much farther in abolishing the distinction between law and equity than did the Illinois Civil Practice Act of 1930). However, Palmer Edmunds argues that New York still functionally recognized a difference between law and equity even if the Code said otherwise. *See* Palmer D. Edmunds, *Note to the Civil Practice Act of 1933 and Rules of the Supreme Court, in* JONES ILLINOIS STATUTES ANNOTATED, *supra* note 98, at 13, 14 ("[W]hile only one form of civil action is authorized

statute does not go as far as the Field Code.[101] Edson Sunderland, a professor at the University of Michigan Law School and one of the principal drafters of the Civil Practice Act of 1933, defended the Act vigorously from its critics.[102] Sunderland contended, among other things, that Illinois' merger of legal and equitable procedure was implemented in a "more direct and less technical way" than in the Field Code.[103]

Illinois' implementation of the merger of law and equity was seen as a frustrating half-measure by many legal observers at the time.[104] Indeed, Dean Charles Clark of Yale Law School, when asked by the University of Chicago Law Review to comment on it, was blunt in his criticism, arguing that Illinois' nonmerger was anything but:

> A major difficulty, it is feared, will be found in the gingerliness, not to say timidity, with which the draftsmen have approached the fundamental question of the abolition of forms of action and the union of law and equity. In their basic enactment they seem to say that only the nomenclature of the forms of actions is dispensed with, while separate procedures in law and equity are to be maintained. On the other hand, provisions later for free joinder of all sorts of claims and for the shifting of actions from one docket to another are at war with such a purpose. . . . One can hope that the Illinois judiciary will ignore the blind provisions as to the abolition of forms and will achieve a simplified procedure through whole-hearted application of the joinder rules.[105]

Despite Clark's criticism, Illinois followed some of its Midwestern neighbors in abolishing form pleading and separate courts without fusing procedure totally. In 1941, the Illinois Supreme Court affirmed that procedure was not totally fused in *Frank v. Salomon*, saying, while analyzing the Civil Practice Act of 1933, "[c]onsidering together all the provisions quoted, it was the obvious intention to do away with forms of pleading but to preserve separate procedure in law and equity."[106]

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under the New York statute, it still remains a fact that in professional and judicial thought there is a clear distinction between actions at law and suits at equity.").

101 *See* Clark, *supra* note 97, at 212. *Contra* Edson R. Sunderland, *Analysis of the Civil Practice Act of 1933*, *in* JONES ILLINOIS STATUTES ANNOTATED 18, 19 (1935) ("Uniform procedure in law and equity has been provided so far as possible, and this has been done in most cases by making the equity rules applicable to both types of proceedings.").

102 Sunderland made remarks to various groups of Illinois lawyers and published several scholarly articles on the matter. *See, e.g.*, Sunderland, *supra* note 101; Edson R. Sunderland, *Observations on the Illinois Civil Practice Act*, 28 ILL. L. REV. 861 (1934).

103 Sunderland, *supra* note 101, at 19.

104 *See* Clark, *supra* note 97, at 212; Roger L. Severns, *Equity and "Fusion" in Illinois*, 18 CHI.-KENT L. REV. 333, 370 (1940).

105 Clark, *supra* note 97, at 211.

106 34 N.E.2d 424, 426 (Ill. 1941).

Much like Iowa's legislature before it, Illinois' supreme court cited the constitutional right to a trial by jury as the primary reason for the continued separation of legal and equitable proceedings.[107]

The drafters of the Civil Practice Act seemed to concur. Edward Hinton, a drafter of the code and law professor at the University of Chicago, remarked that the Field Code attempted to "do the impossible, that is, to abolish the distinction between legal and equitable actions."[108] Professor Hinton further argued that as long as law and equity continued to coexist, there would be "inherent differences which can not be wiped out by legislative fiat."[109] Professor Sunderland noted, in remarks made to the Chicago Bar Association in March of 1934, that "[t]he great tragedy of English jurisprudence" was the fact that law and equity had developed different forms of pleading.[110] He further concluded that the "essential problems of pleading" are identical in all cases, because no matter what kind of suit is before the court, all that a pleading must provide in order to be effective is (1) the names of the parties who need to appear before the court, and (2) the nature of the controversy.[111] Illinois thus, contrary to Dean Clark's charge, enacted the greatest possible modernizing reform allowed by both the federal Constitution and its own state constitution.

Illinois has not substantively changed its stance on merger since it passed the Civil Procedure Act of 1933, which suggests that Illinois should not have any separate courts of chancery. While this is technically true, Cook County does maintain a separate Chancery Division of its circuit court with its own separate judges, who sit by designation.[112] It is noteworthy that this was done by local rule and not by statewide act.[113]

III. EQUITY MUST BE KEPT SEPARATE FROM LAW

These states, alongside Delaware, Tennessee, and Mississippi, demonstrate persuasively that separation between law and equity is not

107 Robert Jay Nye & Jonathan D. Nye, *Jury Trial in Illinois: Chancery, Multi-Remedy, and Special Remedy Civil Cases*, 22 LOY. U. L.J. 625, 631 (1991).

108 Edward W. Hinton, *Pleading Under the Illinois Civil Practice Act*, 1 U. CHI. L. REV. 580, 580 (1934).

109 *Id.*

110 Sunderland, *supra* note 102, at 864.

111 *Id.* at 865.

112 See *Chancery Division*, THE STATE OF ILL. CIR. CT. OF COOK CNTY., http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/ChanceryDivision [https://perma.cc/U9WG-UA8W] (noting that the Chancery Division of the Circuit Court of Cook County is established pursuant to General Order 1.2, 2.1 (b) of the General Orders of the Circuit Court of Cook County).

113 *Id.*

the great tragedy that the fusionists argued it would be. But merely that there is no *reason* for fusion is not enough reason to undo it, in no small part because most states have already fused their courts. It would be costly to separate them again, to say nothing of the costs to the legal system as lawyers and judges alike would have to learn how to navigate a new system. But fusion is not just unnecessary—it is actively harmful. The lack of sophistication around equity caused by imposing equity jurisdiction on generalist judges has led to substantial misapplication of equitable remedies. Further, making every trial-level judge in the country a chancellor exacerbates the concerns that many fusionists had about different chancellors having wildly different standards for relief.

Some form of equity is necessary to a system of laws.[114] One of the first recorded philosophers to propose a system of equity was Aristotle, born over a thousand years before England would create its Court of Chancery.[115] The argument that equity is "a prerogative of the king that ha[s] no place in a democratic society" is thus simply incorrect—it was invented before the English crown was ever even a thought.[116] But even beyond that, the peculiar English system of equity as was embodied in the English Court of Chancery is still indelibly intertwined with the American legal system today. Even in jurisdictions that purport to have abolished the distinction between law and equity, the distinction between legal and equitable *remedies* remains.[117] This distinction is not merely a dead letter; courts will consider it when determining whether to award relief typically thought of as equitable.[118] Because our legal system maintains these distinctions—and, if the reasoning in *Brown v. Kalamazoo Circuit Judge* is correct,[119] it may be constitutionally required to do so—it is important that those who interpret our laws and dispense justice understand what these remedies are, in order to dispense them fairly.

Furthermore, equity is not an easy area of justice to define, which makes it all the harder for generalist judges to understand and apply it fairly. This is not made any easier to answer by the substantial overlap

114 *See* BAKER, *supra* note 72, at 114–15 (discussing Aristotle's conception of equity as a means of compensating for gaps in written laws, and the adoption of this justification by English jurists).

115 *Id.*

116 *See* Watkins, *supra* note 12, at 403.

117 Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 540–50 (2016).

118 *See id.* at 544–45; *see also* United States v. Texas, 566 F. Supp. 3d 605, 645 (W.D. Tex. 2021) ("[A]n injunction is appropriate where required by the 'ends of justice': where 'the remedy in equity could alone furnish relief.'" (quoting Watson v. Sutherland, 72 U.S. (5 Wall.) 74, 79 (1866))).

119 *See supra* notes 31–32 and accompanying text.

between equity and law.[120] States which retain specialty courts of chancery build up a corpus of opinions by the chancellors that provide even nonspecialist appellate judges and justices with a substantial number of equitable analyses to which they can refer when ruling on matters of law pertaining to equity.[121] The value of creating specialty courts to deal with particularly intricate or specialized areas of the law is not lost on the governments of the United States or the individual states, as the existence of probate, bankruptcy, and tax courts can attest to, to name but three.

The fusionists rarely acknowledge that this question is complex, or even that it exists. There is some merit to the argument that equitable procedure does not need to be substantially different than legal procedure, but it spares not a thought for the complexities it leaves behind. Even Dean Clark, the staunch defender of fusion, acknowledged that there are some differences between law and equity:

> It is true as well as obvious that equitable is not the same as legal relief, that an injunction is not identical with a judgment for money damages. It is likewise true and obvious that court trials and jury trials are not identical. But further, it is true that neither the ultimate remedy to be granted nor the form of fact-finding process used require the preservation and continuation of separate tribunals, of separate actions and of separate forms of action.[122]

Clark's argument is not unreasonable (even Sunderland agreed with its main point),[123] but what it fails to acknowledge is that the mere fact that separate proceedings are not *necessary* does not mean that they are not *useful*. This is not to say that the issues endemic in the courts

120 *See* Bray, *supra* note 117, at 536–37 ("*Equity* means many different and overlapping things. . . . Even today, the extent and inevitability of law-equity fusion remains a topic of debate in the United Kingdom and other common law countries."). Professor Maitland famously wrote that equity was so hard to define, the only adequate definition was "that body of rules . . . which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity." MAITLAND, *supra* note 36, at 1.

121 *See, e.g.*, Bayard v. Martin, 101 A.2d 329, 336 (Del. 1953) ("[W]e can hardly improve upon the language of the learned Chancellor ad litem in Burton v. Willen [a case from eighty years prior]." (citing Burton v. Willen, 33 A. 675, 680 (Del. Ch. 1872)); C.T. v. R.D.H. (*In re* Adoption of D.N.T.), 843 So. 2d 690, 709 (Miss. 2003) ("On the other hand, perhaps the learned chancellor in this case [i.e., the case at bar] said it best . . . .").

122 Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 6–7 (1925).

123 *See* Sunderland, *supra* note 102, at 865 ("As a matter of fact, the essential problems of pleading are identical in all cases, whether we call them legal or equitable. There are just two essential matters which the pleader must deal with: first, the parties concerned should be before the court; second, the nature of the controversy should be stated. So-called legal actions are usually simple, because they developed in the early days of society when life itself was simple. So-called equitable actions are usually more complex, because they developed at later stages. But the pleading problems are identical in both.").

of chancery were not worthy of concern. Sunderland calls the separate development of procedure for law and equity "[t]he great tragedy of English jurisprudence"[124] in no small part because the excessively rigid forms of pleadings that arose around proceedings both legal and equitable were unnecessary and contrary to the very purpose of rules of procedure; that is, to facilitate the hearing of claims.[125] But Sunderland diverges with Clark principally on the question of whether the Field Code accomplishes this goal.[126] The question of whether the Field Code simply perpetuated the same or similar excesses as the old system did is open to debate, but perhaps the most worrisome issue with the Code's merger of law and equity is that it waves away the difficulty of discerning which aspects of equity and law jurisprudence are "procedural" (and hence unnecessary) and which aspects are "substantive" (and hence should be left alone).

Ideally, any defects in a merger enacted via a code of civil procedure could be mitigated by careful work by judges, but the very nature of merger makes this a difficult task.[127] The advantage to having

124 *Id.* at 864.

125 *See id.* at 863 ("The rules are enacted for the definite purpose of facilitating litigation. That purpose certainly ought to be more important than the letter of the rules. The difficulty with legal practice has always been that it becomes hidebound and technical, and loses its elasticity.").

126 Sunderland observed wryly that he estimated that the Field Code had cost the people of the State of New York $100 million "merely to find out what it means, through litigation over questions of procedure." *Id.* at 864. Clark, for his part, attributed this to recalcitrant New York judges who refused to allow the Code to work as intended, even going so far as to judicially overwrite them with the old rules. Clark, *supra* note 122, at 3 ("The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history. They had been bred under the common law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to impart into the Code rules and distinctions from the common law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators." (quoting McArthur v. Moffett, 128 N.W. 445, 446 (Wis. 1910))).

127 Judge Harry Fisher, a circuit judge in Chicago and a member of the Cook County Judicial Advisory Council, presciently observed that even unified court systems would "necessarily divide [their] work into various departments with judges . . . assigned to each, according to their experience and special fitness" because it would allow judges to become experts in their chosen fields, thus increasing the quality of their decisions and reducing the need for appeals. *See* Harry M. Fisher, *The Judicial Structure of Cook County*, 36 ILL. L. REV. NW. U. 628, 638–39 (1942). Judge Fisher wrote of his concern that the completely unified court system that Cook County had, at the time of his writing, created massive delays because cases that certain judges could handle in a matter of "at most, hours" were being given to other judges who viewed them as "complicated problem[s] consuming days of [their] time in reaching the proper solution." *Id.* at 639. *See also* Severns, *supra* note 104, at 342–43 (saying that the expectation that judges be chancellors when hearing cases in equity and not when hearing cases in law "caused trouble").

separate courts of equity and law is that it allowed certain judges (that is, chancellors) to specialize in equity. Why is specialization important? Because equity was not historically the same as the common law, but was guided by "traditional principles of equity," which the Supreme Court has affirmed must still govern how American judges dispense equity today.[128] These "traditional principles" were developed and honed through cases back through the establishment of the English Court of Chancery in the 1300s. It is only through the rigorous understanding and application of these principles that equity can avoid subsuming the law and rendering "the whole legal system . . . incertain."[129] Joseph Story, in his seminal treatise on equity, expressed this very concern. Story argued that, in order to avoid "an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[130] Alexander Hamilton sought to assuage such concerns by pointing out that equity courts were meant to give relief primarily "in extraordinary cases."[131] He further argued that equity was no longer the freewheeling field of law that it was in its youth, as "the principles by which that relief is governed are now reduced to a regular system."[132]

However, the transformation of each trial court judge into a chancellor places a great deal of strain on these restraints. Consider the now-controversial case of the "universal" or "nationwide" injunction, i.e., an injunction restraining the defendant's behavior against the whole world, not merely the plaintiff. Such an injunction did not exist under the principles established by the English court of chancery.[133] And yet, these injunctions are issued with frightening regularity, especially when it comes to enjoining the federal government from enacting some manner of policy that touches upon a political flash point.[134]

128 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999) (quoting 11A CHARLES ALAN WRIGHT, MARY KAY KANE & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2941 (2d ed. 1995)).

129 Letter from Thomas Jefferson to Philip Mazzei (Nov. 1785), *reprinted in* 9 THE PAPERS OF THOMAS JEFFERSON 67, 71 (Julian P. Boyd & Mina R. Bryan eds., Princeton Univ. Press 1954) (1785) (footnote omitted).

130 THE FEDERALIST NO. 78, *supra* note 17, at 471 (Alexander Hamilton); *see* 1 STORY, *supra* note 7, at 15–17.

131 THE FEDERALIST NO. 83, *supra* note 17, at 505 (emphasis omitted).

132 *Id.*

133 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2017).

134 *See, e.g.*, Hawaii v. Trump, 265 F. Supp. 3d 1140, 1161 (D. Haw. 2017) (ordering that the named defendants "hereby are enjoined fully from enforcing or implementing [portions of Proclamation No. 9645, prohibiting entry into the United States by nationals of certain foreign countries] *across the Nation*" (emphasis added)); Texas v. United States, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016) (enjoining the federal government from

The extreme willingness of federal courts to issue such broad-based injunctions has encouraged the practice of forum-shopping,[135] lending a substantial weight to the concerns of English lawyer John Selden, who once decried equity for the inherent arbitrariness between different chancellors' personal standards:

> Equity is a roguish thing: for law we have measure, know what to trust too. Equity is according to ye conscience of him that is Chancellor, and as it is larger or narrower so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would be this. One Chancellor has a long foot another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's Conscience.[136]

Justice Story further noted that, if judges sitting in equity were to discard prior precedents and limiting principles, it would "literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, *arbitrio boni judicis*, . . . according to his own notions and conscience; but still acting with a despotic and sovereign authority."[137] If questions of equity were given not to judges acting as part-time chancellors, but rather to experts in the field of equity, one imagines that thorny issues like the nationwide injunction would be handled with greater elegance and thought.

More fundamental than the concern that judges may not understand equity well enough to apply it within its appointed bounds is the question of what those bounds even are. In *Liu v. SEC*, the Supreme Court was presented with the question of whether disgorgement was an equitable power allowed to federal courts under *Grupo Mexicano*.[138] The Court held that it was, on the grounds that even though disgorgement called as such had only appeared relatively recently, the idea of forcing a wrongdoer to give up profits that he had gained through inequitable behavior was substantially older.[139] The Court held that the restriction on this remedy was not in its type, but in its scope.[140] But the Court was not unanimous in so holding. Justice Thomas, the lone

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"initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex," without limiting the relief to cases concerning the named plaintiffs).

135 *See* Bray, *supra* note 133, at 457–61.

136 Fowler, *supra* note 46, at 25–26 (quoting TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., 1927)).

137 1 STORY, *supra* note 7, at 21.

138 *See* Liu v. SEC, 140 S. Ct. 1936, 1942 (2020).

139 *Id.* at 1942–43 (pointing to scholarly works on "accounting," "restitution," and "unjust enrichment," all of which were equitable remedies forcing a defendant to relinquish illicit gain).

140 *Id.* at 1946.

dissenter, argued that disgorgement was purely an invention of the twentieth century, and that it was too vague to even plausibly be a "traditional equitable remedy."[141] He proceeds by noting that courts' use of the term "disgorgement" changed over time, starting as a "colloquial[]" reference to what they were ordering defendants to do and eventually becoming a discrete judicial remedy in its own right by the 1970s.[142] Justice Thomas emphasizes that his opinion is based on the same concerns that Founding-era critics of equity raised.[143] It is perhaps telling that one of the precedents on which the court relies notes the substantial overlap between remedies at law and remedies at equity, and hence the importance of making it clear which is which.[144]

Roscoe Pound felt that equity began to become "decaden[t]" when it was subjected to "the common law theory of binding precedents and resulting case-law equity."[145] Pound thought that the point of equity was to escape the "mechanical" nature of the operation of law, and the introduction of the Field Code was simply the *coup de grâce* on the idea of equity as a separate doctrine, formalizing equity's subjugation to the mechanical aspects of common law.[146] Pound therefore considered the Field Code an unqualified good, because without any of the beneficial aspects of equity left, arguing "against the fusion of law and equity to-day is no less futile than were the ponderous arguments of the sixteenth century sergeant-at-law who inveighed against chancery in his 'replication' to Doctor and Student."[147] However, these facts could be interpreted equally to weigh in the opposite direction: if "[l]aw must be tempered with equity," why would it not make equal sense to "fight for equity" within the current system instead of surrendering to Pound's so-called decadence?[148]

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141 *Id.* at 1951 (Thomas, J., dissenting) ("Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention. As an initial matter, it is not even clear what 'disgorgement' means . . . [which] is the first sign that it is not a historically recognized equitable remedy.").

142 *See id.* at 1952.

143 *Id.* at 1954 ("[T]he Founders accepted federal equitable powers only because those powers depended on traditional forms. The Constitution was ratified on the understanding that equity was 'a precise legal system' with 'specific equitable remed[ies].'" (quoting Missouri v. Jenkins, 515 U.S. 70, 127 (1995) (Thomas, J., concurring)) (alteration in original)).

144 *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 266 (1993) (White, J., dissenting) ("In some instances, there was jurisdiction both in law and in equity and it was generally (although not universally) acknowledged that the beneficiary could elect between his or her legal and equitable remedies.").

145 Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 25 (1905).

146 *Id.* at 20, 25.

147 *Id.* at 35 (quoting 1 A COLLECTION OF TRACTS RELATIVE TO THE LAWS OF ENGLAND 322 (Francis Hargrave ed., Dublin, Lynch et al. ed. 1787))

148 *Id.*

CONCLUSION[149]

The powers of equity are substantial, and improper applications of these powers formed the basis for some of the earliest objections to the institution of courts of chancery in the United States.[150] But as Aristotle observed, equity in some form is necessary for robust systems of law.[151] The abolition of separate courts makes these powers much easier to abuse, because it becomes nearly impossible for judges to keep the substantive concepts separate.[152] Brutus worried about what might result from judicial overreach before the foundation of the United States, and even now scholars still write about such concerns.[153] Fusion has exacerbated the problem of overreach, as the ahistorical application of the equitable injunction has shown. Reinstating separate chancery courts would help rein in the judiciary by allowing judges to specialize in equity and become expert the principles that guide it.

149 There would, of course, be costs inherent in separating the courts after they have been merged for almost two hundred years. It is beyond the scope of this Note to make specific implementation proposals, but there are certainly cost-limiting measures that states could take, like establishing courts of equity not by county, but by groups of counties.

150 Katz, *supra* note 12, at 276 (discussing the abuse of colonial chancery powers to collect substantial quitrents for the Crown (quoting Letter from Governor Burnet to the Lords of Trade (Dec. 21, 1727), *reprinted in* 5 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 848, 848 (E.B. O'Callaghan ed., Albany, Weed, Parsons & Co. Brodhead ed. 1855)).

151 *See supra* notes 114–15 and accompanying text.

152 *See* Severns, *supra* note 104, at 355 (stating that merger "led the courts into the usual errors of nonrecognition and refusal").

153 *See, e.g.*, Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Right*s, 78 NOTRE DAME L. REV. 171, 195 (2002) (arguing that a judicial exercise of its own policy preferences "would undermine the Constitution's requirement of separation of powers"); Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretatio*n, 96 NW. U. L. REV. 1239, 1241 (2002) ("If judges were to stray from their statutory instructions and make law themselves, there would be reason to question the legitimacy of *Marbury*'s holding.").