

# Our Equity: Federalism and Chancery

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*Federal courts sitting in diversity cannot agree on whether state or federal law governs the award of a preliminary injunction. The conditions for the exercise of a federal diversity court's extraordinary remedial power are anybody's guess. The immediate cause of the confusion is Justice Frankfurter's cryptic opinion in Guaranty Trust Co. v. York, which aggressively enforced Erie and, at the same time, preserved the so-called "equitable remedial rights" doctrine. There are, however, much broader and deeper causes that explain why the equitable remedial rights doctrine is almost incomprehensible today.*

*This Article argues that the early history of equity in the federal courts is a distinctive and untold story about equity's interaction with judicial federalism. Conventionally, this is a tale of two equities: homogeneous equity, where federal courts apply uniform nonstate equity, and heterogeneous equity, where federal courts apply state equity. This Article demonstrates that homogeneous federal equity commenced in 1809, about a decade earlier than previously thought, and that there is a deep and unappreciated tension at the center of heterogeneous federal equity.*

*The primary contribution of this Article is to recover a third federal equitable tradition, a middle ground between the extremes of homogeneity and heterogeneity. This third conception of federal equity—the facilitative conception—is*

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*revealed by a close reading of federal equity cases before 1809, a period to which equity scholars have paid scant attention. The facilitative conception originated in the earliest years of the Republic, was sensitive to the legitimate interests and activities of the states, and contributed to the construction of the early United States. Using a key supplied by the facilitative conception of federal equity, this Article proposes a system of shifting presumptions to systematize and structure the equitable remedial rights doctrine.*

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## I. INTRODUCTION

Here is a simple question: should federal courts sitting in diversity apply state or federal law when deciding whether to grant a preliminary injunction?<sup>1</sup> For decades, federal courts have split on this straightforward question about the application of *Erie*.<sup>2</sup> Some courts apply federal law; others apply state law; and still others adopt a mixed approach.<sup>3</sup> Scholars have tackled the problem head-on.<sup>4</sup> But

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<sup>1</sup> The same question arises when federal courts exercise supplemental jurisdiction. In general, the question arises when a federal court enforces a state-created right. My central concern is not about federal courts applying equity in public law to enforce federal constitutional or statutory imperatives against the states.

<sup>2</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). See David Crump, *The Twilight Zone of the Erie Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court a Block Away"?*, 1991 WIS. L. REV. 1233, 1234–35 (1991); John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 190–91, 228 (1999).

<sup>3</sup> See *infra* Part V.A.

<sup>4</sup> See generally Crump, *supra* note 2, at 1233–35; Cross, *supra* note 2, at 190–91, 228.

a federal court in California noted the conflict almost fifty years ago,<sup>5</sup> and today nothing has changed.

Before *Erie* was decided in 1938, our simple question was among the easiest to answer. Because a preliminary injunction is an equitable remedy, federal law governed.<sup>6</sup> At the time—shockingly, to our *Erie*-habituated instincts—federal courts across the nation enforced a uniform set of equitable doctrines and remedies, regulated under the Federal Equity Rules.<sup>7</sup> Kristin Collins has shed some much-needed light on the equity side of the federal courts in the nineteenth century, concluding that “federal courts generally applied a uniform body of nonstate, judge-made equity principles.”<sup>8</sup> Our question became much more difficult after *Guaranty Trust Co. v. York* reoriented federal equity to the states in 1945.<sup>9</sup> Applying *Erie*, Justice Frankfurter overturned the *homogeneous* (uniform) conception of federal equity in favor of a *heterogeneous* (state-by-state) one.<sup>10</sup> Federal diversity courts, even when sitting in equity, were to consider themselves “only another court of the State”<sup>11</sup>—although plainly this was an exaggeration.<sup>12</sup> Frankfurter, however, included a vague caveat: “[t]his does not mean . . . that a federal court may not afford an equitable remedy not available in a State court.”<sup>13</sup> It is the indeterminate scope of this caveat, known as the “equitable remedial rights” doctrine, that makes our simple question hard to answer.<sup>14</sup>

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<sup>5</sup> *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) (“The courts are in conflict . . . as to whether state or federal law governs the issuance of an injunction.”).

<sup>6</sup> See e.g., *Breeden v. Lee*, 4 F. Cas. 50, 51–52 (CC.E.D. Va. 1877) (No. 1,828); *Taylor v. Clark*, 89 F. 7, 7–8 (C.C.S.D. Cal. 1898); *Davidson v. Calkins*, 92 F. 230, 232–36, (C.C.S.D. Cal. 1899).

<sup>7</sup> See, e.g., *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868).

<sup>8</sup> Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 254 (2010) [hereinafter Collins, *A Considerable Surgical Operation*].

<sup>9</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945).

<sup>10</sup> See *id.* at 109–12.

<sup>11</sup> *Id.* at 108.

<sup>12</sup> See U.S. CONST. amend. VII.

<sup>13</sup> *Guar. Tr.*, 326 U.S. at 105.

<sup>14</sup> See *id.* See generally Note, *The Equitable Remedial Rights Doctrine: Past and Present*, 67 HARV. L. REV. 836, 836 (1954) [hereinafter *Past and Present*]; Comment, *The Equitable Remedial Rights Doctrine*, 55 YALE L.J. 401, 414–15 (1946) [hereinafter *Equitable Remedial Rights Doctrine*].

Our simple question is made even harder because it is only one instance of a more general problem: should federal courts sitting in diversity apply state or federal law when deciding whether to administer equitable relief? The answer matters because equitable remedies are powerful; indeed, “[t]he preliminary injunction may be the most striking remedy wielded by contemporary courts.”<sup>15</sup> We need a sure guide for understanding what law governs equitable relief when federal courts enforce state-created rights. This Article argues that neither the homogeneous nor heterogeneous conception of federal equity is up to the task. But there is another equitable tradition, a middle ground between the extremes of homogeneity and heterogeneity. This third conception of federal equity—which I’ll call the *facilitative* conception—provides a key for deciding whether to apply state or federal law when equitable relief is requested in a diversity case. Drawing on equity’s classic distinction between the exclusive jurisdiction and the jurisdiction in aid of legal rights, the facilitative conception counsels that federal law presumptively governs only that equitable relief which merely facilitates or aids a final merits decision.<sup>16</sup> The presumption is rebutted if the relief is functionally equivalent to a final decision. On this view, federal law presumptively governs preliminary injunctions because they merely seek to minimize the risk of irreparable injury pending litigation on the merits.<sup>17</sup>

The facilitative conception finds its origins in the federal courts at the turn of the nineteenth century.<sup>18</sup> In the early years of the Republic, federal courts used equity to facilitate the commonsense implementation of the first Judiciary Act,<sup>19</sup> and to contribute to the construction of the early United States, in three distinct ways. First, equity ensured that aggrieved states could enforce in federal court legal claims deriving from their own statutes. Exercising original jurisdiction in 1792, the Supreme Court enjoined a circuit court’s

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<sup>15</sup> John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978).

<sup>16</sup> See J.D. HEYDON ET AL., MEAGHER, GUMMOW AND LEHANE’S EQUITY: DOCTRINES & REMEDIES 11–12 (5th ed. 2015).

<sup>17</sup> Leubsdorf, *supra* note 15, at 540–41 (“[T]he preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to a hasty decision.”).

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

execution of a judgment at law because a state had no opportunity to enforce its statute.<sup>20</sup> The injunction preserved the status quo while the Supreme Court determined the merits at common law.<sup>21</sup> Second, the federal courts, worried about encroaching on state powers, deployed equity to limit federal jurisdiction. For example, a circuit court dismissed a common law action where a plaintiff had fraudulently manufactured diversity jurisdiction.<sup>22</sup> The fraud was revealed after an equitable bill of discovery pierced the common law pleadings and revealed that the true plaintiff was nondiverse.<sup>23</sup> Third, early federal equity courts sedulously applied state statutes, including statutes of limitation.<sup>24</sup> They adopted state court interpretations of limitation statutes, even if they thought that the state courts had got it wrong.<sup>25</sup> A common theme of federal equity's three interventions is concern and regard for the role and status of the states in the early federalism.

These different historical conceptions of federal equity (facilitative, homogeneous, and heterogeneous) are not cleanly demarcated, hard-and-fast categories. They are useful devices for describing federal equity's function and historical progression. The facilitative and homogeneous conceptions, for example, were manifestations of the general common law articulated by Justice Story in *Swift v. Tyson*.<sup>26</sup> Federal courts cited state, federal, and English cases to determine as best they could correct equitable doctrine. The differences between facilitative and homogeneous federal equity illustrate that we can be more precise in describing exactly what federal equity courts were doing under the *Swift* regime.

This Article shows that the early history of equity in the federal courts is an untold story about equity's interaction with American

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<sup>20</sup> *Georgia v. Brailsford (Brailsford I)*, 2 U.S. (2 Dall.) 402, 405 (1792) (opinion of Johnson, J.); *id.* at 405–06 (opinion of Iredell, J.).

<sup>21</sup> *Brailsford I*, 2 U.S. (2 Dall.) at 405 (opinion of Johnson, J.); *id.* at 407 (opinion of Blair, J.); *id.* at 409 (opinion of Jay, C.J.); *Georgia v. Brailsford (Brailsford II)*, 2 U.S. (2 Dall.) 415, 419 n.\* (1793).

<sup>22</sup> *Maxfield's Lessee v. Levy*, 4 U.S. (4 Dall.) 330, 331–36, 338, 16 F. Cas. 1195 (C.C.D. Pa. 1797) (No. 9,321).

<sup>23</sup> *Id.* at 330–33.

<sup>24</sup> *See, e.g., Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 456–58 (1806).

<sup>25</sup> *See, e.g., Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 419–20 (1808).

<sup>26</sup> 41 U.S. (16 Pet.) 1, 18–19 (1842).

judicial federalism. The first contribution of this Article is an analysis of federal equity before 1809, a period to which equity scholars have paid scant attention. During this time, federal judges sitting in diversity applied federal equity in service of state interests, reflecting a delicate federalist/antifederalist compromise.<sup>27</sup> But the analysis shows more than the federal courts administering a distinct vision of equity in the first two decades of the Republic. It also demonstrates, drawing on Stephen Skowronek's theory of state-building<sup>28</sup> and recent work on equity and administration,<sup>29</sup> that this vision contributed to the construction of the early American state. Unnoticed until now, early federal equity—which ensured the determination of state legal claims, guarded against the fraudulent expansion of federal jurisdiction, and deferred to state statutory interpretation<sup>30</sup>—facilitated the practical administration of the judiciary and reinforced the early American state of “courts and parties.”<sup>31</sup>

The second contribution of this Article is to show that the Supreme Court, speaking via John Marshall, adopted a robust homogeneous equity almost ten years earlier than previously thought.<sup>32</sup> It is a settled faith that the Supreme Court first established homogeneous federal equity in 1818.<sup>33</sup> But nearly a decade earlier, two cases—*Bodley v. Taylor* and *Taylor v. Brown*, both decided in 1809—speak the language of homogeneous federal equity, marking the transition from the facilitative conception to the homogeneous one.<sup>34</sup> Scholars have overlooked the full import of these two cases. This Article analyzes *Bodley* and *Brown*, and contextualizes Chief Justice Marshall's pronouncement that “[i]n all cases in which a court of equity

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<sup>27</sup> See *infra* Part IV.

<sup>28</sup> See generally STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 7–8 (1982).

<sup>29</sup> See generally EQUITY AND ADMINISTRATION (P. G. Turner ed., 2016).

<sup>30</sup> See *infra* Part IV.

<sup>31</sup> SKOWRONEK, *supra* note 28, at 23, 27–29.

<sup>32</sup> See *infra* Part III.A.

<sup>33</sup> See *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222–23 (1818).

<sup>34</sup> See *Bodley v. Taylor*, 9 U.S. (5 Cranch) 191, 222 (1809); *Taylor v. Brown*, 9 U.S. (5 Cranch) 234, 255 (1809).

takes jurisdiction, it will exercise that jurisdiction upon its own principles.”<sup>35</sup>

Third, this Article shows that equity is in deep tension with *Erie*.<sup>36</sup> Scholars have highlighted the internal inconsistency of *Guaranty Trust*.<sup>37</sup> On the one hand, Frankfurter’s opinion nominally reaffirmed the equitable remedial rights doctrine, which preserves a domain for independent federal equitable relief when enforcing state-created rights.<sup>38</sup> But on the other hand, Frankfurter aggressively enforced *Erie* in equity cases, saying that a federal court “cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.”<sup>39</sup> In the result, Frankfurter resected over one hundred years of homogeneous federal equity, leaving federal diversity courts with a chronically impoverished equitable remedial rights doctrine. This “considerable surgical operation,”<sup>40</sup> which reduced federal equity in diversity cases to “the forms and mode of enforcing the [state-created] right,”<sup>41</sup> “marked a significant—even seismic—change.”<sup>42</sup>

This Article argues that there is a tension between equity and *Erie* running deeper still. After *Guaranty Trust*, a federal equity court engages in a qualitatively different inquiry to its premerger counterpart. Today, federal diversity courts do not ascertain upon general reasoning and legal analogies the just rule furnished by the

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<sup>35</sup> *Bodley*, 9 U.S. (5 Cranch) at 222. *Bodley* and *Brown* concerned title to land, which *Swift* explicitly excepted. They are, in their result, an application of local law. But large portions of the opinions are devoted to what Marshall called an “inquiry of vast importance whether . . . a court of equity acts upon its known, established and general principles, or is merely substituted for a court of law.” *Id.*

<sup>36</sup> See *infra* Part III.B.

<sup>37</sup> See, e.g., Collins, *A Considerable Surgical Operation*, *supra* note 8, at 280, 341–42 (equity is outcome-determinative vis-à-vis the common law, and “once the general principle was transposed into the federal system, equity was by its very nature outcome determinative vis-à-vis state law”).

<sup>38</sup> See *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945).

<sup>39</sup> *Id.* at 108–09.

<sup>40</sup> Collins, *A Considerable Surgical Operation*, *supra* note 8, at 339.

<sup>41</sup> *Guar. Tr.*, 326 U.S. at 108.

<sup>42</sup> Collins, *A Considerable Surgical Operation*, *supra* note 8, at 338.



principles of equity to govern the case. Instead, they are, within constitutional boundaries, “only another court of the State.”<sup>43</sup> The question for a federal equity court sitting in diversity is not, “What is equitable?”<sup>44</sup> It is, instead, “What would a state court think is equitable?” The cabining of discretion, this Article argues, is antithetical to equity. Applying Henry Smith’s account of equity as a second-order system, a kind of safety valve, this Article shows that *Guaranty Trust* removed the federal equity court’s capacity to stage a second-order intervention in diversity cases.<sup>45</sup>

The final contribution of this Article draws on the facilitative conception of federal equity to both reinforce and normalize the equitable remedial rights doctrine that *Guaranty Trust* marginalized but, in order to maintain a modicum of decisional independence in the federal courts, nevertheless preserved. Federal courts have not discarded the doctrine and their application of it is, to put it mildly, uneven. This Article proposes a system of shifting presumptions for the application of the equitable remedial rights doctrine.<sup>46</sup> The initial presumption follows the heterogeneity ordained by *Guaranty Trust*: state law governs when equitable relief is requested on a state-created right.<sup>47</sup> But that presumption can be rebutted in limited circumstances by showing that the requested equitable relief is preliminary or auxiliary to, or merely facilitates or aids the final determination of, the merits. These genuine preliminary injunctions do not engage *Erie*’s twin aims,<sup>48</sup> and only arise when state law does not provide for them.<sup>49</sup> And that presumption, in turn, can be rebutted by show-

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<sup>43</sup> *Guar. Tr.*, 326 U.S. at 108.

<sup>44</sup> More accurately, “What is the correct application of equitable doctrine to the circumstances of this case?”

<sup>45</sup> See Henry E. Smith, *Fusing the Equitable Function in Private Law*, in *PRIVATE LAW IN THE 21ST CENTURY* 173, 175–76 (Kit Barker et al., eds., 2017).

<sup>46</sup> See generally J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U.L. REV. 907, 907 (1992).

<sup>47</sup> See *Guar. Tr.*, 326 U.S. at 108–09.

<sup>48</sup> See *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965).

<sup>49</sup> See FED. R. CIV. P. 64(a) (making available “every remedy . . . that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment”); see also *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 330–31 (1999) (suggesting that Rule 64 governs injunctions restraining defendants from dealing with assets pending resolution of litigation).

ing that the requested equitable relief, although nominally facilitative, is functionally equivalent to a conclusive determination of the litigation.

Facilitative federal equity thus supplies a key, a structural guide, for answering our simple but difficult question. Preliminary injunctions are typically equitable, but are issued to minimize the risk of irreparable injury to facilitate a final decision on the merits. In general, then, federal law should govern unless the preliminary injunction effectively decides the merits of the case. It is hoped that the set of shifting presumptions provides real guidance to the federal courts in resolving the doctrinal confusion over preliminary injunctions.

The argument proceeds as follows. Part II briefly reviews the nature of equity and its history leading up to the Founding. It sets out equity's classical exclusive and facilitative jurisdictions, and recounts the challenges to, and responses of, equity in England and the American colonies. Part III analyzes the two prevailing conceptions of federal equity, arguing that the homogeneous conception began in 1809, about a decade earlier than previously thought, and that there is a deep conceptual tension between equity and *Erie*, which *Guaranty Trust* papered over. Part IV demonstrates that before 1809 the federal courts administered a distinct facilitative conception of federal equity. It describes three instances in which the federal courts, concerned about their place in the new nation, took advantage of equity's flexibility to cabin their power and accommodate state interests. This Part also argues that the facilitative conception of federal equity contributed in small part to the construction of the nascent American state. Part V incorporates the facilitative conception of federal equity into a system of shifting presumptions to structure a federal court's analysis under the equitable remedial rights doctrine.

## II. EQUITY: ANTECEDENTS AND BEGINNINGS

In the beginning, there was law and there was equity. Equity provided doctrines and remedies to supplement and mollify the rigor of the common law.<sup>50</sup> By the mid-eighteenth century, equity had

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<sup>50</sup> HEYDON ET AL., *supra* note 16, at 5.

long shed its reputation for unbounded, discretionary decision-making.<sup>51</sup> Equity's association with the royal prerogative, however, was harder to cast off—especially because chancery sat without a jury.<sup>52</sup> Nevertheless, courts of chancery existed, at one time or another, in most of the American colonies.<sup>53</sup> Some colonies, such as South Carolina, embraced equity wholeheartedly in the eighteenth century.<sup>54</sup> In others, like New York, the growth of equity jurisprudence was uneven, partly due to intense political hostility.<sup>55</sup> But the founding generation was familiar with the law/equity divide, and Article III extended the judicial power to all cases “in law and equity.”<sup>56</sup>

This Part briefly highlights that one of equity's classic and important functions is to aid and assist the vindication of rights at common law. This is known as equity's auxiliary or facilitative jurisdiction.<sup>57</sup> It is this jurisdiction, transposed to the new federalism, that the federal courts deployed in the early years of the Republic to contribute to the construction of the nascent United States.

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<sup>51</sup> Equity became “a highly articulated system . . . consist[ing] of a series of distinct remedial devices” and “a set of conditions that determine whether equitable relief is appropriate.” Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1669–70 (2015). One of equity's central features is the development of “a set of principles or guidelines to structure the exercise of” great “discretion so as to make it socially useful.” *Id.* at 1669.

<sup>52</sup> Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in LAW IN AMERICAN HISTORY 257, 260 (Donald Fleming & Bernard Bailyn eds., 1971); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 54–55 (2d ed. 1985).

<sup>53</sup> See FRIEDMAN, *supra* note 52, at 54.

<sup>54</sup> See James Nelson Frierson, *Legal Introduction*, in 6 RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA 1671–1779, at 20, 53–54 (Anne King Gregorie ed., 1950); see also FRIEDMAN, *supra* note 52, at 54.

<sup>55</sup> Joseph H. Smith & Leo Hershkowitz, *Courts of Equity in the Province of New York: The Cosby Controversy, 1732–1736*, 16 AM. J. LEGAL HIST. 1, 6–8, 40 (1972); see also FRIEDMAN, *supra* note 52, at 54–55.

<sup>56</sup> U.S. CONST. art. III, § 2.

<sup>57</sup> HEYDON ET AL., *supra* note 16, at 11–12; see also *Baker v. Biddle*, 2 F. Cas. 439, 446 (C.C.E.D. Pa. 1831) (No. 764).

### A. *The Nature of Equity*

The standard definition of “equity” is not analytically satisfying but proudly question-begging:<sup>58</sup> “the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”<sup>59</sup> Entirely separate from the common law courts, the Court of Chancery exercised equity jurisdiction in England until 1873, when the Chancery Division was created within the High Court of Justice.<sup>60</sup> Chancery recognized forms of equitable property (trusts, mortgages, and priorities of estates and interests), enforced torts by injunction, enforced contracts by specific performance and injunction, afforded relief against the rigidity of the common law (fraud, undue influence, accident, and mistake), and provided procedural convenience (account, interrogatories, and discovery).<sup>61</sup>

Modern perspectives of equity center on Maitland’s famous dictum that equity is a “gloss” on the common law.<sup>62</sup> The common law

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<sup>58</sup> F. W. MAITLAND, *EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES* 1 (A.H. Chaytor & W. J. Whittaker eds., 1984) (“What is Equity? . . . Equity is a certain portion of our existing substantive law, and yet in order that we may describe this portion and mark it off from other portions we have to make reference to courts that are no longer in existence.”). *See generally* WILLIAM W. BILLSON, *EQUITY IN ITS RELATIONS TO COMMON LAW: A STUDY IN LEGAL DEVELOPMENT* 3–5 (1917).

<sup>59</sup> *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939)).

<sup>60</sup> *See generally* D. M. KERLY, *AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 1 (Fred B. Rothman & Co. 1986) (1890); *Supreme Court Judicature Act 1873*, 36 & 37 Vict. c. 66 (Eng.).

<sup>61</sup> *See* 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 252, 404–06 (1903); HEYDON ET AL., *supra* note 16, at 10. *See generally* KERLY, *supra* note 60, at 191–92.

<sup>62</sup> MAITLAND, *supra* note 58, at 18–19 (“We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of the common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short act saying ‘Equity is hereby abolished,’ we might still have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one’s good name, the rights of ownership and of possession would have been decently protected and contract would have been enforced. On the other hand had the legislature said, ‘Common law is hereby abolished,’ this decree if obeyed would have

and equity are not “two rival systems”; equity is “a sort of appendix added on to our code.”<sup>63</sup> Equity supplements rather than substitutes the common law.<sup>64</sup> Equity assumes the operation of the common law, and alters or aids that operation.<sup>65</sup> In a modern functional characterization, equity is an *ex post* second-order intervention.<sup>66</sup> The common law supplies the first order rules, and equity acts on a party who has opportunistically taken advantage of the harshness or absurdity of the common law.<sup>67</sup>

### B. *Equity’s Exclusive and Facilitative Jurisdiction*

Equity jurisdiction can be divided into *exclusive* jurisdiction on the one hand, and *facilitative* or *auxiliary* jurisdiction on the other.<sup>68</sup> The exclusive jurisdiction comprises areas where only equity can provide relief.<sup>69</sup> Enforcing a trust is the classic example. Traditionally, the common law did not recognize trusts, so relief for breach of trust was available only in equity.<sup>70</sup> Similarly, a vendor suing to set aside a conveyance of land for undue influence had to proceed in equity.<sup>71</sup> In general, the exclusive jurisdiction included cases where a plaintiff had sued on an equitable right, which the common law refused to recognize.<sup>72</sup>

Equity’s facilitative or auxiliary jurisdiction was exercised in aid of legal rights.<sup>73</sup> The early American federal judiciary assured the

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meant anarchy. At every point equity presupposed the existence of common law.”).

<sup>63</sup> MAITLAND, *supra* note 58, at 18–19. *Accord* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 13 (Boston, Hilliard, Gray & Co. 1836) (“[Lord Bacon] said, Chancery is ordained to supply the law, and not to subvert the law. Finch . . . says, that the nature of Equity is to amplify, enlarge, and add to the letter of the law.”) (footnotes omitted).

<sup>64</sup> MAITLAND, *supra* note 58, at 18–19.

<sup>65</sup> *Id.*

<sup>66</sup> Smith, *supra* note 45, at 175–79, 181–83.

<sup>67</sup> *See generally id.*

<sup>68</sup> HEYDON ET AL., *supra* note 16, at 11–12; *see also* David Yale, *A Trichotomy of Equity*, 6 J. LEGAL HISTORY 194, 194–96 (1985).

<sup>69</sup> HEYDON ET AL., *supra* note 16, at 11.

<sup>70</sup> *See generally id.* at 7, 10–11.

<sup>71</sup> *See generally id.*

<sup>72</sup> *See generally id.*

<sup>73</sup> *See id.* at 11–12.

states, using two equitable devices, that the central government was sensitive to their interests.<sup>74</sup> The first is discovery. Before the mid-nineteenth century, discovery was available at common law only with the assistance of equity.<sup>75</sup> A defendant in a common law action seeking documents from the plaintiff would have to file a bill of discovery in the court of chancery and, if successful, an injunction would stay the legal proceedings until the information was disclosed.<sup>76</sup> Any documents discovered, if proved and admissible, could be evidence in the action at law.<sup>77</sup> Second, an important component of the facilitative jurisdiction is the injunction to restrain the violation of a common law right.<sup>78</sup> This includes threatened violations, as well as continued or repeated violations of legal rights.<sup>79</sup> Before 1852, chancery did not decide common law questions.<sup>80</sup> So, if a plaintiff apprehended an imminent violation of a common law right, then equity could provide interim injunctive relief to facilitate the common law determination of whether a right had been violated.<sup>81</sup> The interim injunction was made perpetual if the common law right was violated, and dissolved if not.<sup>82</sup>

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<sup>74</sup> See *infra* Part IV.

<sup>75</sup> See Mark Leeming, Commentary, *Seeking Documentary Evidence in Transnational Litigation: Problems and Pitfalls*, in INTERNATIONAL COMMERCIAL LAW, LITIGATION, AND ARBITRATION 90, 90 (K. E. Lindgren & N. Perram eds., 2011) (discussing the bill of discovery procedure in the Court of Chancery before 1852); *McLean v. Burns Philp Tr. Co.* [1985] 2 NSWLR 623, 644 (Austl.) (discussing the bill of discovery procedure in the Court of Chancery before 1852).

<sup>76</sup> See Leeming, *supra* note 75, at 90.

<sup>77</sup> For a Founding-era innovation, see Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82 (1789).

<sup>78</sup> HEYDON ET AL., *supra* note 16, at 708.

<sup>79</sup> *Id.*

<sup>80</sup> KERLY, *supra* note 60, at 285. A statute enacted in 1852 permitted the Court of Chancery to determine common law rights and titles without requiring litigants to file a separate action at law. 15 & 16 Vict. c. 86, s. 62. In 1862, legislation hardened this power into a duty. Chancery Regulation Act of 1862, 25 & 26 Vict. c. 42, s. 1.

<sup>81</sup> See, e.g., *Harman v. Jones* (1841) 41 Eng. Rep. 505, 505 (Ch).

<sup>82</sup> See, e.g., *id.*; *Bacon v. Jones* (1839) 41 Eng. Rep. 167, 169 (Ch).

C. *Hostility to Equity: The Chancellor's Foot and the King's Conscience*

Two broad and persistent criticisms were leveled at chancery. The first was directed at equity's arbitrariness and subjectivity. In England, Selden most effectively attacked equity, or conscience, as nothing more than the idiosyncratic and personal moral judgment of the chancellor.<sup>83</sup> In a criticism published posthumously in 1689, he famously lambasted equity as a "roguish thing," because it was measured against the chancellor's conscience.<sup>84</sup> We may as well, said Selden, "make [th]e Standard for [th]e measure we[] call A foot, . . . [th]e Chancellor[']s foot . . . One Chancellor ha[]s a long foot[,] another A short foot[,] a third an indifferent foot; 'tis [th]e same thing in [th]e Chancellor's Conscience."<sup>85</sup>

The second criticism was that chancery, having originated in the *curia regis*, was "closely associated with the royal prerogative."<sup>86</sup> Commencing in the late 1500s, English common lawyers, with some popular support, launched a sustained assault on chancery.<sup>87</sup> Sir Edward Coke frequently resisted attempts by James I to interfere with the common law courts.<sup>88</sup> Things came to a head in 1615, when James overruled Coke and upheld Lord Chancellor Ellesmere's view "[t]hat when a Judgment [at common law] is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party."<sup>89</sup>

Both criticisms made their way to the New World; chancery's association with the monarch proved almost devastating in some colonies.<sup>90</sup> By the eighteenth century, "[h]ostility to chancery was

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<sup>83</sup> TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed. 1927).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Accord Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 680 (2007); M. Macnair, *Arbitrary Chancellors and the Problem of Predictability*, in LAW & EQUITY: APPROACHES IN ROMAN LAW AND COMMON LAW 79, 83 (E. Koops & W.J. Zwalve eds., 2014); DENNIS R. KLINCK, CONSCIENCE, EQUITY AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 2 (2010).

<sup>86</sup> Katz, *supra* note 52, at 260. Accord FRIEDMAN, *supra* note 52, at 54–55.

<sup>87</sup> Katz, *supra* note 52, at 260.

<sup>88</sup> *Id.*

<sup>89</sup> Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 487–89 (Ch).

<sup>90</sup> See FRIEDMAN, *supra* note 52, at 54–55; Katz, *supra* note 52, at 260, 265.

widespread.”<sup>91</sup> Massachusetts, for example, never established a separate court of chancery (although it selectively conferred some equity jurisdiction on common law courts).<sup>92</sup> In New York, colonists attacked the court of chancery as a juryless emanation of the Crown, and the legislative assembly repeatedly protested various governors’ assertions of a unilateral power to create a separate equity court.<sup>93</sup> This decades-long maelstrom curbed the development of equity.<sup>94</sup> Pennsylvania, after several failed efforts, established its first and only separate court of chancery in 1720, which operated with a significant docket.<sup>95</sup> But after opposition intensified, it was disbanded in 1736.<sup>96</sup> In both New York and Pennsylvania, hostility to chancery focused on equity’s potential for abuse rather than its ideology.<sup>97</sup>

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<sup>91</sup> FRIEDMAN, *supra* note 52, at 54. *Accord* 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 493 (1971) (“[T]he very word ‘chancery’ was identified with prerogative in the popular mind, and so unamendably un-American.”).

<sup>92</sup> See Phyllis Maloney Johnson, *No Adequate Remedy at Law: Equity in Massachusetts 1692–1877* (Aug. 25, 2008), in YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 3 (2012), [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1001&context=student\\_legal\\_history\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1001&context=student_legal_history_papers); FRIEDMAN, *supra* note 64, at 54.

<sup>93</sup> Smith & Hershkowitz, *supra* note 55, at 6–8, 40; *see also* FRIEDMAN, *supra* note 55, at 54–55.

<sup>94</sup> Smith & Hershkowitz, *supra* note 55, at 2; *see also* FRIEDMAN, *supra* note 55, at 54–55.

<sup>95</sup> Sydney G. Fisher, *The Administration of Equity Through Common Law Forms*, 1 L.Q. REV. 455, 456–57 (1885).

<sup>96</sup> *Id.*

<sup>97</sup> David Thomas Konig, *Regionalism in Early American Law*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580–1815) 144, 175 (Michael Grossberg & Christopher Tomlin eds., 2008); Katz, *supra* note 52, at 265 (“In the colonial period, at least, Americans objected to chancery courts rather than to equity law.”); *id.* at 282 (“Equity law was accepted by all concerned—the dispute was over the constitution of the courts that dispensed equity.”); *see also* Calvin Woodard, *Joseph Story and American Equity*, 45 WASH. & LEE L. REV. 623, 641 (1988) (“For purely political reasons . . . equity started off in this country with a black eye.”). *But cf.* GOEBEL, *supra* note 104, at 493 (“Equity was a word Americans had learned to live with as an ingredient of justice, but in states where there were no distinct chancery courts this forbearance did not extend to more than a niggardly borrowing of the procedures by which equity jurisprudence had been administered in England.”); *id.* at 500 (when dis-



#### D. *Equity's Response: Systematize and Support*

English chancery developed two responses to the criticisms of arbitrariness and prerogative tyranny. First, beginning in the early sixteenth century, equity evolved from a personal morality and subjective conscience into a systematic body of principle.<sup>98</sup> In 1676, Nottingham, the father of systematic equity, proclaimed that “[w]ith such a conscience as is only *naturalis et interna* [natural and internal, inward, personal], this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica* [civic and political, external, public], and tied to certain measures.”<sup>99</sup> The transition was complete by the early nineteenth century under Eldon as Lord Chancellor.<sup>100</sup>

Second, despite Ellesmere’s victory over Coke, chancery did not then run roughshod over the common law.<sup>101</sup> Bacon, Ellesmere’s successor, published orders in 1618 to prevent abuse of injunctions staying actions at law.<sup>102</sup> In 1759, Hardwicke wrote that since the Glorious Revolution, chancery judges “endeavoured with much anxiety to preserve the boundaries of common law and equity from being confounded; and have sent forth their injunctions to stop the course of the common law with a cautious and sparing hand.”<sup>103</sup> Importantly, in 1734, the Master of the Rolls, Sir Joseph Jekyll, noted that the common law and equity had ceased their adversarial relationship.<sup>104</sup> The “rules of law and equity,” said Jekyll, “are not to oppose, but each, in its turn, to be subservient to the other.”<sup>105</sup> Equity in some cases “follows the law implicitly, in others, assists it, and

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cussing the Congressional debates over the first Judiciary Act, “the inveterate belief in the virtues of jury trial had much to do with the apparent disinclination to implement the jurisdiction in equity”).

<sup>98</sup> JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 346–61 (2009); HEYDON ET AL., *supra* note 16, at 8–11.

<sup>99</sup> *Cook v. Fountain* (1676) 36 Eng. Rep. 984, 990; Dennis R. Klinck, *Lord Nottingham and the Conscience of Equity*, 67 J. HIST. IDEAS 123, 125 (2006).

<sup>100</sup> LANGBEIN ET AL., *supra* note 98, at 352–53; HEYDON ET AL., *supra* note 16, at 8–11.

<sup>101</sup> See KERLY, *supra* note 60, at 99–100.

<sup>102</sup> *Id.* at 116.

<sup>103</sup> *Id.* at 166.

<sup>104</sup> *Cowper v. Cowper* (1734) 24 Eng. Rep. 930, 942 (Ch).

<sup>105</sup> *Id.*

advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof.”<sup>106</sup>

In the American colonies, Joseph Story argued in his influential treatise that equity “can scarcely be said to have been generally studied, or administered, as a system of enlightened and exact principles, until about the close of the eighteenth century.”<sup>107</sup> Story invoked Hamilton’s observation about the “material diversity” of chancery jurisdiction that existed in the several states in the late eighteenth century.<sup>108</sup> Story also invoked the lack of a mature system of law reports.<sup>109</sup> Plainly, there is much truth to Story’s claim—particularly about the diversity of colonial institutional arrangements—and it resonates today.<sup>110</sup> But a more complete picture of colonial chancery has emerged since Story wrote his treatise, and it cautions against the absolute conclusion that colonial equity was a dead letter.

Despite the colonists’ hostility to the institution of the court of chancery, equity nevertheless made halting progress to systematize its jurisdiction and support the common law. Maryland, for example, recognized equity as a separate system from the 1650s, when equity suits were heard in the court of chancery.<sup>111</sup> As early as the late sev-

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<sup>106</sup> *Id.*

<sup>107</sup> STORY, *supra* note 63, at 63.

<sup>108</sup> *Id.* at 62–63; *see also* THE FEDERALIST NO. 83, at 502–03 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>109</sup> STORY, *supra* note 63, at 63.

<sup>110</sup> Henry Hart and Herbert Wechsler, in their important first edition, noted that “in 1789 equity was either non-existent or undeveloped in the courts of many of the states.” HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 578 (1st ed. 1953). *See, e.g.*, John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS J. 1, 23–24 (2013) (“[E]quity in the states was in disarray at the Founding.”); *id.* at 24 (claiming that there was no “coherent body of equity law at the state level”); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1011 (2015) (“[I]n 1789 the equity of the nascent United States was relatively feeble and unsystematic.”); *cf.* PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 103 (1990) (“An American law of equity was beginning to emerge in some of the states, but other states had no equity courts.”).

<sup>111</sup> Bernard C. Steiner, *Maryland’s First Courts*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901, at 211, 227 (1902);

enteenth century, procedure and remedies were consciously modeled on English chancery, and practitioners in England were consulted on points of dispute.<sup>112</sup> Injunctions were granted, specific performance decreed, and jurisdiction assumed over trusts and matters of fraud and mistake.<sup>113</sup> A surprising number of eighteenth-century Maryland lawyers were educated at the Inns of Court.<sup>114</sup> Similarly, in eighteenth-century South Carolina, the doctrines and remedies of equity were well understood and competently administered.<sup>115</sup> In Virginia, by the second quarter of the eighteenth century, the equity cases brought to the General Court “were pleaded with tolerable learning and skill.”<sup>116</sup> At around the same time, “an extensive jurisdiction in chancery was . . . emerging” in Virginia’s county courts.<sup>117</sup> Indeed Richard Francis, who wrote the influential English

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*see also* J. Hall Pleasants, *The First Century of the Court of Chancery of Maryland*, in 51 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COURT OF CHANCERY OF MARYLAND 1669–1679, at xxxii, xxxiv (J. Hall Pleasants ed., 1934).

<sup>112</sup> Carroll T. Bond, *Introduction to the Legal Procedure*, in 51 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COURT OF CHANCERY OF MARYLAND 1669–1679, *supra* note 111 at xxii; *see also* Richard B. Morris, Book Review, 35 COLUM. L. REV. 632, 633 (1935) (reviewing 51 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COURT OF CHANCERY OF MARYLAND, 1669–1679 (J. Hall Pleasants ed., 1934)).

<sup>113</sup> Morris, *supra* note 112, at 633; *see also* Pleasants, *supra* note 111, at xxxii–iii.

<sup>114</sup> *See* Letter of Transmittal from Samuel K. Dennis et al., to the Maryland Historical Society (Sept. 1, 1934), in 51 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COURT OF CHANCERY OF MARYLAND 1669–1679, *supra* note 111, at ix, xii; Robert von Moschzisker, Book Review, 77 U. PA. L. REV. 1040, 1041 (1929) (reviewing CARROLL T. BOND, *THE COURT OF APPEALS OF MARYLAND, A HISTORY* (1928)).

<sup>115</sup> *See* Frierson, *supra* note 54, at 53–54; *see also* Stanley M. Levy, Book Review, 36 CORNELL L.Q. 165, 167 (1950) (reviewing 6 RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671–1779 (Anne King Gregorie ed., 1950)); R.L. Meriwether, Book Review, 17 J.S. HIST. 71, 71 (1951) (reviewing 6 AMERICAN LEGAL RECORDS: RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA, 1671–1779 (Anne King Gregorie ed., 1950)).

<sup>116</sup> Marvin K. Singleton, *New Light on the Chancery Side of Virginia’s Evolution to Statehood*, 2 J. AM. STUD. 149, 156 (1969).

<sup>117</sup> William E. Nelson, *Law and the Structure of Power in Colonial Virginia*, 48 VAL. U.L. REV. 757, 817–18 (2014).

text *Maxims of Equity* in 1729, immigrated to Virginia in 1738, and practiced before the General Court in chancery.<sup>118</sup>

A subservient equity jurisdiction emerged and even grew in colonies openly hostile to chancery. In the first half of the eighteenth century, the Pennsylvania common law courts were vested with equity jurisdiction, no doubt to remedy the absence of a separate court of chancery.<sup>119</sup> In 1768, for example, a plaintiff brought an action of debt on a bond—a common law action.<sup>120</sup> At common law, of course, a defendant could not raise an equitable defense such as mistake or failure of consideration.<sup>121</sup> To raise an equitable defense, the defendant would file a bill in the court of chancery and, if successful, chancery would enjoin the action at law.<sup>122</sup> But in 1768, there was no court of chancery in Pennsylvania.<sup>123</sup> Rather than have the defendant go remediless, the Supreme Court of Pennsylvania permitted equitable defenses in common law actions.<sup>124</sup> The Court held that “there being no Court of Chancery in this Province, there is a

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<sup>118</sup> See *Jones v. Porter* (Gen. Ct. Va. 1740), in THOMAS JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730, TO 1740, AND FROM 1768, TO 1772, at 62, 66 n.\* (Charlottesville, F. Carr., & Co. 1829). Baker called *Maxims of Equity* “the first published book on equity.” J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 111 n.79 (4th ed. 2002). See also LANGBEIN ET AL., *supra* note 98, at 339 n.82; W.H. Bryson, *Francis, Richard*, OXFORD DICTIONARY NAT’L BIOGRAPHY, <http://www.oxforddnb.com/view/article/47165>.

<sup>119</sup> This was the second time that this was done. See generally William Henry Rawle, *Equity in Pennsylvania*, Lecture Before the Law Academy of Philadelphia (Feb. 11, 1868), in EQUITY IN PENNSYLVANIA 1–12 (Philadelphia, Kay & Bros. 1868). In 1684, Pennsylvania’s Assembly passed a law providing that “every court of justice should be a court of equity as well as of law.” *Id.* at 9. County courts exercised jurisdiction at common law and in equity. Appeal from the county courts was to the provincial court, which also tried any cases at law and in equity over which the county courts could not exercise jurisdiction. See *id.* at 5–8. The law establishing the county courts was disallowed in London in 1693. The colonial assembly immediately re-established the courts, but they transacted very little business. See generally Fisher, *supra* note 95, at 455–56; Spencer R. Liverant & Walter H. Hitchler, *A History of Equity in Pennsylvania*, 37 DICK. L. REV. 156, 159–60 (1933); WILLIAM H. LLOYD, THE EARLY COURTS OF PENNSYLVANIA 168–69 (1910).

<sup>120</sup> *Swift v. Hawkins*, 1 U.S. (1 Dall.) 17, 17, 1 Ald. 7 (Pa. 1768).

<sup>121</sup> HEYDON ET AL., *supra* note 16, at 34.

<sup>122</sup> *Id.*

<sup>123</sup> FRIEDMAN, *supra* note 52, at 54.

<sup>124</sup> *Swift v. Hawkins*, 1 U.S. (1 Dall.) at 17.

necessity, in order to prevent a failure of Justice, to let the Defendants . . . prove mistake or want of consideration.”<sup>125</sup> By the second half of the eighteenth century, the Supreme Court of Pennsylvania routinely used the absence of a separate court of chancery to justify the application of equitable doctrines.<sup>126</sup> The Pennsylvania courts, however, did not assume complete equity powers.<sup>127</sup> A similar trend occurred in Massachusetts, which emerged as a leader in trust law despite the absence of a court of chancery.<sup>128</sup>

### E. *At the Founding*

With little argument at the Convention, Article III of the Constitution extended the federal judicial power to “law and equity.”<sup>129</sup> Section 11 of the Judiciary Act of 1789 conferred equity jurisdiction on the federal courts,<sup>130</sup> but section 16 prohibited suits in equity “in any case where plain, adequate and complete remedy may be had at

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<sup>125</sup> *Id.* Chief Justice William Allen added that this practice—the interposition of mistake and failure of consideration (equitable defenses) in an action of debt *sur obligation* (a legal action)—was “known to be the constant practice of the Courts of Justice in this Province for thirty nine Years past.” *Id.* This would put the availability of equitable defenses in legal actions at 1729, when the separate court of chancery was still operational.

<sup>126</sup> *See, e.g.,* *Kennedy v. Fury*, 1 U.S. (1 Dall.) 72, 72, 1 Ald. 20 (Pa. 1783) (a beneficial owner of land could bring an action for ejectment, Justice Atlee observing that “[w]e have no Court of Equity here; and, therefore, unless the *cestui que trust* could bring an ejectment in his own name, he would be without remedy, in the case of an obstinate trustee”); *James v. Browne*, 1 U.S. (1 Dall.) 339, 339, 1 Ald. 98 (Pa. 1788) (noting that “we have no Court of Chancery to interpose an equitable jurisdiction,” and “[t]he necessity of a liberal extension of the action of *Account render* between joint partners, is apparent”); *Wharton v. Morris*, 1 U.S. (1 Dall.) 125, 125–26, 1 Ald. 35 (Pa. 1785) (common law courts would administer equity to remedy a penal bond or a breach of trust).

<sup>127</sup> In *Dorow v. Kelly*, 1 U.S. (1 Dall.) 142, 144, 1 Ald. 42 (Pa. Ct. C.P. Phila. Cty. 1785), Edward Shippen, then President of the Philadelphia Court of Common Pleas, observed that “[t]he Courts of law in this state, have in some instances adopted the chancery rules, to prevent the absolute failure of justice.” *Id.* But “[b]eing a Court of law, we cannot take upon ourselves to act as a Court of chancery.” *Id.* Accordingly, the common pleas could not foreclose the equity of redemption, or impose terms upon a mortgagor applying to redeem. *See id.* at 144–145.

<sup>128</sup> *See Johnson, supra* note 92, at 3.

<sup>129</sup> *See GOEBEL, supra* note 91, at 240; DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* 9 (1971); HOFFER, *supra* note 110, at 95.

<sup>130</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (1789).

law.”<sup>131</sup> Consonant with the colonial experience, much of the hostility to equity in the early United States centered on its mode of implementation—lack of a jury—rather than its doctrine. For example, in the Senate debate on what became section 16, “more was said in favor of Chancery than against.”<sup>132</sup> It was the “inveterate belief in the virtues of jury trial” that accounted for the “apparent disinclination to implement the jurisdiction in equity.”<sup>133</sup> That said, both the Federal Farmer and Brutus attacked equity itself. The Federal Farmer thought that it was “a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity,” because “if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate.”<sup>134</sup> Brutus argued that the federal courts, being invested with both equity jurisdiction and jurisdiction arising under the Constitution, “will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution.”<sup>135</sup>

From 1792 to 1938, equity jurisdiction was exercised by the equity “side” of the federal courts.<sup>136</sup> Procedure was pegged first to “the course of the civil law” (from 1789 to 1792),<sup>137</sup> and then to “the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law” (from 1792 to 1912).<sup>138</sup> In 1792, the Supreme Court also acquired procedural rule-making power for the equity side of the federal courts, which it exercised in an ad hoc manner in 1822 and 1842, and comprehensively

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<sup>131</sup> Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82. (“[S]uits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law”).

<sup>132</sup> GOEBEL, *supra* note 91, at 499–500.

<sup>133</sup> *Id.* at 500.

<sup>134</sup> Letter from the Federal Farmer, No. III (Oct. 10, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST: OBJECTIONS OF NON-SIGNERS OF THE CONSTITUTION AND MAJOR SERIES OF ESSAYS AT THE OUTSET 234, 244 (Herbert J. Storing ed., 1981).

<sup>135</sup> *Essays of Brutus No. XI* (Jan. 31, 1788), in 2 THE COMPLETE ANTI-FEDERALIST: OBJECTIONS OF NON-SIGNERS OF THE CONSTITUTION AND MAJOR SERIES OF ESSAYS AT THE OUTSET, *supra* note 134, at 417, 420.

<sup>136</sup> RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 560–61 (7th ed. 2015).

<sup>137</sup> Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (1789).

<sup>138</sup> Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792).

in 1912.<sup>139</sup> In 1915, Congress permitted cases to be transferred between the equity and law sides of the federal courts, and equitable defenses to be raised on the common law side “without the necessity of filing a bill on the equity side of the court.”<sup>140</sup> The equity side of the federal courts operated under the 1915 statute and, with minor modifications, the Equity Rules of 1912, until the Federal Rules of Civil Procedure were enacted in 1938.<sup>141</sup>

### III. THE TWO CONCEPTIONS OF FEDERAL EQUITY

Federal courts administer two distinct conceptions of equity. The first, which the federal courts have been applying since the dawn of the Republic, is uniform or *homogeneous*. When laboring under this conception, a federal court possesses “authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”<sup>142</sup> Federal courts sit as national courts administering homogeneous equity throughout the country. Today the homogeneous conception is reserved for cases where federal courts enforce federal rights, or when they invoke the equitable remedial rights doctrine. In the nineteenth and early twentieth centuries, however, the homogeneous conception exhausted federal equity and applied even when federal courts enforced state-created rights.<sup>143</sup> The second conception of federal equity is *heterogeneous*. If a party requests the federal court apply equitable doctrine or relief when enforcing a state-created right, then the federal court will apply state law, including state equity.<sup>144</sup> That is the basic holding of *Guaranty Trust*, which held that federal equity courts sitting in diversity could not ignore an applicable state statute of limitations when enforcing a state right.<sup>145</sup>

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<sup>139</sup> See FALLON ET AL., *supra* note 136, at 560–61.

<sup>140</sup> Act of Mar. 3, 1915, ch. 90, §§ 274a–274b, 38 Stat. 956, 956 (1915).

<sup>141</sup> FALLON ET AL., *supra* note 136, at 560–61, 564–65.

<sup>142</sup> *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939)); *id.* at 335 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Atlas Life Ins. Co.*, 306 U.S. at 568).

<sup>143</sup> See Collins, *A Considerable Surgical Operation*, *supra* note 8, at 338.

<sup>144</sup> See *Guar. Tr. Co. v. York*, 326 U.S. 99, 112 (1945).

<sup>145</sup> See *id.* at 110–12.

The heterogeneity arises because the content of the equity administered by the federal court differs from state to state.

This Part reviews the content and development of the homogeneous and heterogeneous conceptions of federal equity. It shows, first, that the Supreme Court under Marshall asserted an equitable homogeneity about ten years before conventionally recognized. This synchronizes homogeneous federal equity with the expansion of federal jurisdiction (and increased power of the Supreme Court) in other areas. Second, after explaining that Frankfurter's opinion in *Guaranty Trust* reimagined *Erie* as a comprehensive legal philosophy, this Part reveals a deep conceptual tension between the heterogeneous federal equity established by *Guaranty Trust* and "the principles of the system of judicial remedies which had been devised and was being administered by the English High Court of Chancery at the time of the founding."<sup>146</sup> Using Henry Smith's account of equity as a second-order system, a kind of safety valve, this analysis suggests that *Guaranty Trust* obliterated not only homogeneous federal equity, but also a federal court's capacity to act as a court of equity when enforcing state-created rights.

#### A. *Homogeneous Federal Equity*

Since their creation, federal courts have applied homogeneous equity. After *Guaranty Trust* was decided in 1945, homogeneous equity only applies when federal courts enforce federal rights or apply what remains of the equitable remedial rights doctrine. But before 1945, federal equity *was* homogeneous equity, that is, it was coextensive with the full scope of the equity jurisdiction of the English High Court of Chancery at the Founding.<sup>147</sup> In nineteenth-century diversity cases, under the *Swift v. Tyson* regime, homogeneous equity governed the equitable aspects of the bill.<sup>148</sup> Suppose, for example, that plaintiff sued on a legal right for an equitable remedy. Then ordinary legal rules governed whether the legal right was violated—say, whether a contract was breached.<sup>149</sup> If the federal equity

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<sup>146</sup> *Grupo Mexicano*, 527 U.S. at 335 (Ginsburg, J., concurring in part and dissenting in part) (quoting *Atlas Life Ins. Co.*, 306 U.S. at 568).

<sup>147</sup> See *Grupo Mexicano*, 527 U.S. at 335 (Ginsburg, J., concurring in part and dissenting in part); *Atlas Life Ins. Co.*, 306 U.S. at 568.

<sup>148</sup> See Collins, *A Considerable Surgical Operation*, *supra* note 8, at 284.

<sup>149</sup> See *id.* at 283–84.



court concluded that the contract had been breached, then it would apply homogeneous equity doctrine to determine whether the plaintiff was entitled to equitable relief.<sup>150</sup> Or suppose, taking a different example, that plaintiff sued on an equitable right—say, plaintiff sued her trustee or fiduciary.<sup>151</sup> Then homogeneous equity governed the entire lawsuit, because trusts and fiduciaries were not recognized at law.<sup>152</sup> And suppose, as a final example, that plaintiff brought a simple breach of contract action on the common law side of the federal court, and defendant wanted to raise an equitable defense. The common law did not recognize equitable defenses, so defendant would file a bill on the equity side to restrain the proceedings at law.<sup>153</sup> The equity side of the federal court would apply homogeneous equity to determine whether defendant could make out the equitable defense.<sup>154</sup>

### 1. ORIGINS: *BODLEY AND BROWN* (1809)

In 1818 and 1819, the Supreme Court decided two cases that courts and commentators have credited with definitively establishing that “federal judges applied nonstate uniform equity principles to determine the applicable procedures, remedies, and—in certain cases—substantive principles.”<sup>155</sup> In *Robinson v. Campbell*, an action at law for ejectment, the Court excluded evidence proving an equitable title in the defendant, notwithstanding that such evidence would have been admitted in the state common law court to make out an equitable defense.<sup>156</sup> Justice Todd held that federal court remedies “are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.”<sup>157</sup> And in *United States v. Howland & Allen*, a judgment creditor’s suit filed

<sup>150</sup> See, e.g., *Guffey v. Smith*, 237 U.S. 101 (1915).

<sup>151</sup> See generally HEYDON ET AL., *supra* note 16, at 5.

<sup>152</sup> Collins, *A Considerable Surgical Operation*, *supra* note 8, at 269.

<sup>153</sup> J. P. McBaine, *Equitable Defenses to Actions at Law in the Federal Courts*, 17 CAL. L. REV. 591, 592 (1929).

<sup>154</sup> See, e.g., *Lawrence v. Bowman*, 15 F. Cas. 21 (C.C.N.D. Cal. 1858) (No. 8,134).

<sup>155</sup> Collins, *A Considerable Surgical Operation*, *supra* note 8, at 265, 272–75.

<sup>156</sup> See *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 213, 218–22 (1818).

<sup>157</sup> *Id.* at 222–23.

in equity, the Court held that a state statute providing a remedy at law did not deprive the federal court of equity jurisdiction.<sup>158</sup> Chief Justice Marshall confirmed that “the Courts of the Union have a Chancery jurisdiction in every state, and the judiciary act confers the same Chancery powers on all, and gives the same rule of decision.”<sup>159</sup>

Entirely missing from this narrative are two cases decided about a decade before *Robinson* and *Howland & Allen*, where the Supreme Court paved the way for a robust assertion of homogeneous federal equity. Scholars have overlooked *Bodley v. Taylor* and *Taylor v. Brown*, two cases filed on the equity side of the federal court in Kentucky, where the Court, guided by Marshall, invoked and asserted homogeneous federal equity after real deliberation.<sup>160</sup> The Court had *Bodley* under consideration for three years: argument commenced in February 1806 and a final opinion issued in March 1809.<sup>161</sup> In February 1807, Marshall delivered a one-paragraph opinion “as to a part only of this case,” holding that a federal court exercising equity jurisdiction “will proceed according to the principles of equity.”<sup>162</sup> In the complete 1809 opinion, Marshall doubled down on homogeneous federal equity. He proclaimed that “the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself,” and that “it will exercise that jurisdiction upon its own principles.”<sup>163</sup> It seems, then, that in its initial *Bodley* decision—eleven years before *Robinson*, twelve years before *Howland & Allen*—the Court decided, after consideration, that federal courts exercise equity jurisdiction according to their own general principles.<sup>164</sup>

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<sup>158</sup> See *United States v. Howland & Allen*, 17 U.S. (4 Wheat.) 108, 115–16 (1819).

<sup>159</sup> *Id.* at 115.

<sup>160</sup> See *Bodley v. Taylor*, 9 U.S. (5 Cranch) 191, 222 (1809); *Taylor v. Brown*, 9 U.S. (5 Cranch) 234, 255 (1809). Patrick Gillen recently quoted some of Marshall’s language from *Bodley*, but did not discuss it. See Patrick T. Gillen, *Preliminary Injunctive Relief Against Governmental Defendants: Trustworthy Shield or Sword of Damocles?*, 8 DREXEL L. REV. 269, 288, 306 n.225 (2016).

<sup>161</sup> See *Bodley*, 9 U.S. (5 Cranch) at 200, 221.

<sup>162</sup> *Id.* at 220.

<sup>163</sup> *Id.* at 222.

<sup>164</sup> The argument in *Brown* also provides insight into the early Marshall Court’s attitude to equity procedure in the lower federal courts. The Supreme Court would tolerate a deviation from regular chancery procedure if it was an established state practice that did not produce acute difficulties. At that time, the

*Bodley* and *Brown* were about the application of general equitable principles to Kentucky's convoluted land law. Kentucky statute prescribed four steps for the acquisition of land: obtain a warrant from the governor, file an entry with the county surveyor (which was placed on public record), survey the land, and return the survey to the land office.<sup>165</sup> The land office then issued a patent, which was conclusive evidence of legal title.<sup>166</sup> But completing prior steps, before a patent issued, conferred equitable interests which a court of chancery would recognize.<sup>167</sup> Importantly, the equitable interests thus created were specific applications of general equitable princi-

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Kentucky federal court sitting in equity impaneled a jury for fact-finding. MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816*, at 180–82 (1978). This was highly unusual. See John H. Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 *YALE L. J.* 1620, 1625 (1974) [hereinafter Langbein, *Fact Finding in the English Court of Chancery*]. Marshall emphasized the importance of following proper equity procedure in federal court, which limited jury fact-finding via the “feigned issue” mechanism. *Brown*, 9 U.S. (5 Cranch) at 238 (“When the first case of a suit in chancery of this kind came before this court from Kentucky [viz., *Bodley*], the court was struck with the irregularity of the intervention of a jury to ascertain the facts in any other mode than by an issue directed by the court as a court of chancery; and as this court is only authorized to proceed in chancery cases according to the principles and usages of courts of equity, the court was disposed to disregard facts thus found . . . . However, as such a practice was said to have been established in Kentucky, the court agreed to look into the facts found where they were not inconsistent with the depositions in the cause.”). It may be that the Supreme Court tolerated this particular deviation from regular chancery procedure because hostility to equity in America partly stemmed from the absence of a jury. See FRIEDMAN, *supra* note 52, at 54–55; see also TACHAU, *supra*, at 165 (“The [Kentucky federal] judge was an ardent Jeffersonian, and it seems likely that he shared Jefferson’s conviction that there should be juries in all courts: chancery, admiralty, and ecclesiastical, as well as in common law courts . . . [h]is use of chancery juries . . . helped avoid even the appearance of tyranny or the arbitrary use of power.”).

<sup>165</sup> See Mary K. Bonsteel Tachau, *Land Claims, Early*, in *THE KENTUCKY ENCYCLOPEDIA* 535 (John E. Kleber ed., 2015) [hereinafter Tachau, *Land Claims*]. As Mr. Lee put it to the Supreme Court in 1801, “there must be a *warrant*, an *entry* and a *survey*; the warrant being the foundation of the entry, and the entry directing and controlling the survey.” *Wilson v. Mason*, 5 U.S. (1 Cranch) 45, 65 (1801).

<sup>166</sup> See Tachau, *Land Claims*, *supra* note 165, at 535.

<sup>167</sup> See *Bodley v. Taylor*, 9 U.S. (5 Cranch) 191, 220–21, 222–23 (1809); *Brown*, 9 U.S. (5 Cranch) at 241.

ples for resolving conflicting interests and priorities; they were necessary because “governors issued warrants with such extravagance.”<sup>168</sup> So, for example, filing a valid entry with the county surveyor conferred an equitable interest in the land described.<sup>169</sup> In general, if an entry was filed *after* a patent had issued, then the earlier legal title prevailed.<sup>170</sup> If, however, an entry was filed *before* a patent issued, then the patentee took the legal title subject to the earlier equitable interest, because the patentee had constructive notice of the prior entry (the prior entry was on the public record).<sup>171</sup> In such a case, the patentee held the legal title on trust for the equitable owner: the equitable owner could repair to a court of equity to compel the patentee to convey the legal title.<sup>172</sup>

In *Bodley*, defendant filed an entry in 1780 and acquired legal title as patentee in 1786.<sup>173</sup> The defendant’s patent, however, included land that was not described in his entry.<sup>174</sup> Defendant, therefore, had legal title to surplus land over which he had never acquired equitable title.<sup>175</sup> Plaintiffs claimed that the defendant’s surplus land was within an entry that they had filed for a parcel of land in 1783, before defendant had acquired legal title.<sup>176</sup> The equity side of the district court in Kentucky decreed that defendant convey to plaintiffs the legal title to the surplus land.<sup>177</sup> In *Brown*, plaintiffs’ and defendants’ surveys overlapped, and legal title had been acquired by both.<sup>178</sup> Plaintiffs had surveyed first but patented last, and argued that defendants had taken legal title over the overlapping land subject to their prior equitable interest.<sup>179</sup> The equity side of the federal district court in Kentucky dismissed plaintiffs’ claim.<sup>180</sup>

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<sup>168</sup> Tachau, *Land Claims*, *supra* note 165, at 535.

<sup>169</sup> *Bodley*, 9 U.S. (5 Cranch) at 222–23; *Brown*, 9 U.S. (5 Cranch) at 241.

<sup>170</sup> *Bodley*, 9 U.S. (5 Cranch) at 222–23; *Brown*, 9 U.S. (5 Cranch) at 241, 253–54.

<sup>171</sup> *Bodley*, 9 U.S. (5 Cranch) at 222–23, 233; *Brown*, 9 U.S. (5 Cranch) at 241, 253–54.

<sup>172</sup> *Bodley*, 9 U.S. (5 Cranch) at 220–21.

<sup>173</sup> *Id.* at 194.

<sup>174</sup> *Id.* at 192–93, 233–34.

<sup>175</sup> *Id.* at 222, 232–33.

<sup>176</sup> *Id.* at 191–92.

<sup>177</sup> *Id.* at 221.

<sup>178</sup> *Taylor v. Brown*, 9 U.S. (5 Cranch) 234–35, 247, 255–56 (1809).

<sup>179</sup> *Id.* at 233–34, 241, 253–56.

<sup>180</sup> *Id.* at 234.

In both cases, Marshall framed his opinion in equitable terms: to resolve the competing equitable priorities. His initial *Bodley* opinion in 1807 invoked homogeneous federal equity, holding that a subsequent patentee (the owner at law) is on constructive notice of any prior entry, and that “the legal title will be considered as holden [*i.e.*, held on trust] for him who has the prior equity.”<sup>181</sup> In the final 1809 *Bodley* opinion, Marshall therefore ordered defendant to convey to plaintiffs “the lands lying within his patent and theirs, which were not within his entry.”<sup>182</sup> And in *Brown*, Marshall said that “[t]he survey under which the plaintiffs claim, being prior in point of time, they have the first equitable title, and must prevail . . . unless their equity is defeated by the circumstances of the case.”<sup>183</sup> He held that their equity was not defeated.<sup>184</sup>

But *Bodley* and *Brown* did not just apply general equitable doctrines. For the first time, the Supreme Court confronted, in Marshall’s words, the “inquiry of vast importance whether . . . a court of equity acts upon its known, established and general principles, or is merely substituted for a court of law.”<sup>185</sup> The Court expressly asserted a general authority to exercise equity jurisdiction “upon its own principles,” that is, “the settled principles of a court of chancery.”<sup>186</sup> Marshall reached this conclusion by making four important general observations about the equity side of the federal courts. First, in *Brown*, he said that the equity side of the Supreme Court is not “merely substituted for a court of law, with no other difference than the power of going beyond the patent.”<sup>187</sup> Two weeks later, in the final *Bodley* opinion, Marshall made the same point more generally, saying that a court of chancery is not “by statute, substituted in the place of a court of law, with an express grant of jurisdiction in the case.”<sup>188</sup> In other words, the federal equity court is not a common law court with limited equity powers (as existed in Pennsylvania, where equity was administered through the common law

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<sup>181</sup> *Bodley*, 9 U.S. (5 Cranch) at 220–21.

<sup>182</sup> *Id.* at 234.

<sup>183</sup> *Brown*, 9 U.S. (5 Cranch) at 241.

<sup>184</sup> *Id.* at 256.

<sup>185</sup> *Bodley*, 9 U.S. (5 Cranch) at 222.

<sup>186</sup> *Id.* at 222–23.

<sup>187</sup> *Brown*, 9 U.S. (5 Cranch) at 255.

<sup>188</sup> *Bodley*, 9 U.S. (5 Cranch) at 222.

forms).<sup>189</sup> Instead, the equity side of the federal court is a fully-fledged court of equity, endowed with full chancery powers.

Second, Marshall repeatedly observed that “the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself,”<sup>190</sup> and that jurisdiction “must be exercised upon the known principles of equity.”<sup>191</sup> He noted that a court of chancery “will afford a remedy which a court of law cannot afford, but since that remedy is not given by statute, it will be applied by this court as the principles of equity require its application.”<sup>192</sup> Assuming jurisdiction as a court of chancery, the Court “will pay great respect”—importantly, Marshall did not say the federal court would be *bound*—“to all those principles which appear to be well established in the state in which the lands in controversy lie.”<sup>193</sup> The equity side of the federal court, then, exercised general equity jurisdiction and was not bound by the equity administered by the state.

Third, Marshall’s vision of federal equity was expansive. The existence of equitable jurisdiction did not simply “bring[] the validity of the entries before the court” to be resolved by the application of detailed, technical rules.<sup>194</sup> It also “br[ought] with that question every other which defeats the equity of the plaintiff.”<sup>195</sup> For example, in *Bodley*, Marshall ordered defendant to convey to plaintiffs

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<sup>189</sup> See *supra* Part II.D. Kentucky courts, like the federal courts, had a common law side and an equity side. See W. Hamilton Bryson, *Equity and Equitable Remedies*, in 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM: STUDIES OF THE PRINCIPAL INSTITUTIONS AND PROCESSES OF LAW 545, 551 (Robert J. Janosik ed., 1987); Henry H. Ingersoll, *Confusion of Law and Equity*, 21 YALE L.J. 58, 63–66, 69 (1911); see also *Hamilton v. Hendrix’s Heirs*, 4 Ky. (1 Bibb) 67, 71 (1809); William E. Bivin, *The Historical Development of the Kentucky Courts*, 47 KY. L.J. 465, 477 (1959).

<sup>190</sup> *Bodley*, 9 U.S. (5 Cranch) at 222.

<sup>191</sup> *Brown*, 9 U.S. (5 Cranch) at 255. The “theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity” was one of the “traditions . . . exert[ing] a strong gravitational pull on the nineteenth-century judiciary.” Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949 (2011) [hereinafter Merrill, *Article III, Agency Adjudication, and the Origins of Appellate Review*].

<sup>192</sup> *Bodley*, 9 U.S. (5 Cranch) at 223.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

land in defendant's patent but not in his survey.<sup>196</sup> This was land to which defendant had legal title but which belonged in equity to plaintiffs. It turned out, however, that plaintiffs themselves were patentees over different land in defendant's prior survey, that is, which belonged at law to plaintiffs but in equity to defendant. Marshall would have ordered that plaintiffs do the equity that they seek. As he put it, the Court would "furnish no equity to [plaintiffs] against the legal title which is held by their adversaries, unless they will submit to the condition of restoring the lands they have gained by the inadvertence of which they complain."<sup>197</sup> Were this a case of first impression, then, Marshall would have held that plaintiffs "ought not to receive a conveyance for the lands within [defendant's] survey, and not within his entry, but on the condition of their consenting to convey to him the lands they hold which were within his entry and are not included in his survey."<sup>198</sup>

Finally, consistent with what Story would say more than thirty years later in *Swift v. Tyson*, Marshall thought that "in questions respecting title to real estate especially, the same rule ought certainly to prevail in both [federal and state] courts."<sup>199</sup> In *Bodley*, although Marshall was "strongly incline[d]" to require plaintiffs to do the equity that they sought, he did not.<sup>200</sup> Referring to the "very extraordinary state of land title" in Kentucky, he applied the "artificial" principle articulated in a series of state court decisions because "[i]t is impossible to say how many titles might be shaken by shaking the principle."<sup>201</sup> That is so even though "the principle is really settled in a manner different from that which this court would deem correct."<sup>202</sup> The ultimate outcome in *Bodley*, then, was to grant equitable relief to plaintiffs without requiring them to reciprocate.<sup>203</sup>

In the final result, *Bodley* and *Brown* were both cases about real property and both ultimately applied local law. This is entirely con-

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<sup>196</sup> *Id.* at 234.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 233–34.

<sup>199</sup> *Taylor v. Brown*, 9 U.S. (5 Cranch) 234, 255 (1809).

<sup>200</sup> *Bodley*, 9 U.S. (5 Cranch) at 233–34.

<sup>201</sup> *Id.* at 234.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* at 233–34.

sistent with *Swift*, where Story expressly held that federal courts follow state law, not general common law, on “the rights and titles to real estate.”<sup>204</sup> And unlike *Robinson* and *Howland & Allen*, *Bodley* and *Brown* do not explicitly say that federal equity jurisdiction is totally independent of the forum state.<sup>205</sup> It is also true that in *Bodley*, Marshall relied on state law for the conferral of chancery jurisdiction, that is, for “the practice of resorting to a court of chancery in order to set up an equitable against the legal title.”<sup>206</sup> “[B]ut,” he stated, “in the exercise of that [chancery] jurisdiction, [the federal court] will proceed according to the principles of equity.”<sup>207</sup> In other words, the federal court followed state practice on whether chancery jurisdiction existed; but in the exercise of that jurisdiction, the federal court was a fully empowered court of chancery and was not bound by state equity doctrine. For his part, Marshall—himself a seasoned equity lawyer<sup>208</sup>—thought he was saying something “of vast importance” in concluding that “a court of equity acts upon its known, established and general principles.”<sup>209</sup> *Bodley* was argued three times in the Supreme Court and it took three years to issue a final opinion.<sup>210</sup>

The assertion in 1809 of a power to decide federal equity cases on general principles coincides with an emboldened Supreme Court under Marshall. Just the day before the final *Bodley* opinion, Marshall delivered *Riddle & Co. v. Mandeville*.<sup>211</sup> Morton Horwitz argued that in *Riddle*, Marshall, “out of the blue, had invoked an independent equity power to establish the principle of negotiability in the federal courts.”<sup>212</sup> *Riddle* “was the first clear assertion in the fed-

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<sup>204</sup> *Swift v. Tyson*, 42 U.S. (16 Pet.) 1, 18 (1842).

<sup>205</sup> Compare *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222–23 (1818), and *United States v. Howland & Allen*, 17 U.S. (4 Wheat.) 108, 115 (1819), with *Bodley*, 9 U.S. (5 Cranch) at 221–22, and *Brown*, U.S. (5 Cranch) at 255.

<sup>206</sup> *Bodley*, 9 U.S. (5 Cranch) at 220–22.

<sup>207</sup> *Id.* at 220.

<sup>208</sup> See R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 87–93 (2001).

<sup>209</sup> *Bodley*, 9 U.S. (5 Cranch) at 222.

<sup>210</sup> See *id.* at 200, 221.

<sup>211</sup> 9 U.S. (5 Cranch) 322 (1809).

<sup>212</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 223 (1977).



eral courts of the idea that a general commercial law existed independently of the decisional law of the states.”<sup>213</sup> And just three short weeks before the final *Bodley* opinion, Marshall had delivered “the Court’s sweeping assertion of jurisdiction”<sup>214</sup> in *United States v. Peters*.<sup>215</sup>

## 2. A NATIONAL EQUITY POWER FOR WESTWARD EXPANSION

Collins explains the evolution of homogeneous federal equity after *Robinson* in terms of the institutional capacity of the federal judicial system.<sup>216</sup> Although it is tempting to situate homogeneous equity in the standard narrative of federal court aggrandizement and empowerment, Collins argues that uniform federal equity also served an institutional purpose. Homogeneous equity is not simply evidence of the concentration of federal court power at the expense of the states; it is also “evidence of an effort to ensure litigant equality and uniform administration of justice throughout the federal judicial system.”<sup>217</sup> In Collins’s view, the failure of the federal courts to match westward territorial expansion, and the significant disparity of state equity, motivated the Court to “use[] uniform equity as one way to secure a modicum of horizontal consistency throughout the federal judicial system.”<sup>218</sup>

## 3. MATURITY AND ENTRENCHMENT IN THE NINETEENTH CENTURY

Homogeneous federal equity came of age during the mid-nineteenth century.<sup>219</sup> Dane’s first abridgment, published in 1824, cited

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<sup>213</sup> *Id.*

<sup>214</sup> NEWMYER, *supra* note 208, at 206–07.

<sup>215</sup> 9 U.S. (5 Cranch) 115, 136 (1809).

<sup>216</sup> See Collins, *A Considerable Surgical Operation*, *supra* note 8, at 292–98.

<sup>217</sup> *Id.* at 300–01.

<sup>218</sup> *Id.* at 292–93.

<sup>219</sup> See generally A. J. PEELER, A TREATISE ON LAW AND EQUITY AS DISTINGUISHED AND ENFORCED IN THE COURTS OF THE UNITED STATES 334 (Austin, Swindells Printing House 1883); GEO. TUCKER BISPHAM & SHARSWOOD BRINTON, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 22 (8th ed. 1909); Pratt v. Northam, 19 F. Cas. 1254, 1258 (C.C.D.R.I. 1828) (No. 11,376); Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832); Livingston v. Story, 34 U.S. (9 Pet.) 632, 655–57 (1835); Gordon v. Hobart, 10 F. Cas. 795, 797 (C.C.D. Me. 1836) (No. 5,609); Barber v.

*Howland & Allen* for the proposition that “[t]he Federal circuit courts have jurisdiction in equity in every State, and in all the same powers and rules of decision.”<sup>220</sup> By 1850 it was uncontroversial that “[t]he chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all.”<sup>221</sup> The starkest example of homogeneity arose from a couple’s agreement made in contemplation of marriage.<sup>222</sup> After the surviving spouse died, the Supreme Court of Georgia held that only the couple’s children could sue in equity to enforce the marriage agreement.<sup>223</sup> The wife’s first cousins could not.<sup>224</sup> But when the husband’s brother and nephew sued in federal court to enforce the agreement—not just the same *kind* of agreement, but the same *exact* agreement considered in the state court proceedings—the U.S. Supreme Court “d[id] not consider

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Barber, 62 U.S. (21 How.) 582, 591–92 (1858); *Green’s Adm’x v. Creighton*, 64 U.S. (23 How.) 90, 105 (1860); *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *Camblos v. Phila. & R.R. Co.-Dinsmore*, 4 F. Cas. 1089, 1097, 1098–99 (C.C.E.D. Pa. 1873) (No. 2,331) (counsel agreed that federal equity was uniform); *Smith v. R.R. Co.*, 99 U.S. 398, 401 (1878); *Ridings v. Johnson*, 128 U.S. 212, 217 (1888); JOHN MITFORD, *A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL* 19–20 n.1 (Charles Edwards ed., New York, John S. Voorhies, 5th Am. ed. 1844); GEORGE TICKNOR CURTIS, *COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES* 25–26, 29 (Philadelphia, T. & J.W. Johnson 1854); ROGER FOSTER, *THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887*, at 16–19 (New York, L. K. Strouse & Co. 1887); 1 CHARLES FISK BEACH, JR., *MODERN EQUITY: COMMENTARIES ON MODERN EQUITY JURISPRUDENCE* 7 (New York, Baker, Voorhis & Co. 1892); JAMES W. EATON, *HANDBOOK OF EQUITY JURISPRUDENCE* 20, 20 n.4 (1901); ARCHIBALD H. THROCKMORTON, *ILLUSTRATIVE CASES OF EQUITY JURISPRUDENCE* 2–3 (1913).

<sup>220</sup> 7 NATHAN DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* 557 (Boston, Cummings, Hilliard & Co. 1824).

<sup>221</sup> BENJAMIN L. OLIVER, *FORMS IN CHANCERY, ADMIRALTY, AND AT COMMON LAW; ADAPTED TO THE PRACTICE OF THE FEDERAL AND STATE COURTS* 289 (Boston, Charles C. Little & James Brown 1842) (quoting *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832)).

<sup>222</sup> See generally *Neves v. Scott (Neves I)*, 50 U.S. (9 How.) 196, 210, 213 (1850); *Neves v. Scott (Neves II)*, 54 U.S. (13 How.) 268, 270, 272 (1851).

<sup>223</sup> *Merritt v. Scott*, 6 Ga. 563, 573 (1849) (“Equity will not enforce a specific performance [of a marriage agreement], at the instance of a volunteer, although so near a relation as a brother or sister . . .”).

<sup>224</sup> *Id.* at 573–74.

th[e] decision of the Supreme Court of Georgia a binding authority,”<sup>225</sup> and granted relief.<sup>226</sup> The Court asserted the uniformity of federal equity principles, saying that “it is for the courts of the United States . . . to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto.”<sup>227</sup> The disagreement between the two supreme courts was internal to equity doctrine. The federal court noted that “the Supreme Court of Georgia, as well as this court, has resorted to the decisions of the High Court of Chancery in England, and to approved writers on equity jurisprudence, as affording the proper guides to a correct decision.”<sup>228</sup> It was a debate over who was right, not who was supreme.<sup>229</sup>

The power and persistence of the homogeneous conception of federal equity derived from its perceived constitutional status. In 1832, Justice Story observed that “[t]he Chancery jurisdiction [is] given by the constitution and laws of the United States.”<sup>230</sup> Its constitutional status was most aggressively asserted by Chief Justice Taney in 1850, holding that “the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit,” because “[t]he Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity.”<sup>231</sup> Taney’s opinion underwrote the constitutional entrenchment of the law/equity distinction for decades.<sup>232</sup>

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<sup>225</sup> *Neves II*, 54 U.S. (13 How.) at 272.

<sup>226</sup> *Id.* at 273.

<sup>227</sup> *Id.* at 272.

<sup>228</sup> *Id.*

<sup>229</sup> The Supreme Court of Georgia later adopted the U.S. Supreme Court’s approach even though it was not required to do so. *Cartledge v. Cutliff*, 29 Ga. 758, 766–67 (1860).

<sup>230</sup> *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832).

<sup>231</sup> *Bennett v. Butterworth*, 52 U.S. (11 How.) 669, 674–75 (1850).

<sup>232</sup> *See, e.g., Fenn v. Holme*, 62 U.S. (21 How.) 481, 485 (1858); *Thompson v. R.R. Cos.*, 73 U.S. (6 Wall.) 134, 137 (1867); *Noonan v. Lee*, 67 U.S. (2 Black) 499, 509 (1862); *Butler v. Young*, 4 F. Cas. 916, 917 (C.C.N.D. Ohio 1872) (No. 2,245); *Scott v. Armstrong*, 146 U.S. 499, 512 (1892); *Gravenberg v. Laws*, 100 F. 1, 4 (5th Cir. 1900); *Jones v. Mutual Fidelity Co.*, 123 F. 506, 517 (C.C.D. Del. 1903); *Gray v. Grand Trunk W. Ry. Co.*, 156 F. 736, 741 (7th Cir. 1907); *Union Pac. R.R. Co. v. Syas*, 246 F. 561, 566 (8th Cir. 1917); *Keatley v. U.S. Trust Co.*,

#### 4. FEDERAL RIGHTS

##### a. *Private Law*

Today federal courts apply homogeneous equity when enforcing federal rights.<sup>233</sup> One year after *Guaranty Trust*, Frankfurter distinguished “the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State,” from “the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress.”<sup>234</sup> And since 1999, the battle over federal equity has occurred on territory staked out by *Grupo Mexicano*.<sup>235</sup> In that case, the Supreme Court held that federal courts lacked power to issue an injunction restraining defendants from dealing with assets pending resolution of the lawsuit—what is known elsewhere as a *Mareva* injunction.<sup>236</sup> Plaintiffs, concerned about defendant’s imminent insolvency, secured a preliminary injunction enjoining defendant from dealing with its remaining substantial asset.<sup>237</sup> Justice Scalia, writing for a bare majority, held that the district court had acted beyond its equitable authority because such orders were unknown to the High Court of Chancery in England in 1789.<sup>238</sup> He also suggested that the authority to issue such injunctions “could render Federal Rule of Civil Procedure 64, which

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249 F. 296, 298 (2d Cir. 1918); *Woodlawn Farm Dairy Co. v. Erie R.R. Co.*, 282 F. 278, 279 (M.D. Pa. 1921); *Trubenizing Process Corp. v. Jacobson*, 10 F. Supp. 655, 655 (S.D.N.Y. 1935).

<sup>233</sup> See e.g., *Holmberg v. Armbrrecht*, 327 U.S. 392, 395–98 (1946).

<sup>234</sup> *Id.* at 395; see also *id.* at 397 (“We conclude that the decision in the *York* case is inapplicable to the enforcement of federal equitable rights.”).

<sup>235</sup> See generally *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

<sup>236</sup> See *id.* at 333; see also *Mareva Compania Naviera S.A. v. Int’l Bulkcarriers S.A.* [1980] 1 All E.R. 213, 213, 214–15 (Eng.).

<sup>237</sup> *Grupo Mexicano*, 527 U.S. at 312–13.

<sup>238</sup> *Id.* at 333. This view has long pedigree. See *Baker v. Biddle*, 2 F. Cas. 439, 447–48, 452–53 (C.C.E.D. Pa. 1831) (No. 764) (“We cannot adopt any rules or principles of the law, which are in contradiction to those which were settled and established before the Revolution.”).

authorizes use of state prejudgment remedies, a virtual irrelevance.”<sup>239</sup> Justice Ginsburg, in dissent, thought that this was “an unjustifiably static conception of equity jurisdiction.”<sup>240</sup> The debate between Scalia and Ginsburg was methodological, and Scalia’s historical approach prevailed.<sup>241</sup>

The Court’s recent equity jurisprudence has been dominated by ERISA’s authorization of “appropriate equitable relief.”<sup>242</sup> Since 2002, the Court has decided five cases interpreting that statutory phrase and, with one exception, those cases present the same general fact pattern: a health plan fiduciary brings a claim against a tort-award-winning beneficiary seeking monetary reimbursement for medical expenses that the plan had paid on the beneficiary’s behalf.<sup>243</sup> Because compensatory damages are quintessentially a legal remedy, fiduciaries must characterize their claim as typically available in equity<sup>244</sup>—for example, the enforcement of a lien or equitable restitution. To determine whether the fiduciary’s request for reimbursement is an example of “appropriate equitable relief,” the Court consults “standard treatises on equity, which establish ‘the

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<sup>239</sup> *Id.* at 330–31. Of course, Scalia’s reasoning only works if state law provides an analogous remedy. *See* FED. R. CIV. P. 64(a) (making available “every remedy . . . that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment”).

<sup>240</sup> *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., dissenting).

<sup>241</sup> *See* Bray, *supra* note 110, at 1011; *see also* Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 34–35 (2004) (observing that the dispute between Justice Ginsburg and Justice Scalia over originalist methodology was illustrated in, *inter alia*, *Grupo Mexicano*).

<sup>242</sup> 29 U.S.C. § 1132(a)(3) (2012) (authorizing plan fiduciaries to file civil suits “to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan”). *See generally* John H. Langbein, *What ERISA Means By “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1318, 1317–21 (2003).

<sup>243</sup> *Compare* *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 206, 208 (2002), *and* *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 359 (2006), *and* *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1543–44 (2013), *and* *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 655–56 (2016), *with* *CIGNA Corp. v. Amara*, 563 U.S. 421, 424–25 (2011) (claim brought by beneficiaries of pension plan challenging fiduciary’s adoption of a new plan partly on the basis that fiduciary’s disclosures had failed to give proper notice of changes to benefits, which in certain respects were less generous).

<sup>244</sup> *See, e.g., Great-West*, 534 U.S. at 210.

basic contours’ of what equitable relief was typically available in premerger equity courts.”<sup>245</sup>

b. *Public Law*

In public law, Owen Fiss explicitly recognized the interaction between equity and federalism, and he protested the Supreme Court’s invocation of the vocabulary of equity to obscure decisions that were really about federalism.<sup>246</sup> In *Douglas v. City of Jeannette*, for example, the Court reversed the district court’s order enjoining the city and its mayor from enforcing an unconstitutional solicitation ordinance.<sup>247</sup> The Court deployed the “familiar rule that courts of equity do not ordinarily restrain criminal prosecutions” to enforce Congress’s “policy . . . of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved.”<sup>248</sup> Absent exceptional circumstances—defined in traditionally equitable terms as preventing clear and imminent irreparable injury—a federal equity court should refuse “to interfere with or embarrass threatened proceedings in state courts.”<sup>249</sup> And “equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds.”<sup>250</sup> For Fiss, these are “statement[s] about the structure of American federalism cast in the language of equity,” which “claimed both that a vital principle of federalism was threatened by the injunctive suit, and that the doctrines of equity should be used to protect that principle.”<sup>251</sup> Ultimately, Fiss argued, using the rhetoric and “doctrines of equity—doctrines forged in the battles of English

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<sup>245</sup> *Montanile*, 136 S. Ct. at 657 (quoting *Great-West*, 534 U.S. at 217). Samuel Bray has argued that the Court’s approach to ERISA’s authorization of equitable relief is characterized by invoking the tradition of equity, but that this tradition is, in fact, a judicially constructed ideal. See generally Bray, *supra* note 124, at 1014–16, 1022.

<sup>246</sup> Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1103–12, 1116–119, 1121 (1977).

<sup>247</sup> *Douglas v. City of Jeannette*, 319 U.S. 157, 159–60, 166 (1943).

<sup>248</sup> *Id.* at 163.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> Fiss, *supra* note 246, at 1106–07.

Chancery—to further views of federalism, a political principle central to American government . . . was a kind of legal prestidigitation.”<sup>252</sup> And, as Douglas Laycock eloquently detailed, the Supreme Court got the equitable doctrine wrong.<sup>253</sup>

Fiss’s primary target was *Dombrowski v. Pfister*, which authorized a federal court to enjoin state criminal prosecutions forming part of a plan of arrests, seizures and threats of prosecution that were designed to harass and discourage the vindication of constitutional rights.<sup>254</sup> The Court held that, on the facts presented, irreparable injury was established and an injunction should issue.<sup>255</sup> Thus, Fiss noted, “[t]he linkage between the two realms of discourse—federalism and equity—was preserved” from *Douglas*.<sup>256</sup> The equitable doctrines, however, “were reinterpreted” and “made to bend to a new vision of federalism, one that posited the federal courts as the primary guardian of constitutional rights.”<sup>257</sup> One of Fiss’s basic points is that this reasoning is doubletalk: “[t]hough steeped in the language of equitable remedies, *Dombrowski* was of course not a struggle about remedies but about judges.”<sup>258</sup> In its appeal to the irreparable injury rule, *Dombrowski* “suggests that a point is being made about remedies, when in truth a point is being made about the structure of the federal system, one that stands independent of the remedy.”<sup>259</sup> *Dombrowski*’s “altered vision of federalism . . . remained submerged, silent beneath the smooth manipulation of equity doctrine.”<sup>260</sup> Fiss praised the tendency of later cases to cast off the “shackles of . . . the ill-founded tradition of using the language of equity to safeguard federal structure.”<sup>261</sup>

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<sup>252</sup> *Id.* at 1107.

<sup>253</sup> See Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 224–28 (1977); DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 134–36 (1991) [hereinafter LAYCOCK, *IRREPARABLE INJURY RULE*].

<sup>254</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 484–85, 487–89, 497 (1965).

<sup>255</sup> *Id.* at 489, 497.

<sup>256</sup> Fiss, *supra* note 246, at 1103.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 1116.

<sup>259</sup> *Id.* at 1107.

<sup>260</sup> *Id.* at 1117.

<sup>261</sup> *Id.* at 1163.

This tactic—manipulating equitable doctrine to safeguard federalism—is as old as the Republic. Laycock observed that it dates at least to *Ex parte Young*, decided in 1908.<sup>262</sup> Part IV demonstrates that the Supreme Court used equity to reinforce federalism as early as 1793. To be sure, the early federal courts did not deploy equity to position themselves as the primary guardian of constitutional rights; instead they used equity to signal the continued dominance of the states.<sup>263</sup> Nevertheless, the early federal courts reinforced the nascent federalism using an equitable vocabulary.<sup>264</sup>

### B. *Heterogeneous Federal Equity*

For the federal courts, 1938 was a big year. In April, the Court decided *Erie*, and in September the new Federal Rules of Civil Procedure came into effect.<sup>265</sup> Promulgated pursuant to the Rules Enabling Act of 1934, the Federal Rules of Civil Procedure realized the Act’s conferral of authority on the Court to “unite the general rules prescribed by [the Court] for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both.”<sup>266</sup> Justice Brandeis wrote the Court’s opinion in *Erie*,<sup>267</sup> but was the only Justice who expressed disapproval of the adoption of the Rules.<sup>268</sup> The Rules and *Erie* effected a revolution, procedurally

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<sup>262</sup> See Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 636, 639 (1979) [hereinafter Laycock, *The Cases Dombrowski Forgot*]; LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 253, at 134–36.

<sup>263</sup> See Laycock, *The Cases Dombrowski Forgot*, *supra* note 262, at 639; see also Fiss, *supra* note 246, at 1127.

<sup>264</sup> See Laycock, *The Cases Dombrowski Forgot*, *supra* note 262, at 639; Fiss, *supra* note 246, at 1163.

<sup>265</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 64 (1938). See generally COMM. ON THE JUDICIARY, 113<sup>TH</sup> CONG., FED. R. CIV. PRO. WITH FORMS, vii (Comm. Print 2014).

<sup>266</sup> Rules Enabling Act, Pub. L. No. 73–415, § 2, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

<sup>267</sup> See *Erie*, 304 U.S. at 64.

<sup>268</sup> See Letter from Charles E. Hughes, Chief Justice of the United States Supreme Court, to Homer Cummings, Attorney Gen. (Dec. 20, 1937), 308 U.S. 649, 649 (“I am requested to state that Mr. Justice Brandeis does not approve of the adoption of the rules.”); see also EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 135–36 (2000).



and substantively, in federal equity.<sup>269</sup> An immediate consequence was the abolition of the separate common law and equity sides of the federal courts. And, after *Guaranty Trust*, federal courts enforcing state-created rights applied state rather than federal equity.<sup>270</sup>

*Erie* holds that, absent applicable federal law, substantive state law (including the decisions of the state's courts) governs state claims litigated in federal court.<sup>271</sup> *Erie* operates primarily in diversity cases; in general, federal courts apply state law when enforcing state rights of action.<sup>272</sup> And of course, *Erie* is more than the command that state law governs substantive issues in diversity cases: it repudiated federal general common law.<sup>273</sup> It approved Justice Holmes's criticism of *Swift v. Tyson* as resting on the invalid assumption that there is "a transcendental body of law outside of any particular State but obligatory within it."<sup>274</sup> In *Guaranty Trust*, Frankfurter said that *Erie* "did not merely overrule a venerable

<sup>269</sup> See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420–21 (2011).

<sup>270</sup> See *Guar. Tr. Co. v. York*, 326 U.S. 99, 108–09 (1945); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 396–97 n.65 (1964).

<sup>271</sup> "*Erie* . . . required 'federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states.'" *Am. Elec.*, 564 U.S. 410, 421 (2011) (quoting Friendly, *supra* note 270, at 422). See also Henry P. Monaghan, Book Review, 87 HARV. L. REV. 889, 892 (1974) [hereinafter Monaghan, Book Review] ("*Erie* is . . . a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate . . ."); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 696 (1974); Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 924 (2013) ("Whatever else it did, *Erie* abandoned what it repeatedly called 'the doctrine of *Swift v. Tyson*.'"); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 133 (2011) ("In *Erie*, the Court overruled *Swift* and held that in adjudicating state-law claims, federal courts should apply both state statutes and state common law."); Michael S. Greve & Richard A. Epstein, *Introduction: Erie Railroad at Seventy-Five*, 10 J.L. ECON. & POL'Y 1, 1 (2013); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL'Y 17, 18 (2013).

<sup>272</sup> See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); see also *Felder v. Casey*, 487 U.S. 131, 151 (1988); *Houben v. Telular Corp.*, 309 F.3d 1028, 1032 (7th Cir. 2002).

<sup>273</sup> "There is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>274</sup> *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

case,” but “overruled a particular way of looking at law.”<sup>275</sup> *Erie* “implicates, indeed perhaps it is, the very essence of our federalism.”<sup>276</sup> What then is equity’s place in *Erie*’s conception of judicial federalism? Is equity a particular way of looking at law that is irreconcilable with *Erie*? Is it inescapably a transcendental body of law outside of any particular state but obligatory within it?

### 1. *GUARANTY TRUST CO. v. YORK: EQUITY AND ERIE*

In *Guaranty Trust*, Frankfurter confronted the question of whether, in a suit brought on its equity side, a federal district court sitting in diversity was required to apply the state’s statute of limitations. Petitioner Guaranty Trust, a trustee with power and obligations to enforce rights of noteholders in a third-party corporation, cooperated in a plan for the cash purchase of notes.<sup>277</sup> The offer was to exchange each note for half its face value plus twenty shares.<sup>278</sup> Non-accepting noteholders brought a class action, solely based on diversity, alleging breach of trust by petitioner in failing to protect noteholders’ interests when it assented to the exchange offer, and in failing to disclose its own interest when sponsoring the offer.<sup>279</sup> The Second Circuit held that the district court sitting in diversity was “not required to apply the State statute of limitations that would govern like suits in” state court.<sup>280</sup>

The Supreme Court reversed and remanded. Frankfurter’s opinion divided in half. The first half brimmed with theory and history, and established that *Erie* applies to equity cases. Frankfurter reimagined *Erie* as a comprehensive legal philosophy. In stark contrast to Brandeis’s concise and “perhaps even gnostic” opinion in *Erie*,<sup>281</sup> Frankfurter swooped from jurisprudential heights. *Swift v. Tyson*, he said, embodied “a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid

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<sup>275</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945).

<sup>276</sup> Ely, *supra* note 271, at 695.

<sup>277</sup> *Guar. Tr.*, 326 U.S. at 100.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 100–101.

<sup>281</sup> PURCELL, *supra* note 268, at 156.

bare.”<sup>282</sup> In 1842, “Law was conceived as a ‘brooding omnipresence’ of Reason, of which decisions were merely evidence and not themselves the controlling formulations.”<sup>283</sup> Federal diversity courts were “free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law.”<sup>284</sup> This “impulse to freedom” was “strongly rooted in . . . the nature of law.”<sup>285</sup> *Swift*, then, “summed up prior attitudes and expressions” and “was congenial to the jurisprudential climate of the time.”<sup>286</sup> It held that “State court decisions were not ‘the law’ but merely someone’s opinion . . . concerning the content of this all-pervading law,” and “federal courts assumed power to find for themselves the content of such a body of law.”<sup>287</sup>

This may, of course, correctly encapsulate the “jurisprudential climate” of the 1840s.<sup>288</sup> But *Erie* said none of it. To be sure, Brandeis famously held that “[t]here is no federal general common law.”<sup>289</sup> Yet the closest Brandeis got to waxing lyrical about jurisprudential climates were a few quotes from Holmes, including that “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”<sup>290</sup> In *Guaranty Trust*, however, Frankfurter simply needed to establish a major premise: *Swift* embodied antiquated nineteenth-century views about the nature of law. And if *Swift* represented a conception of law, *Erie* must represent its philosophical opposite.

Frankfurter then linked homogeneous federal equity to *Swift*. Recognizing the deep doctrinal pedigree of homogeneous federal equity, Frankfurter noted that *Swift* “was merely another expression of the ideas put forth in the equity cases.”<sup>291</sup> Federal equity courts were particularly sympathetic to “sentiments for uniformity of decision and freedom from diversity in State law . . . because equitable

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<sup>282</sup> *Guar. Tr.*, 326 U.S. at 101.

<sup>283</sup> *Id.* at 102.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 102–03.

<sup>287</sup> *Id.* at 103.

<sup>288</sup> *Id.*

<sup>289</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>290</sup> *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

<sup>291</sup> *Id.* at 103 n.1.

doctrines are so often cast in terms of universal applicability.”<sup>292</sup> Logically, this was sufficient to decide the case: homogeneous equity was a manifestation of *Swift*’s conception of law, which *Erie* overruled.

But Frankfurter went further, making the strong historical claim that federal diversity courts, “in the long course of their history, have not differentiated in their regard for State law between actions at law and suits in equity.”<sup>293</sup> The Rules of Decision Act, he explained, “was deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits.”<sup>294</sup> This strong historical claim depended crucially on Frankfurter’s distinction between rights and remedies. On state-created rights, he argued, “Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.”<sup>295</sup> On remedies, things were different. “This does not mean,” he cautioned, “that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court.”<sup>296</sup> There are well-known constitutional and statutory limitations on equity in federal courts.<sup>297</sup> It follows, said Frankfurter, that states cannot define the remedies a federal diversity court “must” give, and that a federal diversity court “may” give equitable relief when a state

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<sup>292</sup> *Id.* at 103.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 103–04.

<sup>295</sup> *Id.* at 105. Frankfurter himself knew the doubtful accuracy of this historical claim. See Collins, *A Considerable Surgical Operation*, *supra* note 8, at 339; *supra* Part III.A.3. William Crosskey argued stridently against it. See WILLIAM WINSLOW CROSSKEY, 11 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 877–902 (1953).

<sup>296</sup> *Guar. Tr. Co.*, 326 U.S. at 105.

<sup>297</sup> “Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery; a plain, adequate and complete remedy at law must be wanting; explicit Congressional curtailment of equity powers must be respected; the constitutional right to trial by jury cannot be evaded. That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts.” *Id.* at 105–06 (citations omitted).

court cannot.<sup>298</sup> Federal diversity courts enforced state-created rights “if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure.”<sup>299</sup>

Frankfurter thus adeptly deployed a strikingly impoverished conception of equity by maintaining an artificially sharp distinction between rights and remedies, and cramming homogeneous federal equity into an artificially narrow remedial domain. He paid lip service to the “good deal of talk in the cases that federal equity is a separate legal system”<sup>300</sup> and to the “talk of freedom of equity from . . . State statutes of limitations.”<sup>301</sup> He approved “[d]icta . . . characterizing equity as an independent body of law.”<sup>302</sup> Frankfurter’s vision of equity, however, was merely remedial because “this system of equity ‘derived its doctrines, as well as its powers, from its mode of giving relief.’”<sup>303</sup> A homogeneous conception of federal equity only existed in this limited domain of equitable remedial rights.

The second half of Frankfurter’s opinion articulated a cryptic, “outcome-determinative” standard for applying *Erie*.<sup>304</sup> Eschewing a general substance/procedure distinction, Frankfurter phrased the *Erie* test in a few different ways: litigation in federal court cannot “substantially affect the enforcement of the right” or “significantly affect the outcome of a litigation” or “lead to a substantially different result.”<sup>305</sup> *Erie*, said Frankfurter, expressed a “policy” that “the outcome of the litigation . . . should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”<sup>306</sup> He cataloged some of the legal rules gov-

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<sup>298</sup> *Id.* at 106.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 105.

<sup>301</sup> *Id.* at 111.

<sup>302</sup> *Id.* at 112.

<sup>303</sup> *Id.* at 105 (quoting C. C. LANGDELL, A SUMMARY OF EQUITY PLEADING xxvii (Cambridge, Charles W. Sever 1877)).

<sup>304</sup> *Id.* at 109 (“[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?”).

<sup>305</sup> *Id.* at 109. *Accord* Cross, *supra* note 2, at 190–91.

<sup>306</sup> *Guar. Tr.*, 365 U.S. at 109.

erned by state law: burden of proof, conflict of laws, and contributory negligence.<sup>307</sup> Similarly, he held, because a statute of limitation “bears on a State-created right vitally and not merely formally or negligibly,” and enacts “consequences that so intimately affect recovery or non-recovery,” federal diversity courts should follow state law.<sup>308</sup>

Understandably, the consistency of the equitable remedial rights doctrine and the outcome-determinative test drew skepticism.<sup>309</sup> Most important for current purposes, though, is that Frankfurter “eviscerated the federal uniform equity doctrine, largely ending equity’s reign as a distinctive site of nonstate, judge-made law in federal diversity jurisdiction cases.”<sup>310</sup> In a phone call to Frankfurter, Chief Justice Stone lauded his “considerable surgical operation” which excised “a good deal more of historical material . . . than the uninformed reader might realize.”<sup>311</sup>

## 2. LEGAL PROGRESSIVISM

Collins has eloquently chronicled Frankfurter’s central role in the diminution of federal equity.<sup>312</sup> Frankfurter waged a decades-long scholarly and political campaign against diversity jurisdiction and federal equity. Frankfurter published work, encouraged students, and agitated Congress in pursuit of two intertwined goals: abolish diversity jurisdiction and limit federal equity.<sup>313</sup> There were larger political objectives. From at least the late 1920s, as Brandeis’s

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<sup>307</sup> *Id.* at 109–10.

<sup>308</sup> *Id.* at 110.

<sup>309</sup> *See, e.g.,* Cross, *supra* note 2, at 174; Crump, *supra* note 2, at 1240; *Past and Present*, *supra* note 15, at 841–42; *Equitable Remedial Rights Doctrine*, *supra* note 15, at 415–16.

<sup>310</sup> Collins, *A Considerable Surgical Operation*, *supra* note 8, at 337.

<sup>311</sup> *Id.* at 339. In Frankfurter’s personal file on the case, Collins found that he had memorialized the telephone conversation. *See id.*

<sup>312</sup> *See id.* at 338; Kristin A. Collins, “*Government by Injunction*,” *Legal Elites, and the Making of the Modern Federal Courts*, 3 *CRITICAL ANALYSIS L.* 335, 353–54 (2016) [hereinafter Collins, *Government by Injunction*].

<sup>313</sup> *See* Collins, *Government by Injunction*, *supra* note 312, at 351–56; PURCELL, *supra* note 268, at 79–81, 86, 144–45, 147.

“de facto agent,”<sup>314</sup> Frankfurter had “drap[ed] his legal Progressivism in neutral scientific and professional language.”<sup>315</sup> Diversity jurisdiction and the general common law it enforced favored corporate interests;<sup>316</sup> and equitable injunctions enjoined industrial action, effectively conscripting workers.<sup>317</sup> In Brandeis’s memorable phrase, the labor injunction “reminds of involuntary servitude.”<sup>318</sup> Frankfurter gratefully received the opportunity presented by *Guaranty Trust* to limit diversity jurisdiction and federal equity in one fell swoop.

### 3. CONCEPTUAL TROUBLES: *ERIE*’S CHANCERY PROBLEM

Frankfurter grounded a federal diversity court’s equitable powers wholly on a line plucked from Langdell’s treatise: “this system of equity ‘derived its doctrines, as well as its powers, from its mode of giving relief.’”<sup>319</sup> But that is not the whole story, as Langdell himself emphasized:

Of course, however, it must not be supposed that equity in modern times is simply a different system of remedies from those administered in courts of law; for there are many extensive doctrines in equity, and some whole branches of law, which are unknown to the common-law courts.<sup>320</sup>

The first edition of Hart and Wechsler’s famous casebook quoted this passage but then observed that “traditional equity was not . . . a system merely of distinctive remedies without distinctive substantive consequences.”<sup>321</sup> Hart and Wechsler highlighted “familiar examples, such as trusts,” and “also the many equitable defenses, enforced by separate bill in equity, by which the chancellor,

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<sup>314</sup> PURCELL, *supra* note 268, at 144.

<sup>315</sup> *Id.* at 80.

<sup>316</sup> *See id.* at 77–81, 83–84, 142–43.

<sup>317</sup> *See id.* at 70–74, 76–77.

<sup>318</sup> *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n of N. Am.*, 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting). *Accord* PURCELL, *supra* note 268, at 70–74, 76–77. *See generally* FELIX FRANKFURTER & NATHAN GREEN, *THE LABOR INJUNCTION* (1930).

<sup>319</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945) (quoting LANGDELL, *supra* note 303, at xxvii).

<sup>320</sup> LANGDELL, *supra* note 303, at xxv.

<sup>321</sup> HART & WECHSLER, *supra* note 110, at 651.

having as always the last word, destroyed interests which the law did recognize, so as to reach a wholly different substantive result.”<sup>322</sup> If equity is remedial, as Frankfurter held, then it is hard to see how any remedy or remedial doctrine is not outcome-determinative, unless *outcome* is taken to “refer only to which party prevails, and not to the form of relief given.”<sup>323</sup> Equity is outcome-determinative vis-à-vis the common law, “[a]nd once the general principle was transposed into the federal system, equity was by its very nature outcome determinative vis-à-vis state law.”<sup>324</sup>

Frankfurter’s remedial conception of equity was not only descriptively wrong but normatively vulnerable. Henry Hart suggested a defense of homogeneous federal equity by reference to a 1915 diversity case, *Guffey v. Smith*.<sup>325</sup> In *Guffey*, holders of an oil and gas lease with an option to surrender sought to enjoin operations under a later lease.<sup>326</sup> Illinois courts did not enforce in equity an oil and gas lease containing an option to surrender.<sup>327</sup> The Supreme Court afforded equitable relief, appealing to homogeneous federal equity.<sup>328</sup> After *Guaranty Trust* cast serious doubt on the continued vitality of *Guffey*,<sup>329</sup> Hart famously wondered:

Can *Guffey* be defended on the ground that the federal court was merely giving a fuller and fairer remedy in the enforcement of state-created rights and obligations than the state courts would give? Does it offend the constitutional plan, or any valid principle of federalism, to have the federal courts administer in favor of diverse citizens, this kind of juster justice? An affirmative answer would require, would it not, a root-and-branch repudiation of the tradition of federal equity in its positive aspects?<sup>330</sup>

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<sup>322</sup> *Id.*

<sup>323</sup> *Past and Present*, *supra* note 14, at 841.

<sup>324</sup> Collins, *A Considerable Surgical Operation*, *supra* note 8, at 341–42.

<sup>325</sup> 237 U.S. 101 (1915). See HART & WECHSLER, *supra* note 110, at 652.

<sup>326</sup> See *Guffey*, 237 U.S. at 108–09.

<sup>327</sup> *Id.* at 114.

<sup>328</sup> *Id.* at 114–17.

<sup>329</sup> See HART & WECHSLER, *supra* note 110, at 650.

<sup>330</sup> *Id.* at 652.



For Hart, the equity jurisdiction of federal diversity courts empowered them to enforce state-created rights better than the state courts themselves.<sup>331</sup> A federal equity court would thereby vindicate the very purpose of diversity jurisdiction.<sup>332</sup> Frankfurter's remedial conception not only narrowed the word "equity" used in Article III and the first Judiciary Act,<sup>333</sup> it also frustrated the point of diversity jurisdiction.

After Frankfurter's intervention in *Guaranty Trust*, it is not obvious that federal diversity courts, deprived of the ability to administer a juster justice, are capable of sitting as courts of equity. *Erie* took aim at the "doctrine of *Swift v. Tyson*,"<sup>334</sup> where Justice Story held that principles of general commercial law (the law merchant) were not "laws of the several states" to which the Rules of Decision Act referred.<sup>335</sup> Federal courts, said Story, could decide questions of general common law independently of the states.<sup>336</sup> The Rules of Decision Act did not apply "to questions of a more general nature," such as "the construction of ordinary contracts or other written instruments," or to "questions of general commercial law," where answers were to be found "not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."<sup>337</sup> That is because neither federal nor state courts could claim authority over the general common law. In that domain:

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<sup>331</sup> *Id.* See also PURCELL, *supra* note 268, at 249–50 ("Hart repeatedly insisted that the federal courts were capable of providing—indeed, that they were specifically designed to provide—a 'juster justice' than the state courts."), 251 (in a letter Hart wrote that *Guaranty Trust* "leaves the diversity jurisdiction without intelligible rationale—or at least without a function of any consequence").

<sup>332</sup> *Id.* See also Monaghan, Book Review, *supra* note 271, at 893 n.20 (suggesting that "the federal diversity court's 'interest' . . . in providing 'juster justice' than that available under state law" is ensuring that substantive, state-created rights and obligations are vindicated).

<sup>333</sup> See U.S. CONST. art. III, § 2; Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (1789).

<sup>334</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938) (emphasis added).

<sup>335</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842). See Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (2012)).

<sup>336</sup> *Swift*, 41 U.S. (16 Pet.) at 19.

<sup>337</sup> *Id.* at 18–19.

[T]he state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case . . . . Undoubtedly, the decision of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.<sup>338</sup>

Story's description of the general common law aligns with his conception of federal equity. Ten years before he wrote the *Swift* opinion, Story said that the exercise of equity jurisdiction in federal court "was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the State."<sup>339</sup> By 1850, the Supreme Court had fully internalized the analogy. On equitable principles, both state and federal courts "resort[] to the decisions of the High Court of Chancery in England, and to approved writers on equity jurisprudence, as affording the proper guides to a correct decision."<sup>340</sup> But "it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto."<sup>341</sup> And "we do not consider this decision of the [state court] a binding authority."<sup>342</sup>

Frankfurter seized on this in *Guaranty Trust* and held that homogeneous federal equity was hopelessly incompatible with *Erie*'s vision of judicial federalism. As noted in Part III.B.1, Frankfurter thought that *Swift* itself was merely a symptom of the homogeneity expressed by federal courts of equity. The devastating Holmesian aphorisms followed thick and fast: uniform federal equity was just

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<sup>338</sup> *Id.*

<sup>339</sup> *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832).

<sup>340</sup> *See, e.g., Neves II*, 54 U.S. (13 How.) 268, 271 (1851).

<sup>341</sup> *Id.* at 272.

<sup>342</sup> *Id.*

another brooding omnipresence and transcendental body.<sup>343</sup> The true position, said Frankfurter, is that “a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State.”<sup>344</sup>

*Guaranty Trust*, in dictating that federal equity courts sitting in diversity must slavishly follow state law, certainly made the “occasion for the enforcement of equitable doctrine” a rare occurrence.<sup>345</sup> Henry Smith’s functional account of equity demonstrates this.<sup>346</sup> Equity, Smith argues, is a second-order intervention to deal with complex and uncertain problems like opportunism.<sup>347</sup> It is second-order because it is “law about law”: equity takes as given the result at common law, and modifies or supplements that result according to its institutionalized conscience.<sup>348</sup> Complex problems like opportunism, which cannot be captured *ex ante*, are amenable to second-order intervention.<sup>349</sup> Smith cautions against a comprehensive procedural merger of law and equity because it makes equity first-order rather than second-order.<sup>350</sup> The result is a “flattening” of remedies,<sup>351</sup> where equity’s traditionally second-order intervention is replaced by multifactor tests and standards—“the closest mono-level substitute for a second-order safety valve.”<sup>352</sup> The federal courts, as long as they retained status as a separate court system, had scope to implement a second-order check on state law. In *Guaranty Trust*, Frankfurter did all he could to deprive the federal diversity courts of their ability to act as a second-order check.<sup>353</sup> Positioning a federal equity court sitting in diversity as simply another court of the state

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<sup>343</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 102–03 (1945).

<sup>344</sup> *Id.*

<sup>345</sup> *Graf v. Hope Bldg. Corp.*, 171 N.E. 884, 887 (N.Y. 1930) (Cardozo, C.J., dissenting) (“Equity follows the law, but not slavishly nor always. If it did, there could never be occasion for the enforcement of equitable doctrine.”) (citation omitted).

<sup>346</sup> *See generally* Smith, *supra* note 55, at 175–76, 185–88.

<sup>347</sup> *Id.* at 184.

<sup>348</sup> *Id.* at 175–76, 181–82.

<sup>349</sup> *See id.* 175–76, 180–81, 184.

<sup>350</sup> *Id.* at 185–87.

<sup>351</sup> *Id.* at 193–95.

<sup>352</sup> *Id.* at 188.

<sup>353</sup> *See Guar. Tr. Co. v. York*, 326 U.S. 99, 108 (1945).

deprives the court of its power to launch a second-order intervention.

Of course, if state courts take a traditionally equitable approach to a state statute of limitations, then a federal court, sitting in diversity, is entitled to do likewise. But to a certain extent, even this version of equitable power is illusory. It is, first, solely contingent on the state's continuing commitment to traditional equity.<sup>354</sup> Second, it nevertheless cabins the federal court's discretion and changes the nature of the federal court's inquiry. Under *Guaranty Trust's* regime of heterogeneous federal equity, the standard of correctness for an equitable decision is necessarily pegged to the state. To paraphrase Story, the federal diversity courts are not ascertaining upon general reasoning and legal analogies the just rule furnished by the principles of equity to govern the case.<sup>355</sup> Instead, they put themselves in the shoes of a legal fiction: an ideal construct of a state court. The federal equity court sitting in diversity does not ask, "What is equitable?" It asks, "What would a state court think is equitable?"<sup>356</sup>

The argument should not be pushed too far. Samuel Bray has argued that federal courts construct an ideal vision of equity even in federal question cases, and there may be no real difference between constructing an ideal doctrine and constructing an ideal court applying some variation of that doctrine.<sup>357</sup> Perhaps, too, the common law method itself can be abstractly described as courts constructing an ideal doctrine. For current purposes, it suffices to observe that federal equity courts seem to engage in different inquiries when exercising diversity and federal question jurisdiction; and when sitting in diversity, they cannot decide equitable doctrine based on their

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<sup>354</sup> See, e.g., *Franke v. Wiltschek*, 209 F.2d 493, 500 (2d Cir. 1953) ("If the highest court of a State rules that, in a certain class of cases, equity is stripped of all discretion and must always grant, automatically, a perpetual injunction, then (say my colleagues) thanks to *Guaranty Trust Company of New York v. York*, a federal court, sitting in that State in a diversity case falling within that class of cases, must likewise surrender all discretion and mechanically issue a perpetual injunction.") (Frank, J., dissenting as to the nature of the relief) (citation omitted).

<sup>355</sup> Cf. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

<sup>356</sup> Henry Hart observed in 1954 that "recent Supreme Court decisions . . . ask only what the courts of the state in which the federal court is sitting would do." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 511 n.75 (1954).

<sup>357</sup> See Bray, *supra* note 110, at 1001.

own principles—they must defer. Federal diversity courts, therefore, are limited-purpose courts of equity: they are courts of equity only to the extent state courts are.

Not everyone shares the view that *Guaranty Trust* strengthened *Erie* and shoehorned federal equity into an artificially narrow remedial conception. In a recent paper, Michael Morley contended the opposite: *Guaranty Trust* “confirmed the vitality of independent federal equity law” by “preserv[ing] the ‘equitable remedial rights doctrine,’ which requires federal courts to apply a uniform body of federal equitable principles . . . rather than state law, to decide whether to grant equitable relief.”<sup>358</sup> Finding “no basis under the Federal Rules of Civil Procedure, federal law, or the U.S. Constitution for federal courts to apply a freestanding, independent body of equitable principles to resolve all remedial issues” when enforcing state-created rights, Morley argued for an absolute rule in diversity cases that federal courts should always apply state law when deciding whether to provide equitable relief.<sup>359</sup> He proposed what he called a “new vision of the federal equity power: equity follows the law.”<sup>360</sup> Under this “new” vision, federal courts apply homogeneous equity when enforcing federal rights, and heterogeneous equity when enforcing state rights.

Morley argued that *Guaranty Trust*’s preservation of the equitable remedial rights doctrine is inconsistent with *Erie*, insisting that Frankfurter’s opinion “required federal courts to apply a uniform body of equitable principles . . . when deciding whether to grant equitable relief in cases arising under state law.”<sup>361</sup> But this overreads *Guaranty Trust*. In fact, *Guaranty Trust* reconciled *Erie* and the equitable remedial rights doctrine by minimizing the latter: state law governs whether to grant equitable relief, except in the small minority of cases where equitable relief would not substantially affect the enforcement of a state-created right.<sup>362</sup> The first half of Frankfurter’s opinion established that *Erie* applies in equity cases. It held, too, that *Erie* preserved a power of federal diversity courts to apply federal

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<sup>358</sup> Michael T. Morley, The Federal Equity Power 32, 35 (Mar. 1, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2924107>.

<sup>359</sup> *Id.* at 35, 57–61.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 3 (emphasis added).

<sup>362</sup> See *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945).

law when deciding whether to grant equitable relief. But the second half of the opinion tightly circumscribed that power: it cannot substantially affect the enforcement of the right or significantly affect the outcome of the litigation. This gutted the equitable remedial rights doctrine. Equitable doctrines and remedies supplement the common law, so they often materially affect the litigation. Of course, “substantially affect the enforcement of the right,”<sup>363</sup> and “significantly affect the result of a litigation,”<sup>364</sup> are not the most precise formulations. Frankfurter offered little guidance, but it is clear that he put the significant modification of a state remedy in the same category as a denial of the state remedy.<sup>365</sup> Frankfurter, guided by *Erie*, stringently limited the equitable remedial rights doctrine.

The very result of *Guaranty Trust* shows that it depleted federal equity in diversity cases. Frankfurter held that a federal court sitting in diversity is bound by a state statute of limitations because the statute “bears on a State-created right vitally and not merely formally or negligibly”<sup>366</sup> and enacts “consequences that so intimately affect recovery or non-recovery.”<sup>367</sup> Before *Guaranty Trust*, however, federal diversity courts took the traditional equitable approach to state statutes of limitation. Frankfurter described this approach in a non-diversity case decided a year after *Guaranty Trust*.<sup>368</sup> “Traditionally

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<sup>363</sup> *Id.* at 109.

<sup>364</sup> *Id.*

<sup>365</sup> As Frankfurter wrote for the Court in 1947, “[a] federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.” *Angel v. Bullington*, 330 U.S. 183, 192 (1947). *See also* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 536–37 (1958) (*Guaranty Trust* “evinced a broader policy to the effect that the federal courts should conform as near as may be—in the absence of other considerations—to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule”).

<sup>366</sup> *Guar. Tr.*, 326 U.S. at 110.

<sup>367</sup> *Id.*

<sup>368</sup> *See* *Holmberg v. Armbrecht*, 327 U.S. 392, 393–97 (1946). Creditors had sued to enforce a liability imposed by federal statute and the Second Circuit, relying on *Guaranty Trust*, held that the state statute of limitations barred suit on the federal cause of action. *See id.* at 393–94. Frankfurter, seemingly exasperated, explained that in *Guaranty Trust* “we pointed out with almost wearisome reiteration . . . that we were there concerned solely with State-created rights.” *Id.* at 394. Federal courts, when “sitting as national courts throughout the country,” could

and for good reasons,” Frankfurter said, “statutes of limitation are not controlling measures of equitable relief.”<sup>369</sup> The “historic principles of equity” took cognizance of statutes of limitation “solely for the light they may shed in determining that which is decisive for the chancellor’s intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair.”<sup>370</sup> *Guaranty Trust’s* curbing of equity in federal diversity courts thus entailed the elimination of what Frankfurter called “the old chancery rule” regarding statutes of limitation, which “this Court long ago adopted as its own.”<sup>371</sup>

Subsequent cases verify that *Guaranty Trust* did not “confirm[] the vitality of independent federal equity law,” nor did it preserve a broad equitable remedial rights doctrine.<sup>372</sup> The clearest example, *Bernhardt v. Polygraphic Co. of America*, was decided in 1956.<sup>373</sup> Both Justice Douglas for the Court and Frankfurter writing separately refused to apply the equitable remedial rights doctrine. Defendant had removed, on diversity grounds, a state law employment contract case to the federal court.<sup>374</sup> Defendant moved for a stay to specifically enforce the arbitration clause.<sup>375</sup> But under state law, an

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“apply their own principles.” *Id.* at 395. Interestingly, Frankfurter observed that “[e]quity eschews mechanical rules; it depends on flexibility,” and “will not lend itself to . . . fraud and historically has relieved from it.” *Id.* at 396. The equitable rule that “where a plaintiff has been injured by fraud and ‘remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered’” is “read into every federal statute of limitation.” *Id.* at 397 (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)).

<sup>369</sup> *Id.* at 396.

<sup>370</sup> *Id.* at 395–96.

<sup>371</sup> *Id.* at 397.

<sup>372</sup> Morley, *supra* note 358, at 32.

<sup>373</sup> *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). Morley cites *Bernhardt* for the proposition that “[t]he Supreme Court repeatedly has recognized that rights are substantive in the *Erie* context.” Morley, *supra* note 358, at 50. But he does not address the fact that *Bernhardt*—which followed *Guaranty Trust* and refused equitable relief in a federal diversity court because the state court wouldn’t give it—counts against his argument. See *Bernhardt*, 350 U.S. at 202–05.

<sup>374</sup> *Id.* at 199.

<sup>375</sup> *Id.*

agreement to arbitrate was revocable prior to an award, and therefore could not be specifically enforced.<sup>376</sup> The Second Circuit held that *Erie* did not apply, arguing that arbitration was merely another form of trial.<sup>377</sup> Douglas disagreed, applying *Guaranty Trust*'s holding that a federal diversity court “may not ‘substantially affect the enforcement of the right as given by the State.’”<sup>378</sup> He wrote that “remedy by arbitration . . . substantially affects the cause of action created by the State.”<sup>379</sup> Frankfurter separately agreed “that the differences between arbitral and judicial determination of a controversy under a contract sufficiently go to the merits of the outcome” to engage *Erie*.<sup>380</sup> Because the equitable remedy of specific performance “vitality and not merely formally or negligibly” affected enforcement of the state-created right, *Guaranty Trust* required application of state law.<sup>381</sup> Scholarship confirmed the limited scope of the equitable remedial rights doctrine after *Guaranty Trust*.<sup>382</sup>

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<sup>376</sup> *Id.* at 199–200.

<sup>377</sup> *See id.* at 202.

<sup>378</sup> *Id.* at 203 (quoting *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945)).

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 207–08 (Frankfurter, J., concurring). The decisions immediately following *Guaranty Trust* robustly enforced its outcome-determinative test, limiting the power of federal diversity courts to displace state law. The 1949 trilogy all applied *Guaranty Trust* to enforce state law. *See generally* *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). *Byrd*, decided in 1958, and *Hanna*, decided in 1965 and still the leading case on *Erie*, were concerned with limiting *Guaranty Trust*'s outcome-determinative analysis. *See generally* *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958); *Hanna v. Plumer*, 380 U.S. 460 (1965).

<sup>381</sup> *Guar. Tr.*, 326 U.S. at 110.

<sup>382</sup> In 1946, *Guaranty Trust* was recognized as “limiting the use of the doctrine,” even though it seemed to “preserve[] to the federal courts an independent determination of the appropriate equitable remedy.” *Equitable Remedial Rights Doctrine*, *supra* note 14, at 414–15. By 1954, the limited scope of the doctrine had settled. Henry Hart wrote that “[t]he decisions to date permit the conclusion that a federal court . . . may *not* grant a remedy which the state court would deny, even though the state court’s denial would be without prejudice to the underlying substantive right.” Hart, *supra* note 356, at 511–12 n.75. *See also Past and Present*, *supra* note 14, at 843–44 (“It would seem, therefore, that the federal court in diversity matters should ordinarily grant the same remedy that would be given in state court.”).



The rigid narrowness of *Guaranty Trust's* equitable remedial rights doctrine robs Morley's critique of its sting. Contrary to Morley's argument, the equitable remedial rights doctrine does not permit federal diversity courts to "apply a uniform set of equitable principles to all cases,"<sup>383</sup> nor "establish their own bodies of equitable principles applicable to all cases,"<sup>384</sup> nor "establish a national code of equitable remedial principles as a matter of substantive law."<sup>385</sup> It is one thing to say that federal diversity courts have no authority to establish a substantive national code of equity. But it is quite another to deny the authority of a federal diversity court to issue a preliminary injunction under federal law to prevent the frustration of the federal judicial process.<sup>386</sup> In Part V, I argue that, consistently with *Erie*, some genuine preliminary injunctions fall within the very limited operation of the equitable remedial rights doctrine.

#### IV. FACILITATIVE EQUITY: A THIRD CONCEPTION OF FEDERAL EQUITY

Concluding that homogeneous federal equity was inconsistent with *Erie*, Frankfurter aggressively enforced *Erie* in equity cases. But there was a road not taken. In the early years of the Republic, before 1809, federal equity courts asserted neither a strong independent power to administer equity solely on their own principles nor an equity jurisdiction tightly bounded by the states. Instead, federal courts capitalized on the flexibility of equity and its facilitative nature. Recent work has highlighted modern equity's strongly facilitative character.<sup>387</sup> Of course, equity has long facilitated the convenient or effective enforcement of common law rights.<sup>388</sup> The *quia*

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<sup>383</sup> Morley, *supra* note 358, at 3.

<sup>384</sup> *Id.* at 54.

<sup>385</sup> *Id.* at 53.

<sup>386</sup> In 1954, Henry Hart posed the question: "Could [a federal district court in a diversity case] deny a remedy which [state] courts would grant?" He said that the answer "would seem in principle to be yes, of course—providing the federal courts merely decline to adjudicate and do not purport to settle substantive rights inconsistently with applicable state law." Hart, *supra* note 356, at 511–512 n.75.

<sup>387</sup> P.G. Turner, *Equity and Administration*, in EQUITY AND ADMINISTRATION, *supra* note 29, at 2–3.

<sup>388</sup> See HEYDON ET AL., *supra* note 16, at 11–12.

*timet* injunction, interpleader, and discovery are only three examples; they demonstrate the importance of the equitable function in aiding the enforcement of legal rights.<sup>389</sup>

This Part will outline three ways in which early federal courts deployed equity to facilitate the practical functioning of the nascent federal judiciary, taking care not to encroach on state interests and activities. First, in one of its earliest decisions, the Supreme Court issued an injunction to stay execution of a circuit court judgment at law, solely to allow a state to pursue its legal rights in federal court.<sup>390</sup> Second, a circuit court refused to exercise diversity jurisdiction after an equitable bill of discovery revealed that diversity among the parties had been fraudulently manufactured.<sup>391</sup> Third, federal equity courts deferred to a state's interpretation of its own statute, even if they thought the interpretation wrong.<sup>392</sup> After 1809, as federal court procedure became more settled and the Supreme Court consolidated its judicial power—including the previously unnoticed talk in *Bodley* and *Brown* about federal courts exercising equity jurisdiction on their own principles—federal equity transitioned from a subservient facilitative conception to the more robust homogeneous conception.

After explaining the legal doctrine,<sup>393</sup> this Part situates facilitative federal equity in its historical context.<sup>394</sup> Just as homogeneous federal equity served the goals of a country bent on westward continental expansion, and heterogeneity served Frankfurter's progressive politics, so facilitative federal equity was deployed for a larger purpose. The federal courts' facilitative equity—especially the traditional facilitative jurisdiction in aid of legal rights—played an important administrative and nation-building role in an era where the states were the powerful stakeholders in the young federalism. It is

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<sup>389</sup> See, e.g., *Buskirk v. King*, 72 F. 22, 25 (4th Cir. 1896); *Sanders v. Armour Fertilizer Works*, 292 U.S. 190, 200 (1934); *Ex parte Boyd*, 105 U.S. 647, 657–58 (1881).

<sup>390</sup> See generally *Brailsford I*, 2 U.S. (2 Dall.) 402, 404–405 (1792); *Brailsford II*, 2 U.S. (2 Dall.) 415, 418–19 (1793) (opinion of Jay, C.J.).

<sup>391</sup> See generally *Maxfield's Lessee v. Levy*, 4 U.S. (4 Dall.) 330, 332–33, 335, 16 F. Cas. 1195 (C.C.D. Pa. 1797) (No. 9,321).

<sup>392</sup> See, e.g., *Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 419–20 (1808).

<sup>393</sup> See *infra* Part IV.A.

<sup>394</sup> See *infra* Part IV.B.

true that even during the era of facilitative equity, federal courts exercised chancery jurisdiction on their own principles. But it was not a conscious assertion of non-statutory jurisdiction, as Marshall claimed in *Bodley* and *Brown* in 1809. Facilitative federal equity is, in short, functionally different from homogeneous federal equity. Before 1809, federal equity was not purposed to secure uniformity over an ever-increasing territorial expanse. Rather, the federal courts actively used equity jurisdiction to practically administer the Judiciary Act of 1789 and to secure the footing of the federal judiciary in the new constitutional landscape.

### A. *The Doctrine*

#### 1. PRESERVING THE STATES' LEGAL CLAIMS

In *Georgia v. Brailsford*, decided in August 1792, federal equity facilitated the enforcement of a state statute in a federal trial court.<sup>395</sup> The case is significant not only because it “offered the Justices the opportunity to explore for the first time the relation between the law and equity sides of the Supreme Court’s jurisdiction.”<sup>396</sup> It also showed that Georgia, one of the sovereign components of the nascent federalism, could rely on the Supreme Court’s equity side to assist in the enforcement (in federal court) of its own legal rights created by its statutes.

The common law side of the federal Circuit Court for the District of Georgia had issued judgment on a 1774 bond.<sup>397</sup> Georgia’s application to be added as a party in the circuit court, on the basis that the debt was subject to the state’s confiscation act, was denied.<sup>398</sup> It was not an isolated case. In one of its filings, Georgia claimed that in many cases the circuit court had issued judgment “for debts within the descriptions of the confiscation law, upon the sole principle of

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<sup>395</sup> See generally *Brailsford I*, 2 U.S. (2 Dall.) 402, 404–05 (1792).

<sup>396</sup> Maeva Marcus, *Georgia v. Brailsford*, 2 J. SUP. CT. HIST. 57, 57 (1996).

<sup>397</sup> *Brailsford I*, 2 U.S. (2 Dall.) at 404.

<sup>398</sup> See John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1443–45 (1998) (observing that Georgia’s attempted interpleader failed because defendant objected to the interpleader and because the circuit court did not have jurisdiction over cases where a state was a party).

debtor and creditor, and without any reference to the right and claim of the state.”<sup>399</sup>

Possessed of a claimed legal right without a legal remedy in the federal courts, Georgia commenced proceedings on the equity side of the Supreme Court. The bill prayed for an injunction to stay in the hands of the marshal of the circuit court the property levied and money raised in execution of the judgment.<sup>400</sup> It also requested that the Court direct the marshal to pay money raised in execution of judgment, and the defendant at law to pay the balance, to the treasurer of Georgia—in other words, Georgia asked the equity side of the Supreme Court for a decision on the merits of Georgia’s common law claim.<sup>401</sup> Over two dissents, and a subsequent dissolution motion, the Supreme Court granted the injunction because “the money ought to be kept for the party to whom it belongs.”<sup>402</sup> The equity side of the Supreme Court did not decide the merits of the claim. Rather, the Court, to enable Georgia to pursue its legal right to the debt, held that “the money should remain in the custody of the law, till the law has adjudged to whom it belongs.”<sup>403</sup> Twelve months later, when common law proceedings had finished and a jury had determined that Georgia was not entitled to the money,<sup>404</sup> the injunction was, naturally, dissolved.<sup>405</sup>

Two aspects of the case will be elaborated later.<sup>406</sup> First, the justices resorted to general equitable principles derived from the English High Court of Chancery. Second, equity was deployed to support the federal system that was “so new and in many respects unaided by [an]y former examples.”<sup>407</sup> Georgia turned to federal equity to fashion a remedy to vindicate its legal rights in the federal courts.

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<sup>399</sup> *Brailsford I*, 2 U.S. (2 Dall.) at 404 (quoting Georgia’s pleading).

<sup>400</sup> *Id.* at 404–05.

<sup>401</sup> *Id.*

<sup>402</sup> *Brailsford II*, 2 U.S. (2 Dall.) at 418–19 (opinion of Jay, C.J.).

<sup>403</sup> *Brailsford I*, 2 U.S. (2 Dall.) at 409 (opinion of Jay, C.J.).

<sup>404</sup> See *Georgia v. Brailsford (Brailsford III)*, 3 U.S. (3 Dall.) 1, 5 (1794).

<sup>405</sup> *Brailsford II*, 2 U.S. (2 Dall.) at 419 n.\*; *Brailsford I*, 2 U.S. (2 Dall.) at 409 n.\*.

<sup>406</sup> See *infra* Part IV.B.2.a.

<sup>407</sup> Letter from James Iredell to George Washington (Feb. 23, 1792), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT 1790–1794, at 239, 240 (Maeva Marcus ed., 1988) [hereinafter James Iredell to George Washington].

## 2. LIMITING FEDERAL COURT JURISDICTION

The second circumstance where the early federal courts used equity to legitimize their processes was the prevention of the fraudulent manufacture of diversity jurisdiction. In *Maxfield's Lessee v. Levy*,<sup>408</sup> the plaintiff, a Delaware citizen, had brought seventy ejectment actions in the Circuit Court for the District of Pennsylvania.<sup>409</sup> The defendants filed a bill for discovery on the equity side of the federal court.<sup>410</sup> The discovery (which was competent evidence in the common law ejectment proceedings) disclosed that the land, located in Pennsylvania, had been conveyed to the plaintiff for no consideration by a Pennsylvania citizen, for the sole purpose of making the plaintiff the nominal lessor to ground diversity jurisdiction.<sup>411</sup>

Riding circuit, Justice Iredell dismissed all seventy ejectment suits in an opinion he thought “very important,”<sup>412</sup> because “it concerns the constitution and laws of the *United States*, in a point highly essential to their welfare, to wit, the proper boundaries between the authority of a single state, and that of the *United States*.”<sup>413</sup> Iredell was not happy at the prospect of the circuit court’s diversity jurisdiction being fraudulently manufactured. A party, he said, “must assign a good reason for coming here.”<sup>414</sup> With these federalism concerns front-and-center, Iredell fumed that “[t]here is not the least shadow of evidence” that the land had been conveyed in good faith.<sup>415</sup> He thundered:

When the constitution has guarded, with the utmost solicitude, against the exercise of a particular authority, so as that, under certain circumstances, one man

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<sup>408</sup> See *Maxfield's Lessee v. Levy*, 4 U.S. (4 Dall.) 330, 16 F. Cas. 1195 (C.C.D. Pa. 1797) (No. 9,321).

<sup>409</sup> Letter from James Iredell to Hannah Iredell (Apr. 21, 1797), in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT 1795–1800, at 170, 170 n.1 (Maeva Marcus ed., 1990) [hereinafter *James Iredell to Hannah Iredell*].

<sup>410</sup> See *Maxfield*, 4 U.S. (4 Dall.) at 330.

<sup>411</sup> See *id.* at 331–35; *James Iredell to Hannah Iredell*, *supra* note 409, at 170 n.1.

<sup>412</sup> *James Iredell to Hannah Iredell*, *supra* note 409, at 170.

<sup>413</sup> *Maxfield*, 4 U.S. (4 Dall.) at 330.

<sup>414</sup> *Id.* at 332.

<sup>415</sup> *Id.* at 333.

shall not sue another in a Court created under it, can such a Court for a moment support a doctrine, that it shall be in the power of such a man, *by any contrivance expressly calculated to defeat this object*, to render it wholly nugatory? This, indeed, would be to render the laws of our country a farce; to make the constitution a mere shadow; and deservedly to draw upon those entrusted with its execution, an odium which has been industriously, but, I hope, will ever be in vain attempted.<sup>416</sup>

Iredell therefore dismissed the suits because the plaintiff “only permits his name to be used, for the support of a fraud on the jurisdiction of the Court.”<sup>417</sup> Although acknowledging that he could not award costs, Iredell added for good measure that if it was in his power, he would have ordered double costs.<sup>418</sup>

As elaborated below, Iredell used equity to guard federal jurisdiction.<sup>419</sup> If the court only had the ejectment pleadings, without the benefit of the bill of discovery, then that “would leave the constitution, and the law . . . open to certain evasion.”<sup>420</sup> Here, “the aid of equity” ensured “that the Court be not made . . . an usurper of jurisdiction not belonging to it.”<sup>421</sup> Iredell made the case about the federal structure, denying relief to preserve “the proper boundaries between the authority of a single state, and that of the *United States*.”<sup>422</sup> And even if judgment had been entered by the common law court, “equity might properly grant an injunction, to prevent a party availing himself of his own fraud.”<sup>423</sup>

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<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 334–35.

<sup>418</sup> *See id.* at 338.

<sup>419</sup> *See infra* Part IV.B.2.b.

<sup>420</sup> *Maxfield*, 4 U.S. (4 Dall.) at 336.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 330.

<sup>423</sup> *Id.* at 336.

### 3. FOLLOWING STATE LAW

#### a. *State Statutes*

Although the Rules of Decision Act did not apply to equity suits, early federal courts sitting in equity carefully applied state statutes. For example, as discussed above, in 1792 the equity side of the Supreme Court—in the absence of a writ of error and at the application of a state (a third party)—restrained a federal court from executing a judgment at law when that state’s statute had not been applied.<sup>424</sup> In 1805, the equity side of the Supreme Court adopted “the construction given by the courts of Georgia to the statute.”<sup>425</sup> The equity side of the lower federal courts also diligently enforced state statutes according to their terms.<sup>426</sup> Even when the equity side of a federal court did not apply a state statute, the court seemed to base its conclusion on a faithful interpretation of the statutory language rather than the application of freestanding equitable doctrine.<sup>427</sup>

One variety of state statute is of particular interest. The early federal courts uniformly applied state statutes of limitations. This may have been established as early as 1806 in *Hopkirk v. Bell*.<sup>428</sup> The Supreme Court ultimately concluded that Virginia’s act of limitations was no bar, but only because the statute was nullified by the Treaty of Paris.<sup>429</sup> But for the interposition of the treaty, the state statute of limitations would have barred plaintiff’s federal equity

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<sup>424</sup> See *supra* Part IV.A.1.

<sup>425</sup> *Telfair v. Stead’s Ex’rs*, 6 U.S. (2 Cranch) 407, 418 (1805) (“We have received information as to the construction given by the courts of Georgia to the statute of 5 *Geo.* 2 making lands in the colonies liable for debts, and are satisfied that they are considered as chargeable without making the heir a party.”).

<sup>426</sup> See, e.g., *Thompson v. Jamesson*, 23 F. Cas. 1051, 1052 (C.C.D.C. 1806) (No. 13,960) (applying the statute of frauds) (“A court of equity cannot, more than a court of law, dispense with the positive and clear prohibition of a statute.”).

<sup>427</sup> See, e.g., *Ray v. Law*, 20 F. Cas. 329, 330 (C.C.D.C. 1806) (No. 11,591) (“THE COURT, on considering the acts of Maryland on that subject, were of opinion that they did not apply to the court of chancery.”).

<sup>428</sup> 7 U.S. (3 Cranch) 454, 456–58 (1806).

<sup>429</sup> *Id.* at 458.

suit.<sup>430</sup> In general, the circuit courts followed state statutes of limitations.<sup>431</sup> And in at least one equity case, the Supreme Court adopted the state court interpretation of its limitation statute, even though the Court thought that the interpretation was contrary to the text.<sup>432</sup> It was a different story once the notion of homogeneous federal equity took root. Some federal equity courts considered state statutes of limitation binding;<sup>433</sup> other federal courts thought the statutes relevant to the equitable doctrine of laches;<sup>434</sup> still others held that they were free from the statute altogether.<sup>435</sup> It was this precise controversy that kicked off *Guaranty Trust*.

b. *When State Common Law Courts “Equitise”*

Before 1809, the federal courts vigilantly applied the Rules of Decision Act even if it meant changing the boundary between law and equity in federal court. A line of cases from Pennsylvania confronted the “strange mixture of legal and equitable powers, in the Courts of law of this state,” which “arises from the want of a distinct forum to exercise chancery jurisdiction; and, therefore, the common

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<sup>430</sup> The Circuit Court for the District of Virginia, sitting in equity, certified to the Supreme Court the question “[w]hether the act of assembly of Virginia for the limitation of actions pleaded by the defendant was, under all the circumstances stated, a bar to the plaintiff’s demand founded on a promissory note given on the 21st day of August, 1773?” *Id.* at 454. The Virginia limitations period for equity suits seeking an account was five years from the date the cause of action accrued. *Id.* at 456. Payees were British subjects and the Treaty of Paris provided “that creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted.” *Id.* at 455. The Court held that the plaintiff’s demand on the note was not barred by the statute of limitations. “[T]he length of time from the giving the note to the commencement of the war” was “not . . . sufficient to bar the demand on the said note, according to the said act of assembly” because “the treaty . . . does not admit of adding the time previous to the war, to any time subsequent to the treaty, in order to make a bar.” *Id.* at 458. In other words, the Treaty of Paris removed the “lawful impediment”—the statute of limitations. *Id.* at 455.

<sup>431</sup> See GOEBEL, *supra* note 91, at 588 n.167.

<sup>432</sup> *Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 419–20 (1808).

<sup>433</sup> See, e.g., *Pulliam v. Pulliam*, 10 F. 53, 76–78 (C.C.W.D. Tenn. 1881).

<sup>434</sup> See, e.g., *Alsop v. Riker*, 155 U.S. 448, 460–61 (1894); see also *Halstead v. Grinnan*, 152 U.S. 412, 416–17 (1894); *Michoud v. Girod*, 45 U.S. (4 How.) 503, 560–61 (1846).

<sup>435</sup> See, e.g., *Johnston v. Roe*, 1 F. 692, 695 (C.C.E.D. Mo. 1880); *Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130, 137–38 (1887).



law Courts equitise as far as possible.”<sup>436</sup> The federal courts—rather than assert that the distinction between law and equity in federal court could not be altered by the states (as was customary after 1809)—deferred and sat as mirror images of the state common law courts, “equitis[ing] as far as possible.”<sup>437</sup>

In 1799, the Supreme Court followed Pennsylvania’s classification of legal and equitable rights to land. In *Sims’ Lessee v. Irvine*, the Court’s paramount concern was adherence to local law for fear of upsetting land titles.<sup>438</sup> Plaintiff grounded his ejectment on money paid, a warrant, and a survey, but no patent.<sup>439</sup> Ordinarily, this vested only equitable title to land and was therefore insufficient for a common law ejectment suit.<sup>440</sup> But in Pennsylvania, “whether from a defect of Chancery powers, or for other reasons of policy or justice,” it vested legal title.<sup>441</sup> Invoking the Rules of Decision Act, Chief Justice Ellsworth held that the “*established legal right . . . with property and tenures . . . remains a legal right notwithstanding any new distribution of judicial powers.*”<sup>442</sup> Iredell concurred because the rule, “having been the ground of many titles, it would be improper in the Court to shake it.”<sup>443</sup> But he took the opportunity to issue a paean to the law/equity distinction, and he cautioned federal judges against deviating from “legal strictness” “when the want of a Court of equity may urge them to procure substantial justice.”<sup>444</sup>

Similarly, deciding an ejectment suit while riding circuit in 1806, Justice Washington administered equity through the common

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<sup>436</sup> *Hollingsworth v. Fry*, 4 U.S. (4 Dall.) 345, 348, 12 F. Cas. 378 (C.C.D. Pa. 1800) (No. 6,619).

<sup>437</sup> *Id.*

<sup>438</sup> *Sims’ Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 456–57 (1799).

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at 457.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* at 465 (Iredell, J., concurring).

<sup>444</sup> *Id.* See also *Penn’s Lessee v. Klyne*, 4 U.S. (4 Dall.) 402, 410, 19 F. Cas. 161 (Washington, Circuit Justice, C.C.D. Pa. 1805) (No. 10,935) (adopting principle of *Sims* but holding that defendant had merely an equitable title, even under an expanded definition of the legal title in Pennsylvania); *Willis v. Bucher*, 30 F. Cas. 63, 66 (Washington, Circuit Justice, C.C.D. Pa. 1818) (No. 17,769) (*Sims* “has been always regarded and acted upon in this court”).

law exactly like a Pennsylvania court.<sup>445</sup> In his charge to the jury, Washington observed that defendant “must show a better title, either legal or equitable,” and—in case anyone missed it— “[w]hen I say equitable, I speak in reference to the laws and usages of this state.”<sup>446</sup> Any equitable title “must be such as a court of equity would sustain.”<sup>447</sup> Washington then applied “[t]he rule in this state . . . that if a man, having a warrant, do not use due diligence to survey it, so as to afford notice to others, he loses his priority.”<sup>448</sup> Citing Fonblanque’s equity treatise, the justice asked: “[w]hat kind of figure would this defendant make in a court of equity, with his dormant title, against a fair bona fide purchaser, without notice, and shielded by a legal title?”<sup>449</sup>

By 1811—notably, after *Bodley* and *Brown*—Washington had changed course, or at least applied a different rule when land titles were not at issue. Riding circuit in *Jordan v. Wilkins*, he refused to adopt the Supreme Court of Pennsylvania’s conscious equitable liberalization of the common law action of account.<sup>450</sup> The plaintiff brought an action at law against one of his partners alleging that the defendant withheld money received from named third parties that belonged to the plaintiff.<sup>451</sup> The evidence, however, showed that the defendant received the money from a third party whom the plaintiff had not named.<sup>452</sup> This would usually justify dismissal because the common law required that the defendant receive money only from the third parties named in the pleadings.<sup>453</sup> But in 1788, the Pennsylvania Supreme Court relaxed that requirement, observing that “we have no Court of Chancery to interpose an equitable jurisdiction.”<sup>454</sup> Washington would have none of it. The state court’s expansion of the action of account was “in consequence of the want of

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<sup>445</sup> See *Gordon v. Kerr*, 10 F. Cas. 801, 802 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 5,611).

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* at 802–03.

<sup>448</sup> *Id.* at 803.

<sup>449</sup> *Id.*

<sup>450</sup> *Jordan v. Wilkins*, 13 F. Cas. 1112, 1112 (Washington, Circuit Justice, C.C.D. Pa. 1811) (No. 7,526).

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *James v. Browne*, 1 U.S. (1 Dall.) 339, 339, 1 Ald. 98 (Pa. 1788).

chancery jurisdiction in the state.”<sup>455</sup> But “[t]his court has chancery jurisdiction.”<sup>456</sup> The action was dismissed.<sup>457</sup>

It appears, however, that on evidentiary issues not affecting land title, federal judges at common law disregarded the “strange mixture of legal and equitable powers” in the Pennsylvania courts—even if it meant divergent outcomes.<sup>458</sup> In *O’Harra v. Hall*, the assignor of a bond objected at trial to the assignee’s attempt to offer parol evidence showing that the assignor had guaranteed payment of the bond.<sup>459</sup> The assignee had invoked the equitable principle allowing parol evidence to prove misrepresentation, and cited a Pennsylvania Supreme Court case holding that “parol evidence was proper to be admitted” in a common law action for ejectment to show “a breach of trust.”<sup>460</sup> The federal court was unmoved. The district judge observed that the result would have been different had plaintiff brought the action in state court:

If we were sitting as Judges in a state Court, I should be inclined to admit the testimony, in order to attain the real justice of the cause; as there is no Court of equity in *Pennsylvania*. But there is no such defect in the federal jurisdiction; and, therefore, when the party comes to the common law side of the Court, he must be content with the strict common law rule of evidence.<sup>461</sup>

Justice Chase, riding circuit, agreed. He said that although “chancery will not confine itself to the strict rule . . . we are sitting as Judges at common-law.”<sup>462</sup>

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<sup>455</sup> *Jordan*, 13 F. Cas. at 1112.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> *Hollingsworth v. Fry*, 4 U.S. (4 Dall.) 345, 348, 12 F. Cas. 378 (Paterson, Circuit Justice, C.C.D. Pa. 1800) (No. 6,619).

<sup>459</sup> *O’Harra v. Hall*, 4 U.S. (4 Dall.) 340, 340–41, 18 F. Cas. 628 (C.C.D. Pa. 1800) (No. 10,468).

<sup>460</sup> *Lessee of Thompson v. White*, 1 U.S. (1 Dall.) 424, 428, 1 Ald. 128 (Pa. 1789). *Thompson* was cited by Jared Ingersoll for the plaintiff assignee. *O’Harra*, 4 U.S. (4 Dall.) at 340.

<sup>461</sup> *O’Harra*, 4 U.S. (4 Dall.) at 341.

<sup>462</sup> *Id.* (Chase, Circuit Justice).

The equity side of the Pennsylvania federal court, although not bound by the express terms of the Rules of Decision Act, similarly took notice of state merger. Riding circuit in 1800, Justice Paterson effectively held that a failure to put equitable arguments to the Pennsylvania Supreme Court had waived those arguments on the equity side of the federal court.<sup>463</sup> Plaintiff's failure, in the earlier state court action, to apprise that court of the equity of its case contributed to Paterson's dismissal, for laches, of the bill filed in federal court.<sup>464</sup> *Hollingsworth* centered on an agreement executed in 1790 providing that if, by a date certain in 1791, plaintiff had not paid defendant money to which defendant was entitled by reason of improvements to land, then the defendant would hold the land free from plaintiff's claims.<sup>465</sup> The Supreme Court of Pennsylvania gave judgment in July 1791 for defendant.<sup>466</sup> Years later, plaintiff filed a bill on the equity side of federal court, alleging fraud by defendant and requesting a perpetual injunction against all proceedings on the state court judgment.<sup>467</sup>

Interestingly, Paterson did not refer to the delicate issue of plaintiff's request for a federal injunction arresting a state common law judgment. Instead he dismissed the bill for laches.<sup>468</sup> Time was of the essence in the 1790 contract, and even if it were not, plaintiff "comes too late to avail himself . . . . The door of equity cannot remain open for ever."<sup>469</sup> Paterson observed that "[t]here is a strange mixture of legal and equitable powers, in the Courts of law of this state," which "arises from the want of a distinct forum to exercise chancery jurisdiction; and, therefore, the common law Courts equitise as far as possible."<sup>470</sup> It was unnecessary to determine whether the Supreme Court of Pennsylvania would have extended relief to the plaintiff, because plaintiff should "have laid the equity of the case before the judges of that Court" when he was on notice of entry of judgment.<sup>471</sup> Plaintiff "did not avail himself of an appeal to the

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<sup>463</sup> *Hollingsworth*, 4 U.S. (4 Dall.) at 348.

<sup>464</sup> *Id.* at 347–48.

<sup>465</sup> *Id.* at 345–46.

<sup>466</sup> *Id.* at 346.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 348.

<sup>469</sup> *Id.* at 347.

<sup>470</sup> *Id.* at 348.

<sup>471</sup> *Id.*

discretion of the Court; but suffered judgment to pass against him, without making any objection.”<sup>472</sup>

## B. *The Motivation*

Just as homogeneous federal equity served to maintain the institutional coherence of the federal courts during westward continental expansion, and heterogeneous federal equity served to consolidate Progressive values in the aftermath of the New Deal, the facilitative conception of federal equity served larger goals. Equity functioned as a useful tool to administer the Judiciary Act of 1789, and it contributed to the construction of the early American state.

### 1. EQUITY AND ADMINISTRATION

Recent scholarship illustrates that equity’s facilitative character explains its capacity for performing administrative tasks.<sup>473</sup> Taking a wide view of administration, Turner notes a variety of administrative tasks, “from the administration of the assets of trusts, through the administration of insolvent estates and of solvent and insolvent business associations, and to the administration of the affairs of the legislative, executive and judicial branches of government.”<sup>474</sup> Equity administers a legislative scheme, for example, by “keep[ing] a responsible person to the performance of his or her obligations under the scheme.”<sup>475</sup> And, when the common law or statute runs out, equity can provide a lawful foundation for administrative tasks.<sup>476</sup> In enforcing a trust, “equity gives effect to deliberately established regimes for the management of assets” when common law and statute do not.<sup>477</sup> Sometimes these features (administering a legislative scheme and providing a lawful foundation for administrative tasks)

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<sup>472</sup> *Id.*

<sup>473</sup> *See generally, e.g.*, P.G. Turner, *Equity and Administration*, in EQUITY AND ADMINISTRATION, *supra* note 29, at 2–3, 33. It is unconventional, perhaps even heretical, to describe any Article III activity as administration rather than adjudication. I do not mean to argue that Article III courts perform non-judicial administrative functions when they exercise equity jurisdiction. The point, rather, is that some exercises of judicial power by equity courts can be broadly characterized as administrative.

<sup>474</sup> *Id.* at 2–3.

<sup>475</sup> *Id.* at 3.

<sup>476</sup> *See id.* at 2–3, 19.

<sup>477</sup> *Id.* at 19.

combine. Equity's imposition of fiduciary obligations on company directors arose as an aspect of the administration of early corporations legislation.<sup>478</sup> Courts of equity provided a lawful basis to impose fiduciary obligations on company directors "by reason of the similarity between their position of control over the company and its assets and the positions held by trustees and agents."<sup>479</sup>

The early federal courts enlisted equity to administer the first Judiciary Act. The statute was an *ex ante* mode of regulation; and it is, of course, impossible to specify in advance the infinite variety of opportunistic behavior that will exploit statutory loopholes.<sup>480</sup> Equity's *ex post* perspective was necessary to ensure that the legislative scheme worked in a commonsense way. In *Brailsford*, for example, the strict application of the common law prevented Georgia from interpleading in the circuit court to press its legal claim.<sup>481</sup> On the equity side of the Supreme Court, Georgia alleged that the parties had conspired not to appeal, thereby frustrating Georgia's claim<sup>482</sup> (until 1875 the lower federal courts had no jurisdiction to hear suits brought by States).<sup>483</sup> Equity provided a lawful foundation to halt execution of judgment so that Georgia's legal entitlement to the debt could be finally decided. The injunction thwarted an untenable situation where a state could not enforce its statute in federal court. Similarly, in *Maxfield*, equity neutralized the opportunistic manufacture of diversity jurisdiction.<sup>484</sup> It enforced the statutory policy that federal court jurisdiction is limited and should not be guilefully enlarged.

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<sup>478</sup> Matthew Conaglen, *Equity's Role*, in EQUITY AND ADMINISTRATION, *supra* note 29, at 504.

<sup>479</sup> *Id.*

<sup>480</sup> See generally Smith, *supra* note 55, at 175–76, 180–81, 184.

<sup>481</sup> James Iredell to George Washington, *supra* note 407, at 241–42.

<sup>482</sup> *Brailsford I*, 2 U.S. (2 Dall.) 402, 404 (1792) (Georgia alleged that "defendant had confederated with [plaintiffs].").

<sup>483</sup> See Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 868–69 n.89 (2016).

<sup>484</sup> *Maxfield's Lessee v. Levy*, 4 U.S. (4 Dall.) 330, 331–36, 16 F. Cas. 1195 (Iredell, Circuit Justice, C.C.D. Pa. 1797) (No. 9,321).

## 2. NATION BUILDING

In his seminal work on the construction of American statehood, Stephen Skowronek recounted that in the eyes of Tocqueville, Hegel, and Marx, the nineteenth-century U.S. governmental order “failed to evoke the sense of a state.”<sup>485</sup> This “distinctive sense of statelessness” was generated by the location of substantive government in the several states.<sup>486</sup> The federal government was comparatively weak and it assumed the absence of strong national institutions.<sup>487</sup> The federal institutions that penetrated the territory were “land offices, post offices, and customhouses,” “illustrat[ing] the orientation toward basic services that routinely dominated federal concerns.”<sup>488</sup> The majority of law, too, was state-centric: “[o]ne finds the most fundamental social choices—from the organization of capitalism to the regulation of family life—firmly lodged in state legal codes.”<sup>489</sup>

The diffusion of governmental power across far-flung territory posed obvious problems for the early federal nation, which Skowronek argues were solved by “the cohesive procedures of courts and parties.”<sup>490</sup> The federal courts in the nineteenth century made sense of the untested constitutional order, and the Supreme Court emerged in the 1790s as an important player in the resolution of federal-state disputes.<sup>491</sup> Plainly the fallout from *Chisholm v. Georgia*<sup>492</sup> looms large, and the enactment of the Eleventh Amendment as a “stunning rebuke to Jay and the Court” has dominated scholarly attention.<sup>493</sup> In holding that the Constitution stripped state sovereign immunity

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<sup>485</sup> SKOWRONEK, *supra* note 28, at 8.

<sup>486</sup> *Id.* at 23.

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> See JOHN R. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS: 1789–1957, at 24 (1958) (“[A]n examination of the record of the judiciary in the period from 1790 to 1800 reveals an imposing record of decisive action as arbiter in federal-state relations.”).

<sup>492</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>493</sup> LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 27–28 (2009).

from suit in federal court, *Chisholm* played into antifederalist fears and positioned the states in opposition to the federal government.<sup>494</sup>

a. *Preserving the States' Legal Claims*

*Chisholm* describes a conflict model of federal-state relations, and the Supreme Court's interjection was a roaring failure. By contrast, in *Brailsford*, the Supreme Court deployed the flexibility of equity to enable the state to vindicate its legal rights in federal court. In an era when the procedure of the Supreme Court had not been liquidated through practice, equity proved a vital tool to maintain institutional coherence.<sup>495</sup> In February 1792, before the case was argued in the Supreme Court, Justice Iredell wrote President Washington that Georgia's inability to press its claim in the circuit court constituted a "circumstance of great importance" and "of the highest moment," arising "under a system without precedent in the history of Mankind."<sup>496</sup> And it is hard to imagine the federal judiciary—with "only a few judges, fledgling courts (some of which lacked regular judges altogether), and precious little else"—maintaining (let alone consolidating) authority if the states could not sue there on their own statutes.<sup>497</sup>

The statute at issue, Georgia's sequestration statute, was particularly contested.<sup>498</sup> The Treaty of Paris required payment of prewar debts to British creditors, but recovery in state court was difficult

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<sup>494</sup> See generally *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

<sup>495</sup> See 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES 176 (Maeva Marcus ed., 1992) [hereinafter 4 THE DOCUMENTARY HISTORY]. In the early 1790s even Congress treaded lightly, "reflect[ing] the general feeling, expressed in a number of letters between members of Congress and their correspondents, that the system was as yet too untried to warrant radical reform." *Id.*

<sup>496</sup> James Iredell to George Washington, *supra* note 407, at 241–42. See also 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: CASES 1790–1795, at 85 (Maeva Marcus ed., 1998) ("[T]he case attracted much public attention . . ."); Nathaniel Pendleton's Circuit Court Opinion (May 2, 1792), *reprinted in id.* at 92 (referring to the case as "a cause of great expectation"); *Brailsford III*, 3 U.S. (3 Dall.) 1, 3 (1794) ("This cause has been regarded as of great importance; and doubtless it is so.").

<sup>497</sup> Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. CHI. L. REV. 423, 427 (1989).

<sup>498</sup> See generally GOEBEL, *supra* note 91, at 743–47.



due to the proliferation of confiscation and sequestration statutes.<sup>499</sup> It is hardly surprising that the *Augusta Chronicle* expressly acknowledged that the injunction issued by the Supreme Court strengthened the institutional integrity of the federal courts and the stability of the federal government itself:

It must be acknowledged that this decision reflects great honor on the four [*sic* three] Judges who accorded therein. It not only wears a republican feature, as maintaining the legal rights of individual states, but must tend to the stability of the general government itself from its impartial tenor.<sup>500</sup>

It is noteworthy too that Jefferson used the “integrity” of the circuit court opinion in *Brailsford* (refusing to let Georgia interplead) to counter British allegations that the United States had violated the Treaty of Paris.<sup>501</sup>

The Supreme Court’s equity side showed how flexible the federal judiciary could be. The Court went to surprising lengths to hear Georgia’s legal claim in *Brailsford*. First, the very fact that the injunction was granted demonstrates awareness of the English doctrine permitting courts of equity to stay money in the hands of the sheriff even after execution of a judgment at law.<sup>502</sup> This species of injunction was relatively novel, originating under Lord Thurlow.<sup>503</sup>

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<sup>499</sup> See Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 *YALE L.J.* 208, 221 (2013).

<sup>500</sup> *AUGUSTA CHRONICLE*, Mar. 16, 1793, reprinted in 6 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: CASES 1790–1795*, *supra* note 496 at 147.

<sup>501</sup> See *Continuation of Mr. Jefferson’s Letter to Mr. Hammond*, *DAILY ADVERTISER* (N.Y.), Feb. 11, 1794, at 2.

<sup>502</sup> See ROBERT HENLEY EDEN, *A TREATISE ON THE LAW OF INJUNCTIONS* 44 (London, Joseph Butterworth & Son 1821) (“Injunctions to stay proceedings at law, are granted . . . if execution has taken place, to stay the money in the hands of the Sheriff . . .”); SAMUEL TURNER, *THE PRESENT PRACTICE AND COSTS IN THE HIGH COURT OF CHANCERY* 961–62 (London, J & W.T. Clarke, 6th ed. 1825) (same); JOHN COLLYER, *A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP* 478 (London, S. Sweet 1832); *Hawkshaw v. Parkins* (1818) 36 Eng. Rep. 723, 726 (Ch).

<sup>503</sup> See EDEN, *supra* note 502, at 72–74; *Axe v. Clarke* (1779) 21 Eng. Rep. 383, 383–84 (Ch); *Franklyn v. Thomas* (1817) 36 Eng. Rep. 86, 88–89 (Ch). Thur-

Second, once the injunction to stay execution issued, the Court had a choice: it could assert equitable jurisdiction over the entire cause to decide the substantive merits of Georgia's claim, or it could relinquish substantive jurisdiction to the common law side for a merits decision. Importantly, if the Court had opted to retain its equitable jurisdiction, that would not have precluded a jury trial. The Court's equity side could direct an issue to be tried by a jury at common law; traditionally, however, the Chancellor was not bound by trials or opinions on issues he had remitted to common law.<sup>504</sup> In dissent, Justices Iredell and Blair favored this approach.<sup>505</sup> The Court instead opted to relinquish its equitable jurisdiction over the substance of Georgia's claim.<sup>506</sup> Georgia then filed an action on the common law side of the Supreme Court, and a jury was convened for a final decision.<sup>507</sup> In the end, the jury found against Georgia;<sup>508</sup> but the Court had mobilized equity to preserve Georgia's right to have its legal claims adjudicated at law by an authoritative, final, and binding jury verdict. The Court "signaled its desire both to limit the equity jurisdiction of the Court and to have the substantive question tried by a jury," and "it appears to have been of great importance to the Court at this early moment in its history to begin to define the boundaries between its law and equity jurisdictions in accordance with the language of the Judiciary Act of 1789."<sup>509</sup> Equity's flexibility facilitated the conclusive determination of Georgia's legal rights in federal court.

Scholars have focused on the *Brailsford* Court's impaneling of a jury and Jay's apparently odd instruction that the jury should make findings of law (the facts were stipulated).<sup>510</sup> Riding circuit in 1851,

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low was Lord Chancellor 1778–1783 and 1783–1792, and contributed to the systemization of equity in the eighteenth century. HEYDON ET AL., *supra* note 16, at 9.

<sup>504</sup> See Langbein, *Fact Finding in the English Court of Chancery*, *supra* note 164, at 1625–28.

<sup>505</sup> *Brailsford II*, 2 U.S. (2 Dall.) 415, 415–17 (1793) (opinion of Iredell, J.); *id.* at 417–18 (opinion of Blair, J.).

<sup>506</sup> *Id.* at 418–19 (opinion of Jay, C.J.).

<sup>507</sup> See *Brailsford III*, 3 U.S. (3 Dall.) 1, 1 (1794).

<sup>508</sup> *Id.* at 5.

<sup>509</sup> 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: CASES 1790–1795, *supra* note 496, at 84 n.65.

<sup>510</sup> See Shelfer, *supra* note 499, at 224–25, 227.

Justice Curtis said that “the whole case is an anomaly,” because “[i]t purports to be a trial by jury in the supreme court of the United States, of certain issues out of chancery,” and “the chief justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed.”<sup>511</sup> Recent work suggests that Curtis’s confusion arises from the nature of the jury impaneled: a special jury of merchants having power to decide mercantile custom, which was incorporated into the common law.<sup>512</sup> Focusing on the equity side in *Brailsford* points up another source of Curtis’s confusion. The case was not “a trial by jury . . . of certain issues out of chancery.”<sup>513</sup> The issues were not directed out of the Court’s equity side; the Court refused to assume equitable jurisdiction over Georgia’s substantive claim.<sup>514</sup> The merits of that claim were decided in an independent common law action on the case, the law decided by a special jury of merchants.

b. *Limiting Federal Court Jurisdiction*

Despite characterizing the early American state as one of courts and parties, Skowronek nevertheless maintained that the early federal courts “imparted an evanescent or elusive quality” that reinforced an impression of statelessness.<sup>515</sup> Circuit riding, so arduous and expensive for the justices, was intended to “meet every Citizen in his own State,” and to “carry Law to their Homes, Courts to their Doors.”<sup>516</sup> In widely published grand jury charges, the justices introduced the citizenry to the political principles of the new country, including those of the national judicial power.<sup>517</sup> At the same time,

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<sup>511</sup> *United States v. Morris*, 26 F. Cas. 1323, 1334 (Curtis, Circuit Justice, C.C.D. Mass. 1851) (No. 15,815).

<sup>512</sup> See Shelfer, *supra* note 499, at 224–25, 227. *But cf.* Daniel Hulsebosch, *Magna Carta for the World? The Merchants’ Chapter and Foreign Capital in the Early American Republic*, 94 N.C.L. REV. 1599, 1623–24 n.97 (2016).

<sup>513</sup> *Morris*, 26 F. Cas. at 1334.

<sup>514</sup> See *Brailsford II*, 2 U.S. (2 Dall.) 415, 418–19 (1793) (opinion of Jay, C.J.).

<sup>515</sup> SKOWRONEK, *supra* note 28, at 29.

<sup>516</sup> William Patterson’s Notes for Remarks on Judiciary Bill (June 23, 1789), in 4 THE DOCUMENTARY HISTORY, *supra* note 495, at 416; see also 4 THE DOCUMENTARY HISTORY, *supra* note 495, at 28.

<sup>517</sup> See 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT 1790–1794, *supra* note 407, at 5.

the federal courts were the junior partner in the administration of justice at the turn of the nineteenth century. The first Judiciary Act “created circuit courts but no circuit judges”: the designated Supreme Court justice rode into town and soon rode out, leaving perhaps an evanescent or elusive impression.<sup>518</sup> Most law was enscorced in the states and enforced by state courts.<sup>519</sup> In trials at common law, the Rules of Decision Act directed federal court judges to apply state law; it was not until 1875 that the federal courts obtained general federal question jurisdiction.<sup>520</sup>

Armed with national judicial power but weak institutional apparatus, the federal courts were careful not to overreach. There was, additionally, the constant antifederalist worry that the federal courts “would eventually swallow up the State courts.”<sup>521</sup> The combination of these institutional and political constraints weighed on the early federal judges. Even Justice Iredell, a vocal federalist, simply could not countenance the artificial manufacture of diversity jurisdiction in *Maxfield*.<sup>522</sup> Federal court jurisdiction had to be affirmatively established; Iredell used equity to pierce the common law pleadings

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<sup>518</sup> William H. Rehnquist, *Foreword to 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT 1790–1794*, *supra* note 407, at xxv.

<sup>519</sup> See SKOWRONEK, *supra* note 28, at 23.

<sup>520</sup> See Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789); Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1825 n.122 [hereinafter Monaghan, *A Cause of Action, Anyone?*]; James J. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 640 (1942).

<sup>521</sup> JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 33 (2012) (quoting 1 ANNALS OF CONG. 852 (1789) (Joseph Gales ed., 1834)); G. Edward White, *Recovering Co-terminous Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 66, 73 (Maeva Marcus ed., 1992) (citing Luther Martin’s Information to the General Assembly of the State of Maryland (Mar. 30, 1788), *reprinted in 2 THE COMPLETE ANTI-FEDERALIST: OBJECTIONS OF NON-SIGNERS OF THE CONSTITUTION AND MAJOR SERIES OF ESSAYS AT THE OUTSET*, *supra* note 134, at 27, 57).

<sup>522</sup> *Maxfield’s Lessee v. Levy*, 4 U.S. (4 Dall.) 330, 331–33, 16 F. Cas. 1195 (Iredell, Circuit Justice, C.C.D. Pa. 1777) (No. 9,321). Although Iredell was a federalist, Goebel detected in at least one of his opinions a “continuing interest in maintaining watch and ward over the rights of the states.” GOEBEL, *supra* note 91, at 753.

and reach the substance of the basis of federal jurisdiction. This he did explicitly in service of federalism, to preserve “the proper boundaries between the authority of a single state, and that of the *United States*.”<sup>523</sup> Iredell thought that his opinion was “very important,”<sup>524</sup> and he asked Dallas to report it in full.<sup>525</sup>

Nearly forty years later, Justice Story blasted *Maxfield* as wrongly animated by “an extreme jealousy of the jurisdiction of the courts of the United States, and an extreme solicitude not to interfere with the state jurisdiction.”<sup>526</sup> John Sergeant, a prominent Supreme Court advocate in the first half of the nineteenth century, argued the same point to the Court in the late 1840s:

The case occurred, it will be remembered, as early as the year 1797, when the Constitution had been very recently made, its institutions were new and untried, and they were both regarded with jealousy, as likely to encroach upon and swallow up the States. The judiciary, of course, had its full share of the effects of this feeling. Experience has shown that it was groundless.<sup>527</sup>

The point is not to argue that *Maxfield* was right or wrong. The point is that Iredell used equity to police the boundaries of federal jurisdiction. Keeping the early federal courts within their limited jurisdiction was crucial to the perceived legitimacy of their decisions; and the continuity of the early American state depended on that perceived legitimacy.

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<sup>523</sup> *Id.* at 330.

<sup>524</sup> James Iredell to Hannah Iredell, *supra* note 409, at 170.

<sup>525</sup> *Maxfield*, 4 U.S. (4 Dall.) at 330 n.1.

<sup>526</sup> *Briggs v. French*, 4 F. Cas. 117, 119 (Story, Circuit Justice, C.C.D. Mass. 1835) (No. 1,871).

<sup>527</sup> *Smith v. Kernochen*, 48 U.S. (7 How.) 198, 210 (1849). Sergeant was “considered one of the three foremost Supreme Court advocates of the antebellum era, along with Henry Clay and Daniel Webster.” Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1880 n.218 (2007). Sergeant was admitted to the bar in 1799, two years after *Maxfield* was decided. *The Late Honorable John Sergeant, of Philadelphia*, 1 AM. L. REG. 193, 194 (1853).

c. *Following State Law*

The practice of early federal courts carefully following state law enhanced the national judiciary's institutional coherence and legitimacy. Skowronek observed that "the most fundamental social choices" were "firmly lodged in state legal codes."<sup>528</sup> The relatively miniscule volume of federal laws was "interstitial in its nature," enacted "against the background of the total *corpus juris* of the states."<sup>529</sup> State law was therefore necessary for the federal courts' institutional coherence. This was no less true for the equity side of the federal courts: equity must take cognizance of the law—including state legislation pursuant to the Rules of Decision Act<sup>530</sup>—in order to supplement it. At least before 1809, the federal courts' vigilant application of state statutes, including statutes of limitation, contributed to the "organizational orientation" of the federal judiciary toward the states.<sup>531</sup> Similarly, the federal courts' application of state law was necessary for their institutional legitimacy. The Rules of Decision Act embodied an important antifederalist principle.<sup>532</sup> The strength of that imperative is evident from the federal court opinions coming out of Pennsylvania before 1809. Federal courts generally interpreted the Rules of Decision Act as overriding the federal distinction between law and equity. In 1806, for example, Justice Washington demonstrated the federal judiciary's institutional malleability by administering equity on the common law side of the federal court, sitting, in effect, exactly like another court of the state.<sup>533</sup> But in 1811, after *Bodley* and *Brown* had spoken of chancery courts exercising jurisdiction on their own principles, Washington reversed course, refusing to apply the Pennsylvania Supreme Court's equitable liberalization of the common law action of account.<sup>534</sup>

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<sup>528</sup> SKOWRONEK, *supra* note 28, at 23.

<sup>529</sup> HART & WECHSLER, *supra* note 110, at 435.

<sup>530</sup> See Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (2012)).

<sup>531</sup> SKOWRONEK, *supra* note 28, at 27–29.

<sup>532</sup> See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52–53, 81–88 (1923).

<sup>533</sup> *Browne v. Browne*, 4 F. Cas. 440, 440–41 (Washington, Circuit Justice, C.C.D. Pa. 1806) (No. 2,035).

<sup>534</sup> *Jordan v. Wilkins*, 13 F. Cas. 1112, 1112 (Washington, Circuit Justice, C.C.D. Pa. 1811) (No. 7,526).

V. EQUITABLE REMEDIAL RIGHTS TODAY: THE PRELIMINARY INJUNCTION

In *Guaranty Trust*, Frankfurter reassured us that there was life in the old equitable dog yet. Federal courts retained the authority to “afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.”<sup>535</sup> Frankfurter’s vague and tepid commitment to the equitable remedial rights doctrine begged plenty of questions. It “is difficult to square with the basic principle of limited federal judicial authority set out in the remainder of the opinion.”<sup>536</sup> It “flatly contradicted the outcome determination principle”<sup>537</sup> because it refused to acknowledge that a “state-defined substantive right and the remedy given for its enforcement may be so closely related that to enforce a different right would change the ‘outcome’ significantly.”<sup>538</sup> It left unanswered whether “the federal court [may] grant specific performance or an injunction where only money damages are available in state courts.”<sup>539</sup> Indeed, Frankfurter’s “use of the remedial rights doctrine seems more for rhetorical emphasis than as a reaffirmance of the doctrine itself.”<sup>540</sup> In the decade following *Guaranty Trust*, the opinion’s “proper interpretation . . . [wa]s little aided by subsequent decisions.”<sup>541</sup> By 1958, a Harvard Law Review note was ambivalent on whether the equitable remedial rights doctrine still had force.<sup>542</sup>

Today, the scope and application of the “equitable remedial rights doctrine” remains mired in confusion. In 2010, a district court in Maine observed that “[w]hether federal courts sitting in diversity are bound by state limits on equitable remedies is a matter of some dispute.”<sup>543</sup> Nowhere is the confusion on more painful display than when litigants seek preliminary injunctions in diversity actions. This

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<sup>535</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 106 (1945).

<sup>536</sup> Cross, *supra* note 2, at 174.

<sup>537</sup> Crump, *supra* note 2, at 1240.

<sup>538</sup> *Past and Present*, *supra* note 14, at 842.

<sup>539</sup> *Equitable Remedial Rights Doctrine*, *supra* note 14, at 415–16.

<sup>540</sup> *Past and Present*, *supra* note 14, at 841.

<sup>541</sup> *Id.*

<sup>542</sup> Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513, 518–19 (1958).

<sup>543</sup> *In re Light Cigarettes Mktg. Sales Practices Litig.*, 751 F. Supp. 2d 183, 191 n.9 (D. Me. 2010).

Part outlines the confusion about preliminary injunctions and, drawing on the facilitative conception of federal equity, proposes a system of shifting presumptions to ameliorate it.

#### A. *The Malady*

Federal courts today are still grappling with the internal incoherence of *Guaranty Trust*. On the one hand, Frankfurter attempted to destroy the federal diversity court's decisional independence by placing it as "in effect, only another court of the State."<sup>544</sup> On the other hand, he seemingly preserved the federal diversity court's decisional independence by saying that it can "afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it."<sup>545</sup> There may be a direct line from this overt contradiction to the federal courts' confusion over preliminary injunctions.<sup>546</sup>

Federal courts have split for decades on whether state or federal law should govern the availability of preliminary injunctions in diversity actions.<sup>547</sup> To some, it is natural that federal law should govern. The interlocutory injunction merely prevents irreparable injury before a decision on the merits, and therefore cannot be outcome determinative. Many federal courts have adopted this line of

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<sup>544</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 108 (1945).

<sup>545</sup> *Id.* at 106.

<sup>546</sup> *See Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) ("To some degree, this conflict among the courts may be the result of two potentially inconsistent statements in *Guaranty Trust*.").

<sup>547</sup> *See, e.g., Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988) ("We recognize that federal courts analyzing the availability of preliminary injunctions in similar cases have come to contradictory conclusions."); *Kaiser Trading Co.*, 321 F. Supp. at 931 n.14 ("The courts are in conflict . . . as to whether state or federal law governs the issuance of an injunction."); *Am. Gen. Corp. v. NLT Corp.*, No. H-82-1434, 1982 WL 1332, at \*17 (S.D. Tex. July 1, 1982) (noting that "there is a split among the jurisdictions as to whether federal or state law governs the issuance of a preliminary injunction in a diversity action"); *U.S. Cable Television Grp., L.P. v. City of Osage City*, No. 91-4195-R, 1991 WL 201232, at \*2 (D. Kan. Sept. 5, 1991) ("The authorities are split on this issue."); *Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 487 F. Supp. 1248, 1260 (D. Md. 1980) (noting that "the authorities are split concerning whether federal law or state law governs the issuance of a preliminary injunction in a diversity action").



thought,<sup>548</sup> including the Second Circuit.<sup>549</sup> And this approach has pedigree: after all, the Supreme Court in *Brailsford*, acting on general equitable principles, enjoined the execution of a circuit court

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<sup>548</sup> See, e.g., *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 806 (2d Cir. 1981) (“State law does not govern the scope of the equity powers of the federal court; and this is so even when state law supplies the rule of decision.”); *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172–73 (4th Cir. 1988) (stating that federal law applies to preliminary injunctions in diversity cases); *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991) (applying federal procedure to determine whether the preliminary injunction was properly issued); *Absolute Activist Value Master Fund Ltd. v. Devine*, No. 2:15-cv-328-FtM-29MRM, 2017 WL 3188502, at \*4 (M.D. Fla. July 25, 2017) (“Federal law governs the issuance, and dissolution, of a preliminary injunction in a diversity action. It is state law, however, that determines whether injunctive relief is available for the given state cause of action or remedy.”) (citations omitted); *Tri-Dam v. Yick*, No. 1:11-CV-01301 AWI-SMS, 2016 WL 4061348, at \*5 (E.D. Cal. July 28, 2016) (stating that federal law applies “in the preliminary injunction context”); *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54, 57 (5th Cir. 1970) (“Neither the Federal Rules of Civil Procedure nor the Erie doctrine deprive Federal courts in diversity cases of the power to enforce State-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in the courts of the State.”); *Crossno v. Crossno*, No. 87–762, 1987 WL 13080, at \*1 (E.D. La. June 18, 1987) (“[P]laintiff is entitled to the equitable remedy of [temporary] injunction even though that remedy might not be available to a state court litigant.”); *Anselmo v. Mull*, No. CIV. 2:12–1422 WBS EFB, 2012 WL 5304799, at \*5 (E.D. Cal. Oct. 25, 2012) (“Courts have held . . . that federal, not state, standards govern issuance of a preliminary injunction when a federal court is sitting in diversity or exercising supplemental jurisdiction over state law claims.”); *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 957 (E.D. Cal. 1990) (“[F]ederal law provides the standards governing plaintiff’s motion for preliminary injunctive relief with respect to . . . her . . . state law claims.”); *Irving Tr. Co. v. Braswell*, 596 F. Supp. 1441, 1443–44 (S.D.N.Y. 1984); *U.S. Cable*, 1991 WL 201232, at \*2 (“[T]he Tenth Circuit has expressly indicated that federal law standards apply in determining whether a preliminary injunction should issue.”) (citing *Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1361 (10th Cir. 1990)); *Fed. Leasing*, 487 F. Supp. at 1260 (stating that federal law governs the issuance of a preliminary injunction in a diversity action), *aff’d*, 650 F.2d 495 (4th Cir. 1981); *Gen. Elec. Co. v. Am. Wholesale Co.*, 235 F.2d 606, 608 (7th Cir. 1956); *Cont’l Grp., Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 357 n.10 (3d Cir. 1980) (quoting *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1141 (3d Cir. 1977)); *Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co.*, 470 F. Supp. 1308, 1312 (N.D.N.Y. 1979).

<sup>549</sup> See, e.g., *Genovese Drug Stores, Inc. v. Conn. Packing Co.*, 732 F.2d 286, 288 n.1 (2d Cir. 1984) (noting that a district court sitting in diversity is not permitted “to ignore the federal law requirement that threatened irreparable injury

judgment pending determination of Georgia's common law claim.<sup>550</sup> But many other federal courts have held precisely the opposite: state law should govern the availability of preliminary injunctions in diversity litigation.<sup>551</sup> Faced with the split, the D.C. Circuit said that "it is not clear whether the court should look solely to the law of . . . the forum for this diversity suit, or whether it is able to draw on the independent equity power inherent in the federal courts."<sup>552</sup>

If only it were that simple. There are a couple of complicating factors. First, federal preliminary injunction requirements can incorporate state law. So, for example, federal law requires that the movant show "a reasonable probability of eventual success in the litigation," but the notion of "eventual success" can only be determined

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must be shown before a *preliminary* injunction may issue"); *Am. Brands, Inc. v. Playgirl, Inc.*, 498 F.2d 947, 949 (2d Cir. 1974).

<sup>550</sup> See Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 15–17 (2013) (classifying *Brailsford* as involving a preliminary injunction).

<sup>551</sup> See, e.g., *Sims*, 863 F.2d at 646; *Agnew v. Alicanto, S.A.*, 125 F.R.D. 355, 359 (E.D.N.Y. 1989) (explaining that New York law governs availability of a temporary restraining order in a diversity action.); *Am. Gen. Corp.*, 1982 WL 1332, at \*17 ("[T]he state law governing the right to [preliminary] injunctive relief must be applied in diversity cases . . ."); *Hudson Nat'l Bank v. Shapiro*, 695 F. Supp. 544, 548 (S.D. Fla. 1988) ("This diversity action requires this Court to apply Florida law in establishing whether or not the movant has established [entitlement to a preliminary injunction.]"); *Borman's, Inc. v. Great Scott Super Mkts., Inc.*, 433 F. Supp. 343, 346 (E.D. Mich. 1975) ("[In a preliminary injunction request,] it would appear entirely proper for the Court to look to state law to determine when and whether a showing of irreparable harm must be made."); *First 100, LLC v. Omni Fin., LLC*, No. 2:16-cv-00099-RFB-CWH, 2016 WL 2980673, at \*7 (D. Nev. May 23, 2016) ("Where (as here) the Court's jurisdiction is based on diversity of citizenship, the Court must apply state law regarding the availability of preliminary injunctive relief rather than federal law if the state law is outcome-determinative."); *Anglo-Am. Inv. Trust Ltd. v. Pearson*, 294 F. Supp. 1150, 1153 (E.D. Wis. 1969).

<sup>552</sup> *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 828 n.18 (D.C. Cir. 1984).

by reference to state law.<sup>553</sup> Thus, federal preliminary injunction requirements have “both federal and state aspects.”<sup>554</sup> Second, sometimes “the outcome is in large part determined at the preliminary injunction stage.”<sup>555</sup> A preliminary injunction can be “so bound up with the substantive rights of the party that an independent federal equitable remedy would interfere with the goals of *Erie*.”<sup>556</sup> A district court in 1970 argued that “the best approach would be to look to state law to determine if a preliminary injunction is permissible,” and then “look to federal law to determine whether the court should exercise its discretion.”<sup>557</sup>

It gets worse. Most courts are careful to distinguish between preliminary and permanent injunctions for the obvious reason that a permanent injunction is the conclusive determination of the claim.<sup>558</sup> At least one district court, however, has erroneously transposed the above mess concerning preliminary injunctions to the per-

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<sup>553</sup> *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1141 (3d Cir. 1977). In the Sixth Circuit, “[w]hile [federal courts] apply [their] own procedural jurisprudence regarding the factors to consider in granting a preliminary injunction, [they] apply [State] law to determine whether Plaintiff has met the first of these factors by demonstrating a substantial likelihood of success on the merits of his underlying diversity action.” *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007). The Eighth Circuit uses a four-factor federal balancing standard, but looks to state law for each factor. *See Safety-Kleen Sys., Inc. v. Hennkens*, 301 F.3d 931, 935–36 (8th Cir. 2002). *See also Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 956 (E.D. Cal. 1990) (“The above analysis is not meant to suggest that state law may not inform the court’s exercise of its equitable powers in determining whether preliminary injunctive relief is available in a particular case.”).

<sup>554</sup> *Sys. Operations, Inc.*, 555 F.2d at 1141.

<sup>555</sup> *Sims*, 869 F.2d at 647.

<sup>556</sup> *Friends*, 746 F.2d at 828 n.18.

<sup>557</sup> *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970). *Accord Anselmo v. Mull*, No. CIV. 2:12–1422 WBS EFB, 2012 WL 5304799, at \*6 (E.D. Cal. Oct. 25, 2012) (“In applying the federal injunction standard, courts recognize that state law would control on the issue of whether a plaintiff is entitled to seek injunctive relief on the claim. After concluding that a plaintiff is entitled to seek a preliminary injunction, however, courts often rely on the federal standard in exercising their discretion to determine whether to grant an injunction.”) (citations omitted).

<sup>558</sup> *See, e.g., Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988); *Sullivan*, 731 F. Supp. at 956; *Tri-Dam v. Yick*, No. 1:11-CV-01301 AWI-SMS, 2016 WL 4061348, at \*5 (E.D. Cal. July 28, 2016).

manent injunction context, concluding that “even if a permanent injunction is permissible under state law, this Court may still exercise its discretion to deny the permanent injunction.”<sup>559</sup> This is a startling, pre-*Erie* assertion of independent federal authority to refuse final relief that state law would give.

### B. *The Tonic*

The existence of facilitative federal equity demonstrates that heterogeneity was not a necessary consequence of *Erie*. Heterogeneous and facilitative federal equity are both oriented toward the states. Heterogeneity enacted a strong turn to the states by situating the federal diversity courts as state courts. The orientation of facilitative federal equity to the states may be less pronounced, but it was effective in maintaining the role and status of the states in the early years of the Republic, while retaining some decisional independence in the federal courts.

Facilitative federal equity provides a key for resolving the contradiction in *Guaranty Trust* because it plausibly walked a fine line between maintaining a modicum of federal decisional independence, and being state-regarding. And it walked this fine line by capitalizing on equity’s classic distinction between the exclusive jurisdiction (trust enforcement is the usual example) and the jurisdiction in aid of legal rights (*quia timet* injunctions, bills of discovery, bills of interpleader, and so on). Facilitative federal equity was state-regarding especially when acting in aid of legal rights: *Brailsford* was a preliminary injunction, *Maxfield* a bill of discovery.

If preliminary or auxiliary equitable relief in aid of a legal right was granted, courts of equity often had to decide whether to take jurisdiction over the whole cause of action or to relinquish substantive jurisdiction to the common law. Riding circuit in 1831, Justice Baldwin put the problem as follows:

When the jurisdiction of equity attaches, the extent of its exercise depends on the nature and object of the suit, if required only as preliminary, or auxiliary to a legal remedy, its power ceases when that is effected by the aid of equity; a subpoena in equity does not

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<sup>559</sup> *United Nat’l Maint., Inc. v. San Diego Convention Ctr. Corp.*, No. 07cv2172 AJB, 2012 WL 3861946, at \*4 (S.D. Cal. Sept. 5, 2012).

. . . draw from law, the cognizance of legal rights or legal remedies, when an auxiliary relief alone was called for, . . . or be abused as a pretext for bringing causes proper for a court of law into equity.<sup>560</sup>

If a bill of discovery, for example, “involves the essence and merits of the whole case,” then a court of equity would make a final decree.<sup>561</sup> Similarly, if a contract was made by fraud, and the common law provided no relief, then the court of equity, “having thus possession of the principal question, makes a final decree on the question and equity of the whole case.”<sup>562</sup> The “plain and intelligible” rule, said Baldwin, is that if a court of equity takes cognizance of “the cause itself,” then it “would not send the party back to law to settle [the] incidents.”<sup>563</sup> Conversely, “if the incidents only are before [the equity court],” then it would not “take the substance of the controversy from [common] law.”<sup>564</sup>

This provides a useful analogy and guide for a steadier application of the equitable remedial rights doctrine. Given the constraints of *Erie* and *Guaranty Trust*, the doctrine must be limited. Plainly, the requested equitable relief cannot involve “the essence and merits of the whole case”; otherwise, the doctrine would swallow *Erie* whenever equitable relief is requested.<sup>565</sup> To appropriate Baldwin, then, the equitable remedial rights doctrine depends on the nature and object of the relief requested. It can extend no further than relief that facilitates, or is preliminary or auxiliary to, the state-created right.<sup>566</sup> As with equitable doctrine generally, this is a case-by-case inquiry. But it is possible to posit a system of rebuttable presumptions that implement the broad principles.

The default position is commanded by *Guaranty Trust*: state law governs when equitable relief is requested in a federal court enforcing a state right.<sup>567</sup> That default presumption can be rebutted only in

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<sup>560</sup> *Baker v. Biddle*, 2 F. Cas. 439, 446 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1831) (No. 764).

<sup>561</sup> *Id.* at 446–47.

<sup>562</sup> *Id.* at 447.

<sup>563</sup> *Id.*

<sup>564</sup> *Id.*

<sup>565</sup> *Id.* at 446–47.

<sup>566</sup> *See id.*

<sup>567</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 108–10 (1945).

limited circumstances: federal standards apply if the requested equitable relief is preliminary or auxiliary to, or merely facilitates the determination of, the state-created right.<sup>568</sup> This category of equitable relief is ascertainable and limited.<sup>569</sup> It excludes remedies like specific performance and defenses like laches, because those touch the essence and merits of the state cause of action.<sup>570</sup> It includes discovery and other judicial housekeeping matters.<sup>571</sup> Generally speaking, it also includes the preliminary injunction, which merely preserves the parties' relative positions pending a merits decision.<sup>572</sup> Accordingly, if the equitable relief requested is merely preliminary, auxiliary, or facilitative, then the presumption arises that federal standards govern. That presumption, in turn, can be rebutted if the requested equitable relief, although ordinarily preliminary, auxiliary, or facilitative, is in all the circumstances functionally equivalent to final relief.

There is limited force to the obvious counterargument that this system of shifting presumptions simply transfers the problem. The objection says that rather than debate the scope of the equitable remedial rights doctrine, courts will simply debate the vagueness of facilitative relief and functional equivalence of final relief. The first response is that the system of shifting presumptions neither can nor should operate as an algorithm to eradicate vagueness. But more importantly, the set of shifting presumptions ameliorates the vagueness problem by structuring the analysis. It implements the proper narrow scope of the equitable remedial rights doctrine. Cases have given content to the equitable jurisdiction in aid of legal rights; the category of preliminary, auxiliary or facilitative relief is relatively determinate.

Nor do genuine preliminary injunctions implicate the twin aims of *Erie*. This is not to deny that different law governing the availability of preliminary injunctions in state and federal court may generate reasons to forum shop. Perhaps genuine preliminary injunctions which do not effect final relief may form the basis of settlement, and plaintiffs will choose the venue where they are more

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<sup>568</sup> See *Baker*, 2 F. Cas. at 446–47.

<sup>569</sup> See *id.* at 443–44.

<sup>570</sup> See *id.* at 452.

<sup>571</sup> *Past and Present*, *supra* note 14, at 843–45.

<sup>572</sup> *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

likely to obtain that leverage. (This is a plausible empirical hypothesis.) In the eyes of *Erie*, however, some forum shopping is more equal than others. A plethora of practitioner literature advises whether to bring suit in state or federal court; many of these forum-shopping strategies are beyond *Erie*'s gaze.<sup>573</sup> *Erie* requires the application of the state law of negligence (including contributory negligence),<sup>574</sup> conflict of laws,<sup>575</sup> state statutes of limitation and rules about tolling,<sup>576</sup> the enforceability of contractual arbitration clauses,<sup>577</sup> state damages caps,<sup>578</sup> and the standard of review of jury verdicts.<sup>579</sup> In other words, *Erie* requires the application of state law that speaks to the existence, nature, or size of ultimate liability as deliberated on, and determined by, the federal diversity court. A genuine preliminary injunction—issued provisionally on partial or scant information and possibly unsatisfactory evidence—does not speak to the ultimate issue. Its use by parties as a bargaining chip to extract a favorable outcome during settlement negotiations should not affect the substantive judicial determination of the state-created right. A federal diversity court's ultimate merits decision should not be responsive to a party's settlement negotiation strategy.

An appealing counterargument runs as follows: remedies are substantive; *Erie* requires federal diversity courts to apply state substantive law; therefore, *Erie* requires federal diversity courts to always apply state law when deciding whether to give any relief.<sup>580</sup> This would be a perfectly valid syllogism if "substantive" had a fixed meaning. But as Frankfurter observed in *Guaranty Trust*, the meaning of "substance" depends on "the particular problem for which it is used."<sup>581</sup> To be sure, remedies are substantive because

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<sup>573</sup> See, e.g., James J. Dillon & Ericka L. Harper, *Countering Plaintiffs' Jurisdictional Maneuvers: Forum Shopping for Procedural Advantage*, 45 (7) DRI FOR THE DEFENSE 50 (2003).

<sup>574</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69, 72–73, 80 (1938).

<sup>575</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

<sup>576</sup> *Guar. Tr. Co. v. York*, 326 U.S. 99, 110 (1945); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533–34 (1949); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980).

<sup>577</sup> *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956).

<sup>578</sup> *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430–31 (1996).

<sup>579</sup> *Id.* at 439.

<sup>580</sup> See, e.g., Morley, *supra* note 358, at 35, 48–51.

<sup>581</sup> *Guar. Tr.*, 326 U.S. at 108.

they give practical content to primary rights and duties.<sup>582</sup> But that is the start, not the end, of the *Erie* inquiry. So, for example, the law governing permanent injunctions, specific performance, and the measure of damages is substantive for *Erie* purposes. But it does not necessarily follow from the existence of state substantive law of preliminary injunctions that *Erie* requires federal diversity courts to apply that law. As I have argued, some genuine preliminary injunctions are not outcome-determinative in light of *Erie*'s twin aims. That does not deny that preliminary injunctions are *remedially* substantive; it only denies that *all* preliminary injunctions are substantive for *Erie* purposes.

Genuine preliminary injunctions are, for *Erie* purposes, analogous to a federal diversity court's inherent power to sanction bad-faith conduct free of the constraints of state law. In *Chambers v. NASCO, Inc.*, Justice White for the Court held that the assessment of attorney's fees as a sanction for bad-faith conduct did not implicate *Erie*'s twin aims.<sup>583</sup> The imposition of sanctions "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation."<sup>584</sup> And "*Erie* guarantees a litigant that if he takes his state law cause of action to federal court . . . the result in his case will be the same as if he had brought it in state court," but "[i]t does not allow him to waste the court's time and resources with cantankerous conduct, even in the unlikely event a state court would allow him to do so."<sup>585</sup> Sanctions for conduct during litigation did not implicate substantive state policy, but "vindicated judicial authority."<sup>586</sup> Likewise, genuine preliminary injunctions serve an important function for the vindication of judicial authority. They preserve the subject matter of the dispute to prevent the judicial process becoming nugatory. Indeed, "the most compelling reason in favor of entering a Rule 65(a) order is the need to

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<sup>582</sup> See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1–3 (4th ed. 2010); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 167 (2008).

<sup>583</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52–53 (1991).

<sup>584</sup> *Id.* at 53.

<sup>585</sup> *Id.* (quoting *NASCO, Inc., v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 706 (5th Cir. 1990)).

<sup>586</sup> *Id.* at 55 (quoting *NASCO*, 894 F.2d at 705).



prevent the judicial process from being rendered futile by defendant's action or refusal to act."<sup>587</sup> A "preliminary injunction is appropriate whenever the policy of preserving the court's power to decide the case effectively outweighs the risk of imposing an interim restraint before it has done so."<sup>588</sup> In other words, a federal court is entitled to apply federal law to protect the integrity of the federal judicial process.<sup>589</sup>

An example will assist. In *Sims Snowboards, Inc. v. Kelly*, the Ninth Circuit vacated a preliminary injunction that had enjoined snowboarding icon Craig Kelly from using or endorsing any snowboard other than a Sims, and from using or endorsing any accessory products identified as Burton products.<sup>590</sup> The district court's injunction was based on an anticipated breach of a personal service contract, even though a California statute prohibited state courts from issuing such injunctions.<sup>591</sup> The Ninth Circuit focused on California's statutory policy, and held that "[t]he general equitable powers of federal courts should not enable a party suing in diversity to obtain an injunction if state law clearly rejects the availability of that remedy."<sup>592</sup> The Court observed that "the outcome is in large part determined at the preliminary injunction stage," because "[i]f Kelly is enjoined from competing for Burton, Sims has accomplished what California has prohibited—the enforcement of a personal service contract."<sup>593</sup>

The *Sims* opinion gestured in the right direction. But it conflated two separate issues: whether a preliminary injunction would effect final relief, and whether a preliminary injunction would contravene California's statutory policy. The opinion suggested that the preliminary injunction is outcome-determinative because a state court could not give it.<sup>594</sup> That cannot be true generally: purely procedural equitable remedies (for example, discovery) are not outcome-determinative in federal court just because state courts cannot give them.

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<sup>587</sup> 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2017).

<sup>588</sup> *Id.*

<sup>589</sup> *See NASCO*, 894 F.2d at 705–06.

<sup>590</sup> *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 644, 647 (9th Cir. 1988).

<sup>591</sup> *Id.* at 645, 647.

<sup>592</sup> *Id.* at 647.

<sup>593</sup> *Id.*

<sup>594</sup> *See id.* at 646–47.

The real question is whether, in all the circumstances of the case, an ordinarily facilitative equitable remedy would in fact effect final relief. And this is the question that is ultimately posed by the system of shifting presumptions. First, although state law usually governs equitable relief when state rights are enforced in federal court, a preliminary injunction is designed merely to preserve the relative positions of the parties pending a merits determination. Under the equitable remedial rights doctrine, federal law governs temporary injunctions that prevent irreparable injury pending a decision on the merits. But second, in *Sims* it is contestable whether the district court's preliminary injunction in fact effected final relief. This cannot be answered by observing that a state court would have no authority to issue such facilitative relief. It can only be answered, in classic equitable fashion, by considering all the circumstances of the case.<sup>595</sup>

#### CONCLUSION: OUR EQUITY

This Article has attempted to capture the distinctive course of American equity. On one level, it describes the unique strain of American equity produced by vesting chancery jurisdiction in a new federal judiciary. It is really a tale of three equities. The first, homogeneous equity, once exhausted federal equity, but today it operates when enforcing federal rights or applying the equitable remedial rights doctrine. This equity is strong and expansive, claiming direct lineage to the English High Court of Chancery of the eighteenth century. Nowhere is the power of this equity clearer than in public law. At the turn of the twentieth century, the federal courts brought to bear the full power of equity in a federalism where the central gov-

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<sup>595</sup> The facts reported in *Sims* are insufficient to answer this question. To understand whether the preliminary injunction is really a permanent one, it would be necessary to know the precise terms of the contract. It could be, for example, that a brief injunction enjoining Kelly from endorsing a Burton snowboard, without requiring him to endorse a Sims snowboard, would be a satisfactory and temporary way to prevent irreparable injury pending a final merits determination. But on the facts reported in *Sims*, we can only speculate. See generally *Sims*, 863 F.2d at 643.

ernment is supreme in the valid exercise of its constitutional authority.<sup>596</sup> Indeed, this equity got so strong that abstention doctrines were trotted out to limit its power (which, incidentally, parallels the English High Court of Chancery's cautious use of the common injunction after vanquishing the common law).<sup>597</sup> Justice Black called abstention an example of "Our Federalism," because it is sensitive to the legitimate interests and activities of the states.<sup>598</sup>

The second and third conceptions of equity—what we might collectively term *Our Equity*—are characterized by an important pivot towards state law. Until now, this equity was thought to have been exhausted by a muscular heterogeneity. *Guaranty Trust* did not require that federal equity courts enforcing state-created rights be only *sensitive* to the legitimate interests and activities of the state; it required that they *adopt* those legitimate interests and activities *for themselves*. Perhaps *Guaranty Trust* represents blind deference to the states against which Black cautioned. This Article suggests that *Guaranty Trust* introduced a deep tension into the work of federal equity courts enforcing state-created rights. But this Article also shows that Our Equity need not eliminate as far as constitutionally possible the separate identity of the federal equity courts. Indeed, there was another conception of federal equity, which I called the *facilitative* conception and which, just like Our Federalism, was born in the early struggling days of our Union. It, too, was sensitive to the legitimate interests and activities of the state, and did not unduly interfere with them.

On a second level, this Article is about legal doctrine. It attempts to provide real guidance to federal courts. If a preliminary injunction

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<sup>596</sup> See Merrill, *Article III, Agency Adjudication, and the Origins of Appellate Review*, *supra* note 191, at 949 ("After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action.") (citations omitted); Monaghan, *A Cause of Action, Anyone?*, *supra* note 520, at 1825 n.122 ("When Congress conferred general federal-question jurisdiction in 1875 . . . the inclusion of general equity authority resulted in a flood of litigation."); see, e.g., *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110–11 (1902).

<sup>597</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>598</sup> *Id.*

is an extraordinary remedy, then we should get the governing law straight. The conditions of the exercise of a federal diversity court's extraordinary remedial power should be well understood. This is not just a preliminary injunction problem, but an equitable remedial rights problem. There is, for example, a split on whether state or federal law applies to an award of attorney fees. Even though the Supreme Court suggested in 1975 that state law should govern,<sup>599</sup> the First Circuit has since said otherwise, at least for federal class actions.<sup>600</sup> Moreover, this Article is about the role that legal doctrine plays to serve political ends or maintain delicate political balances. Collins persuasively showed the extent to which Frankfurter was motivated by his progressivism.<sup>601</sup> Facilitative federal equity was animated by a desire to ease, so far as it could, the suspicion with which the states viewed the early federal government. In fact, before 1809, Our Equity played a part in the construction of the United States.

On a third level, this Article raises questions about the nature and history of equity. For example, scholarship discussing individual American colonies can have a "best in show" quality. One scholar says that Maryland was different to other colonies because it recognized equity at an early date;<sup>602</sup> another that equity in South Carolina was especially and impressively advanced;<sup>603</sup> and another that "[t]here can be no doubt that Virginia courts exercised a more advanced form of Equity jurisdiction than did the courts in other colonies," including South Carolina.<sup>604</sup> A systematic evaluation of colonial equity would be fruitful.

This Article also raises persistent questions about the desirability of equity's preservation in the United States. In Federalist 83,

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<sup>599</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975).

<sup>600</sup> *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 520, 522 n.5, 522–23 (1st Cir. 1991); *see also In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1362 n.32 (S.D. Fla. 2011).

<sup>601</sup> *See Collins, A Considerable Surgical Operation*, *supra* note 9, at 338; Collins, *Government by Injunction*, *supra* note 312, at 351–56.

<sup>602</sup> *See Steiner*, *supra* note 111, at 227.

<sup>603</sup> *See Meriwether*, *supra* note 115, at 71.

<sup>604</sup> Singleton, *supra* note 116, at 150.

Hamilton saw great advantages to the separation of law and equity.<sup>605</sup> Iredell agreed.<sup>606</sup> A minority of contemporary American scholars defend the law/equity distinction,<sup>607</sup> or at least lament its dissolution.<sup>608</sup> But the dominant view is for fusion.<sup>609</sup> Today the distinction between law and equity is so antiquated that a prominent text on the Federal Rules of Civil Procedure can assert that “the only respect in which the ancient distinctions between law and equity have continued to be significant since the merger of the two federal civil justice systems in 1938 is with regard to the scope of the jury trial right.”<sup>610</sup> Douglas Laycock famously argued that “[e]quity is ordinary, not extraordinary, in remedies, procedure, and substance,” and “[t]he distinctive traditions of equity now pervade the legal system.”<sup>611</sup> This raises important questions. Should the equitable remedial rights doctrine be preserved at all? Is equity really an enforceable body of intelligible doctrine? Or is it no more than a space for normative discourse, and, if so, is it desirable to preserve that normative vocabulary?

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<sup>605</sup> See THE FEDERALIST NO. 83, at 505 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>606</sup> See *Sims' Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 464–65 (1799) (Iredell, J., concurring) (“It is of infinite moment, in my opinion, that principles of law and equity should not be confounded, otherwise inextricable confusion will arise . . .”).

<sup>607</sup> See generally Bray, *supra* note 110, at 997–998.

<sup>608</sup> See John C.P. Goldberg & Henry E. Smith, *Foreword: Letter from America*, 6 UK SUP. CT. Y.B. 169, 170–72 (2014–2015) (“Would that these were the problems we face in the United States! Fusion has proceeded much further here, and has gone hand-in-hand with the rise of Legal Realism and the corresponding decline of attention to basic doctrinal distinctions.”).

<sup>609</sup> See Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53–54 (1993).

<sup>610</sup> 9 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2302 (3d ed. 2017).

<sup>611</sup> Laycock, *The Triumph of Equity*, *supra* note 609, at 53–54. Accord LAYCOCK, IRREPARABLE INJURY RULE, *supra* note 253, at 5.