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Equity's Constitutional Source

ABSTRACT. Over the past three decades, the Supreme Court has led a historicist revolution in equity jurisprudence. In a series of decisions known as the "new equity" cases, the Court has sought to limit federal equitable remedies to the forms of relief typically issued by the English Court of Chancery at the Founding. It has read this stringent limitation into various federal statutes that refer to equity—from the Employment Retirement Income Security Act to the Judiciary Act. But these cases miss the mark on their own quasi-originalist terms. By focusing on statutes as the basis for the judiciary's power to grant equitable relief, the Court has overlooked the underlying source of that power: the provision of Article III that extends "[t]he judicial Power" to cases in "Equity."

This Article uncovers federal equity's constitutional source. Applying the Supreme Court's historically inflected methodology, it argues that "[t]he judicial Power" in "Equity" is best understood as vesting the federal courts with inherent power to grant equitable relief. That power is coextensive with the remedial authority of the Founding-Era English Chancellor. Put simply, Article III empowers federal courts to apply the system of equitable remedies administered by the Court of Chancery in 1789 as the baseline of federal equity power. Thus, absent express congressional action (which is rare), it is Article III itself—not federal statutes—that defines the limits of federal equity.

Returning equity to its constitutional source suggests that the judiciary has greater leeway to develop the federal system of equitable remedies than the Court's time-bound new equity cases seem to permit. To be sure, the remedial power incorporated by Article III was not illimitably flexible. Founding-Era Chancellors were bound by settled rules from which they did not depart absent legislative authorization. But nor was it fixed in time. Chancery could elaborate the system of equitable remedies in a gradual, accretive, precedent-based way. Article III vests an equivalent power in the federal courts. By ignoring this power and instead tying federal equity to particular statutes, the Court has, in the name of fidelity to history, adopted an ahistorical, cramped understanding of the federal equity power.

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INTRODUCTION

Equity lives. Despite generations of academic derision, the "absurd,"[1] "irrelevant,"[2] and "obsolete"[3] distinction between law and equity has only grown in importance — particularly with respect to the equitable remedies available in federal court. Over the past thirty years, the Supreme Court has handed down nearly two dozen opinions shaping access to equitable relief, leading one commentator to observe that we are in the midst of "an unexpected and striking revival of equity."[4] And this trend shows no sign of abating. If anything, it is accelerating: in the last three Terms, the Court has taken multiple merits cases implicating federal equity power.[5]

A major methodological development has accompanied this revival of equity: the historical turn. When faced with questions about equitable remedies, the Court now looks to history.[6] It relies on equity practice as developed "in the days of 'the divided bench,' before law and equity merged," particularly the doctrines of the Founding-Era English Court of Chancery, to demark the scope of federal equitable remedies.[7] Under this approach, the Court considers whether the precise remedy sought was "traditionally accorded"[8] by the English Chancellor in 1789 or, more vaguely, "typically available in equity."[9] If not, the Court denies relief. Critics of this methodology have disparaged it as "frozen in time"[10]

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1. Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY iii, iv (Edward D. Re ed., 1955).
2. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 54 (1993).
3. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 412 (1906).
4. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1044 (2015).
5. *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021); Liu v. SEC, 140 S. Ct. 1936 (2020); DHS v. New York, 140 S. Ct. 599 (2020).
6. *See* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1271-73 (2020); Bray, *supra* note 4, at 1008-09.
7. US Airways, Inc. v. McCutchen, 569 U.S. 88, 94-95 (2013) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)). For further examples, see *Jackson*, 142 S. Ct. at 535; *Liu*, 140 S. Ct. at 1942-47; *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391-93 (2006); *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 212-13 (2002); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999); and *Mertens v. Hewitt Associates*, 508 U.S. 248, 256-57 (1993).
8. *Grupo Mexicano*, 527 U.S. at 319.
9. *McCutchen*, 569 U.S. at 94 (quoting *Mertens*, 508 U.S. at 256).
10. Bray, *supra* note 4, at 1010. For further criticism, see *infra* note 13.

and advocated a discretionary, "dynamic equity jurisprudence."[11] Nevertheless, like the Court's revival of equity in general, its reliance on history shows no sign of abating. On the contrary, its historically inflected methodology has attracted an unusual level of support across ideological lines.[12]

The Supreme Court's focus on equity and its corresponding historical turn have sparked a robust scholarly response.[13] It is easy to see why. A judge's powers are at their apex in equity: without the constraint of a jury, she can order parties, including government officers, to take or refrain from specific action on pain of contempt.[14] Over the decades, doctrinal shifts touching on this potent fount of authority have attracted sustained attention, as scholars have clashed over labor

11. *Grupo Mexicano*, 527 U.S. at 337-42 (Ginsburg, J., concurring in part and dissenting in part); *see also Great-W.*, 534 U.S. at 232-33 (Ginsburg, J., dissenting) (arguing that equity "was and should remain an evolving and dynamic jurisprudence"); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 174 (2010) (Stevens, J., dissenting) (asserting that a court's "function" in equity is "to mould each decree to the necessities of the particular case" (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944))).

12. *See, e.g.*, *Liu*, 140 S. Ct. at 1942-47 (Sotomayor, J.); *eBay*, 547 U.S. at 390 (Thomas, J.); *McCutchen*, 569 U.S. at 94-95 (Kagan, J.); *Grupo*, 527 U.S. at 318-19 (Scalia, J.); *see also* Bray, *supra* note 4, at 1036 (noting that as of 2015 all nine sitting Justices had shown a willingness to "look[] to equity's past as a guide for equity's present.").

13. *See, e.g.*, David C. Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 MONT. L. REV. 159, 160-72 (2021) (arguing that federal equity is "stuck in time"); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1137 (2021) (condemning the "polarization between formalism and contextualism [that] is characteristic of the U.S. Supreme Court's 'new equity' jurisprudence"); Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy Under the Federal Securities Laws*, 105 CORNELL L. REV. 1611, 1650 (2020) (expressing surprise that "there are planets on which the inhabitants continue to care — deeply — about *exactly* what English Chancery was getting up to in 1789"); Bray, *supra* note 4, at 1010-11 (criticizing *Grupo*); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012) (lamenting the "cataclysmic effect" of *eBay*); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 231-55 (2003) (attacking the Court's reliance on history in equity); 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. 1317, 1318-21 (2003); Stephen B. Burbank, *Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power — A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292-97 (2000).

14. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 265 (4th ed. 2012); *see also* Samuel L. Bray, *A Little Bit of Laches Goes a Long Way*: *Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 VAND. L. REV. EN BANC 1, 16 (2014) ("[E]quitable remedies . . . represent the extremities of judicial power.").

injunctions,[15] *Ex parte Young* relief,[16] and structural reform injunctions.[17] Even so, the sheer volume of recent commentary on equitable remedies is remarkable. To take just one example, the debate over the permissibility of nationwide injunctions has itself become a veritable subfield of federal jurisprudence, generating reams of scholarly criticism[18] and judicial opinions.[19]

Still, there is something curious about this outpouring of interest in equity. Thus far, courts and commentators have largely overlooked the only reference to equity in the original Constitution: the provision of Article III that "extend[s]" the "judicial Power" of the United States to "Cases" in "Equity."[20] And although a few Justices have recently alluded to this provision,[21] the Court as a whole has yet to address its significance. Instead, most of the Court's so-called "new equity" cases have been framed as questions of statutory interpretation, in which the

15. *See, e.g.*, FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

16. *See, e.g.*, Andrew S. Oldham & Adam I. Steene, The *Ex Parte Young* Cause of Action: A Riddle, Wrapped in a Mystery, Inside an Enigma (2022) (unpublished manuscript), https://ssrn.com/abstract=4204132 [https://perma.cc/SYP2-WS57]; Pfander & Wentzel, *supra* note 6, at 1271-82; Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 935-41 (2019); John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 990-91 (2008).

17. *See, e.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1387-89 (2007); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1121-24 (1996); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281-84 (1976).

18. *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1123 (2020) [hereinafter Sohoni, *The Power to Vacate a Rule*] (calling this debate a "maelstrom"). For a sampling of scholarly commentary, see Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 888-93 (2020); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 922-30 (2020) [hereinafter Sohoni, *Lost History*]; Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 2-7 (2019); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 68-74 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1067-70 (2018); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418-24 (2017); and Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2096-2101 (2017).

19. *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55, 55-57 (2020) (collecting cases).

20. U.S. CONST. art. III, § 2. For a discussion of why I focus on these terms, see *infra* Part I.

21. *See* DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); Trump v. Hawaii, 138 S. Ct. 2392, 2425-26 (2018) (Thomas, J., concurring); Amy Coney Barrett, Assoc. Just., U.S. Sup. Ct., The Nature of Federal Equity Power, Keynote Address at the Notre Dame Law Review's 2022 Federal Courts Symposium (Feb. 14, 2022), https://www.youtube.com/watch?v=noLA-z-SW5w [https://perma.cc/2NM2-RUMC].

Justices closely parse the text of federal statutes to determine the equitable remedies they authorize.[22] Scholars have reacted accordingly, focusing their analyses on statutory grants of and limits on federal equity power.[23] As a result, the dimensions of the "judicial Power" in "Equity" are a mystery. Indeed, the few commentators who have discussed this constitutional reference to "Equity" have mostly expressed uncertainty about its import.[24] Recently, however, a number of

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22. *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1940-46 (2020) (interpreting "equitable relief" in the Securities Act of 1933); US Airways, Inc. v. McCutchen, 569 U.S. 88, 91-95 (2013) (interpreting "appropriate equitable relief" in the Employment Retirement Income Security Act (ERISA)); eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 390-92 (2006) (delimiting the scope of injunctive relief available under the Patent Act); Grupo Mexicano de Desarrollo, S.A., v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (interpreting the phrase "all suits . . . in equity" in the Judiciary Act of 1789).

23. By and large, these scholars have not questioned the Court's statutory approach or even mentioned Article III's reference to "Equity." Instead, most have responded to the new equity cases on their own terms by assuming that federal statutes are the appropriate focus of analysis. *See, e.g.*, Gabaldon, *supra* note 13, at 1648 (adopting the Court's position that "the definition of 'equitable' simply is a question of statutory meaning for purposes of the particular statute under consideration"); Sohoni, *The Power to Vacate a Rule*, *supra* note 18, at 1126-27 (arguing that the Administrative Procedure Act (APA) authorizes nationwide injunctions); John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37, 41-47 (2020) (arguing the opposite); Clopton, *supra* note 18, at 16 (citing *Grupo Mexicano*'s interpretation of the Judiciary Act for the proposition that "the equitable powers of federal courts are to be traced to the history of equity"); Bray, *supra* note 18, at 420-21, 473 (arguing that the Judiciary Act prohibits federal courts from awarding nationwide injunctions); Gergen et al., *supra* note 13, at 214-19; Langbein, *supra* note 13, at 1318-19 (interpreting the phrase "equitable relief" in ERISA); Burbank, *supra* note 13, at 1296 (expressly "evaluat[ing] the opinions in *Grupo Mexicano* on their own terms"). That said, a few commentators have offered more detailed defenses of this assumption. *See, e.g.*, Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 652-61, 674-76 (2015) (tracing federal equity power to the Process Act of 1792); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121-30 (1998) (rooting the federal courts' power to enjoin unlawful administrative action in the Judiciary Act of 1789). For further discussion of these arguments, see *infra* notes 283 and 314.

24. *See, e.g.*, Bray, *supra* note 14, at 16 n.87 (noting that "the Constitution itself refers to a distinction between law and equity" but admitting that "the implications of these references are unclear"); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 861 n.652 (2001). Of the small number of scholars who have addressed the term "Equity" directly, most have focused narrowly on its relevance to specific forms of relief. *See generally, e.g.*, Yoo, *supra* note 17 (addressing this issue in the context of structural reform litigation). A few others have maintained that Article III authorizes the courts to grant equitable remedies, but their analyses are fairly conclusory. *See, e.g.*, Vladeck, *supra* note 13, at 162 (claiming baldly that "[t]here is no question that the framers of the Constitution intended federal courts to have broad equitable authority"); Rendleman, *supra* note 18, at 916 (asserting, without discussion, that Article III's grant of "subject matter jurisdiction

critics have raised alarm that application of the Court's "equitable originalism" to Article III might endanger core tenets of modern constitutional litigation, such as the availability of injunctive relief against unconstitutional state action under *Ex parte Young*.[25] But they, too, have yet fully to engage the issue by analyzing the terms of Article III under the Court's historical approach.

This Article begins to fill that gap by examining Article III's reference to "[t]he judicial Power" in "Equity" through the lens of the historical turn.[26] It asks what application of the Court's historicist methodology to those terms might mean for the equity power of federal courts. The thesis is straightforward: as originally understood, "[t]he judicial Power" in "Equity" includes an inherent power to administer a system of equitable remedies that is coextensive with the remedial authority of the English Court of Chancery in 1789. Put differently, applying the historical turn to Article III suggests that it incorporates the system of remedies that was being administered by the Founding-Era English Chancellor as the baseline of federal equity power.

I am careful in using the term "baseline." Like nearly all inherent judicial powers, the Article III equity power vests in each federal court only when it is created and granted jurisdiction by Congress.[27] As a result, it is subject to broad congressional control.[28] In other words, Article III sets up a constitutional default rule: if Congress creates federal courts and grants them jurisdiction, those courts become possessed of the authority inherent in "[t]he judicial Power" in "Equity" unless Congress expressly limits or expands upon that baseline.

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over 'all Cases, in Law and Equity'" includes the "power to issue the equitable remedy of an injunction"); Frost, *supra* note 18, at 1080 ("The 'judicial Power' includes the power to issue both legal and equitable remedies, but the text of Article III does not spell out the scope of those remedies." (footnote omitted)). Recently, John Harrison has taken a different tack, arguing that "Article III does not adopt the principles of equity or empower courts to do so." John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911, 1923 (2022). Instead, he avers, equity remained a body of unwritten law when the Constitution was adopted, which the federal courts were permitted to apply in appropriate cases. *See* Harrison, *supra*. For a discussion of the relationship between Harrison's nuanced argument and my own, see *infra* notes 317, 480.

25. *See* Pfander & Wentzel, *supra* note 6, at 1273; Sohoni, *Lost History*, *supra* note 18, at 928; *see also* Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2048-54 (2022) (warning that adopting a historical or originalist reading of Article III's reference to "Equity" could limit congressional authority to authorize novel forms of equitable relief).

26. U.S. CONST. art. III, § 2.

27. *See* Michaelson v. United States *ex rel.* Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65-66 (1924).

28. *See* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (noting that Congress can withhold equity jurisdiction "in the exact degrees and character which to Congress may seem proper" (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845))).

Recovering Article III as a primary source of federal equity power has potentially profound implications. For one, it suggests that courts and commentators might be missing the point by framing debates over federal equitable remedies as purely questions of statutory interpretation. Of course, some statutory basis is required for the federal courts to issue relief in equity cases, as the courts generally cannot exercise *any* inherent powers without a statutory grant of jurisdiction.[29] But most of the time Congress does no more than that—it simply grants federal courts jurisdiction over a class of equity cases. Only rarely does it limit, augment, or alter the set of federal equitable remedies. Rather, Congress typically leaves the constitutional default remedies in place. Thus, in the mine-run of equity cases, federal courts grant remedies pursuant not to statutory authority but to their inherent power under Article III. Attempting to demark the scope of federal equity power by interpreting statutory text is therefore almost always a futile endeavor. It is simply the wrong place to look.

The prevailing focus on statutes is also misguided in how it applies equitable originalism. As originally understood, Article III vests the federal courts with an equity power considerably different from what the Court has interpreted most federal statutes to confer. To be sure, the remedial system administered by the Founding-Era Court of Chancery was not the dynamic, flexible, and discretionary form of justice that some modern commentators have advocated.[30] But neither was it frozen in time; the Chancellor was not categorically limited to granting only those exact remedies that his forebears had issued. Reality lay somewhere between these two extremes. At the Founding, English equity adhered to a system that this Article calls "precedent-based equity." Under that system, the Chancery was governed by—and did not depart from—a core set of rules. But it could still develop, elaborate, and modestly update the law of equity by accretion of precedent—that is, by applying those core rules to new factual and legal contexts. Only avulsive changes to equity jurisprudence required legislative approval from Parliament.

This history indicates that the federal courts have greater leeway to adapt the federal system of equitable remedies than the Supreme Court's statute-based doctrine seems to permit. The determinative question is not whether a specific form of equitable relief—or a nearly identical analog—was issued by the Founding-Era Chancellor. Instead, a remedy is permissible if (1) it is not inconsistent with any settled rules of equity that obtained at the Founding and (2) one can

29. The exception is those powers exercised by the Supreme Court in its original jurisdiction. *See* California v. Arizona, 440 U.S. 59, 65 (1979).

30. *See, e.g.*, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 232-33 (2002) (Ginsburg, J., dissenting); Rendleman, *supra* note 18, at 923; James E. Pfander & Wade Formo, *The Past and the Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 724-30 (2020); Chayes, *supra* note 17, at 1292-96.

trace its development from historical Chancery practice via the gradual accretion of precedent. Of course, this system still requires Congress to authorize any major doctrinal innovations, such as the creation of new equitable remedies or the substantial expansion of existing forms of relief. But it envisions a more meaningful role for the federal judiciary in the development of equity than do the Court's new equity cases.

Returning federal equity power to its constitutional source could thus alter the trajectory of ongoing debates over the scope of that power. At a wholesale level, this Article's thesis suggests that if the Court is committed to the historical turn, it might need to reevaluate the rigidly time-bound doctrinal framework it has developed under that approach. At a retail level, it implies that scholarly concerns about extending the historical turn to Article III might be overstated. The original meaning of Article III in fact provides a strong theoretical basis for federal equitable remedies — like *Ex parte Young* injunctions — that emerged through a process of precedential development from traditional Chancery practice. It even suggests that the permissibility of certain novel forms of equitable relief, such as nationwide and structural-reform injunctions, might be a closer question than many originalist analyses have acknowledged. On the other hand, it would seem to augur against the power of federal courts to issue remedies — like the injunctions against judges at issue in *Whole Woman's Health v. Jackson*[31] — that flatly contradict core rules of Founding-Era equity, as such sharp departures from historical practice likely require congressional authorization. Admittedly, these observations about particular remedies are tentative and would require more comprehensive analyses to maintain with confidence. But they give some sense of the implications that could flow from equity's constitutional source.

A note on methodology is necessary before proceeding. This Article applies an augmented version of the Supreme Court's historical approach to equity. Specifically, it examines the original meaning of "[t]he judicial Power" in "Equity" by analyzing not only the history of equity in England and America prior to the Founding but also the structure of the Constitution and early judicial practice. It takes this approach for two reasons. First, the historical record is, to varying degrees, inconclusive with respect to the questions this Article addresses, so it makes sense to consult other indicia of constitutional meaning. Second, the Court has traditionally looked to history, structure, and practice in resolving questions over the scope of "[t]he judicial Power."[32] Thus, relying on those same sources seems the most plausible way to adapt the Court's methodology, which

31. 142 S. Ct. 522 (2021).

32. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217-25 (1995); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1814 (2008) ("[T]he Court's current practice is to analyze the judicial power through the lens of text, structure, and history . . . ."); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846-52 (2008).

it has developed in the statutory-interpretation context, to these broader constitutional questions.[33]

This Article proceeds in four parts. Part I examines the text of Article III to identify the precise constitutional terms relevant to the existence and scope of an inherent federal equity power, ultimately settling on "[t]he judicial Power" in "Equity." Part II traces the historical development of those terms in English law. Part III demonstrates how the original understanding of Article III reveals that "[t]he judicial Power" in "Equity" includes an inherent power to grant equitable remedies that vests in all federal courts once they are created and given jurisdiction by Congress. Finally, Part IV turns to the scope of that power and concludes that Article III adopted the precedent-based system of remedies administered by the English Court of Chancery at the time of the Constitution's ratification. Both Parts III and IV conclude by sketching the implications of their arguments for current federal-courts doctrine.

I. PARSING ARTICLE III'S TEXT

Before applying the historical turn to Article III, one must identify the specific terms on which that interpretive methodology should be employed. Since Article III does not expressly mention equitable remedies, this Part parses the text to pinpoint those terms that, when interpreted through a historical lens, could bear on the existence and scope of equity's constitutional source.

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33. A final note on scope will be helpful. Of the components of equity jurisprudence—rights, procedure, remedies, and jurisdiction—this Article focuses exclusively on remedies. Admittedly, such a sharp-edged division between equity doctrines is fairly anachronistic. Founding-Era Americans did not necessarily conceive of equity in such distinct categories, but rather more holistically. *See* Yoo, *supra* note 17, at 1166. Nevertheless, this structure is helpful in translating Founding-Era equity to modern federal practice, in which the majority of equity cases involve questions of remedy. *Cf.* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 590-91 (2003) (explaining why this type of "translation" is a necessary part of originalist methodology). Finally, within remedies, this Article considers those forms of relief granted by courts of equity in their "concurrent" jurisdiction, that is, "cases in which equity offers an alternative to what a plaintiff could get at law—especially an alternative remedy," Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1765 (2022), rather than relief associated with equity's exclusive domain of substantive law, such as trusts, *see id. See also* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 32-33 (Boston, Hilliard, Gray & Co. 1836) (distinguishing between concurrent, exclusive, and auxiliary jurisdiction in equity). Specifically, when this Article refers to "equitable remedies," it means those issued by modern American courts: injunctions, specific performance, reformation, quiet title, accounting, constructive trust, equitable liens, subrogation, and recission. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 551-58 (2016).

The only reference to equity in the original Constitution appears in Article III, Section 2:

> *The judicial Power* shall extend to all Cases, *in Law and Equity*, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[34]

Although Section 2's reference to "Equity" seems a natural place to start in searching for equity's constitutional source, the scope of that term is less than pellucid. It is unclear whether the word "Equity" relates only to federal-question cases or all cases heard in federal court. "The judicial Power" looks like another potential candidate, as it is the only provision of Article III that affirmatively confers power on federal courts.[35] Ultimately, this Article focuses on a combination of these terms—"[t]he judicial Power" in "Equity." But it uses this phrase entirely for reasons of clarity. As this Part explains, one could reach substantially identical conclusions based solely on an interpretation of "[t]he judicial Power."

On its face, Article III's grant of "Equity" jurisdiction appears to apply only to federal-question cases.[36] Grammatically, the clause "in Law and Equity" modifies the portion of Section 2 that extends federal jurisdiction to cases "arising under" federal law. It is difficult to see how that clause, offset by commas to delimit its reach, could carry over to modify the other eight heads of federal jurisdiction. Indeed, as a legal matter, "Equity" could not have applied to *all* other jurisdictional categories. It would not make sense to read "Equity" as extending to "Cases of admiralty and maritime Jurisdiction" because in Founding-Era practice, admiralty was considered an entirely separate branch of law; admiralty actions sounded in admiralty, not in law or equity.[37] And there does not seem to be

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34. U.S. CONST. art. III, § 2 (emphasis added).

35. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176-77 (1992).

36. *See* Harrison, *supra* note 24, at 1919-21 (arguing as much).

37. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 561 (Boston, Hilliard, Gray & Co. 1833) ("[A] suit in the admiralty is not, correctly speaking, a suit in law, or in equity . . . .").

any grammatically tenable interpretation of Section 2 that would make "Equity" applicable to every head of jurisdiction except admiralty.[38]

The relevant drafting history of Article III, though sparse, supports this interpretation.[39] The word "Equity" initially appeared in a draft of the Constitution when the Philadelphia Convention voted to insert the clause "both in Law and Equity" in the first section of what would later become Article III, such that it read: "The Judicial Power of the United States, both in Law and Equity, shall be vested" in the federal courts.[40] Soon thereafter, the Convention added the same clause to the section listing the heads of federal jurisdiction; this revision resulted in the current form of Article III, Section 2, with "in Law and Equity" modifying the "arising under" jurisdictional category.[41] Then the Convention removed the earlier adopted reference to equity that modified "[t]he judicial Power" itself.[42] This course of events suggests that the Convention specifically relocated the "Equity" clause to narrow its scope. Rather than defining "[t]he judicial Power" as a whole, "Equity" merely "expand[ed] the number of 'arising under' cases to which '[t]he judicial Power shall extend.'"[43]

Despite the apparent clarity of the text, however, both the historical record surrounding ratification and early governmental practice indicate that a broader understanding of Article III's reference to "Equity" prevailed at the Founding. In short, many early Americans apparently understood "Equity" as modifying

38. *See* Harrison, *supra* note 24, at 1919-21.

39. Admittedly, because records of the Philadelphia Convention were not publicly available until after the Constitution was ratified, they "shed little, if any, light on the public's understanding of what the document meant at the time of ratification." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1999 (2011). Nevertheless, these records can be of modest utility insofar as they corroborate inferences drawn from constitutional text and structure. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 789-93 (1995); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 9 (1996); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 499 (2013).

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 422, 428 & n.8 (Max Farrand ed., 1911) [hereinafter FARRAND] (recording the vote of Aug. 27, 1787).

41. *Id*. at 425.

42. *Id*. at 621 (recording the events of Sept. 15, 1787).

43. James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 746-47 (1998) (quoting FARRAND, *supra* note 40, at 621 (Sept. 15, 1787)); *see also id.* (arguing that this change was made to ensure that "the 'law and equity' modifier" would not "corrupt[] the qualitative content of [the 'judicial Power'] with a quantitative descriptor"); Harrison, *supra* note 24, at 1921 (suggesting that the insertion of the term "Equity" was meant to "clarify that the institutional divisions found in the English system did not matter, so that the new federal courts' jurisdiction based on the substance of the law being applied was comprehensive").

"[t]he judicial Power" itself, thereby enabling the judiciary to adjudicate equity cases arising under any relevant head of federal jurisdiction.

During the ratification debates, commentators frequently discussed the term "Equity" as if it applied to federal jurisdiction in general rather than federal-question cases in particular. Consider, for example, Alexander Hamilton's defense of federal equity jurisdiction in *The Federalist*. Hamilton began his analysis by asking: "[W]hat need of the word 'equity'" in Article III?[44] He answered by listing types of cases in which "it would be impossible for the federal judicatories to do justice without an equitable, as well as a legal jurisdiction."[45] Importantly, every example he cited fell within jurisdictional categories other than federal question.[46] Other Founding-Era commentary was of a piece. Advocates on both sides of the ratification debates seemed to understand the inclusion of "Equity" in Article III to establish that the federal courts could function as general courts of chancery, not merely as authorization for them to hear equity cases "arising under" federal law.[47]

This view persisted in early practice postratification. For instance, the first Congress apparently believed "[t]he judicial Power" could extend to equity cases beyond federal questions, as the Judiciary Act of 1789 granted the new federal courts jurisdiction over "suits of a civil nature . . . in equity" between diverse parties.[48] This practical exposition of "[t]he judicial Power" is significant because the Supreme Court typically views Founding-Era congressional enactments as highly probative evidence of the Constitution's original meaning.[49] And it has applied this presumption with particular vigor to the Judiciary Act,[50] such that the Act has "often been viewed as the embodiment of Article III."[51]

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44. THE FEDERALIST NO. 80, at 415 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

45. *Id.*

46. *Id.* (listing "contracts" disputes "where foreigners were concerned on either side" and "[a]greements to convey lands claimed under the grants of different states").

47. See *infra* notes 359-377 and accompanying text (describing these debates in detail).

48. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

49. *See* Printz v. United States, 521 U.S. 898, 905 (1997).

50. *See* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) (asserting that the Judiciary Act "is contemporaneous and weighty evidence of [the Constitution's] true meaning"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 420 (1821) ("A contemporaneous exposition of the constitution . . . is the judiciary act itself.").

51. Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 13, 13 (Maeva Marcus ed., 1992); *see also* HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 21 (Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro eds., 7th ed. 2015) ("[T]he first Judiciary Act is widely viewed as an indicator of the original understanding of Article III . . . .").

Early judicial practice accorded with Congress's understanding of Article III. In the decade following the passage of the Judiciary Act, the federal courts adjudicated nearly 350 equity suits where the only basis for federal jurisdiction was diversity.[52] That no court expressed uncertainty about its authority to hear these cases strongly suggests that early federal judges understood "[t]he judicial Power" applied in both law and equity.[53] In fact, early federal courts often described their authority to grant equitable remedies as conferred by "the Constitution and laws" of the United States.[54] Since the courts made these statements almost exclusively in diversity cases, they must have believed "[t]he judicial Power" extended to equity cases outside of federal-question jurisdiction. At times, the courts were even more explicit: several cases expressly interpreted Article III's reference to "Equity" as modifying "the judicial power of the general government" as a whole.[55]

And it is not just history and practice that cut against the narrower reading of "Equity." On closer examination, the constitutional text itself is less clear than it initially seems. If "Equity" applies only to federal-question jurisdiction, then Article III's reference to actions "in Law" does as well, given that it appears in the same clause.[56] But a reading that would restrict the federal courts from exercising jurisdiction in either law or equity outside of federal-question cases is untenable. The Founders conceptualized legal claims as arising in either law, equity, or admiralty.[57] Thus, unless the other heads of federal jurisdiction were meant to be empty categories, "[t]he judicial Power" must have been understood to include

52. DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 87, 119 (1971).

53. *Cf.* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (holding that "practice and acquiescence under" a particular interpretation of Article III "for a period of several years, commencing with the organization of the judicial system" can "fix[] the construction" of the text). For post-*Erie* students of federal courts, it might be tempting to suggest that state law provided the authority for federal courts to hear these equity cases in diversity. But early federal courts expressly rejected reliance on state law in favor of a uniform body of equitable principles. *See* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 271-80 (2010).

54. *See infra* notes 292-316 and accompanying text (examining these early cases).

55. *See, e.g.*, Bennett v. Butterworth, 52 U.S. (11 How.) 669, 674-75 (1850) ("The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity . . . ."); Thompson v. R.R. Cos., 73 U.S. (6 Wall.) 134, 137 (1867) (similar); Cates v. Allen, 149 U.S. 451, 454 (1893) (similar).

56. *See* U.S. CONST. art. III, § 2.

57. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 253 (1985).

authority to hear suits of a legal or equitable nature falling under those heads.[58] In light of this textual incongruity, one might wonder if the Convention's relocation of the "in Law and Equity" clause was merely an oversight in the long and complex process of drafting Article III.[59]

Given the conflicting evidence, it is unsurprising that scholars have taken a variety of positions on this issue. Echoing Hamilton in *The Federalist*, many modern critics have assumed—without parsing the text of Article III—that "Equity" applies to the whole of federal jurisdiction.[60] Others read that term more narrowly, pointing to the textual evidence that suggests it modifies only "arising under" jurisdiction.[61] The few to grapple with the conflict between text, history, and practice have generally concluded that the peculiar placement of the word "Equity" in Article III should not be read as limiting the judiciary's equity jurisdiction to federal-question cases.[62]

At the end of the day, perhaps the best way to resolve this seemingly intractable ambiguity is to conclude that it does not make much practical difference. Regardless of whether the word "Equity" applies beyond federal-question cases, "[t]he judicial Power" itself is best understood as implicitly including a concept of equitable jurisdiction. The Founders modeled the federal courts on the English judiciary; thus, the original meaning of Article III can only be ascertained by reference to that background system of law.[63] Eighteenth-century English jurists

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58. The Eleventh Amendment supports a similar inference. Adopted six years after the Constitution, it provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Whatever the precise import of this deceptively simple provision, its text plainly presupposes that "the judicial Power" could have been "construed to extend" to "suits" in "equity" outside of federal question jurisdiction. Otherwise, the Amendment's negation of that power in diversity cases brought against states would be surplusage.

59. *See* Michael Anthony Lawrence, *Rescuing the Fourteenth Amendment Privileges or Immunities Clause: How Attrition of Parliamentary Processes Begat Accidental Ambiguity; How Ambiguity Begat* Slaughter-House, 18 WM. & MARY BILL RTS. J. 445, 461-70 (2009) (explaining how complex drafting processes can create inadvertent ambiguities in constitutional text).

60. *See, e.g.*, Bray & Miller, *supra* note 33, at 1773 ("[E]quity was included in the federal judicial power under Article III of the U.S. Constitution . . . ."); Collins, *supra* note 53, at 258 & n.29 ("Article III specifies three different substantive fields of competence for federal courts: law, equity, and admiralty."); Frost, *supra* note 18, at 1080; Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 578 (2019).

61. *See* Yoo, *supra* note 17, at 1147-49; Harrison, *supra* note 24, at 1919-21.

62. *See, e.g.*, John T. Cross, *The* Erie *Doctrine in Equity*, 60 LA. L. REV. 173, 210 n.220 (1999).

63. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) ("We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted . . . ."); *see also infra* notes 64-68 and accompanying text (tracing the roots of early American understandings of equity to English law).

defined judicial power in terms of the three great heads of jurisdiction: law, equity, and admiralty.[64] The American colonial- and state-court systems adopted these categories more or less precisely.[65] Given this context, it probably went without saying among informed members of the Founding Generation that federal "courts" exercising "judicial Power" would do so in law, equity, or admiralty as the case required.[66] Indeed, this assumption might explain why many Founders, including the usually precise Hamilton, read "Equity" as applying to the whole of federal jurisdiction despite textual evidence to the contrary. To early Americans raised in the common-law tradition, the jurisdictional scope of that word was of little significance; either way, "[t]he judicial Power" itself incorporated the ability to hear equity cases.[67]

For the sake of clarity, the remainder of this Article focuses on the combined phrase "[t]he judicial Power" in "Equity." Because both the Founders and early federal judges often discussed Article III's reference to "Equity" in relation to "[t]he judicial Power" as a whole, many of the historical materials on which I rely are phrased in those terms. And given that "[t]he judicial Power" itself includes a concept of equity jurisdiction, it makes no substantive difference which formulation I consider. Thus, I chose the one that aligns most neatly with the evidence this Article investigates.

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64. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 24-29 (2d ed. 1985).

65. *See* JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 5-18 & nn.13-14, 85-87, 96-100 (1971).

66. *See* United States v. Bevans, 16 U.S. (3 Wheat.) 336, 379 (1818) (argument of Daniel Webster) ("[T]he framers of the constitution must be supposed to have intended to establish courts of common law, of equity, and of admiralty, upon the same general foundations, and with similar powers, as the courts of the same descriptions respectively, in that system of jurisprudence with which they were all acquainted."); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855) (listing "matter[s] . . . subject for judicial determination" as "a suit at the common law, or in equity, or admiralty"). This contention raises the question of why "Equity" was included in Article III at all. One might explain it as a belt-and-suspenders decision to place beyond doubt that the federal courts could hear equity cases "arising under" federal law. But this was an odd place to put on the belt and suspenders. Given that some states did not even have equity courts at the Founding, *see* THE FEDERALIST NO. 83, at 435-36 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001), if it were necessary to clarify that a category of federal jurisdiction included equity, diversity was the more logical choice. Ultimately, as John T. Cross has observed, "[w]hy the framers chose to include the reference to law and equity for federal question suits but not the others may remain a mystery forever." Cross, *supra* note 62, at 210 n.220.

67. I refer here only to the federal courts' ability to exercise subject-matter jurisdiction over equity cases. Whether "[t]he judicial Power" also includes authority to grant remedies in those cases is a complex question that this Article takes up in Parts III and IV.

II. THE DAYS OF THE DIVIDED BENCH: THE HISTORICAL DEVELOPMENT OF EQUITY IN ENGLAND

This Part explores the development of equity in English law prior to the American Founding. For several reasons, this historical background is essential to interpreting "[t]he judicial Power" in "Equity."

At a basic level, working out the meaning of these terms within Article III requires an understanding of their origins. Neither "[t]he judicial Power" nor "Equity" were novel constructions of the Framers. Both had deep historical roots in English law.[68] Early Americans were intimately familiar with English common law,[69] and the Founders conceptualized equity in terms of its place within that tradition.[70] As such, it would be impossible to assess accurately the original understanding of "[t]he judicial Power" in "Equity" without first studying the meaning those terms bore in English legal history.[71]

Historical English practice might also help to define the content of "[t]he judicial Power." The English court system served as a model for the Founders and undergirded their understanding of both judicial authority and the role of courts.[72] Thus, by vesting "courts" with "judicial Power," the text of Article III suggests that the new federal courts were designed to operate in a manner similar to their English forebears.[73] In general, then, if Founding-Era English judges had a given power, it is more likely that Article III incorporates a comparable one.

This presumption applies with particular force to "[t]he judicial Power" in "Equity." The Supreme Court typically interprets common-law terms of art in

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68. *See* Dairmuid F. O'Scannlain, *The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit*, 33 HARV. J.L. & PUB. POL'Y 963, 964 (2010); GOEBEL, *supra* note 65, at 230.

69. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30-31 (2017); *Ex parte* Grossman, 267 U.S. 87, 110 (1925).

70. *See* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1208-09 (2001).

71. *See Grossman*, 267 U.S. at 108-09; Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1822 (2012).

72. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27-28 (2001).

73. *See* Cross, *supra* note 62, at 207 ("The framers . . . borrowed many basic features from the English judicial system. . . . [T]he basic way in which rights were to be adjudicated was intended to be roughly the same."); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 8370 (1999) (arguing that "the judicial power" encompasses "the power to adjudicate as traditionally exercised by Anglo-American courts"); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("'[T]he judicial Power of the United States' . . . must be deemed to be the judicial power as understood by our common-law tradition." (citation omitted)).

the Constitution, of which "Equity" is one, by reference to their meaning in English law at the Founding.[74] Thus, if Founding-Era English courts had inherent power to grant equitable remedies, that would be weighty evidence that a similar authority became part of "[t]he judicial Power."

Still, one must not stretch this presumption too far. The U.S. Constitution specifically rejected many structural features of its English forebear in favor of a system of separated powers and federalism. Thus, while the Court often relies on English practice to interpret constitutional provisions with common-law roots, it has eschewed that approach where the particular practice is incompatible with the Constitution's structure.[75] For this reason, one cannot assume that *every* aspect of the English judicial system was incorporated into Article III. Instead, "one must always ask whether a particular English legal practice . . . conforms to the often-distinctive structural assumptions underlying the U.S. Constitution."[76]

This qualification suggests a final, equally important reason for consulting English history—namely, to ascertain the precise nature of any equity powers exercised by English courts at the Founding and the structural features of the English Constitution that underpinned their development. If those features align with the American constitutional structure, that alignment would provide further evidence that such power was understood to be part of the Article III "judicial Power." If, on the other hand, they are contradictory, it would suggest the opposite.

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74. *See* Manning, *supra* note 39, at 2025 ("The original Constitution is a lawyer's document . . . packed with legalese, and the Court has often read it with that understanding in mind." (footnote omitted)); Sachs, *supra* note 71, at 1823; *see also* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 614 (2021) (arguing that written constitutional enactments must be read "in light of their unwritten antecedents, and with an eye to the preexisting *corpus juris*"). For examples, see *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122-24 (2019), which looks to English history in interpreting "cruel and unusual punishment"; and *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), which interprets "*ex post facto* law" as "a term of art with an established meaning at the time of the framing of the Constitution." Importantly, the Court has adhered to this approach when interpreting terms in the Constitution that, like "Equity," were used to define the jurisdiction and powers of the English courts. *See, e.g.*, United States v. Flores, 289 U.S. 137, 148-49 (1933) (observing that Article III's reference to "cases of admiralty and maritime jurisdiction" has "been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies"); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (interpreting "Suits at common law" in the Seventh Amendment by reference to English practice in 1791).

75. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 248-49 (1936) ("[T]he range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that law. But . . . the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions.").

76. Manning, *supra* note 72, at 29.

That said, this inquiry is a bit more complex with respect to equity. At the Founding, two competing conceptions of equity had emerged in English law, which I call "conscience-based" and "precedent-based" equity.[77] As a result, there is no one English equity tradition to compare or contrast with the structure of the U.S. Constitution. Instead, this Part examines these two conceptions in turn. For each conception, I begin with the structural assumptions that fostered its growth, turn to a brief history of its development, and conclude with a detailed description of the remedial powers associated with that conception. This analysis sets the stage for Parts III and IV to consider which—if either—of these conceptions was incorporated into "[t]he judicial Power."

A. Conscience-Based Equity

Of these two conceptions of equity, conscience-based equity is the more ancient. It appeared in the late fourteenth century and flourished for more than two hundred years before the transition to precedent-based equity began in the seventeenth century.[78]

Conscience-based equity was defined by a concentration of authority in the hands of one man: the King's Lord High Chancellor. As the embodiment of the King's conscience, the medieval Chancellor was empowered to create, issue, and enforce novel and extraordinary remedies as necessary to ensure that justice would be accorded to the King's subjects. This nearly omnipotent conception of

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77. *Cf.* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 7-12 (1990) (similarly describing "two equities"); STORY, *supra* note 33, at 10-22 (same).

78. Another brief note on methodology is in order. As with any historical process, the evolution of equity in English law was complex and contingent. The analysis presented in this Part necessarily simplifies some aspects of that nearly 500-year-long development. If one were to consider the historical evidence at a granular level, the transition from conscience-based to precedent-based equity might look more like a series of switchbacks that reach their final destination circuitously, rather than via the relatively straight path described below. Indeed, though distinctly marginal, some concepts of conscience-based equity retained a foothold in Anglo-American legal thought at the Founding, despite the ascendance of precedent-based equity over a century earlier. *See infra* notes 222, 338-368 and accompanying text. The goal of this Part is thus not to recount every twist and turn in the relevant history but rather to offer an account that accurately reflects the historical trends at a level of generality that will be useful in addressing a modern legal question—the meaning that an informed, Founding-Era observer would have ascribed to "[t]he judicial Power" in "Equity." *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813-17 (2019) (explaining that originalist methodology involves a more "limited . . . historical inquiry" focused on drawing "*conclusions* about the substance of past law" than does historical scholarship, which seeks "*explanations* of change over time"); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 292-93 (2017) (contrasting the ways in which lawyers and historians use historical evidence).

equity was a product of time, place, and circumstance. Its distinctive character depended upon the particular structure of the medieval English Constitution.

1. Structural Underpinnings

In contrast to the U.S. Constitution, the medieval English government was a system of fused powers.[79] Accordingly, government officials rarely distinguished between the basic functions of legislation, adjudication, and administration. At the central government, responsibility for all three functions fell upon the King and his court, known as the *Curia Regis*.[80] In the centuries following the Norman Conquest (1066), the primary organs of English government — Parliament, the royal courts, and the King's Council — gradually emerged as offshoots of the *Curia*, such that their powers ultimately derived, at least in theory, from the Crown.[81] As a result, the precise division of powers and functions between these institutions remained blurry even centuries after their formal separation from the *Curia*.[82]

Four features of this constitutional structure were relevant to the development of conscience-based equity. First, until the Glorious Revolution in 1688, the Crown asserted a prerogative power to grant judicial relief outside the normal course of civil litigation.[83] In early English political theory, the King was seen as the ultimate source of judicial power — the "fountain of justice," both empowered and obligated to ensure that right was done between his subjects.[84] Though

79. *See* Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PA. L. REV. 842, 843-44 (1938).

80. JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 20-21 (5th ed. 2019).

81. *See* Manning, *supra* note 72, at 37-39.

82. As late as the fifteenth century, Parliament and the courts were "so closely connected with the [Council] . . . that it is difficult to determine . . . to what extent, one should regard them as separate institutions." Theodore F.T. Plucknett, *The Place of the Council in the Fifteenth Century*, TRANSACTIONS ROYAL HIST. SOC'Y 157, 157-58 (1918); *see also* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 146 (photo. reprt. 2010) (5th ed. 1956) [hereinafter PLUCKNETT, CONCISE HISTORY] ("[I]n the end a rough allocation of duties was made" between Parliament, the courts, and the Council, "but this classification of powers was never very strictly carried out.").

83. *See* BAKER, *supra* note 80, at 106; JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 8 (2009).

84. 1 RUDOLPH GNEIST, THE HISTORY OF THE ENGLISH CONSTITUTION 183 (Philip A. Ashworth trans., New York, G.P. Putnam's Sons 1886) (1882).

the Crown delegated most judicial business to the common-law courts, it retained a residual power to fashion extraordinary remedies to prevent a failure of justice in those courts or elsewhere.[85]

Second, the medieval English state lacked an independent judiciary. Because the King was unable personally to adjudicate every case arising within the realm, he entrusted a portion of his prerogative over justice to royal judges.[86] But those judges remained executive branch officers, sharing in the Crown's executive power, rather than exercising an independent judicial power.[87] Consequently, King and Council exerted significant control over the common-law courts well into the fourteenth century, and even after the judges obtained a measure of independence from direct control, they still served at the King's pleasure and were subject to royal manipulation.[88]

Third, the Crown asserted an inherent power to legislate without Parliament. At least through the fourteenth century, the Crown often issued legislation with the assent of only the House of Lords or the Council, and sometimes even on the King's authority alone.[89] Moreover, early Parliaments did not enact statutes in the modern sense; they merely petitioned the King to address a given issue, and if the monarch agreed, his Council would then draft and promulgate a statute on the topic after Parliament had adjourned.[90] Even when Parliament secured the authority to enact specific statutes, the Crown continued to claim independent legislative power: monarchs, through the Stuarts, issued proclamations that had the force of law and attempted to dispense with or suspend the execution of statutes.[91]

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85. BAKER, *supra* note 80, at 105-06.

86. *See* R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 30 (1959).

87. F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 267 (photo. reprt. 1993) (H.A.L. Fisher ed., 1908); *see also* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 31-32 (2d ed. 1998) (noting that "the roots of the idea of a judicial 'power' distinct from the executive" did not emerge in England until the seventeenth century); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 5 (1965) (similar).

88. Thus, though the English judiciary existed from the twelfth century, "we must not, for a long time yet, think of the judges as enjoying any great degree of independence; they are still the king's servants . . . and occasions on which the royal will is allowed to interfere with the course of royal justice are but too frequent." MAITLAND, *supra* note 87, at 134; *see also* BAKER, *supra* note 80, at 217 ("Even when the courts began to separate from central government, . . . the king in council could issue general or specific directions to the judges.").

89. *See* Manning, *supra* note 72, at 47; PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 320-23 (collecting examples of royal lawmaking).

90. *See* COURTENAY ILBERT, LEGISLATIVE METHODS AND FORMS 5 (1901).

91. See 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 100-04, 296-97 (3d ed. 1945).

Fourth, there was substantial overlap between Parliament and the courts, and thus between the processes of legislation and adjudication.[92] Judicial business comprised a major portion of early Parliamentary work, and while it later shifted focus to legislative and political matters, Parliament retained some judicial functions, with the House of Lords serving as the highest court of appeals.[93] Common-law judges, moreover, were integrated into many aspects of the lawmaking process. Early on, these judges were themselves members of Parliament and directly contributed to legislation.[94] Though Parliament and the courts began pulling apart in the fourteenth century, judges continued to advise legislators on points of law well into the eighteenth century.[95] Likewise, as the legally trained members of the Council, judges often were tasked with drafting legislation in response to Parliamentary petitions.[96]

The limited distinction between lawmaking, administration, and adjudication affected how English judges understood their role in the constitutional structure. So long as they retained a close connection with the Council and Parliament, judges could share in their legislative powers.[97] Accordingly, medieval English courts paid little heed to whether the power they exercised in deciding a case could be seen as legislative.[98] Cases often bounced between the courts, Parliament, and the Council, without regard for whether the ultimate resolution was theoretically "legislative" or "judicial" in nature.[99] Indeed, the connection

92. *See* Frederick J. deSloovère, *The Equity and Reason of a Statute*, 21 CORNELL L.Q. 591, 591-92 (1936).

93. *See* G.O. SAYLES, THE MEDIEVAL FOUNDATIONS OF ENGLAND 454-55 (2d ed. 1950); LANGBEIN ET AL., *supra* note 83, at 358-59.

94. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 331; ELIZABETH READ FOSTER, THE HOUSE OF LORDS 1603-1649: STRUCTURE, PROCEDURE, AND THE NATURE OF ITS BUSINESS 82-83 (1983).

95. *See* Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 AM. J. LEGAL HIST. 117, 126-27 (1994); Manning, *supra* note 72, at 40-44 & nn.166, 169 & 173.

96. *See* FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE: FOR STUDENTS OF THE COMMON LAW 330 (photo. reprt. 1996) (London, MacMillan & Co. 1896).

97. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 152-58.

98. *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 269 (1987); Manning, *supra* note 72, at 41-46.

99. *See, e.g.*, Staunton v. Staunton, YB 15 Edw. 3, Hil. 15 (1341), *reprinted in* 31 ROLLS SERIES, pt. B, vol. 5, at 288-300 (Luke Owen Pike ed. & trans., London, Eyre & Spottiswoode 1889) (resolving a case that, after initially being filed in Common Pleas, was considered at least twice by that court, twice by Parliament, once by the King's Bench, and twice by the Council before ultimately being decided by the King in Chancery); THEODORE F.T. PLUCKNETT, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 23-24 (Harold Dexter Hazeltine ed. 1922).

between these three institutions was so tight that judges sometimes found themselves interpreting statutes that they had written as members of Parliament or the Council.[100]

2. *The Emergence of Conscience-Based Equity*

The history of conscience-based equity begins with its jurisprudential cousin, the common law. Equity arose in response to deficiencies in the rigid form of justice administered by English common-law courts in the fourteenth century. To understand its origins thus requires a discussion of those courts.

At the time of the Norman Conquest, England had an established set of local judicial institutions.[101] When these antiquated and slow-moving tribunals proved inadequate, however, litigants began seeking relief directly from the King in his role as fountain of justice.[102] By Henry II's reign (1154-89), King and Council were flooded with requests for extraordinary relief; they needed a way to dispense with this business quickly and efficiently.[103]

Over the late-twelfth and early-thirteenth centuries, three courts arose to fill this need. In 1178, Henry II appointed five men from his Council who would constitute "a permanent and a central court" to "hear all the complaints of the kingdom."[104] This first set of judges comprised what would become known as the Court of Common Pleas. By 1215, Common Pleas had settled at Westminster, where it would soon be joined by the courts of the King's Bench and Exchequer.[105] With their faster and more authoritative processes, uniform principles, and superior modes of proof, the new royal courts displaced their ineffective local predecessors. By the late thirteenth century, royal justice had become the generally applicable (i.e., common) law of the realm.[106]

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100. *See, e.g.*, Aumeye v. Anon., YB 33 Edw. 1, Mich. 40 (1305), *reprinted in* 31 ROLLS SERIES, pt. A, vol. 5, at 79, 82 (Alfred J. Horwood ed. & trans., London, Longman & Co. 1879) (admonishing counsel to "not gloss the Statute" because "we understand it better than you do, for we made it").

101. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 42-43 (Cambridge, Cambridge Univ. Press 2d ed. 1898).

102. *See* LANGBEIN ET AL., *supra* note 83, at 86.

103. *See* BAKER, *supra* note 80, at 16-17; VAN CAENEGEM, *supra* note 86, at 30.

104. 1 POLLOCK & MAITLAND, *supra* note 101, at 153-54.

105. Each of these courts initially had (somewhat) distinct spheres of civil jurisdiction. *See* MAITLAND, *supra* note 87, at 134-35. Through the aggressive use of legal fictions, however, their jurisdictions had become largely coextensive by the sixteenth century. PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 171.

106. *See* MAITLAND, *supra* note 87, at 22, 114.

To avail oneself of the justice available in these new royal courts, a plaintiff was required to obtain a writ from the Chancery. Chancery was the royal scrinium; its staff of clerks created and issued all official communications on behalf of the Crown.[107] At the head of Chancery was the Chancellor, the most important and powerful member of the King's Council.[108] In the judicial context, writs issued out of Chancery were essentially tickets to litigate in the royal courts; they formed the basis of the court's jurisdiction, so a plaintiff could not access royal justice without one.[109]

The early common law that developed under the writ system was flexible. Initially, Chancery clerks would custom make writs for each case, copying down the facts of a plaintiff's complaint into the document itself.[110] This practice ensured that no aggrieved party would be turned out of the King's courts without a remedy because "if some new wrong be perpetrated then a new writ may be invented to meet it."[111] Or, as Bracton put it, there were to be "as many forms of action as there are causes of action."[112]

By the fourteenth century, this paradigm had shifted dramatically. The common law became rigid, inflexible, and subject to abuse. Far from offering a remedy for every wrong, its deficiencies often left legitimately aggrieved parties without adequate relief. In particular, the writ system that once drove the common law's expansion now severely restricted its development.[113] In the mid-thirteenth century, the courts began refusing to accept novel writs.[114] If no previously recognized forms of action accurately captured the plaintiff's case, they

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107. *See* Frederic William Maitland, *Introduction* to RECORDS OF THE PARLIAMENT HOLDEN AT WESTMINSTER ON THE TWENTY-EIGHTH DAY OF FEBRUARY, IN THE THIRTY-THIRD YEAR OF THE REIGN OF KING EDWARD THE FIRST (A.D. 1305) xxxvii (Frederic William Maitland ed., London, Eyre & Spottiswoode 1893).

108. *See* FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES 3 (John Brunyate ed., 2d ed. 1936) ("[The Chancellor] is the king's prime minister . . . .").

109. *See* LANGBEIN ET AL., *supra* note 83, at 92.

110. FREDERIC W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 315 (A. H. Chaytor & W. J. Whittaker eds., 1909).

111. *Id.* at 300; *see also* MAITLAND, *supra* note 87, at 17.

112. MAITLAND, *supra* note 110, at 300; *see also* 4 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 286 (George E. Woodbine ed., Samuel E. Thorne trans. 1997) (c. 1235) (translating as "there will be as many formulas for writs as there are kinds of actions").

113. *See* BAKER, *supra* note 80, at 62-63; *see also* David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 554-55 (1986) (noting further shortcomings of the common-law courts, including delay, evidentiary challenges, and inability to compel obedience by powerful litigants).

114. MAITLAND, *supra* note 87, at 114. Though Chancery clerks were still free to fashion new writs, defendants could object to novel forms of action, which courts would typically quash. *See, e.g.*,

were simply out of luck; no remedy was available at common law.[115] In other words, there were now only "as many causes of action as there [we]re forms of action."[116]

Most importantly for present purposes, the remedies and means of enforcement available at common law had also proven inadequate. In general, common-law courts awarded only money damages; they did not grant specific relief.[117] So, for example, while they could order monetary compensation for breach of contract, they would not compel the breaching party to perform.[118] Similarly, they could award damages to a plaintiff harmed by the defendant's nuisance but could not order the defendant to abate the nuisance.[119] In many cases, money proved an imperfect substitute for an order compelling the defendant to right a wrong. Common-law process, moreover, was enforced only against a defendant's property.[120] This *in rem* mode of proceeding, designed for disputes between landholding feudal lords, was ill suited to the private litigation that now comprised most business in the royal courts.[121]

Furthermore, common-law judges stubbornly favored form over substance. They would "tolerate a 'mischief' (a failure of substantial justice in a particular case) rather than an 'inconvenience' (a breach of legal principle)."[122] A consequence of this approach was that the common law offered no remedy in cases of fraud, accident, hardship, or mistake.[123] Quite the opposite, these courts' exaltation of form effectively encouraged litigants to take advantage of such inequities.[124]

Abbot of Lilleshall v. Harcourt (1256) (Eng.), *reprinted in* 96 SELDEN SOCIETY 44, 45 (1980) ("[Defendant] . . . says that he ought not to answer to this writ, for it is novel, unheard of and framed against reason.").

115. BAKER, *supra* note 80, at 63.

116. 2 POLLOCK & MAITLAND, *supra* note 101, at 564 ("Tot erunt genera actionum quot sunt formulae brevium.").

117. *See* LANGBEIN ET AL., *supra* note 83, at 274 & n.25.

118. *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACTS: THE RISE OF THE ACTION OF ASSUMPSIT 14, 22-23 (1975).

119. *See* 2 STORY, *supra* note 33, §§ 925-27, at 204-07.

120. *See* BAKER, *supra* note 80, at 71-73.

121. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 177.

122. *Id.* at 680; *see, e.g.*, Waberley v. Cockerel (1541) 73 Eng. Rep. 112, 113; 1 Dyer 51 a, 51 a ("[I]t is better to suffer a mischief to one man than an inconvenience to many . . . .").

123. *See* MAITLAND, *supra* note 108, at 7.

124. A classic example involved sealed instruments, which the common law regarded as irrefutable evidence of a valid debt. *See* BAKER, *supra* note 80, at 110-11. If a debtor neglected to obtain an acquittance or destroy the instrument after satisfying her obligation, her creditor could bring

While the causes of this shift in the common law were many and varied, it can at least partly be traced to an incipient concern for separation of powers. By the fourteenth century, Frederic W. Maitland has explained, it was "more and more seen that to invent new remedies is in effect to make new laws . . . and it is more and more felt that for new laws the consent of the estates of the realm [(i.e., Parliament)] . . . is necessary."[125] Pressure was mounting on the courts to leave legislating to the legislature. Concurrently, the judges began to separate from the Council, which reduced their ability to rely on the Crown's lawmaking power.[126] Thus, common-law courts, now partially divorced from the sources of legislative authority, began to see it as Parliament's job to update the law and their role merely to apply it.[127]

While Parliament's growing legislative role checked the development of the common law, it failed to shoulder the corresponding burden of updating the nation's ossifying legal system.[128] Ultimately, it had little interest in doing so. By this time, Parliament had shifted much of its focus from small-bore judicial business to high-level issues of state and politics.[129] In any event, the nascent legislature still lacked the acumen and authority required to carry out a comprehensive program of law reform.

As a result, disappointed litigants, left without remedy in the courts and Parliament, returned to the fountain of justice.[130] Although governmental power was beginning to divide more sharply along functional lines, the Crown's residual authority to grant relief outside the course of civil justice remained entrenched.[131] Petitions invoking this authority followed a rough formula: the wronged individual would piteously set forth the facts of her case, explain that she was unable to obtain redress elsewhere, and conclude by begging the Crown

a second suit on the same debt. In such cases, the common-law courts would studiously ignore the defendant debtor's claim to have already paid the bond and award double payment to the creditor. *See, e.g.*, Denom v. Scot, YB 17 Edw. 3, pl. 11 (1343), *in* YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD 296-300 (Alfred J. Horwood ed., 1883).

125. MAITLAND, *supra* note 87, at 17.

126. *See* Raack, *supra* note 113, at 552.

127. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 158.

128. *See id.* at 159.

129. *See* SAYLES, *supra* note 93, at 458-60; LANGBEIN ET AL., *supra* note 83, at 117.

130. *See* Roger L. Severns, *Nineteenth Century Equity: A Study in Law Reform—Part I*, 12 CHI.-KENT L. REV. 81, 92 (1934).

131. *See* E.W. IVES, THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND: THOMAS KEBELL: A CASE STUDY 194 (1983).

"to find a remedy for the love of God and in the way of charity."[132] For a time, the Council as a whole assumed responsibility for addressing these requests. This practice soon proved unsustainable: by the late fourteenth century, the number of petitions had increased dramatically.[133]

The solution devised was to delegate a portion of the Crown's judicial prerogative to the Chancellor. As a leading member of the Council with a large professional staff who regularly interacted with the existing court system, the Chancellor was well positioned to dispense extraordinary justice in the King's name. By the late fourteenth century, suitors began to direct their pleas for relief to the Chancellor, and soon thereafter, a formal Chancery Court took shape.[134] Chancery was not a common-law court; instead, it was a prerogative tribunal, accountable only to the Crown, that administered a distinctive type of law known as equity.[135]

3. The Nature of Conscience-Based Equity

Early Chancery practice revolved around the idea of conscience.[136] Beyond that, conscience-based equity could hardly be described as a coherent system of law.[137] Instead, it was a largely ad hoc mode of adjudication that proceeded on the basis of two general principles. First, no one would leave Chancery without a remedy; if the Chancellor perceived that a plaintiff would suffer a default of justice in the common-law courts, he would do what was necessary to remedy it.[138] Second, the Chancellor would not be constrained by the formalities that

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132. MAITLAND, *supra* note 108, at 4. Though Maitland's description sounds hyperbolic, it accurately reflects the piteous terms in which requests for extraordinary relief were framed. *See, e.g.*, Petition to the Chancellor, c. 1396-1399, *in* SELECT CASES IN CHANCERY, A.D. 1364 TO 1471, at 49 (William Paley Baildon ed., London, Bernard Quaritch 1896) ("May it please your most righteous Lordship to command the [defendants] . . . to come before you . . . so that the [plaintiff], who hath not wherewithal to live, may have her right in the said lands . . . found and proved; for God and in way of holy charity.").

133. PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 178-81.

134. JAMES FOSDICK BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 248-52 (1913).

135. MARK FORTIER, THE CULTURE OF EQUITY IN EARLY MODERN ENGLAND 7 (2005).

136. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 681-82; Joshua Getzler, *Patterns of Fusion*, *in* THE CLASSIFICATION OF OBLIGATIONS 157, 176 (Peter Birks ed., 1997).

137. *See* BAKER, *supra* note 80, at 114.

138. *See* R.P. MEAGHER, J.D. HEYDON & M.J. LEEMING, MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES §§ 3-005 to -015, at 85-86 (4th ed. 2002); *see also* Anon., YB 4 Hen. 7, fol. 4, Hil., pl. 8 (Ch. 1489), *reprinted in* LANGBEIN ET AL., *supra* note 83, at 313-14 ("[No one departs from the Court of Chancery without remedy]."); Anon., YB 8 Edw. 4, fol.

dominated the common law.[139] Instead, he evaluated the facts of each case and attempted to do justice between the parties.[140] Equity existed "to temper and mitigate the rigour of the law;"[141] where the common law was inadequate, the Chancellor would intervene.[142]

Conscience-based Chancellors exercised broad discretion in pursuing these goals. In particular, to ensure that no suitor was left without redress, the Chancery became a fount of new remedies. If the available common-law remedy proved deficient, equity would create one to fill the gap.[143] Crucially, the Chancellor could order specific relief; rather than merely awarding damages, he "would tell people what to do—*exactly* what to do."[144]

Some of these forms of specific relief were negative or prohibitory—they directed the defendant to refrain from or cease doing something that would violate one of the plaintiff's legal rights. For instance, the Chancellor might order a land owner to stop building a wall on her property if that wall would unlawfully block the light to her neighbor's windows.[145] Most significantly, Chancery was willing to enjoin litigants from prosecuting cases or enforcing judgments obtained in the common-law courts if the outcome of those proceedings would be substantively unjust.[146] To obtain this remedy, known as an anti-suit injunction, a defendant-at-law was required to establish that the suit against her was tainted by some type of unlawfulness or inequity that the overly technical common-law

4, Pasch., pl. 11 (Ch. 1468), *reprinted in* LANGBEIN ET AL., *supra* note 83, at 311 ("[H]e will have a remedy in this court for *Deus est procurator futurorum* (God is the protector of the departed).").

139. *See* 5 HOLDSWORTH, *supra* note 91, at 286 (describing early Chancery practice as "the reverse of technical"). For a paradigmatic expression of this principle, see Anon., YB 9 Edw. 4, fol. 14a, Trin., pl. 9 (Ch. 1469) ("[A] man shall not be prejudiced by mispleading or by defects of form, but he shall be judged according to the truth of his case."), *quoted in* 5 HOLDSWORTH, *supra* note 91, at 286.

140. *See* BAKER, *supra* note 80, at 111-12.

141. CHRISTOPHER ST. GERMAIN, THE DOCTOR AND STUDENT 45 (William Muchall ed., Robert Clarke & Co. 1874) (1500).

142. *See* LANGBEIN ET AL., *supra* note 83, at 359.

143. *See* Pushaw, *supra* note 24, at 803; IVES, *supra* note 131, at 195; MAITLAND, *supra* note 108, at 301.

144. Samuel L. Bray, *Equity: Notes on the American Reception*, *in* EQUITY AND LAW: FUSION AND FISSION 31, 34 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019) (footnotes omitted); *see also* LANGBEIN ET AL., *supra* note 83, at 269 ("Only the Chancellor could decree specific relief, that is, injunction, specific performance, constructive trust, or rectification (reformation) of an instrument.").

145. MAITLAND, *supra* note 108, at 319; 2 STORY, *supra* note 33, at 205; *see also* Raack, *supra* note 113, at 556-68 (cataloging early negative injunctions, including to restrain waste and prevent patent and copyright infringement).

146. *See* MAITLAND, *supra* note 108, at 321; 2 STORY, *supra* note 33, at 166.

courts would not consider, such as fraud, accident, or undue influence.[147] In essence, this device allowed a defendant-at-law to transform herself into a plaintiff-in-equity for the purposes of raising a defense that was unavailable at law.

Conscience-based Chancellors could also compel affirmative action. For example, equity might force a defendant to specifically perform on a contract or act to abate a nuisance.[148] Thus, in addition to stopping an individual from building a wall that would block her neighbor's light, the Chancellor might order her to tear down a wall already constructed.[149] And, in response to those cases of fraud and other unconscionable conduct that the anti-suit injunction could not reach, equity developed restitutionary remedies, most of which required the defendant to turn over ill-gotten gains to the plaintiff. These remedies included accounting, constructive trust, and equitable liens.[150]

What made these new remedies so effective was the mechanism by which they were enforced: contempt. As noted, the common-law process focused on the defendant's property. Equity was different because it acted *in personam*.[151] Chancery decrees were framed as personal orders directing the recipient to take or omit from taking a particular action; refusal was tantamount to direct defiance of the King.[152] The Chancellor could hold recalcitrant defendants in contempt and imprison them until they complied.[153]

While conscience-based equity allowed for the issuance of new remedies, it adopted few standards to govern when it would do so.[154] Unlike the common-law courts, Chancery did not follow precedent.[155] Instead, the Chancellor considered the case as a whole and decreed what he personally thought should be done as a matter of justice. If that required him to create a novel remedy, substantially alter an existing one, or grant relief in an unprecedented context, so be it.[156] Not satisfied with doing justice to the injured plaintiff, conscience-based

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147. *See* BAKER, *supra* note 80, at 114; Harrison, *supra* note 16, at 997-98.

148. MAITLAND, *supra* note 87, at 311-20; *see also* Raack, *supra* note 113, at 556-58, 564-68 (cataloging early affirmative injunctions, including to abate nuisances and even to compel performance of marriage promises).

149. MAITLAND, *supra* note 108, at 320-21.

150. Bray, *supra* note 33, at 553-54.

151. D.E.C. Yale, *Introduction* to LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY' 17 (D.E.C. Yale ed., Cambridge Univ. Press 1965) (n.d.).

152. *See* LANGBEIN ET AL., *supra* note 83, at 286.

153. *See id.*; BAKER, *supra* note 80, at 111-12.

154. *Cf.* BAKER, *supra* note 80, at 118 ("The essence of equity as a corrective to the rigour of laws was that it should not be tied to rules.").

155. *See* MAITLAND, *supra* note 108, at 8.

156. *See* BAKER, *supra* note 80, at 110-12; PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 681.

Chancellors, most of whom were clergymen, believed their mandate extended to saving the defendant's soul from eternal damnation by forcing her to right whatever wrong she committed.[157]

Theoretically, the Chancellor did not rely on his personal conscience in making decisions but rather on the conscience of the realm—a Christian conscience.[158] But the practical difference between these two concepts during the medieval period was limited, if not wholly nonexistent. In actuality, the Chancellor had discretion to resolve each case as he saw fit.[159] As a result, early Chancery cases were not resolved according to known laws or settled principles, and it was almost impossible to predict the outcome of an equity suit because it turned largely on the personal opinion of the Chancellor.[160]

This personal form of justice arose naturally in the system of fused powers that was the medieval English Constitution. Indeed, the conscience-based Chancellor epitomized that system.[161] Technically, the Chancellor resolved legal disputes. But he did not do so in a manner typical of Anglo-American judicial institutions (i.e., according to preestablished rules and precedents). Instead, he acted as a one-man legislature, creating novel remedies and enforcing them in accordance with his conscience. And with the executive behind him, those who contravened the dictates of the Chancellor's conscience would find themselves confined to the Fleet Prison.[162]

As Section II.B explains, conscience-based equity was not only a product of this institutional setting—it was inextricably tied to it. Once English political

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157. SIMPSON, *supra* note 118, at 397-99. For an example, see YB 4 Hen. 7, fol. 4, Hil., pl. 8 (Ch. 1489), *reprinted in* LANGBEIN ET AL., *supra* note 83, at 314 ("[T]he Law of God is that an executor, who is of evil disposition, must not waste all the goods . . . . [I]f he does so waste . . . he shall be damned in Hell. And to make remedy for such an act as this, as I think, is well done according to conscience.").

158. *See* Bray, *supra* note 144, at 34.

159. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *53 ("No regular judicial system at that time prevailed in [Chancery]; but the suitor . . . found a desultory and uncertain remedy, according to the private opinion of the chancellor . . . ."); BAKER, *supra* note 80, at 115 ("Medieval chancellors were . . . driven back onto their own consciences."); MAITLAND, *supra* note 87, at 225 ("[E]ach chancellor assumed a considerable liberty of deciding causes according to his own notions of right and wrong.").

160. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *433-34 ("The decrees of a court of equity were then . . . founded on no settled principles . . . ."); ROBERT ATKYNS, AN ENQUIRY INTO THE JURISDICTION OF THE CHANCERY IN CAUSES IN EQUITY 32 (London 1695) ("The Chancellor's Judgment is not guided always by certain and known Rules, so that no foresight can sense and provide against it." (spelling modernized)).

161. *See* Pushaw, *supra* note 24, at 828 n.497.

162. *See* 5 HOLDSWORTH, *supra* note 91, at 286; LANGBEIN ET AL., *supra* note 83, at 286.

theory began to adopt a more robust doctrine of separation of powers, conscience-based equity faded from prominence.

B. Precedent-Based Equity

By the eighteenth century, a fundamentally different constitutional structure had emerged in England, which gave rise to an equally different conception of equity. Conscience-based equity was incompatible with the new constitutional paradigm based on parliamentary rule and separation of powers. Faced with the possibility that the Court of Chancery would be abolished, a series of Chancellors abandoned the quasi-legislative conscience-based conception and adopted the precedent-based conception. In contrast to their predecessors, these Chancellors followed precedent and developed a set of rules to constrain their discretion. Put differently, equity began adhering to the rule of law, and Chancery confined itself to the role of courts in a system of separated powers.

1. Structural Shifts

The four structural features that fostered the development of conscience-based equity — the King's power to grant extraordinary judicial relief, the judiciary's status as a subordinate executive department, the Crown's inherent legislative authority, and the overlap between legislative and judicial processes and officials — were abandoned over the course of the seventeenth century in favor of a governmental system based partially on the separation of powers. At the outset of James I's reign (1603), the English Constitution remained a system of fused powers centered on the King.[163] The dominant political theory was so-called "mixed monarchy," which emphasized incorporating the socioeconomic classes of English society in Parliament. Those classes — the Crown, the aristocracy, and the commons — represented distinct interests and would reciprocally check each other, ensuring that no class became too powerful.[164]

Two seventeenth-century constitutional crises drove English thinkers to develop an alternative to mixed monarchy. The first was the conflict between Parliament and the Stuart kings, who sought to impose a continental-style absolute monarchy on the country.[165] The second resulted from the first: with Parliament's victories against the Stuarts in the English Civil War (1642-51), the scales

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163. *See* GWYN, *supra* note 87, at 30.

164. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 198-99 (1998).

165. *See* MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 63 (2003); Raack, *supra* note 113, at 573-74.

of power began to tip too far in its direction, and Parliament itself began to govern arbitrarily. Rather than merely pass legislation, the Long Parliament and its successors exercised executive and judicial powers, effectively governing by extemporaneous decree.[166]

English legal theorists decried the abuses of both the Stuarts and Parliament as tyrannical and inconsistent with the rule of law.[167] This argument had intellectual purchase because the rule of law was a primary ingredient in the classical English conception of liberty.[168] As John Locke described it, the rule of law meant having one's affairs governed by preestablished and known laws "common to everyone of that society" rather than by "the inconstant, uncertain, unknown, arbitrary will of another man."[169]

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166. As Oliver Cromwell, once the champion of Parliament against the Crown, explained,

> The parliament . . . became themselves too desirous of absolute authority; and not only engrossed the legislative, but usurped the executive power. All causes civil and criminal, all questions of property and right, were determined by committees; who, being themselves the legislature, were accountable to no law; and for that reason their decrees were arbitrary . . . .

Oliver Cromwell, *The Protector's Final Answer (Apr. 26, 1657)*, *in* THE POLITICAL BEACON: OR THE LIFE AND CHARACTER OF OLIVER CROMWELL, IMPARTIALLY ILLUSTRATED 454-55 (London 1770) (spelling modernized); *see also* VILE, *supra* note 87, at 48 ("[P]arliament could be as tyrannical as a king."); GWYN, *supra* note 87, at 37-53 (discussing "republican dissatisfaction" with the Long Parliament).

167. *See* RAKOVE, *supra* note 39, at 246; GWYN, *supra* note 87, at 37.

168. For a detailed examination of the relationship between liberty and the rule of law in seventeenth- and eighteenth-century English legal theory, see JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES (2004) [hereinafter REID, RULE OF LAW]. *See also* JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION (1988) [hereinafter REID, LIBERTY] (elaborating on the centrality of the rule of law in English and American conceptions of liberty during the American Revolution); BAILYN, *supra* note 69, at 77 (describing English liberty as "the capacity to exercise 'natural rights' within limits set not by the mere will or desire of men in power but by non-arbitrary law").

169. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 132-33 (Lee Ward ed., Hackett Publ'g Co. 2016) (1690); *see also* REID, RULE OF LAW, *supra* note 168, at 4 ("The first element in the makeup of the historical rule-of-law doctrine is the general principle that 'individuals should be governed by law rather than by the arbitrary will of others,' that is, of course not by the arbitrary will and caprice of government officials but by law ruling over governor and governed alike." (quoting Guri Ademi, Comment, *Legal Intimations: Michael Oakeshott and the Rule of Law*, 1993 WIS. L. REV. 839, 844)); REID, RULE OF LAW, *supra* note 168, at 5 ("Another element defining historic rule-of-law was certainty. Again a test of liberty was that 'government be conducted in accordance with established and performable norms.'" (quoting Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 97, 101 (Allan C. Hutchinson & Patrick Monahan eds., 1987)).

English thinkers advanced the separation of powers as a theoretical counterweight to both Stuart absolutism and Parliamentary overreach.[170] One of the primary arguments raised in favor of this constitutional structure was what M. Elizabeth Magill has called the "rule-of-law thesis."[171] As the English experience in the seventeenth century made clear, the rule of law could never obtain if the same officials could both make and apply the law "since those persons in their legislative capacity would always modify the law to excuse whatever they might do in their executive capacity."[172] Thus, advocates of the rule-of-law thesis maintained that the powers of lawmaking and judging should be separated so as to limit official discretion and "assure that the law is impartially administered and that all administrators are under the law."[173] Initially, these theorists were primarily concerned with preventing the King from exercising legislative and judicial powers. But the threat of legislative tyranny led to a "second stage" in the English development of separation of powers, which entailed "the realization that legislatures must also be subjected to restriction if individual freedom was not to be invaded."[174]

The outcome of these crises, culminating in the Glorious Revolution, ensured that separation of powers and the rule-of-law thesis became fixed features of the English Constitution.[175] To be sure, England never adopted a pure system of separated powers; the government that took shape in the eighteenth century combined separation-of-powers principles with the older theory of mixed monarchy.[176] Even so, this modest shift away from fused powers wrought significant change to the constitutional structure. As relevant here, it resulted in the abandonment of the four structural features that had fostered the development of conscience-based equity.

First, Parliament abrogated the King's power to administer justice outside the course of the common law. During the seventeenth century, Parliamentarians attacked the prerogative courts, including Chancery and the infamous Star

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170. *See* RAKOVE, *supra* note 39, at 246; VILE, *supra* note 87, at 7, 43-50.

171. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1191 (2000).

172. GWYN, *supra* note 87, at 35. For contemporary articulations of this thesis, see LOCKE, *supra* note 169, at 198; and JOHN TOLAND, THE ART OF GOVERNING BY PARTYS 80-81 (London, Bernard Lintott 1701).

173. GWYN, *supra* note 87, at 127; *see* Manning, *supra* note 72, at 67-69.

174. VILE, *supra* note 87, at 47-49; *see also* REID, RULE OF LAW, *supra* note 168, at 25-28 (describing royalist arguments that Parliament was violating the rule of law).

175. *See* VILE, *supra* note 87, at 57; 10 HOLDSWORTH, *supra* note 91, at 713.

176. It did so by roughly dividing the three governmental functions between the three estates: the executive power in the King, the supreme judicial power in the House of Lords, and the legislative power in the Lords and Commons. *See* VILE, *supra* note 87, at 58-82.

Chamber, as instruments of arbitrary royal power.[177] Parliament's victory in the English Civil War sealed the fate of these tribunals.[178] By 1689, Parliament had abolished all prerogative courts except Chancery, and the Crown disclaimed any authority to establish judicial bodies in the English Bill of Rights.[179] According to Blackstone, removing "all judicial power" from the Crown was necessary to preserve the rule of law because "as then was evident from recent instances, [it] might soon be induced to pronounce that for law, which was most agreeable to the prince."[180]

Relatedly, English judges secured independence from the Crown. Stuart manipulation of the courts convinced Parliament that even common-law judges could not be trusted to fairly administer the law unless they were protected from royal influence.[181] Parliament accomplished this objective by granting the judges salary protection and life tenure during good behavior.[182] Seventeenth-century thinkers also reconceptualized the power that courts exercised.[183] Whereas royal judges had long been understood as merely sharing in the executive power, by 1768 Blackstone could argue that the "distinct and separate existence of the judicial power" was a "main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated" from "the executive power."[184] Thus, at the time of the American Founding, English judges were no longer dependent royal agents; the judiciary

177. *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1202-04 (2005).

178. *See* Yale, *supra* note 151, at 7-8.

179. Bill of Rights 1689, 1 W. & M. c. 2 (Eng.) (declaring such powers "illegal and pernicious").

180. 1 WILLIAM BLACKSTONE, COMMENTARIES *260.

181. *See* RAKOVE, *supra* note 39, at 247 (explaining that seventeenth-century "royal judges who had often acted as instruments of an arbitrary Crown at whose pleasure they served still commanded more distrust than respect"); MAITLAND, *supra* note 87, at 312 (characterizing Stuart-era judges as the Crown's "servile creatures").

182. Act of Settlement 1700, 12 & 13 Will. 3 c. 2, § 3 (Eng.); *see also* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 61 (noting that the Act of Settlement "permanently established" the "complete independence of the bench").

183. *See* VILE, *supra* note 87, at 40-53; GWYN, *supra* note 87, at 42-44, 53-55.

184. 1 WILLIAM BLACKSTONE, COMMENTARIES *259. As is apparent from Blackstone's reference to preserving public liberty, an independent judiciary was closely connected with the rule-of-law thesis. *See* CLEMENT WALKER, RELATIONS AND OBSERVATIONS, HISTORICAL AND POLITICK, UPON THE PARLIAMENT BEGUN *ANNO DOM.* 1640, at 149 (n.p. 1648) ("Nor can the King by Himself, or joyntly with the Lords and Commons judge *what the Law is*, this is the office of the sworn Judges . . . yea, they doe declare *by what Law the King Governes*, thereby keeping the King from governing arbitrarily, and inslaving the people.").

was an independent branch of government wielding a distinctive "judicial power."[185]

The Crown was also forced to renounce its claim to independent legislative authority. In agreeing to the English Bill of Rights, William and Mary relinquished the Crown's last significant legislative power, that of suspending and dispensing with acts of Parliament.[186] Once again, Parliamentarians viewed this change as essential to ensure impartial rule by law and to limit arbitrary administrative discretion.[187]

Finally, the judiciary more fully separated from Parliament.[188] Although judges still occasionally advised on legislation, eighteenth-century Parliaments wrote and enacted statutes without the oversight or permission of the Council.[189] Likewise, judges acted independently to resolve cases according to preestablished rules; matters no longer passed through a revolving door between Parliament and the courts.[190] This division of functions and personnel between the legislative and judicial branches was closely connected to the rule-of-law thesis, both because it encouraged the legislature to enact clear and specific statutes to constrain judicial discretion and because it limited judges to faithfully applying the law.[191]

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185. GWYN, *supra* note 87, at 7-8.

186. Bill of Rights 1689, 1 W. & M. c. 2 (Eng.) (declaring that "the pretended Power of Suspending of Laws" and "Dispensing with Laws or the Execution of Laws by Regall Authoritie" is "illegall").

187. *See* GWYN, *supra* note 87, at 55-72, 106-08.

188. *See* BAKER, *supra* note 80, at 220.

189. Henry Horwitz, *Changes in the Law and Reform of the Legal Order: England (and Wales) 1689-1760*, 21 PARLIAMENTARY HIST. 301, 323 (2002).

190. *See* VILE, *supra* note 87, at 49 (noting the seventeenth-century consensus that "the *legislature* must be restricted to the making of law, and not itself meddle with particular cases"); LOCKE, *supra* note 169, at 193 (arguing that the legislature must not "rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges").

191. *See* Manning, *supra* note 72, at 66-70. This point was made famously by Blackstone, who argued that if the judicial power were "joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law." 1 WILLIAM BLACKSTONE, COMMENTARIES *259; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *142 (asserting that if the legislature and courts are separated, "the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject").

2. *The Transition to Precedent-Based Equity*

These changes to England's constitutional structure had a profound impact on the Court of Chancery. There was simply no place for conscience-based equity in the system of limited monarchy and separated powers that emerged after the Glorious Revolution. Equity was not abolished, but it was domesticated: Chancery jettisoned conscience-based equity in favor of the more limited precedent-based conception.

Conscience-based equity had been subject to criticism since its inception. As early as the fourteenth century, Parliaments protested the Chancellor's use of prerogative power to reform the common law, a task they saw as properly legislative.[192] Likewise, common-law judges chafed at Chancery's willingness to enjoin proceedings in their courts.[193] And common lawyers attacked the Chancellor's reliance on his personal conscience in deciding cases.[194] They argued that a system in which legal rights hinged on one man's predilections was arbitrary and inconsistent with the rule of law.[195] As one commentator put it, "What thing may be more unknown and more uncertain" than being "ordered by the discretion and conscience of one man?"[196]

With the restructuring of the English Constitution, the tide turned against conscience-based equity. Seventeenth-century lawyers renewed their predecessors' critiques of equity as lawless and unpredictable.[197] Most famously, John Selden mocked equity as a "roguish thing," the extent of which varied with the length of the "Chancellor's foot."[198] Parliamentary opponents of the Stuarts piled on; they maligned Chancery as no less a tool of arbitrary royal authority than the other prerogative courts.[199]

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192. *See* LANGBEIN ET AL., *supra* note 83, at 288-89.

193. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 57.

194. *See* BAKER, *supra* note 80, at 115.

195. *See id.*

196. *The Replication of a Serjeant at the Laws of England*, *in* CHRISTOPHER ST GERMAN ON CHANCERY AND STATUTE 99, 101 (J.A. Guy ed., 1985) (1531) (spelling modernized).

197. *See, e.g.*, ATKYNS, *supra* note 160, at 31-32 (condemning the Chancellor's "[a]bsolute and [a]rbitrary" power to decide cases based "upon [his] sole [o]pinion and [c]onscience"); CHARLES GEORGE COCK, ENGLISH-LAW 85 (London, Robert White 1651) ("[The] Court of Conscience is grown as unconscionable as any . . . ."); *see also* FORTIER, *supra* note 135, at 163-64 (summarizing critiques from prominent seventeenth-century lawyers).

198. JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN 43 (Pollock ed., 1927) (1689); *see also* MARK FORTIER, THE CULTURE OF EQUITY IN RESTORATION AND EIGHTEENTH-CENTURY BRITAIN 16 (2015) (calling Selden's claim "only the most famous statement of a widely recognized problem").

199. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 688.

From a more theoretical perspective, conscience-based equity was irreconcilable with the emphasis on separation of powers and the rule of law that took hold in the late seventeenth century.[200] As discussed, the rule-of-law thesis emphasized the need to separate executive, legislative, and judicial power to limit official discretion and to ensure that individuals were governed only by known, nonarbitrary laws. Conscience-based equity was based on the opposite presumptions: it fused all three powers to maximize the Chancellor's discretion.[201] As Blackstone later explained, this anomalous institution could not long coexist with the rule-of-law thesis:

> [C]ertainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case . . . [i]ts powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will.[202]

Conscience-based equity had become a constitutional anachronism. Based on antiquated views of fused powers and royal prerogative, it was destined to come under fire during the seventeenth-century upheavals against the Crown.

These pressures culminated in numerous efforts to abolish the Court of Chancery. Between 1640 and 1660, Parliament repeatedly considered proposals to either eliminate or radically reform Chancery.[203] Deprived of the structural underpinnings that once sustained its legitimacy, equity had only one weapon to resist this onslaught: its usefulness. Parliament would not abide a legal system

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200. *See* LANGBEIN ET AL., *supra* note 83, at 346.

201. *Cf.* REID, RULE OF LAW, *supra* note 169, at 7 ("[T]o combine in one individual . . . the authority to make, interpret, and enforce law was to create arbitrary power. To do the opposite and separate the authorities should mean the opposite of arbitrary power, and that was one definition of rule-of-law.").

202. 3 WILLIAM BLACKSTONE, COMMENTARIES *440; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *442, *433 (asserting that if equity decrees were made according to "the loose and fluctuating dictates of the conscience of a single judge," the Chancellor "would rise above all law . . . and be a most arbitrary legislator in every particular case"); HENRY HOME, PRINCIPLES OF EQUITY 27 (Michael Lobban ed., Liberty Fund 2014) (1778) (arguing that while a "court of equity in its perfection" would "determine every particular case according to what is just . . . without regarding any rules" because individuals "cannot safely be trusted with unlimited powers," equity must be governed by "establish[ed] rules, to preserve uniformity of judgment" and avoid "making judges arbitrary").

203. *See* Stuart E. Prall, *Chancery Reform and the Puritan Revolution*, 6 AM. J. LEGAL HIST. 28, 28 (1962) (summarizing these efforts).

that lacked the capacity to issue specific relief, and it could not agree on alternative means of affording equitable remedies outside of Chancery.[204]

Thus, Chancery survived. But its near-death experience prompted significant internal reform. Beginning with the Chancellorship of Lord Nottingham in 1675, Chancery transformed itself to fit within the new English constitutional structure by conforming to the rule of law and limiting the Chancellor's discretion.[205] In other words, Chancery became like the common-law courts—an independent tribunal exercising only judicial power and resolving cases based on settled principles.[206]

3. The Nature of Precedent-Based Equity

The precedent-based conception of equity that emerged from this transformation differed markedly from its predecessor. It was a developed body of law administered via traditional judicial proceedings. It lost the free-wheeling, quasi-legislative power that defined conscience-based equity.

Perhaps the best way to describe precedent-based equity is as a system of judicial remedies. Equity was not a standalone body of law; it depended on the common law for its existence and purpose.[207] This dependence owed to the fact that the content of primary legal rights and duties, such as whether an enforceable contract had been formed or whether a certain invasion of property constituted a trespass, was generally defined by common or statutory law.[208] Precedent-based equity did not create or alter rights; instead, it simply supplied an alternative set of remedies—judicial tools for enforcing primary rights—in cases

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204. *See* Stanley Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY 257, 260-61 (Donald Fleming & Bernard Bailyn eds., 1971).

205. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 692-94, 702-06; Dennis R. Klinck, *Lord Nottingham's "Certain Measures,"* 28 LAW & HIST. REV. 711, 727-32 (2010).

206. *See* FREDERICK POLLOCK, *The Transformation of Equity*, *in* ESSAYS IN THE LAW 180, 191 (1922).

207. *See* BAKER, *supra* note 80, at 123; MAITLAND, *supra* note 108, at 17.

208. As Blackstone explained, the "declaratory" part of the law, "whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down . . . depends . . . upon the wisdom and will of the legislator." 1 WILLIAM BLACKSTONE, COMMENTARIES *53-54; *see also* C.C. Langdell, *Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 55-59 (1887) (describing the role of equity and common-law judges in the creation of rights); Cross, *supra* note 62, at 208-09, 209 n.214 (noting that courts of equity "typically looked to the legislature and the precedent of the common-law courts for the rules that established the relative legal position of the litigants").

where common-law remedies were inadequate.[209] Chancery's jurisdiction was thus largely concurrent with that of the common-law courts: the two institutions offered different remedies to protect the same underlying rights.[210]

As the appellation suggests, precedent-based Chancellors followed precedent in administering this system of remedies.[211] By the late seventeenth century, Chancery decisions were reported and relied upon, such that equity became "a laboured connected system, governed by established rules, and bound down by precedents, from which [courts] do not depart."[212] No longer did Chancellors decide cases based on their personal conceptions of justice; rather, as Nottingham explained, "the conscience by which [the Chancellor is] to proceed is merely *civilis et politica*, and tied to certain measures."[213] Put differently, the "conscience" of precedent-based equity was equivalent to "precedent" or "the law of the land."[214] Precedent-based Chancellors thus proceeded only according to preestablished rules and principles.[215]

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209. *See* Burgess v. Wheate (1754) 28 Eng. Rep. 652, 666; 1 Eden. 177, 214 ("[I]n no case does [equity] contradict or overturn the grounds and principles [of the law] . . . ."); 3 WILLIAM BLACKSTONE, COMMENTARIES *434-36 (maintaining that law and equity were "founded in the same principles of justice and positive law" and were distinguished by "the different modes of administering justice in each . . . and the mode of relief").

210. *See* 1 STORY, *supra* note 33, at 92-94.

211. *See* W.H.D. Winder, *Precedent in Equity*, 57 LAW Q. REV. 245, 249-51 (1941). Illustrative contemporary expressions of this point abound. *See, e.g.*, Hilliard v. Taylor (1773) 21 Eng. Rep. 354, 354; [1773] Dick. 475, 476 ("I must be governed by precedents."); Sympson v. Hornsby (1716) 24 Eng. Rep. 196, 197; [1716] Prec. Ch. 439, 442 (noting that the Chancellor "must submit to be bound by [precedent]"); Fry v. Porter (1669) 86 Eng. Rep. 898, 902; 1 Mod. 300, 307 ("Certainly precedents are very necessary and useful to us . . . and it would be very strange, and very ill, if we should disturb and set aside what has been the course for a long series of time and ages.").

212. 3 WILLIAM BLACKSTONE, COMMENTARIES *432; *see also* JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL 4 (Dublin, Elizabeth Lynch 2d ed. 1787) ("Principles of decision thus adopted by the courts of equity, when fully established and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law.").

213. Cook v. Fountain (1676), 36 Eng. Rep. 984, 990; 3 Swans. 585, 600.

214. *See* NOTTINGHAM, *supra* note 151, at 200; *see also* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 95 (2d ed. 1981) ("What mattered now [in equity] was the civil conscience of the court, which was nothing other than a new system of law . . . ."); PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 692 ("[E]quity is now, for practical purposes, a body of law . . . .").

215. *See* Cowper v. Cowper (1734) 24 Eng. Rep. 930, 942; 2 P. Wms. 720, 753 (asserting that the Chancellor's "discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is exercised here, is to be governed by the rules of law and equity"); *see also* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 692 (describing precedent-based equity as "a consistent and definite body of rules").

By adhering to precedent, the set of remedies available in Chancery and the legal standards for granting them became determinate. As Blackstone put it, equity had been reduced to a "regular science,"[216] which meant that the remedy one could obtain from the Chancellor became predictable.[217] To obtain equitable relief under this system, a plaintiff was required to show that: (1) the defendant had violated (or was about to violate) one of her recognized legal rights, (2) she had no adequate remedy at law, and (3) she met whatever additional criteria applied to the specific remedy sought.[218] If the plaintiff could not make this showing, or if none of the established equitable remedies would redress her injury, then she could not obtain relief in Chancery.[219] No longer could the Chancellor invent a new remedy to prevent what he perceived to be a failure of justice.[220] Nottingham justified this change as necessary to preserve the rule of law, "for if equity be tied to no rule, all other laws are dissolved, and everything becomes arbitrary."[221] Precedent-based equity was thus not a different type of *law* but simply an alternative set of *remedies* that the Chancellor would issue in specific circumstances.[222]

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216. 3 WILLIAM BLACKSTONE, COMMENTARIES *440.

217. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *441 (asserting that it could now "be known what remedy a suitor is entitled to expect . . . as readily and with as much precision, in a court of equity as in a court of law" (spelling modernized)); FREDERICK EDWIN SMITH BIRKENHEAD, FOURTEEN ENGLISH JUDGES 158 (1926).

218. *See* 1 STORY, *supra* note 33, at 32; MITFORD, *supra* note 212, at 8, 32.

219. *See, e.g.*, Challis v. Casborn (1715) 25 Eng. Rep. 67, 67; [1715] Gilb. Rep. 96, 97 (admonishing a party that the court "could not assist them" unless they "could shew some Precedents" supporting Chancery's authority to grant the remedy sought).

220. BAKER, *supra* note 80, at 119. For examples of this shift in attitude, see *Prowse v. Abingdon* (1738) 25 Eng. Rep. 955, 957; [1738] West, T. Hard. 312, 316; *Stephens v. Craven* (1725) 25 Eng. Rep. 211, 211; [1725] Sel. Cas. T. King. 41, 41; *Cook v. Fountain* (1676) 36 Eng. Rep. 984, 990; 3 Swans. 585, 600; and 3 WILLIAM BLACKSTONE, COMMENTARIES *430, which lists "hard" cases in which "a court of equity had no power to interpose."

221. NOTTINGHAM, *supra* note 151, at 194.

222. *See* JOHN JAMES PARK, WHAT ARE COURTS OF EQUITY? 23-24 (London, Ellerton & Henderson 1832). Precedent-based Chancellors did retain a modicum of discretion greater than their common-law counterparts. To some extent, this was a practical necessity. As Samuel L. Bray has explained, equitable "remedies compelling action or inaction tend to present much more insistently [the] problems of specifying, measuring, and ensuring compliance" and hence demand "more flexibility in how the court restores the plaintiff to his rightful position." Bray, *supra* note 33, at 563, 568. The historical record also reveals occasions, however fleeting, in which eighteenth-century Chancellors reverted to the conscience-based approach of their forebears. *See, e.g.*, Dudley v. Dudley (1705) 24 Eng. Rep. 118, 119; Prec. Ch. 241, 244 ("My reasoning shall be drawn from the original institution of this court of equity and conscience . . . ."). But such statements represented a minority view that was out of step with prevailing law. *See* PLUCKNETT, CONCISE HISTORY, *supra* note 82, at 692 (asserting that by the

Importantly, precedent-based equity's adherence to rules did not mean that the law of equitable remedies was totally immutable. Equity continued to evolve, but unlike conscience-based equity in which the Chancellor could unilaterally expand the scope of relief, precedent-based equity divided responsibility for its development between the Court of Chancery and Parliament.[223] The roles assigned to each reflected contemporary views as to the appropriate functions of the judicial and legislative branches.

In this new paradigm, Chancery played a more modest role in the development of equitable remedies. As noted, the Chancellor now applied settled rules and principles to each case that came before him. But, of course, there arose cases to which the application of those rules was uncertain because of an unprecedented set of facts or a novel legal issue that had yet to be resolved by prior case law. When Chancery decided one of these questions of first impression, it would both elaborate on the preexisting rules and create new precedent that would apply in future cases.[224] As Lord Redesdale put it,

> There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity . . . decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are . . . fixed and certain . . . .[225]

Thus, the court could develop the doctrine in a certain direction by applying settled rules in new contexts, but it could do so only interstitially and within the

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eighteenth century, "chancellors accept[ed] the conclusion that equity has no place for a vague and formless discretion"); *cf.* HOME, *supra* note 202, at 24-25, 27 (asserting that while a court of equity "boldly undertakes" to "correct or mitigate the rigour, and what even in a proper sense may be termed the injustice of common law," the Chancellor still "ought not to interpose, unless he can found his decree upon some rule that is equally applicable to all cases of the kind" because "[i]f he be under no limitation, his decrees will appear arbitrary" (emphasis omitted)).

223. *See* LANGBEIN ET AL., *supra* note 83, at 359-61.

224. *See* Winder, *supra* note 211, at 252 ("Precedents accumulated but slowly so that there long continued to be gaps in equity which could be filled only by a novel ruling."); *see also* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 852 (2015) ("One familiar feature of legal rules is that the same rule can produce changing outcomes over time. Rules usually take account of various facts about the world; when the facts change, the outcomes change too.").

225. Bond v. Hopkins [1802] 1 Sch. & Lefr. 413, 428-29 (Ct. Ch.) (Ir.); *see also* HOME, *supra* note 202, at 21 (similarly describing the gradual judicial development of precedent-based equity); 1 STORY, *supra* note 33, at 19-23 (same).

bounds of precedent.[226] In other words, it could make law the way courts do (by accretion) but not the way legislatures do (by fiat).[227]

On the other hand, Parliament could make avulsive changes to equity practice. In the eighteenth-century English Constitution, major law reform, including "set[ting] and adjust[ing] the bounds of Chancery jurisdiction," was a legislative function within Parliament's domain.[228] And unlike its medieval forebear, Parliament was now capable of discharging this responsibility; indeed, it enacted far-reaching reforms, including modifications and expansions of equitable remedies.[229] Thus, the two institutions' roles with respect to the development of equity corresponded to their distinctive functions in a system of separated powers: Parliament set policy by enacting general statutes, and Chancery applied those policies in particular cases.

Finally, despite the differences between the two conceptions of equity, they shared several key features. First, the power to grant specific relief remained the distinctive function of the Court of Chancery.[230] Likewise, Chancery continued to proceed *in personam* and enforce its decrees by contempt.[231] Precedent-based Chancellors could send a recalcitrant defendant to prison with equal dispatch as their conscience-based predecessors.

III. DOES ARTICLE III CONFER AN INHERENT EQUITY POWER?

This Part considers whether "[t]he judicial Power" in "Equity" includes an inherent power to grant equitable remedies. Of course, Article III does not *expressly* confer such power; it says nothing at all about remedies. But its reference to "'judicial power' [has] long been understood to carry with [it] certain powers incident to all courts."[232] Thus, this Part investigates whether an informed

226. *See* Winder, *supra* note 211, at 252-53 ("A power to decide a matter untouched by authority is distinct from a power to disregard authority already in point. Equity judges continued to exercise the first power freely after the second had become weakened by the demands of judicial consistency.").

227. *See* Smith v. Clay (1767) 27 Eng. Rep. 419, 420; [1767] Amb. 645, 648 (maintaining that Chancery "had not legislative power"); *cf.* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 13 (2015) (distinguishing between judicial and legislative lawmaking).

228. LANGBEIN ET AL., *supra* note 83, at 359.

229. DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 13 (1989); LANGBEIN ET AL., *supra* note 83, at 360.

230. LANGBEIN ET AL., *supra* note 83, at 350.

231. *See, e.g.*, Penn v. Lord Baltimore (1750) 27 Eng. Rep. 1132, 1134-35; 1 Ves. Sen. 444, 447-48.

232. Barrett, *supra* note 32, at 816; *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.").

Founding-Era observer would have understood the authority to issue equitable relief to be one of those powers.[233] It examines three sources of evidence to answer that question: (1) the historical record surrounding the drafting and ratification of the Constitution, (2) the structure of Article III, and (3) early judicial practice.

But what is an "inherent judicial power"? At a basic level, the definition is straightforward: an inherent power is one that a federal court can exercise by virtue of its being a "Court" vested with "[t]he judicial Power of the United States."[234] Put somewhat differently, it is a power "that a court possesses . . . in its own right, even in the absence of enabling legislation."[235]

Despite its useful simplicity, this definition contains a few separate elements worth unpacking. First, an inherent judicial power is a component of the Article III "judicial Power" itself. Second, in order to apply its inherent powers, a federal court must be created and given jurisdiction by Congress. Article III's Vesting Clause is "a self-executing enactment,"[236] so all powers included in "[t]he judicial Power" are automatically vested by the Constitution in the Supreme Court and any lower federal courts that Congress chooses to establish, even in the absence of specific enabling legislation.[237] Nevertheless, a jurisdictional grant is necessary for a federal court to apply its inherent powers, as, outside of the Supreme Court's original jurisdiction, federal courts cannot exercise *any* power until given jurisdiction by Congress.[238] A statutory grant of jurisdiction is thus a necessary predicate for the exercise of—but is not the source of—federal judicial power.[239]

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233. *See* Barrett, *supra* note 32, at 847-48; *cf.* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252-65 (2001) (describing and defending this interpretative methodology in the context of Article II's Vesting Clause).

234. U.S. CONST. art. III, § 1; *see* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (defining inherent judicial powers); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 84-89 (same).

235. Barrett, *supra* note 32, at 842.

236. John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 211 (1997).

237. Engdahl, *supra* note 234, at 87-88; *cf. Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) (explaining that since "[t]he power to punish for contempts is inherent in all courts," the "moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power").

238. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause."); Engdahl, *supra* note 234, at 86 (noting the "prevailing view from the very beginning of our national jurisprudence" that "Article III's vesting clause is self-executing" with respect to inherent powers but not jurisdiction (emphasis omitted)).

239. *See* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1379 & 1379 n.7 (1994).

Parsing these two aspects of inherent judicial power illuminates the types of evidence relevant to the present inquiry. For instance, evidence that Founding-Era observers understood the power to grant equitable remedies as necessarily inhering in the very nature of a court vested with "judicial Power" would support the existence of an inherent equity power. On the other hand, indications that the Founders viewed federal equity power as purely statutory would cut the other way. Historical evidence that the courts' abilities to issue relief in equity cases depended on a statutory grant of jurisdiction would still be consistent with the existence of an inherent equity power, as subject-matter jurisdiction is a necessary predicate for courts to exercise "[t]he judicial Power." But any suggestion that further congressional action — that is, specific enabling legislation — was necessary before the courts could grant equitable remedies would imply that power was not understood to be part of "[t]he judicial Power."

The ensuing Sections of this Part examine history, structure, and early judicial practice regarding the original understanding of Article III. Ultimately, though the evidence is not overwhelming, it does support the proposition that federal courts have some inherent power to issue equitable relief.

A. History

The historical record surrounding the drafting and ratification of Article III comprises the richest potential source of evidence as to how an informed member of the ratifying public would have understood the Constitution's text. Consequently, it is where the Supreme Court typically looks in determining original meaning.[240]

Unfortunately, the historical record is relatively sparse concerning the inherent powers of the federal courts. In debating the judiciary, the Founders focused mainly on structural issues, such as the method of appointing and removing judges, the need for inferior federal tribunals, and the subject matter over which the courts would have jurisdiction. They simply did not devote much time to

240. *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493-95 (2019) (relying on state ratifying convention debates, *The Federalist*, and Anti-Federalist writings); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-23 (1995) (relying on *The Federalist* and other contemporaneous publications to interpret "[t]he judicial Power"); *see also* RAKOVE, *supra* note 39, at 16 (arguing that the records of state ratifying conventions "provide our best evidence of how the Constitution and its provisions were understood at the moment of adoption"); RAKOVE, *supra* note 39, at 14-15 (explaining the relatively limited utility of the Philadelphia Convention records in assessing original understanding); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 965 (2003) (asserting that contemporary commentaries are valuable evidence of original understanding).

expounding the specific inherent powers that those courts would possess.[241] As a result, the Founders never squarely addressed whether "[t]he judicial Power" in "Equity" encompassed authority to grant remedies.[242]

Normally, the lack of acknowledgment or discussion of a particular power at the Founding would suggest that contemporary observers did not understand it to exist. But context weakens that inference with respect to the judiciary. Many scholars have recognized that the minimal attention paid by the Founders to the federal courts' inherent powers more likely reflects a shared assumption about the content of those powers than an implicit denial of their existence.[243] Members of the Founding Generation were well acquainted with Anglo-American court systems in the colonies, the states, and England. Thus, they probably assumed that the judiciary would "exercise all functions and powers which Courts were at that time in the judicial habit of exercising."[244] There was no need to catalog exhaustively the powers included in "[t]he judicial Power," as most informed observers understood that the federal courts would basically do what courts had always done.[245]

The sparseness of the historical record is particularly insignificant for the present inquiry because "Equity" refers to a power at the core of Anglo-American courts' traditional role. The courts with which the Founders were familiar resolved legal disputes by granting remedies to protect rights.[246] This was doubly

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241. *See* Pushaw, *supra* note 24, at 822 ("[T]he Convention delegates did not specifically discuss [the] issue [of inherent judicial authority]. Similarly, the ratification records do not mention inherent power . . . ."); Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 12 (2011).

242. *See* Collins, *supra* note 53, at 269 ("Relatively little debate concerning Article III occurred at the Constitutional Convention, and the decision to give federal courts powers in equity was no exception."). To be sure, federal equity became a topic of heated controversy during the ratification debates. *See infra* notes 358-373 and accompanying text. But the focus of that controversy was on the *scope* of federal equity power rather than the antecedent question of whether Article III directly empowered the courts to grant equitable remedies.

243. *See* Pushaw, *supra* note 24, at 822 n.463; FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 253-54 (1985).

244. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 332 (1928).

245. *See* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1262 (1985) (arguing that "the Framers referred only to '[t]he judicial Power of the United States'" because they "probably anticipated that federal courts would act in the way courts were accustomed to operating"); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) ("[T]he framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system . . . ."); Chambers v. NASCO, Inc., 501 U.S. 32, 58 (1991) (Scalia, J., dissenting) ("Article III courts . . . derive from the Constitution . . . the authority to do what courts have traditionally done in order to accomplish their assigned tasks.").

246. *See* Engdahl, *supra* note 234, at 170-71.

true of the Court of Chancery: by the mid-eighteenth century, equity had essentially been distilled into an intricate system of judicial remedies.[247] That the English court underlying early Americans' understanding of equity was defined by its power to grant remedies strongly suggests that informed Founding-Era observers would have assumed the federal judiciary to possess some comparable authority.[248] Thus, the absence of express historical reference to an inherent equity power actually sheds little light on whether Article III encompasses such power.

In fact, when viewed more broadly, the historical record implies that Article III would probably have been understood to vest the federal courts with some inherent remedial authority. The nearly uniform conception of the judiciary reflected in the framing and ratification debates is of an independent branch empowered to execute its constitutional role of deciding cases and controversies.[249] And the Framers understood that the federal courts would do so in a manner typical of Anglo-American courts by applying the law to the facts of particular cases and issuing appropriate remedies to enforce their judgments.[250] It is hard to see how the courts could fulfill this role without any power to grant remedies.

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247. *See supra* notes 207-211 and accompanying text.

248. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991) (noting that prescribing the judiciary's remedial powers "probably appeared unnecessary" to the Framers "because the Constitution presupposed a going legal system, with ample remedial mechanisms"); Cross, *supra* note 62, at 210.

249. *See* Baude, *supra* note 32, at 1815. There are many examples of this view. *See, e.g.*, THE FEDERALIST NO. 80, at 413 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (referring to the judicial power of "determining causes"); The FEDERALIST NO. 64, at 335 (John Jay) (George W. Carey & James McClellan eds., 2001) ("[T]he judgments of our courts . . . are as valid and as binding on all persons whom they concern, as the laws passed by our legislature."); 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551 (2d ed. 1901) (John Marshall) (describing the federal courts' primary responsibility as "the decision of controversies"); 4 ELLIOT, *supra*, at 156 (William Davie) (arguing that it was necessary that the federal courts be "competent to the decision of all questions arising out of the constitution"); Oliver Ellsworth, *A Landholder No. V*, CONN. GAZETTE, Dec. 3, 1787, *reprinted in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 480, 483 [hereinafter DOCUMENTARY HISTORY] (Merrill Jensen ed., 1978) ("It is as necessary there should be courts of law . . . to carry into effect the laws of the nation . . . .").

250. *See* Pushaw, *supra* note 24, at 827. There are expressions to this effect throughout the ratification debates. *See, e.g.*, 3 ELLIOT, *supra* note 249, at 554 (John Marshall) (asserting that an individual injured by a federal officer could "apply" to a federal court "for redress, and get it"); 4 ELLIOT, *supra* note 249, at 37 (Archibald Maclaine) (similar); 4 ELLIOT, *supra* note 249, at 163 (Archibald MacLaine) (suggesting that the federal courts would give remedies in private-law disputes).

The structure of Article III supports this inference. A. Michael Froomkin has observed that Article III's "recognition of the judiciary's equal constitutional stature" combined with its creation "of a Supreme Court staffed with Justices who have life tenure and both original jurisdiction and powers of appellate review" demonstrates "that the judiciary must have the power to decide cases."[251] In other words, the design of Article III itself embodies an assumption about the role and function of courts, namely that they definitively adjudicate the rights of parties appearing before them.[252] This structural insight, in turn, implies that "[t]he judicial Power" encompasses some authority to grant remedies in the execution of federal judgments.[253] A remediless court is nothing more than an advisory body, which is inconsistent with the Founding-Era view of the federal judiciary.[254]

Founding-Era discussions regarding the role of equity in the new judicial system similarly evidence an assumption that the power to grant remedies inhered in all equity courts. For example, Hamilton explained that the "great and primary use of a court of equity, is *to give relief* in extraordinary cases."[255] This view is unsurprising considering the centrality of remedies to the prevailing conception of equity in England.

Finally, the clash over federal equity powers during the ratification debates corroborates that "[t]he judicial Power" in "Equity" was understood to encompass some remedial authority.[256] As ventilated in Part IV, the Anti-Federalists argued that the term "Equity" in Article III incorporated conscience-based equity, thereby vesting the federal courts with arbitrary authority akin to a medieval

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251. A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1352 (1994).

252. *See* Pushaw, *supra* note 24, at 741.

253. *See* Gordon v. United States, 117 U.S. 697, 699, 704 (1885) (asserting that the "judicial power in the sense in which those words are used in the Constitution" includes the power to "render judgment in the legal sense" by "carry[ing] [the court's] opinion into effect") (1885 publication of opinion originally drafted in 1864).

254. *See* Felix Frankfurter, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1020 (1924) ("At the time of the framing of the Constitution, a few basic ideas . . . had clustered around the very notion of a court," including that "[i]t is the characteristic of courts to decide and not merely to advise."); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 354 (Rothman Reprints, Inc. 1969) (1803).

255. THE FEDERALIST NO. 83, at 438 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (emphasis changed); *see also* GOEBEL, *supra* note 65, at 240 (arguing that extension of federal jurisdiction to include equity is evidence of how "earnestly the [Constitutional] Convention . . . applied itself to create an effective judicia[ry]").

256. *See infra* notes 358-373 and accompanying text (describing these debates).

English Chancellor. The Federalists responded by stressing that Article III incorporated only the more limited, precedent-based conception. But no commentator even intimated that the courts would not have any power to grant equitable remedies without specific congressional authorization. That the Federalists and Anti-Federalists disagreed only over the *extent* of the constitutional equity power suggests that they implicitly accepted that power's *existence*. And when the two sides of the ratification debates agreed that the Constitution included a particular power, it is significant evidence that it actually did.[257]

Taken together, these historical data offer modest support for the proposition that Article III empowers the federal courts to grant remedies in equity cases. To be sure, this conclusion relies on a number of inferences and assumptions, the most important of which is that an informed observer at the Founding would have understood the fundamental role of courts, including courts of equity, in the Anglo-American tradition. But these assumptions, in addition to being consistent with the tenor of Founding-Era discussions of the judiciary, are plausible given the distinct lack of historical evidence cutting against the existence of an inherent equity power.

B. Structure

This Section turns from history to structure. Considering structural evidence makes sense because it is difficult to interpret constitutional text accurately in isolation.[258] It is for this reason that the Supreme Court typically analyzes the

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257. *Cf.* Prakash & Yoo, *supra* note 240, at 892, 955-56.

258. *See* RAKOVE, *supra* note 39, at 11; *see also* Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1161 (1998) ("[T]he constitutional text may provide less than complete guidance. In resolving such ambiguities, it is useful—if not essential—to determine the specific import of the constitutional text by reference to the constitutional structure."). To be methodologically precise, this Section engages in what is often referred to as structural reasoning, that is "a method of constitutional interpretation in which the reader draws inferences from the relationship among the structures of government" established by the Constitution. Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 833 (2004). The logic behind structural reasoning is straightforward: the Constitution set up a finely wrought governmental system based on separation of powers and federalism, so its particular provisions should be read in light of that overall structure and the intellectual traditions underpinning its design. *See* 1 STORY, *supra* note 37, at 387 ("In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1964-65. And when faced with competing interpretations of a constitutional provision, the fact that one fits more closely with the

judicial power in context—by reference to the structure of Article III and the Constitution as a whole.[259] Moreover, structure might resolve any lingering uncertainty over the historical evidence reviewed in the previous Section. As noted, the historical record suggests that a Founding-Era observer would have understood "[t]he judicial Power" in "Equity" to include some authority to grant remedies. But as Robert J. Pushaw, Jr., has explained, the Constitution's separation of the judiciary from the executive "render[s] indeterminate the applicability of traditional English court functions, which derived from the king's prerogative," such that "American judges may or may not have a particular power possessed by their British counterparts, and this power may or may not require a legislative grant."[260] One might, therefore, read the history as affirming that the courts could grant remedies in equity cases *if* specifically authorized by Congress. Thus, it is helpful to consider whether any structural features of Article III give reason to think that it empowers the judiciary to issue equitable relief without enabling legislation.

The existence of the Supreme Court's original jurisdiction does just that. Admittedly, the connection between the Court's original jurisdiction and inherent equity power is not immediately self-evident. Section 2 of Article III grants the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[261] On its face, this provision seems only to address the manner in which particular cases are to be adjudicated at the Supreme Court. Crucially, however, the Supreme Court's original jurisdiction is entirely self-executing. Unlike the jurisdiction of the lower federal courts and the Supreme Court's appellate jurisdiction, it is conferred directly by the Constitution, does not require a statutory grant of jurisdiction, and cannot be limited or controlled by Congress.[262]

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structure created by the document as a whole is weighty evidence that that interpretation more accurately captures the provision's meaning. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2067 (2009).

259. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-25 (1995); Flast v. Cohen, 392 U.S. 83, 96 (1968) (explaining that "the implicit policies embodied in Article III . . . impose the rule against advisory opinions on federal courts," which "implements the separation of powers prescribed by the Constitution"). The Court has relied on structural reasoning to interpret "[t]he judicial Power" since the Founding Era. *See* Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. 98, 104 (2009) (explaining that Chief Justice Marshall's opinion in *Marbury v. Madison* "derived the power of judicial review from general understandings of the judicial function and the nature of a written constitution").

260. Pushaw, *supra* note 24, at 826 n.480.

261. U.S. CONST. art. III, § 2.

262. *See* California v. Arizona, 440 U.S. 59, 65 (1979); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1071 (1967).

In addition, most original jurisdiction cases are "basically equitable in nature."[263] Almost all of these lawsuits arise between two states or between a state and the federal government.[264] Money damages are rarely adequate to protect the interests at stake in suits between sovereigns, which include territorial disputes, competing claims to water rights, and alleged breaches of interstate compacts.[265] For instance, when a state invokes the Court's original jurisdiction to resolve a border dispute, it typically seeks to recover land held by the defendant state, not simply to obtain compensation for the loss.[266] And because only equity can provide such specific relief, the Court has been called upon to grant the full panoply of equitable remedies in original actions.[267]

The source of the Supreme Court's authority to grant equitable relief in these cases must be "[t]he judicial Power." Because its original jurisdiction is beyond congressional control, the Court's power to grant remedies within that domain cannot be contingent on enabling legislation; otherwise, Congress could strip that jurisdiction by refusing to pass an authorizing statute. This conclusion follows from two facts: the Supreme Court, like all federal courts, is forbidden from

263. Ohio v. Kentucky, 410 U.S. 641, 648 (1973); *see also* Kansas v. Nebraska, 574 U.S. 445, 453-55 (2015) (describing the Court's original jurisdiction as of "an essentially equitable character"); Rhode Island v. Massachusetts, 39 U.S. (14 Pet.) 210, 256-57 (1840) (noting that the "proceedings" in original jurisdiction cases are typically "regulated by the rules and usages of the Court of Chancery").

264. 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4044 (3d ed. Apr. 2022 update).

265. *See, e.g.*, *Rhode Island*, 39 U.S. at 256 (territorial dispute); Kansas v. Colorado, 185 U.S. 125, 139, 142 (1902) (water rights); *Nebraska*, 574 U.S. at 448, 453 (interstate compact).

266. *See, e.g.*, *Rhode Island*, 39 U.S. at 256-57.

267. *See, e.g.*, Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 405 (1792) (injunction); New Jersey v. New York, 526 U.S. 589, 589 (1999) (injunction); Kentucky v. Indiana, 281 U.S. 163, 169 (1930) (specific performance); United States v. Wyoming, 333 U.S. 834, 835 (1948) (quiet title); Virginia v. West Virginia, 206 U.S. 290, 317 (1907) (accounting); Missouri v. Illinois, 180 U.S. 208, 224-49 (1901) (summarizing original jurisdiction cases seeking equitable relief).

issuing advisory opinions,[268] and an "adjudication of rights which a court is powerless to enforce is tantamount to an advisory opinion."[269] Thus, the Court must rely on a non-statutory source for its remedial authority in original-jurisdiction cases.

This structural inference finds ample support in early practice. The Court began granting equitable remedies under its original jurisdiction immediately after it was organized, notwithstanding the lack of express statutory authorization.[270] And the only constitutional provision that explicitly authorizes the Court to act is the Article III "judicial Power," which must therefore be the source of this power.

If Article III empowers the Supreme Court to issue equitable remedies in its original jurisdiction, then it also confers that same authority on any lower courts that Congress chooses to create and on the Supreme Court in its appellate jurisdiction. After all, Article III automatically vests "[t]he judicial Power" in every federal court the "moment" they are "called into existence and invested with jurisdiction" by Congress.[271] And "[t]he judicial Power" in "Equity" exercised by the Supreme Court in original jurisdiction cases is identical to that conferred on

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268. *See* Thomas Jefferson to Chief-Justice Jay and Associate Justices (July 18, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 486-87 (New York, G.P. Putnam's Sons 1891) [hereinafter CORRESPONDENCE OF JOHN JAY]; Chief-Justice Jay and Associate Justices to President Washington (July 20, 1793), *in* 3 CORRESPONDENCE OF JOHN JAY, *supra*, at 487-88; Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 CORRESPONDENCE OF JOHN JAY, *supra*, at 488-89; *see also* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1773-74 (2015) (noting that "*The Correspondence of the Justices* is almost universally regarded as having liquidated the meaning of Article III as flatly forbidding the federal judiciary from issuing advisory opinions").

269. Los Angeles v. Lyons, 461 U.S. 95, 129 n.20 (1983) (Marshall, J., dissenting); *see also* Miller v. Albright, 523 U.S. 420, 452-53 (1998) (Scalia, J., concurring) (asserting that federal courts lack jurisdiction over cases where "the Court has no power to provide the relief requested"); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 88 n.222 (1981) ("A denial of jurisdiction to grant effective relief could, in sufficiently extreme cases, also effectively put the federal courts in the position of rendering 'mere advisory opinions,' in violation of the case or controversy requirement of article III.").

270. *See, e.g.*, *Brailsford*, 2 U.S. at 402; Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 732, 749 (1838) (asserting that the Court could grant remedies "according to the principles and usages of a court of equity" without "an act of congress in aid"). Later cases made this point more explicitly. *See, e.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 460, 462 (1856).

271. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

every federal court by Article III.[272] Article III refers to "[*t*]*he* judicial Power," and it vests that power "in one supreme Court, *and* in such inferior Courts" established by Congress.[273] In other words, "There is only *one* 'judicial Power'" of the United States, and that authority is vested—without differentiation—in all federal courts.[274] The provisions of Article III demarking the Supreme Court's jurisdiction merely distribute this authority among different courts and between appellate and original jurisdiction; they do not apportion it differently based on the level of court.[275]

To be sure, there is one important sense in which the equity power possessed by the Supreme Court in its original jurisdiction differs from that vested in all other federal courts: the latter is subject to congressional control. Outside of the Court's original jurisdiction, Congress has broad authority to regulate federal subject-matter jurisdiction,[276] which carries with it a power to prescribe the remedies that federal courts can issue.[277] Thus, Congress can limit the lower federal courts' ability to grant equitable remedies simply by withholding equity jurisdiction in particular categories of cases.[278] As discussed further below, Congress has rarely stripped or limited the courts' jurisdiction in equity. In any event, that Congress can regulate the remedies available outside of the Supreme Court's original jurisdiction does not affect the conclusion impelled by the very existence of that jurisdiction—that "[t]he judicial Power" in "Equity" must include some remedial authority.

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272. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 332-33 (1816); Sohoni, *Lost History*, *supra* note 18, at 957 ("Article III does not differentiate between courts at various levels of the federal judicial hierarchy in its conferral of the power to decide 'Cases[] in . . . Equity.'").

273. U.S. CONST. art III, § 1 (emphasis added).

274. Sohoni, *Lost History*, *supra* note 18, at 957 (emphasis added); *see also* Barrett, *supra* note 32, at 817 ("Article III vests 'the judicial Power' in *each* Article III court. To the extent that 'the judicial Power' carries with it [a particular power], each court possesses that power in its own right.").

275. *See* Monaco v. Mississippi, 292 U.S. 313, 321 (1934); Minnesota v. Hitchcock, 185 U.S. 373, 383 (1902) ("[The] paragraph, distributing the original and appellate jurisdiction of this court, is not to be taken as enlarging the judicial power of the United States . . . ."); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 563 (1851) (observing that the original jurisdiction case "under consideration, is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia").

276. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512-14 (1868); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850).

277. *See* John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 (1998).

278. *See* Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

Admittedly, this structural inference alone provides only modest support for interpreting Article III to encompass an inherent power to grant equitable remedies.[279] But it does give some reason to read the historical record in favor of that interpretation rather than the alternative, which would require congressional authorization for any exercise of remedial powers in equity.

C. Early Judicial Practice

This Section surveys federal equity cases decided between 1789 and 1835 to assess whether early federal judges believed themselves to possess inherent power to grant equitable remedies under Article III.[280] Early federal courts' understanding of their own inherent power is relevant in two respects. First, the Supreme Court often considers practical expositions of the Constitution as evidence of how it was originally understood for the simple reason that early government actors, including federal judges, were informed observers familiar with the legal and linguistic customs of the Founding Era.[281] Second, the Court has indicated that a consistent course of practice can "liquidate" the meaning of an otherwise ambiguous constitutional provision.[282] Thus, to the extent that the text of Article III, even when read in light of history and constitutional structure,

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279. After all, original-jurisdiction cases are relatively rare and often extraordinary, which might counsel against relying exclusively on inferences drawn from that context. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 705 (1925) (observing that interstate disputes are "in a world wholly different from that of a law-suit between John Doe and Richard Roe over the metes and bounds of Blackacre").

280. During this period, members of the Founding Generation were serving on the Supreme Court. The last two such Justices, Chief Justice Marshall and Justice Duvall, left the Court in 1835.

281. *See, e.g.*, Knowlton v. Moore, 178 U.S. 41, 56 (1900); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418-20 (1821) (attaching "[g]reat weight" to the "contemporaneous exposition" of Article III in "the uniform decisions of this Court"); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1537 (2005) ("Early interpretations evidence the original meaning of the Constitution because it is thought that early interpreters were likely to understand the meaning of the constitutional language and the context in which it was enacted.").

282. *See, e.g.*, NLRB v. Canning, 573 U.S. 513, 525 (2014); *see also* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803). Indeed, several prominent members of the Founding Generation contemplated that post-ratification liquidation by practice would be necessary to elucidate the Constitution's relatively general terms. *See, e.g.*, THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., 2001) ("All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); *see also* William P. Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 8-34 (2019) (describing Founding-Era conceptions of liquidation).

could reasonably be read two different ways (i.e., either as encompassing an inherent power to grant equitable remedies or not), a pattern of early judicial practice might help resolve that ambiguity.[283]

At first glance, judicial practice in the early Republic appears strongly to support the conclusion that Article III encompasses an inherent equity power. In 1789, Congress passed the Judiciary Act, which established a set of federal circuit courts and granted them original jurisdiction over "suits of a civil nature . . . in equity."[284] The Act also granted the Supreme Court appellate jurisdiction over certain equity cases originating in state and federal court.[285] Immediately after the passage of these statutes, the federal courts began to issue a full set of equitable remedies in cases within their respective jurisdictions.[286] They generally did so without express reliance on, or even reference to, any statutory authority. In a way, this is unsurprising, as no statute seemed expressly to empower the judiciary to grant equitable remedies.[287] That the courts did so anyway is

283. *See* Sohoni, *Lost History*, *supra* note 18, at 926 n.37 ("The Court has long relied upon historical practice by the federal courts to lend meaning to the notoriously terse phrases of Article III."). Courts and commentators have disagreed over whether interpreters can rely on *any* pattern of governmental practice or if only *early* practice is probative of constitutional meaning. *Compare Canning*, 573 U.S. at 525 ("[T]his Court has treated practice as an important interpretive factor even when . . . that practice began after the founding era."), *and* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 45-50 (2020) (criticizing the view that early practice should be privileged), *with Canning*, 573 U.S. at 572-74 (Scalia, J., concurring) (asserting that practice is only relevant where it "has been open, widespread, and unchallenged since the early days of the Republic"), *and* Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1233 (2014) ("[H]istorical practice ought to matter if it emerged in the first few decades of constitutional history . . . ."). It is not my goal to enter this debate here. Instead, I focus on early practice but note later evidence for those who believe it relevant. C*f.* Manning, *supra* note 72, at 85-101 (considering cases decided between 1789-1834 as evidence of early judicial practice).

284. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

285. *See id.* §§ 13, 22, 25, 1 Stat. at 80-81, 84-87.

286. *See, e.g.*, Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792) (injunction); Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306 (1808) (accounting); Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810) (constructive trust); Alexander v. Pendleton, 12 U.S. (8 Cranch) 462 (1814) (quiet title); Mut. Assurance Soc'y v. Watts Ex'r, 14 U.S. (1 Wheat.) 279 (1816) (equitable lien); Hepburn v. Dunlop & Co., 14 U.S. (1 Wheat.) 179 (1816) (specific performance); Bradley v. Reed, 3 F. Cas. 1158 (C.C.W.D. Pa. 1800) (No. 1,785) (injunction); McAlister v. Barry, 15 F. Cas. 1203 (C.C.D.N.C. 1803) (No. 8,656) (rescission); Bryant v. Hunter, 4 F. Cas. 516 (Washington, Circuit Justice, C.C.D. Pa. 1811) (No. 2,068) (accounting); Conway v. Sherron, 6 F. Cas. 372 (C.C.D.C. 1813) (No. 3,147) (specific performance); Lidderdale v. Robinson, 15 F. Cas. 502 (Marshall, Circuit Justice, C.C.E.D. Va. 1824) (No. 8,337) (subrogation).

287. Neither section 14 of the Judiciary Act of 1789 nor section 2 of the Process Act of 1792, both conceivable sources of statutory authority, appear to do so. The former provided that the federal courts "shall have power to issue . . . all other writs not specially provided for by statute,

weighty evidence of their belief that "[t]he judicial Power" itself included this authority.

That said, the modern Supreme Court's interpretation of the Judiciary Act casts doubt on this superficially obvious conclusion. The Court has read the eleventh section of that statute, which simply provided that "the circuit courts shall have original cognizance . . . of all suits of a civil nature . . . in equity," as providing express statutory authority for the federal courts to issue equitable remedies.[288] As a textual matter, this construction is awkward.[289] And it creates a serious doctrinal conflict, as the Supreme Court has also made clear that

which may be necessary for the exercise of their respective jurisdictions." § 14, 1 Stat. at 81-82. The relationship, if any, between this "curiously obscure" provision and the federal courts' power to grant equitable remedies is unclear. GOEBEL, *supra* note 65, at 509. I found no case in which an early federal court expressly relied on section 14 for such authority. Modern federal courts have read its successor statute, the All Writs Act (AWA), as "a codification of the federal courts' traditional, inherent power to protect" their jurisdiction. Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099 (11th Cir. 2004). In other words, the AWA is not a general statutory authorization to issue remedies to protect legal rights; instead, it is a residual source of authority to address ancillary matters that might "frustrate the implementation of a court order or the proper administration of justice." United States v. N.Y. Tel. Co., 434 U.S. 159, 174 (1977); *see also* Samuel I. Ferenc, *Clear Rights and Worthy Claimants: Judicial Intervention in Administrative Action Under the All Writs Act*, 118 COLUM. L. REV. 127, 140-41 (2018) (collecting examples of equitable remedies issued under the AWA). The Process Act of 1792 presents a somewhat closer question. It provided that "the forms and modes of proceeding" applied by federal courts in equity cases "shall be . . . according to the principles, rules and usages which belong to courts of equity." Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. Anthony J. Bellia, Jr. and Bradford R. Clark seem to interpret this provision as authorizing the federal courts to "apply remedies and procedures generally used by courts of equity" in England. Bellia & Clark, *supra* note 23, at 675. But that reading is hard to square with early Supreme Court decisions indicating that section 2 merely regulated the federal courts' proceedings; it did not empower them to grant remedies. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 24 (1825). In other words, these early cases suggest that while the Process Act may bear on the *scope* of federal equity power, it was not the *source* of that power. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) ("[The Process Act] gave the federal courts no power that they would not have had in any event when courts were given 'cognizance,' by the first Judiciary Act, of suits in 'equity.'"). But whatever the original purpose of the Process Act, it cannot be the source of federal equity power today, as it was repealed in 1948. *See* Duffy, *supra* note 23, at 147-48 n.173; Bellia & Clark, *supra* note 23, at 627-28 (acknowledging that the Process Act "no longer govern[s] how federal courts operate"). That the federal courts continued to grant equitable remedies after its repeal strongly suggests that section 2 was never understood as the primary source of their remedial authority.

288. *See, e.g.*, Grupo Mexicano de Desarrollo v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

289. *See* Cross, *supra* note 62, at 201 n.182 ("The idea that Congress meant for its grant of jurisdiction in equity to include a delegation of lawmaking power is inconsistent with the language of the statutes it enacted.").

jurisdictional grants generally do not authorize the federal courts to develop substantive law.[290] However aberrant, the Court's reading of the Act and its successor statutes appears settled.[291] That complicates this Section's analysis because many early federal courts granted equitable relief without identifying a particular source of authority. Thus, if the Supreme Court's reading of section 11 is correct, it is possible that, in issuing relief in these cases, early federal courts were implicitly relying on the Judiciary Act rather than on inherent Article III power.

Sorting out this uncertainty requires parsing the case law. I have divided the cases into three groups: (1) cases that explicitly or implicitly assert a claim to inherent equitable authority under Article III, (2) cases that assert a power to grant equitable remedies without identifying the source of that power, and (3) cases that seem to rely on the Judiciary Act for authority to grant equitable relief. When viewed in this way, the evidence supporting an inherent equity power is less overwhelming. Nonetheless, early judicial practice does support an inference that federal judges understood themselves to be vested with some degree of inherent power to grant remedies in cases over which they had been given equity jurisdiction.

1. *Article III Cases*

In a handful of cases, early federal courts appeared to claim an inherent power to issue equitable relief. These generally divided into two subgroups: (1) cases in which the court explicitly identified the Constitution as the source of its

290. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981). John F. Duffy resists this conclusion, maintaining that, at least in the context of judicial control of administrative action, general jurisdictional statutes do "authorize[]" the federal courts "to create and apply a federal common law of equity." Duffy, *supra* note 23, at 126. Though he acknowledges that this view diverges from modern doctrine, he suggests that historical practice—namely the federal courts' traditional willingness to grant equitable relief solely on the basis of a jurisdictional grant—justifies exempting equity from the more limited understanding of jurisdictional provisions articulated in cases like *Radcliff Materials*. *See id.* at 121-30. Duffy's careful historical analysis is persuasive, but I interpret the evidence somewhat differently. Rather than sanctioning a doctrinally strained reading of jurisdictional statutes, the historical pattern Duffy identifies most plausibly supports the existence of an inherent federal equity power under Article III. Recall that an inherent judicial power is one that a federal court possesses solely by virtue of it having been created and granted subject-matter jurisdiction by Congress. Thus, the fact that federal courts historically exercised equity powers without express statutory authorization implies that they understood themselves as possessing an inherent power to grant equitable remedies that was unlocked by, but not rooted in, general jurisdictional grants. *See* Barrett, *supra* note 32, at 874-75.

291. For discussion of how this anomalous interpretation came to be accepted doctrine, see *infra* notes 330-336 and accompanying text.

remedial authority and (2) cases in which the court implicitly asserted an inherent power by claiming it would grant equitable remedies even in the absence of specific statutory authorization.

The opinions in the first group of cases were typically cursory and somewhat vague. Most simply asserted that the "chancery jurisdiction given by the constitution" includes some authority to "administer[]" "remedies in equity" according to "the general principles of courts of equity."[292] These cases do not specifically root that authority in "[t]he judicial Power," though it is hard to imagine any other constitutional provision to which they would be referring. Some lower court decisions were a bit more specific on this score. For instance, in *Baker v. Biddle*, Justice Baldwin explained that section 11 of the Judiciary Act was merely "[i]n execution" of a preexisting power.[293] It was the "organic law," specifically "the second section of the third article of the constitution" by which "the judicial power of the United States is extended to all cases in equity" that "creat[ed]" the power those courts "exercised" when deciding cases within the jurisdiction conferred by section 11.[294]

The cases in the second group are clearer. Most significant is *Bodley v. Taylor*, which involved a complex set of competing land claims in Kentucky.[295] At the Supreme Court, one of the parties reasoned that because the legal rights at issue were created by statute, a federal court "ought to consider itself as sitting in the character of a court of law and . . . decide [the] questions as a court of law would decide them," including, apparently, by issuing only those remedies authorized by the statute.[296] Chief Justice Marshall bluntly rejected this argument:

> In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles. . . .

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292. Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832); *accord* Livingston v. Story, 34 U.S. (9 Pet.) 632, 660-61 (1835); Lucas v. Morris, 15 F. Cas. 1063, 1064 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1825) (No. 8,587). Importantly, though these early opinions often spoke in terms of equity "jurisdiction," they were not referring to subject-matter jurisdiction. Rather, they "used the term in a general sense to mean the power of the federal court to apply traditional equitable remedies in a case in which legal remedies were unavailable or inadequate." Collins, *supra* note 53, at 278.

293. 2 F. Cas. 439, 444 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1831) (No. 764).

294. *Id.* at 443-44; *see also* Harvey v. Richards, 11 F. Cas. 746, 755 (Story, Circuit Justice, C.C.D. Mass. 1818) (No. 6,184) (asserting that under their "constitutional jurisdiction" the "equity powers and authorities of the courts of the United States are . . . co-equal and co-extensive, as to . . . remedies").

295. 9 U.S. (5 Cranch) 191, 191-200 (1809). For background on the question in *Bodley*, see Jeffrey S. Gordon, *Our Equity: Federalism and Chancery*, 72 U. MIAMI L. REV. 176, 201-08 (2017).

296. *Bodley*, 9 U.S. at 222.

> The court, therefore, will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a court of chancery. It 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.[297]

Because the *Bodley* Court expressly disclaimed all reliance on statutory authorization, the only possible source of its authority to issue relief in that case was Article III.[298] Indeed, the Court's assertion that it could grant equitable remedies "not given by statute" is a paradigmatic claim to inherent power.[299]

Taken together, these two sets of cases reflect an assumption that the federal courts derived at least some equity power directly from Article III.[300] That assumption, in turn, supports an inference that "[t]he judicial Power" encompasses authority to grant remedies in "Equity," as the Constitution does not directly vest the judiciary with any other power.

2. *Cases that Do Not Identify a Source of Equity Power*

In a significant number of cases, early federal courts asserted the authority to grant equitable remedies without identifying a source of that power. They frequently maintained that they could issue a particular remedy by virtue of their being constituted as a "court of equity" or a "court of chancery."[301] Occasionally

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297. *Id.* at 222-23; *see also* Taylor v. Brown, 9 U.S. (5 Cranch) 234, 255 (1809) (reaffirming *Bodley*); Harrison v. Rowan, 11 F. Cas. 666, 668 (Washington, Circuit Justice, C.C.D.N.J. 1819) (No. 6,143) (asserting that the court could grant an equitable remedy "because, having jurisdiction of the cause, the court possesses every incidental power necessary to the due exercise of that jurisdiction").

298. *Cf. Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807) (explaining that because federal courts are "created by written law," they can exercise only those powers "given by written law"—that is, the Constitution or a statute).

299. *Bodley*, 9 U.S. at 223; *see* Pushaw, *supra* note 24, at 738 n.4 (explaining that inherent powers encompass all instances of "judicial discretion" including "remedying [legal] violation[s]" that the courts exercise "without a specific statutory grant"); Gordon, *supra* note 295, at 204-05 (interpreting *Bodley* as asserting that the federal courts were "endowed with full chancery powers").

300. Later precedents articulated more clearly what these early cases implied: Article III empowers the courts to issue equitable remedies without authorizing legislation. *See, e.g.*, Irvine v. Marshall, 61 U.S. (20 How.) 558, 564-66 (1857); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429-30 (1868); McConihay v. Wright, 121 U.S. 201, 205-06 (1887).

301. *See, e.g.*, Georgia v. Brailsford, 2 U.S. (2 Dall.) 415, 417 (1793) (opinion of Iredell, J.) (issuing an injunction on "the authority of this Court, sitting as a Court of Equity"); Massie v. Watts,

they were more conclusory, simply claiming the power to grant relief "on equitable principles."[302] Even in cases where the judges ultimately denied equitable relief, opinions often noted that the court did, in fact, have the power to grant the requested remedy in an appropriate case.[303]

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10 U.S. (6 Cranch) 148, 160 (1810) ("[I]n a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery [to grant relief] is sustainable . . . ."); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489, 495 (1824) (noting that "[a] Court of equity . . . will compel a fulfilment of" an agreement); Stephens v. M'Cargo, 22 U.S. (9 Wheat.) 502, 505 (1824) ("[Plaintiffs] have an unquestionable right to unite in their application to a Court of equity, for an injunction to this judgment."); Harding v. Handy, 24 U.S. (11 Wheat.) 103, 125 (1826) (asserting that "a Court of equity will interpose" to rescind agreements "obtained by the exercise of undue influence"); Mechs. Bank of Alexandria v. Seton, 26 U.S. (1 Pet.) 299, 305 (1828) (holding that if "the remedy at law" for breach of contract "is not clear and perfect" then "it is not a case for compensation in damages, but for specific performance; which can only be enforced in a Court of Chancery"); Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 278 (1831) ("The right of a vendor to come in to a court of equity to enforce a specific performance is unquestionable."); Bradley v. Reed, 3 F. Cas. 1158, 1159 (C.C.W.D. Pa. 1800) (No. 1,785) (granting an injunction against waste on the grounds that "courts of equity have interposed to protect the corpus of the estate until partition"); Bean v. Smith, 2 F. Cas. 1143, 1150 (Story, Circuit Justice, C.C.D.R.I. 1821) (No. 1,174) ("[T]his bill states a case, which is entirely fit and proper, if it be proved, for the interference of a court of equity."); Harding v. Wheaton, 11 F. Cas. 491, 493 (Story, Circuit Justice, C.C.D.R.I. 1821) (No. 6,051) ("Frauds and trusts are emphatically within the jurisdiction of courts of equity . . . [so] the case, if made out in proof, justifies equitable relief."); Dunlap v. Stetson, 8 F. Cas. 75, 80 (Story, Circuit Justice, C.C.D. Me. 1827) (No. 4,164) (asserting that as "a court of chancery" the court could "create[]" a "constructive trust"); McKay v. Carrington, 16 F. Cas. 167, 171 (McLean, Circuit Justice, C.C.D. Ohio 1829) (No. 8,841) (granting recission, which "involves the exercise of a power which exclusively belongs to a court of chancery").

302. Bryant v. Hunter, 4 F. Cas. 516, 519 (Washington, Circuit Justice, C.C.D. Pa. 1811) (No. 2,068); *see also* Alexander v. Pendleton, 12 U.S. (8 Cranch) 462, 468 (1814) (asserting "the interposition of equity is allowable" to quiet title); McAlister v. Barry, 15 F. Cas. 1203, 1203 (C.C.D.N.C. 1803) (No. 8,656) ("Misrepresentations, and obtaining a bargain in consequence thereof, disadvantageous to the party deceived by them, is a ground in equity for setting aside the conveyance . . . .").

303. *See, e.g.*, Graves v. Bos. Marine Ins., 6 U.S. (2 Cranch) 419, 442 (1805) (framing the question as "whether, under the circumstances of the case, a court of equity will relieve the plaintiffs against the mistake alleged to exist in the contract"); Hepburn v. Dunlop & Co., 14 U.S. (1 Wheat.) 179, 197 (1816) (maintaining that if a contracting party "acted under a mistake, or was imposed upon by the other party, or the like, a court of equity will interpose and afford a relief"); Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290, 299 (1817) ("[This is] a case standing on those general principles which govern all applications to a court of equity, to decree the specific performance of a contract."); Hunt v. Rhodes, 26 U.S. (1 Pet.) 1, 13 (1828) ("[I]f [a] mistake exist[s] . . . in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a Court of Equity will, in general, grant relief . . . ."); Thomas v. Perry, 23 F. Cas. 964, 968 (Washington, Circuit Justice, C.C.D.N.J. 1811) (No. 13,908) ("If the difference between the real and the represented quantity be very great [in a contract for land], both parties act obviously under a mistake, which it would be the duty of

Significantly, the courts characterized their remedial powers in these cases as inseparable from their existence as courts of equity — or, put differently, as *inhering* in the powers of a court of equity. Also notable is the fact that the courts repeatedly chose to describe the locus of their authority in this manner, rather than avert to any statutory authority.[304] Considered as a whole, these cases suggest that the early federal courts understood themselves to be empowered to grant equitable remedies once they were established as "courts of equity" or, in other words, set up by Congress and given jurisdiction over equity cases. And because the only power that the federal courts possess by virtue of their existence is "[t]he judicial Power," Article III is the most plausible source of this authority.

3. Judiciary Act Cases

In a few cases, the federal courts seemed to rely on the grant of equity jurisdiction in section 11 of the Judiciary Act as the source of their authority to grant remedies. If some courts understood their equity powers in this way, it would undermine the conclusions drawn in the foregoing Section, as it suggests that the courts were implicitly relying on the Judiciary Act rather than Article III when granting equitable relief. But careful examination of these cases reveals that was not so.

The federal courts very rarely identified the Judiciary Act as the sole source of their authority in equity. Instead, they usually pointed to both "the constitution and laws," effectively treating Article III and section 11 as consistent sources of authority.[305] Though admittedly not the only possible interpretation, the best reading of this set of cases is that they merely recognized the need for a statutory grant of jurisdiction for the federal courts to deploy their inherent remedial power.[306] On that view, these cases are consistent with a conclusion that early

a court of equity to correct . . . ."); Garnett v. Macon, 10 F. Cas. 12, 22 (Marshall, Circuit Justice, C.C.E.D. Va. 1825) (No. 5,245) ("A court of equity compels the specific performance of contracts . . . .").

304. *Cf.* Barrett, *supra* note 32, at 874-75 & nn.189-90 (arguing that cases in which federal courts "explicitly invoke[] the powers possessed by courts of common law and equity" are evidence they believed the power at issue to be inherent).

305. *See* Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832); Livingston v. Story, 34 U.S. (9 Pet.) 632, 660 (1835); Lucas v. Morris, 15 F. Cas. 1063, 1064-65 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1825) (No. 8,587); Bains v. The James & Catherine, 2 F. Cas. 410, 416-18 (Baldwin, Circuit Justice, C.C.D. Pa. 1832) (No. 756) (construing the terms "law and equity" to bear the same meaning in the Constitution and the Judiciary Act).

306. *See* Pfander & Wentzel, *supra* note 6, at 1324-25 (explaining that the early Court "viewed federal equity power (coupled with a jurisdictional grant) as a sufficient basis for fashioning relief"). This reading accords with the view the federal courts have long adopted in admiralty,

federal courts understood "[t]he judicial Power" in "Equity" to encompass inherent power to grant remedies.

A pair of early decisions under the federal patent laws supports this reading of these cases. In *Livingston v. Van Ingen*, a patentee brought suit in federal court seeking an injunction against infringement.[307] Riding circuit, Justice Livingston dismissed the case for lack of jurisdiction. He explained that "although by the constitution the judicial power is extended to all cases in law and equity," Congress could "say that the relief which they intended to afford in a particular case shall be at law only."[308] And because Congress had conferred only jurisdiction at law in patent suits, the court had no power to issue an injunction.[309] Fourteen years later, the court addressed the same issue in *Sullivan v. Redfield*.[310] By then, however, Congress had fixed the jurisdictional defect that precluded relief in *Livingston* by granting the circuit courts jurisdiction "in equity" over patent cases.[311] Significant here is the way Justice Thompson described the effect of that statute:

> This act does not enlarge or alter the powers of the court. . . . [I]t only extends its jurisdiction to parties not before falling within it. . . . [I]n the exercise of the jurisdiction[,] . . . the court is to proceed according to the course and principles of courts of equity in such cases. So that the questions presented in the present case are precisely where they would have been without this act.[312]

In other words, the statutory grant of jurisdiction was not the source of the court's power to issue equitable relief, just a necessary predicate for its exercise. The source of its power, as Justice Livingston previously suggested, was the "general judicial power," which Congress had now permitted to "flow" to the courts in patent cases.[313] This relationship between judicial power and jurisdiction seems to be what early federal courts were getting at in the Judiciary Act

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namely that the jurisdictional statute merely unlocked their inherent Article III power to grant maritime remedies. *See* Fallon et al., *supra* note 51, at 688-89.

307. 15 F. Cas. 697, 697 (Livingston, Circuit Justice, C.C.D.N.Y. 1811) (No. 8,420).

308. *Id.* at 699.

309. *Id.* at 698. Congress had granted the courts jurisdiction over an "action on the case" for patent infringement—that is, an action at law—but not a suit in equity. *See* Act of Apr. 17, 1800, ch. 25, 2 Stat. 37.

310. 23 F. Cas. 357 (Thompson, Circuit Justice, C.C.D.N.Y. 1825) (No. 13,597).

311. *See* Act of Feb. 15, 1819, ch. 19, 3 Stat. 481.

312. *Sullivan*, 23 F. Cas. at 360.

313. *Van Ingen*, 15 F. Cas. at 698.

cases that identified "the constitution and laws" as consistent sources of equitable authority.[314]

The significance of the few cases in which early federal courts located their equity powers exclusively in the Judiciary Act is less certain. For one, there was an exceedingly small number of these decisions, so doctrine on this point was underdeveloped.[315] The actual question presented in the cases further muddies the waters. In each, the Supreme Court considered whether a provision of state law, such as a statute creating a new legal remedy, could affect a federal court's ability to grant equitable relief in a suit arising under that state's law. The Court ruled in the negative, partially on the grounds that under the Judiciary Act, "the courts of the Union have a chancery jurisdiction in every state" and that jurisdiction must be uniformly administered rather than subject to the vagaries of state practice.[316] In this sense, the Court seemed to construe section 11 as merely a disclaimer that federal courts need not consider state-law remedies when exercising their equity power, rather than as a grant of equity power in itself.

On net, then, the Judiciary Act cases do not substantially undermine the conclusion that early federal courts understood themselves as possessed of an inherent power to grant equitable remedies under Article III. On the contrary, the majority of these cases are fully consistent with that conclusion.

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314. Justice Johnson made a similar point on circuit in *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (Johnson, Circuit Justice, C.C.D.S.C. 1808) (No. 5,420). In discussing the court's power to grant mandamus, Johnson explained that the federal courts derive their remedial powers directly from Article III but can only exercise that authority pursuant to a statutory grant of jurisdiction. He asserted that the "term 'judicial power' conveys the idea, both of exercising the faculty of judging and of applying physical force to give effect to a decision." *Id.* at 361. If Congress were to vest "in the circuit court a certain jurisdiction, without prescribing by what forms that jurisdiction should be exercised," the court, acting pursuant to its Article III power, "must itself adopt a mode of proceeding adapted to the exigency of each case." *Id.* at 361-62. Thus, the power to grant relief "follow[ed] with the principal jurisdiction, when vested by congress." *Id.* at 362. This approach reflects how the early Supreme Court seemed to understand the interaction between "[t]he judicial Power" and statutory subject-matter jurisdiction in general. *See Ex parte* Crane, 30 U.S. (5 Pet.) 190, 202 (1831) ("[L]egislative provisions are indispensable to give effect to a power, to bring into action the constitutional jurisdiction of the supreme and inferior courts.").

315. I have identified only two. The clearest is *United States v. Howland*, in which Chief Justice Marshall asserted that "the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all." 17 U.S. (4 Wheat.) 108, 115 (1819). The Court seemed to rely on the Judiciary Act as a source of authority in *Robinson v. Campbell*, but it also pointed, somewhat confusingly, to the Process Act of 1792. 16 U.S. (3 Wheat.) 212, 221-23 (1818).

316. *Howland*, 17 U.S. at 114-15; *accord Robinson*, 16 U.S. at 222-23 ("[T]he remedies in the courts of the United States, are to be, at common law and in equity, not according to the practice of state courts, but according to the principles of common law and equity . . . .").

D. Synthesis and Implications

All three sources on which the Supreme Court traditionally relies in interpreting Article III — history, structure, and early practice — support the proposition that "[t]he judicial Power" in "Equity" encompasses some inherent power to grant remedies. Admittedly, each of these pieces of evidence is far from dispositive when considered in isolation. But when viewed together and in light of the distinct lack of contrary evidence, they seem sufficient for a historically focused Court to conclude that the original understanding of Article III includes the power to issue equitable relief.

In practical terms, this Part has sketched an account of federal equity power that departs sharply from current doctrinal assumptions. As previously noted, modern courts and commentators have largely relied on congressional statutes as the source of the federal courts' power to grant equitable remedies. The analysis in this Section suggests that reliance is often misplaced. The real source of the judiciary's authority in equity cases is the inherent power conferred by Article III.[317]

Of course, any analysis of federal equity power must still start with Congress: the federal courts can exercise their inherent powers only if Congress has given them subject-matter jurisdiction over the case.[318] And even where Congress has conferred general equity jurisdiction, it can still regulate the courts' ability to issue specific equitable remedies, as Congress' control over federal ju-

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317. Despite some statements suggesting a contrary view, Harrison's recent analysis of the relationship between Article III and federal equity power seems to accept this conclusion. To be sure, Harrison "rejects" the proposition that "the source of the equitable principles that federal courts apply is ultimately the Constitution"; instead, he maintains that the source of federal equity power is a body of "unwritten law as modified by statute and other sources of binding norms." Harrison, *supra* note 24, at 1914, 1922. But he also acknowledges that it is solely by virtue of their being vested with the "judicial power" that the federal courts are able to apply that unwritten law to give relief in appropriate cases. *See id.* at 1922. In other words, Harrison does not appear to seriously dispute that Article III is the source of the federal courts' authority to grant equitable remedies, only that Article III directly incorporates the content of those previously unwritten remedial principles. For discussion of this latter point, *see infra* note 480.

318. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) ("[T]he federal judiciary is not empowered to grant equitable relief in the absence of congressional action extending jurisdiction over the subject matter of the suit.").

risdiction encompasses the power to delimit the set of remedies available in federal court.[319] It can do so expressly, by stripping the courts of jurisdiction,[320] or implicitly, by creating an exclusive remedial scheme for the enforcement of a given right.[321] Though such restrictions on equitable relief are relatively uncommon, the Supreme Court has confirmed that they are permissible exercises of congressional power over federal jurisdiction.[322] That said, the Court has also required that Congress speak clearly to limit the federal courts' equity powers.[323]

But once Congress creates federal courts and grants them jurisdiction in equity, those courts are immediately possessed of authority to grant equitable remedies, solely by virtue of their being vested with "[t]he judicial Power." Thus, Article III is best understood as establishing a constitutional default rule for federal equitable remedies. It empowers every federal court to issue equitable relief unless Congress expressly provides otherwise. This default rule is of great practical significance because Congress has historically conferred broad equity jurisdiction on the federal courts[324] and has rarely spoken with sufficient clarity to overcome the presumption against displacing the courts' equity powers.

Although this understanding of Article III is solidly supported by the relevant evidence, it has been all but ignored in the recent stream of equity decisions issued by the Supreme Court. But if a historicist interpretation of Article III suggests that it is the source of federal equity power, one might wonder why the

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319. *See* John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514-15 (1998).

320. *See, e.g.*, Act of March 23, 1932, ch. 90, § 1, 47 Stat. 70, 70 (stripping the courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except" where stringent criteria are met); *see also* Yakus v. United States, 321 U.S. 414, 442 n.8 (1944) (collecting further examples).

321. *See* AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1350 (2021).

322. *See, e.g.*, Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329-30 (1938); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-65 (1939) (holding that federal equitable remedies are "subject, of course, to modifications by Congress"). *Lauf* has its critics. *See* Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C. L. REV. 1865, 1902-04 (2021). But the Court has yet to suggest that it is anything other than good law.

323. *See, e.g.*, Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836).

324. Take, for example, the Judiciary Act of 1789 and the Jurisdiction and Removal Act of 1875, which conferred respectively diversity and federal-question jurisdiction. Both statutes simply provided that "the circuit courts shall have original cognizance . . . of all suits of a civil nature . . . in equity." An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789); Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. Congress typically speaks in similarly broad terms when conferring equity jurisdiction to enforce particular statutes. *See, e.g.*, 15 U.S.C. § 78u(d)(5) (2018) ("[E]quitable relief that may be appropriate or necessary for the benefit of investors."); Bray, *supra* note 4, at 1013 n.76 (collecting further examples of Congress using "equitable" in recently passed statutes).

current, historically inclined Court has instead characterized those powers as statutory.

In fact, it was only in the past three decades that the Supreme Court fully lost sight of equity's constitutional source. The view that the federal equity power is rooted in "[t]he judicial Power" and unlocked by a jurisdictional grant prevailed well into the twentieth century.[325] For example, when Congress conferred general federal-question jurisdiction "in equity" on the federal courts in 1875, the courts immediately began issuing equitable remedies in federal-question cases.[326] They did not wait for specific enabling legislation; "[t]he judicial Power" plus a grant of jurisdiction was seen as sufficient to grant appropriate relief.[327] And, much like their eighteenth-century forebears, federal courts in the early twentieth century continued to refer to "the Constitution and statutes of the United States" as the source of their equity powers.[328] Even when Congress expressly authorized the judiciary to grant equitable remedies in particular contexts, the courts generally read those provisions as nothing more than jurisdictional grants that "called into play" their "inherent equitable powers."[329]

The Supreme Court's wholesale relocation of its equity powers from Article III to federal statutes apparently began with two opinions written by Justice Scalia: *Mertens v. Hewitt Associates*[330] and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*[331] *Mertens* involved a statutory provision authorizing federal courts to issue "appropriate equitable relief" to redress violations of the Employment Retirement Income Security Act.[332] Breaking with prior practice,

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325. Indeed, traces of this view appear as late as Justice Harlan's concurrence in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. 403 U.S. 388, 399-404 (1971) (Harlan, J., concurring in the judgment).

326. *See, e.g.*, Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); Delaware, L. & W.R. Co. v. Stevens, 172 F. 595 (C.C.N.D.N.Y. 1909).

327. *See* 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) ("After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action . . . on the theory that [they] needed only a grant of jurisdiction . . . in order to exercise the powers of a court of equity.").

328. Gordon v. Washington, 295 U.S. 30, 35-36 (1935).

329. Porter v. Warner Holding Co., 328 U.S. 395, 398-400 (1946); *see also* De Beers Consol. Mines v. United States, 325 U.S. 212, 218-19 (1945) (holding that section 4 of the Sherman Act, which authorized federal district courts "to prevent and restrain violations" of the Act, "confers no new or different powers than those traditionally exercised by courts of equity"); Bell v. Hood, 327 U.S. 678, 682-85 (1946) (discussing the "established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions" in a variety of circumstances).

330. 508 U.S. 248 (1993).

331. 527 U.S. 308 (1999).

332. 508 U.S. at 253.

the Court declined to read this generic reference to equity as a jurisdictional provision unlocking the federal courts' inherent authority. Instead, Justice Scalia explained that the remedial power conferred by such provisions "remains a question of [statutory] interpretation in each case."[333]

Likewise, in *Grupo Mexicano*, the Court described the statute granting general equity jurisdiction in diversity cases as the source of its "authority to administer" equitable remedies in those cases.[334] Without acknowledgment (perhaps even without awareness), these cases worked a substantial shift in federal equity jurisprudence, insisting that the courts' power to grant equitable relief must be derived from some statutory source rather than the Constitution. As the Court's focus on equity intensified in the ensuing decades, it built on Justice Scalia's approach, further obscuring equity's constitutional source.[335]

This doctrinal relocation, however, has practical significance only insofar as the equity power conferred by Article III differs from that which the Court has read into federal statutes. It may well. For one, that the power is inherent rather than statutory might mean that there is a core set of federal equitable remedies that lies beyond congressional control.[336] But even assuming a core power exists, it would be quite small, hardly worth the effort put forth in this Section to prove the existence of an inherent equity power.[337] Thus, the salient question concerns

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333. *Id.* at 257.

334. *Grupo Mexicano*, 527 U.S. at 318.

335. *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1942 (2020) (citing *Mertens*); Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 142 (2016) (same); Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209, 217 (2002) (citing *Mertens* and *Grupo*).

336. *Cf.* Michaelson v. United States *ex rel.* Chicago, 266 U.S. 42, 66 (1924) (asserting that Congress's ability to regulate the inherent judicial power to punish for contempt is subject to "limits not precisely defined").

337. Henry M. Hart, Jr., has argued that Congress's power over federal jurisdiction must be limited insofar as it cannot be used to nullify constitutional rights by depriving them of all means of enforcement. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366-72 (1953); *see also* Harrison, *supra* note 24, at 1926 (noting that Congress's control over the remedies available in federal court "pose[s] a danger of improper expansion of congressional authority . . . because a power over the remedy can in practice amount to a power over the content of the primary rule"). To be sure, the precise relationship between legal rights and judicial remedies is contested. *Compare* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (arguing that constitutional "rights and remedies are inextricably intertwined" to the extent that "[r]ights are dependent on remedies . . . for their scope, shape, and very existence"), *and* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) ("[T]here is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete

the scope of the Article III equity power itself: is it broader, narrower, or identical to the statutory powers on which the modern Court has relied? The next Part takes up this question.

IV. WHAT IS THE SCOPE OF ARTICLE III EQUITY?

This Part analyzes the scope of the Article III equity power. Following the methodology of Part III, it examines history, structure, and early judicial practice in order to assess how an informed Founding-Era observer would have understood the remedial authority conferred on federal courts by "[t]he judicial Power" in "Equity." Ultimately, this Part concludes that Article III incorporates the system of remedies that comprised the precedent-based conception of equity as it existed when the Constitution was ratified.

A. History

This Section surveys the Founding-Era historical record relative to the meaning of "[t]he judicial Power" in "Equity." It examines the colonial experience with equity courts, the drafting and ratification of Article III, and early American legal treatises. The overall objective in analyzing these materials is the same as in Section II.A: to reconstruct how the ratifying public would have understood the terms of Article III. But the specific goal of this Section is to assess whether an informed observer would have understood "[t]he judicial Power" in "Equity" to incorporate conscience-based equity, precedent-based equity, or something else entirely.

Ultimately, the historical evidence is inconclusive with respect to this question. But it does definitively establish that Article III's reference to "Equity" was understood to define the content of "[t]he judicial Power" and to adopt either precedent-based or conscience-based equity—and not something else.

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issues."), *with* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1313-17 (2006) (taking a middle position but ultimately disagreeing with the view that "'rights' should be equated solely with 'judicially enforceable rights'"). But few would deny that there is *some* correlation between the two, which suggests that when Congress limits the federal courts' ability to grant a particular equitable remedy, it also affects—however slightly—the practical content of the primary rights that remedy previously enforced. Nevertheless, even Hart acknowledged that the combination of Congress's broad authority over federal jurisdiction and the availability of state courts to enforce constitutional rights means that "a complaint about [congressional] action of this kind [restricting remedies] can rarely be of constitutional dimension." Hart, *supra*, at 1366; *cf.* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1096 (2010) (concluding that only "congressional attempts to preclude all possible remedies for the systematic or ongoing violation of constitutional rights," including state law remedies, "should be deemed intolerable").

1. *The Colonial Period*

Equity was controversial in the American colonies. Indeed, as Stanley Katz has observed, "no colonial legal institution was the object of such sustained and intense political opposition as the courts dispensing equity law."[338] Americans' experience with these tribunals would shape their views of equity and inform the debates over its inclusion in Article III.

Colonial governments adopted diverse approaches to incorporating equity in their respective legal systems.[339] Some, such as New York and New Jersey, established distinct chancery courts modeled on the English system.[340] Others, including Massachusetts and Pennsylvania, combined elements of law and equity into a unitary legal system.[341] And still others never created any courts with equity powers.[342] One explanation for the varied reception of equity in America was that law in the colonies was rudimentary; prior to the mid-eighteenth century, most colonies had not developed sufficiently complicated legal systems so as to require chancery courts.[343] But an equally salient reason was that many colonists were overtly hostile to "the amorphous nature of equity jurisprudence."[344]

Among the colonies that did establish chancery courts, there was substantial variation in the type of equity that they administered. Several attempted to mimic the rules-based remedial system of precedent-based equity, while others adopted more flexible approaches akin to conscience-based equity.[345] For example, the chancery court in Pennsylvania was created for the express purpose of

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338. Katz, *supra* note 204, at 257-58.

339. *See* Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, *in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 779, 779-809 (1908); *see also* THE FEDERALIST NO. 83, at 435-36 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (surveying the systems of equity in various colonies).

340. *See* Katz, *supra* note 204, at 264; WILLIAM CLEVENGER, THE COURTS OF NEW JERSEY: THEIR ORIGIN, COMPOSITION, AND JURISDICTION 119-22 (1903).

341. *See* Harrington Putnam, *The Early Administration of Equity in This Country*, 90 CENT. L.J. 423, 424 (1920); GOEBEL, *supra* note 65, at 9 n.14; THE FEDERALIST NO. 83, at 435-36 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

342. *See* 1 STORY, *supra* note 33, at 62.

343. Katz, *supra* note 204, at 262.

344. Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 432 (1931).

345. *See* WOOD, *supra* note 164, at 298-99; Katz, *supra* note 204, at 263-65.

"mitigating in many Cases the Rigour of the Laws, whose Judgments are tied down to fixed and unalterable Rules."[346]

Both conceptions of equity were subject to criticism, but conscience-based equity bore the brunt of the colonists' ire.[347] Many of their arguments will sound familiar; Americans rehashed the points made against conscience-based equity in England, including that it embodied a dangerous fusion of powers and was inimical to the rule of law.[348] Writing in 1756, John Dickinson condemned the Pennsylvania courts' exercise of "extensive and arbitrary" equity powers, which caused "every judgment" to become "a confused mixture of private passions & popular error, & every court [to] assume[] the power of legislation."[349]

Not only was equity in the colonies vulnerable to the same criticisms that dogged Chancery in England, but it was also tainted by association with royal authority and the practice of deciding cases without juries.[350] Most colonial chancellors were royal officials — either the governor or members of his council — and therefore evoked "dread and suspicion" in the colonists.[351] As agents of the Crown, they were viewed as inherently biased toward executive and English interests. One New Yorker explained that there was an "inevitable" danger that "the Chancellor governour can . . . determine on the Suppos'd Side of the

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346. William Keith, *A Proclamation*, *in* 2 PENNSYLVANIA ARCHIVES 1335 (8th ser. 1931) (1720); *see also* Pollard v. Shaaffer, 1 U.S. (1 Dall.) 210, 211 (Pa. 1787) (asserting that Pennsylvania judges "must be guided by . . . conscience").

347. *See* Yoo, *supra* note 17, at 1152-53.

348. *See* REID, RULE OF LAW, *supra* note 168, at 35; *see also* WOOD, *supra* note 164, at 291-305, 455 (emphasizing the colonists' "intense fear" of unbridled judicial discretion).

349. Letter from John Dickinson to his father (Aug. 2, 1756), *in* H. Trevor Colbourn, *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754-1756*, 86 PA. MAG. HIST. & BIOGRAPHY 417, 451 (1962); *see also* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 155 (1938) (noting that New Englanders objected to conscience-based equity because the Chancellor "may judge by a personal standard"); GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 122-24 (1960) (recounting similar criticisms). For examples from other colonies, see Katz, *supra* note 204, at 265-66 (describing opposition to equity in New Jersey, North Carolina, and South Carolina).

350. *See* FRIEDMAN, *supra* note 64, at 54-55 (noting that colonial "[h]ostility to chancery was widespread in the 18th century" because it "was closely associated with executive power" and "worked without a jury" such that "there were no barriers against the use of these courts as tools of imperial policy"); Yoo, supra note 17, at 1152-53 ("Americans associated equity courts with the Crown and its colonial administrators."); BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 68-69 (1970) (describing how jury-less chancery courts were "particularly obnoxious" to colonists).

351. CLEVENGER, *supra* note 340, at 118.

Crown."[352] Many governors confirmed these suspicions by exploiting equity courts to enforce unpopular English policies.[353]

In the colonies, conscience-based equity courts were often true prerogative tribunals — created by the Crown without legislative consent and staffed by royal officials.[354] By the eighteenth century, the Crown was forbidden from establishing prerogative courts in England but continued to maintain them in America.[355] Colonial representatives objected to this amplification of executive power at the expense of their local legislatures.[356] But these objections were largely futile; English authorities routinely rejected attempts by colonial assemblies to abolish or reform chancery courts, further stoking opposition to equity.[357]

2. *The Ratification Period*

Perhaps surprisingly given the colonial experience with equity, the extension of the "[t]he judicial Power" to cases in "Equity" attracted almost no attention at the Constitutional Convention.[358] But during the ratification debates, Article III's reference to "Equity" became a hotly contested provision, with the Federalists and Anti-Federalists fighting bitterly over the meaning and implications of

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352. Letter from Lewis Morris to James Alexander (Aug. 25, 1735), *in* Stanley N. Katz, *A New York Mission to England: The London Letters of Lewis Morris to James Alexander, 1735 to 1736*, 28 WM. & MARY Q. 439, 469 (1971); *see also* WILLIAM LIVINGSTON, ON THE DELAYS IN CHANCERY (1753), *reprinted in* THE INDEPENDENT REFLECTOR, OR WEEKLY ESSAYS ON SUNDRY IMPORTANT SUBJECTS MORE PARTICULARLY ADAPTED TO THE PROVINCE OF NEW-YORK 250, 253 (Milton M. Klein ed., 1963) (labeling colonial chancery courts a "political Evil").

353. *See, e.g.*, BEVERLEY W. BOND, JR., THE QUIT-RENT SYSTEM IN THE AMERICAN COLONIES 268-69 (1919) (describing the governor of New York's use of chancery to collect quit-rent taxes).

354. For example, North Carolina's chancery court — consisting of a governor-chancellor and a five-person council — was established by the Crown and governor, not the legislature. CHARLES LEE RAPER, NORTH CAROLINA: A STUDY IN ENGLISH COLONIAL GOVERNMENT 36, 75-76, 150-51 (1904); *see also* Katz, *supra* note 204, at 269 (describing the early Pennsylvania equity court as a "central court composed of appointed proprietary officials, lacking legislative consent"); CLEVENGER, *supra* note 340, at 122 (recounting that Governor Franklin of New Jersey appointed himself Chancellor by executive order).

355. BAILYN, *supra* note 350, at 68-69.

356. *See, e.g.*, 1 JOURNAL OF THE VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW YORK 308 (1764) ("Erecting a Court of Equity without Consent in General Assembly, is contrary to Law, without Precedent and of dangerous Consequence to the Liberty and Property of the Subjects."); 3 PENNSYLVANIA ARCHIVES, *supra* note 346, at 2316 (recording similar objections in Pennsylvania).

357. *See* Putnam, *supra* note 341, at 424-26 (describing how the Crown's rejection of colonial requests to regulate chancery engendered "popular hostility" against equity).

358. *See* Collins, *supra* note 53, at 269.

that term.[359] In short, the latter opposed including "Equity" in Article III because it would give federal judges arbitrary, conscience-based powers, while the former responded that Article III referred only to precedent-based equity.

Anti-Federalist concerns with federal equity were premised on a view that Article III incorporated conscience-based equity. Picking up on colonial-era sentiments, they argued the new federal courts would exercise unbridled discretion in the mode of medieval English Chancellors. "Brutus," the most cogent Anti-Federalist commentator on the judiciary, made clear that he understood "Equity" in Article III to mean conscience-based equity.[360] Proceeding from that basis, he reasoned that federal equity courts would "not confine themselves to any fixed or established rules."[361] "Federal Farmer" agreed that equity's inclusion in Article III would "give the judge a discretionary power," and he concluded his attack on federal equity with an expression of sardonic disbelief that the Constitution could have "intended to lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate."[362]

Anti-Federalists expounded three specific reasons for opposing Article III's purported incorporation of conscience-based equity. First, it would undermine separation of powers and the rule of law by empowering the judiciary to control the other branches.[363] Brutus feared that the combination of life tenure and eq-

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359. *See infra* notes 360-373 and accompanying text.

360. Brutus No. XI (Jan. 31, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 417, 419-20 (Herbert J. Storing ed., 1981) (defining "equity" as "the correction of that, wherein the law, by reason of its universality, is deficient . . . . [T]hus depending essentially upon each individual case, there can be no established rules and fixed principles of equity laid down . . . .").

361. *Id.* at 420; *see also* Letter from Melancton Smith to Abraham Yates, Jr. (Jan. 23, 1788), *in* 20 DOCUMENTARY HISTORY, *supra* note 249, at 638-39 (arguing that "the Court[s] who are vested with [equity] powers are totally . . . uncontroulable"); Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *in* 5 DOCUMENTARY HISTORY, *supra* note 249, at 618, 619 (assailing the "indefinite [and] unlimited" federal equity power).

362. Federal Farmer No. XV (Jan. 18, 1788), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 360, at 315, 322-23; *see also* Federal Farmer No. III (Oct. 10, 1787), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 360, at 234, 244 (arguing it was dangerous to give the same judge authority over both law and equity, "for 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"); Centinel No. XIII (Jan. 26, 1788), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 360, at 190, 192 (derisively asking who would be "so suitable or deserving of the office" as a federal judge that would "be both Judge and jury, sovereign arbiter in law and equity" and could "tramp[le] upon his fellow creatures with impunity").

363. *See* Brutus No. XIV (Mar. 6, 1788), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 360, at 433, 437 (arguing that by giving the Supreme Court the "power to determine in law and in

uity jurisdiction would render judges "independent of the people, of the legislature, and of every power under heaven."[364] Second, it would threaten federalism by allowing the federal courts to usurp the power of the state governments.[365] Finally, federal equity would threaten the right to jury trial in civil cases. In such a system, argued the Federal Farmer, "[i]f the conduct of judges shall be severe and arbitrary," there would be no jury to "check them, by deciding against their opinions and determinations."[366]

It is not as though Anti-Federalists were not aware of precedent-based equity; they simply believed that was not the "Equity" to which Article III referred. The Federal Farmer acknowledged that "[t]he word equity, in Great Britain, has in time acquired a precise meaning – chancery proceedings there are now reduced to system."[367] But he posited that this system would not (perhaps could not) obtain in the United States for the foreseeable future. Because the young country lacked a fulsome set of equity precedents, federal equity "for many years will be mere discretion."[368]

Responding to these concerns, Federalists asserted that Article III incorporated only the precedent-based conception of equity. Federal judges would dispense equitable relief in accordance with "the principles by which that relief is governed" in England, which had been "reduced to a regular system."[369] As for the Federal Farmer's fear that a lack of American equity precedents would permit federal judges to exercise broad discretion, Timothy Pickering explained:

> As our ideas of a court of equity are derived from the English Jurisprudence, so doubtless the Convention, in declaring that the judicial power shall extend to all cases in *equity* as well as *law*, under the federal jurisdiction, had principally a reference to *the mode of administering justice*, in

equity, on the law and the fact," that court "is exalted above all other power in government, subject to no controul"); Brutus No. XV (Mar. 20, 1788), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 360, at 437, 440 (fearing that federal equity judges would "not be subordinate to, but above the legislature").

364. Brutus No. XV, *supra* note 363, at 438.

365. *See id.* at 441.

366. Federal Farmer No. XV, *supra* note 362, at 320.

367. *Id.* at 322.

368. Federal Farmer No. III, *supra* note 362, at 244; Federal Farmer No. XV, *supra* note 362, at 322.

369. THE FEDERALIST NO. 83, at 438 n.* (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see also* Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 249, at 193, 199 (asserting that "Equity" in Article III referred not to conscience-based discretion but simply to "*the mode of proof, the mode of trial, & the mode of relief*").

> cases of equity, agreeably to the practice of the court of Chancery in England.[370]

Pickering also cited Blackstone's description of precedent-based equity in responding to the Anti-Federalists' more general contention that equity itself would give judges arbitrary power: federal equity courts, like their contemporary English counterparts, could no more "enlarge, diminish, or alter" the law than could a court of law.[371]

More specifically, Federalists maintained that the judiciary could not invent novel equitable remedies or depart from settled principles of English equity. Quite the opposite, Hamilton asserted that the courts must be "bound down by strict rules and precedents" in "every particular case that comes before them," suggesting restraint in both equitable and legal decisions.[372] In justifying the inclusion of "Equity" in Article III, he explained that the term merely ensured that the federal courts would have jurisdiction over certain kinds of cases. For example, without equity jurisdiction, the courts would be powerless to resolve suits involving "*fraud, accident, trust,* or *hardship*."[373]

Clearly, these debates reveal that sharp disagreement existed among informed Founding-Era observers over the meaning of "[t]he judicial Power" in "Equity." But the historical record is not in total equipoise. There are at least a few reasons to believe that the Federalists' account is more faithful to the original meaning of Article III.

For one, the Federalist understanding of "Equity" represents a more limited view of federal power. This is significant because both the Federalists and Anti-Federalists understood the Constitution as a limiting document by which the people delegated only a portion of their sovereign power to the government.[374] The Federalists were advocates of more robust national authority, and they did not hide the ball—they frankly stated how and why the Constitution enhanced federal power.[375] Thus, when the Federalists responded to specific Anti-Federal-

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370. Pickering, *supra* note 369, at 200.

371. *Id.* at 199.

372. THE FEDERALIST NO. 78, at 407 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see also* Aristides, *Remarks on the Proposed Plan (Jan. 1788)*, *in* 15 DOCUMENTARY HISTORY, *supra* note 249, at 535-36 (denying that Article III's reference to equity would "give the judges a power of legislation" to make "barefaced impudent innovations").

373. THE FEDERALIST NO. 80, at 415 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

374. *See* WOOD, *supra* note 164, at 597-99.

375. *See* EDLING, *supra* note 165, at 29.

ist concerns by conceding a more limited conception of federal power, that conception is at least somewhat more likely to be representative of the Constitution's true meaning.[376]

Moreover, the Federalists presented a more accurate portrayal of the contemporary legal meaning of equity. It seems unlikely that a single word in the U.S. Constitution was meant to reintroduce a long-repudiated mode of adjudication premised on a pre-Glorious Revolution view of royal prerogative. If anything, colonial experiences with equity and resulting distrust of judicial discretion make it *less* likely that Americans would incorporate a similar authority into the Constitution. Thus, the Federalists' modern, lawyerly, and precise understanding of "Equity" is simply more plausible.[377]

Early American treatises provide further evidence that the Federalist view more closely tracked the original understanding of Article III. Several treatises support the point that, by 1789, informed American observers would have understood the term "Equity" as referring to the remedial system then being administered by the English Court of Chancery rather than to the more ancient conscience-based conception. A good example is Henry Ballow's 1793 *Treatise of Equity*.[378] Ballow's description of equity accords closely with the precedent-based conception: he emphasized that chancellors must "proceed upon some clear and established principle . . . and not upon a vague, arbitrary, and indefinite

376. *See id.* ("Whatever the Federalists promised before adoption that the new government would not do, they could not legitimately do after adoption."); Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J., concurring) ("When an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.").

377. *Cf.* Nelson, *supra* note 33, at 570 (noting that "Federalists often advanced lawyerly reasons why [constitutional] provisions were narrower than the Anti-Federalists suggested," including that they used "special terms of art whose technical meaning was narrower than their ordinary meaning.").

378. 1 HENRY BALLOW, A TREATISE OF EQUITY WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES (Fonblanque ed., 1793) [hereinafter BALLOW, 1793 TREATISE]. Though initially published in England, Ballow's treatise was a standard reference on equity in North America prior to publication of Story's *Commentaries on Equity Jurisprudence*. *See* Letter from Thomas Jefferson to John Minor (Aug. 30, 1814) (including Ballow's treatise on a list of essential reading for new law students). An American edition was published in 1805. *See* 1 HENRY BALLOW, A TREATISE OF EQUITY WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES (Fonblanque ed., W. Clarke & Sons 1805) (1793).

power."[379] And he repudiated the conscience-based conception, arguing that equity "must not be considered as a power to make a new law, or to dispense with any established law."[380]

Other early treatises addressed Article III equity specifically. In his *Commentaries on the Constitution*, Justice Joseph Story asserted that Article III adopted precedent-based equity as developed in England "to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union."[381] He reiterated this point three years later in *Commentaries on Equity Jurisprudence*.[382] In that work, he firmly rejected conscience-based equity as arbitrary, unjust, and inconsistent with the rule of law:

> [T]he unbounded jurisdiction which has been thus generally ascribed to [equity], of correcting, controlling, moderating, and even super[s]eding the law . . . and of freeing itself from all regard to former rules and precedents . . . would be . . . the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the [j]udge, acting . . . according to his own notions and conscience . . . with a despotic and sovereign authority.[383]

Later treatises followed Story's lead and confirmed that "Equity" in Article III referred to the practices of the Founding-Era Court of Chancery.[384]

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Ultimately, the historical evidence alone is probably insufficient to conclude that Article III incorporated precedent-based equity. While there are good reasons to believe that the Federalists got the better of the equity debate, the salient

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379. BALLOW, 1793 TREATISE, *supra* note 378, at 24; *see also id.* at 23-24 ("Principles of decision adopted by courts of equity, when fully established, and made the grounds of successive decisions, are considered by those courts as rules to be observed with as much strictness as positive law.").

380. *Id.* at 6.

381. 3 STORY, *supra* note 37, at 506.

382. *See* 1 STORY, *supra* note 33, at 19-22.

383. *Id.* at 21.

384. *See, e.g.*, 1 JOHN POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 409 n.8 (5th ed. 1941); ARMISTEAD DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928) ("[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution . . . .").

fact is that there was a serious debate over the meaning of "Equity" among informed Founding-Era observers. It is therefore problematic to rely entirely on text and history in attempting to establish the original understanding of Article III equity's scope.[385]

But that does not render the historical record irrelevant. For one, the evidence at least tips the scales slightly in favor of reading Article III to incorporate precedent-based equity. More importantly, it confirms the appropriate frame of analysis. The Founders uniformly understood "[t]he judicial Power" in "Equity" to incorporate either conscience-based or precedent-based equity. No contemporary commentator argued that "Equity" in Article III was a meaningless placeholder or referred to some other form of law. Thus, while the ambiguity of the record means that even a historically focused interpreter should resort to other sources of constitutional meaning, it at least informs what to look for in those sources.

B. Structure

While text and history do little more than confirm the two possible meanings of "[t]he judicial Power" in "Equity," constitutional structure points to a more definitive answer. Conscience-based equity's foundation in fused powers is inconsistent with the structural assumptions underlying the U.S. Constitution. On the other hand, precedent-based equity fits more comfortably with the Constitution's relatively sharp separation of powers and the intellectual tradition that inspired its design.

This Section first explores the rationale behind the Constitution's distinctive structure. This background merits careful attention because the Supreme Court has attributed doctrinal significance to the intellectual history of the Constitution's structural provisions.[386] It then proceeds to consider the specific structural features of the Constitution that distinguish it from its English forebear. These departures from common-law practice give reason to doubt that Article III incorporated conscience-based equity, which was inextricably linked to the institutional setting in which it developed.

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385. *See* KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 194 (1999) ("If we were to discover fundamental disagreement among the founders over meaning, then we must admit that this undercuts the determinacy of the text.").

386. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-25 (1995); *see also* Manning, *supra* note 39, at 1998 ("Surely, [the] historical context [of the Constitution's drafting] may help modern interpreters, at the margin, to understand the point and, thus, the meaning of some specific structural provisions actually included in the U.S. Constitution.").

American colonists brought classical English conceptions of liberty and the rule of law with them to the New World.[387] As William Penn remarked soon after his arrival in America, what "is truly and properly called *an Englishman's liberty*" is to have "the Law" rather than "the mere will of the Prince" be "both the measure and bound [of his] duty and allegiance."[388]

Though early colonists understood that preserving liberty and the rule of law required some restraint on government action, they did not initially gravitate toward separation of powers. In fact, most colonial governments incorporated only a minimal separation of functions and institutions.[389] By and large, they resembled the English state prior to the Glorious Revolution, with Crown officials exercising substantial legislative and judicial power and colonial assemblies playing both legislative and judicial roles.[390]

Still, the intellectual legacy of the Glorious Revolution was influential in America, and colonists gradually began to incorporate the rule-of-law thesis and separation of powers into their political theory.[391] As occurred in England, Americans developed these theories in two distinct stages.

During the first stage, in the years immediately before and after the Revolutionary War, Americans sought to limit executive power. Revolutionary political theory singled out arbitrary executive authority as the primary threat to liberty.[392] The conflict with George III combined with the extensive powers of local Crown officials to give that theory real-world bite.[393] This distrust of executive power extended to the judiciary, as colonial courts served at the pleasure of the

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387. *See* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 8 (2011); REID, LIBERTY, *supra* note 168, at 66; REID, RULE OF LAW, *supra* note 168, at 33-42.

388. William Penn, *The Excellent Priviledge of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England, 1687*, *in* 1 THE FOUNDER'S CONSTITUTION 432 (Kurland & Lerner eds., 1987); *see also* MCDONALD, *supra* note 243, at 9 (noting that to colonial Americans "freedom is the opposite of arbitrary rule: it is life under a government of laws, wherein rulers govern according to known and fixed principles.").

389. WOOD, *supra* note 164, at 160-61; VILE, *supra* note 87, at 139.

390. *See* GREENE, *supra* note 387, at 33-34, 135-38; *see also* RAKOVE, *supra* note 39, at 212 ("Colonial governors exercised powers rendered obsolete in Britain."); WOOD, supra note 164, at 154 ("[Colonial] assemblies in the eighteenth century still saw themselves" as "a kind of medieval court making private judgments as well as public law.").

391. *See* Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305 (1989).

392. WOOD, *supra* note 164, at 18-28; WARREN, *supra* note 244, at 769.

393. BAILYN, *supra* note 69, at 52 (noting that "the threat of ministerial aggrandizement seemed particularly pressing and realistic [in America], for there . . . the executive branch[] . . . used[] powers that in England had been stripped from the crown in the settlement that had followed the Glorious Revolution as inappropriate to the government of a free people").

Crown and were thus open to both perceived and actual manipulation by English officials.[394]

American fear of executive tyranny manifested itself in early state constitutions. While these charters paid lip service to separation of powers, in reality they created systems of legislative supremacy.[395] For American revolutionaries, this contradiction was easily reconciled: separation of powers was meant to preserve liberty, and, under prevailing political theory, allowing legislatures to operate free from executive influence would accomplish that objective.[396] To effectuate these changes, governors' roles in lawmaking and day-to-day administration were restricted, and many traditionally executive powers were vested in legislatures.[397] Likewise, state courts were protected from executive control by, for example, removing the governor's power to appoint judges.[398] But because Americans still distrusted judicial discretion and were unwilling to give the courts full independence, judges remained subject to legislative interference with both their decisions in individual cases and their salary and tenure in office.[399]

But as their English ancestors had learned from the abuses of the Long Parliament, Americans soon realized that an omnipotent legislature is equally capable of tyranny as an executive. Unchecked by governors or courts, state assemblies ran amok, using their nearly unlimited powers to enact a stream of oppressive and often self-interested legislation, which unsettled preexisting

394. *See id.* at 105 (noting that colonial courts were "open to political maneuvering in which, more often than not, the home government managed to carry its point"); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1062 (1997); *see also January 7*, N.Y.J., Feb. 2, 1769, *reprinted in* BOSTON UNDER MILITARY RULE, 1768-1769: AS REVEALED IN A JOURNAL OF THE TIMES 46 (Oliver Morton Dickerson ed., 1936) (comparing the colonial Courts of Vice Admiralty to the Star Chamber).

395. MCDONALD, *supra* note 243, at 160.

396. *See* Edward Hirsch Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976); WOOD, *supra* note 164, at 157 ("When Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation.").

397. *See* GORDON S. WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 36-42 (2021).

398. *See id.* at 40-41.

399. As Thomas Jefferson argued, the peoples' representatives could be trusted to dispense "mercy . . . equally & impartially to every description of men," but the same was not true of "judge[s]," who were subject to "the eccentric impulses of whimsical, capricious designing [men]." Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* THOMAS JEFFERSON: WRITINGS 755, 757 (Merrill D. Peterson ed., 1984); *see also* MCDONALD, *supra* note 243, at 85 ("[F]ew Americans except lawyers trusted a truly independent judiciary."); WOOD, *supra* note 164, at 161 ("The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions . . . .").

rights and mired the entire legal system in uncertainty.[400] And these bodies did not just pass laws; they exercised all three powers of government in what ultimately amounted to rule by arbitrary decree.[401] For instance, assemblies often meddled in and decided individual legal cases or overruled final judicial decisions.[402] And though many Revolutionary constitutions professed to be paramount law beyond legislative alteration, state assemblies routinely violated their provisions with impunity because there were no independent courts that could enforce them.[403]

Owing to these popular depredations, the second stage in American development of separation of powers focused on constraining the legislature.[404] By the time of the Philadelphia Convention, American theorists no longer believed that liberty was safe in the hands of elected assemblies just because they were the

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400. *See* WOOD, *supra* note 164, at 369, 404-10 (describing legislative abuses during this period). For a contemporary discussion, see THE FEDERALIST NO. 48, at 256-57 (James Madison) (George W. Carey & James McClellan eds., 2001), which laments that legislative power is "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex"; and Increase Moseley, President, Address of the Council of Censors to the Freemen of the State of Vermont (Feb. 14, 1786), *in* VERMONT STATE PAPERS 540 (Middlebury, J.W. Copeland 1823), which states that "the revised laws have been altered—re-altered—made better—made worse; and kept in such a fluctuating position, that persons in civil commission scarce know what is law . . . ."

401. *See* WOOD, *supra* note 397, at 50 ("Time and again the [state] legislatures interfered with the governors' legitimate powers, rejected judicial decisions, [and] disregarded individual liberties and property rights . . . ."); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 479 (1989); *see also* Letter from a Gentleman in the Country, to his Friend in this Town, Indep. Chron. & Universal Advertiser (Jan. 29, 1778) (criticizing state assemblies for "render[ing] null and void by *extemporary decrees*" the "established *standing laws*").

402. *See* Manning, *supra* note 72, at 63-64. For contemporary discussion, see THE FEDERALIST NO. 48, at 259 (James Madison) (George W. Carey & James McClellan eds., 2001), which argues that state legislatures had "*in many* instances, *decided rights* which should have been left to *judiciary controversy*"; Moseley, *supra* note 400, at 540, which complains that

> it is an imposition on the suitor, to give him the trouble of obtaining . . . a final judgment agreeably to the known established laws of the land; if the Legislature, by a sovereign act, can interfere, reverse the judgment, and decree in such manner, as they, unfettered by rules, shall think proper[;]

and *Council of Censors, A Report*, *in* THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, AS ESTABLISHED BY THE GENERAL CONVENTION, CAREFULLY COMPARED WITH THE ORIGINAL 38 (Philadelphia, Francis Bailey 1784), which critiques the Pennsylvania assembly for "extending their deliberations to the cases of individuals."

403. *See* WOOD, *supra* note 164, at 274-75; THE FEDERALIST NO. 48, at 259-60 (James Madison) (George W. Carey & James McClellan eds., 2001) (cataloging violations of the Pennsylvania constitution by the state assembly).

404. *See* WOOD, *supra* note 164, at 364, 403-53; VILE, *supra* note 87, at 157-62.

peoples' representatives.[405] Instead, they argued that legislatures should be limited to prescribing general rules, which would be enforced by the Executive and applied by independent judges.[406] Otherwise, as the author of *The Essex Result* explained, liberty and the rule of law would be threatened because "the maker of the law will also interpret it."[407] Relatedly, American theorists asserted that the judiciary should be empowered to set aside legislative actions that conflicted with the higher law of the Constitution.[408] Of course, to make judicial enforcement possible, judges had to be made independent of legislative control, lest they be "liable to be tossed about by every veering gale of politicks."[409]

Thus, the Founders adopted the rule-of-law thesis and its separation-of-powers principles. No longer an auxiliary theory to mixed government, separation of powers was exalted by early Americans on both sides of the Federalist/Anti-Federalist divide as the "first principle of free government[]."[410] Indeed,

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405. *See* Manning, *supra* note 72, at 64; *see also Number V. On the Affairs of the State*, PA. PACKET & DAILY ADVERTISER, Sept. 21, 1786, at 1 ("At the commencement of the revolution, it was supposed that what is called the executive part of a government was the only dangerous part; but we now see that quite as much mischief, if not more, may be done, and as much arbitrary conduct acted, by a legislature."); FARRAND, *supra* note 40, at 300-01 ("[American] prejudices against the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty." (spelling modernized)); THE FEDERALIST NO. 48, at 257 (James Madison) (George W. Carey & James McClellan eds., 2001) (explaining the dangers of "legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations"); AEDANUS BURKE, AN ADDRESS TO THE FREEMEN OF THE STATE OF SOUTH-CAROLINA 23 (Philadelphia, Robert Bell 1783) ("A popular assembly, not governed by fundamental laws . . . will commit more excess than an arbitrary monarch . . . .").

406. *See* THE FEDERALIST NO. 75, at 388 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("The essence of the legislative authority is . . . to prescribe rules for the regulation of the society; while the execution of the laws [is] . . . the function[] of the executive magistrate."); THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[I]nterpretation of the laws is the proper and peculiar province of the courts.").

407. Theophilus Parsons, *The Essex Result*, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 480, 494 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

408. *See* Prakash & Yoo, *supra* note 240, at 940-69; WOOD, *supra* note 164, at 537-38.

409. Richard Bache, *To the Citizens of Pennsylvania*, PA. GAZETTE & WKLY. ADVERTISER, Mar. 24, 1779, at 1; *see also* WOOD, *supra* note 164, at 453-54 ("[The] department of government which benefited most from this new, enlarged definition of separation of powers was the judiciary.").

410. JAMES MADISON, *Government of the United States*, *in* JAMES MADISON: WRITINGS 508, 508 (Jack N. Rakove ed., 1999). As Gordon S. Wood put it, American "constitutional reformers in the years after 1776 exploited" separation of powers "with a sweeping intensity," which "magnified" this "relatively minor eighteenth-century maxim . . . into the dominant principle of the American political system." WOOD, *supra* note 164, at 449; *see also* VILE, *supra* note 87, at 133, 165-66 (describing how separation of powers came to replace mixed government as the leading principle of American political theory).

with its precise demarcation of lawmaking and law application, the Constitution in many ways epitomizes the rule-of-law thesis.[411]

Perhaps it is unsurprising, then, that the Constitution rejected each structural feature of the English government that had enabled the growth of conscience-based equity. The most obvious evidence to this effect is the Vesting Clauses themselves, which confer the three powers of government on separate, independent, and coequal branches.[412] And further examination of the Constitution's specific structural features demonstrates how thoroughly it repudiated the assumptions underlying conscience-based equity.

For one, the Constitution denies the Executive authority to dispense justice outside the course of law. The concept of the Crown as the "fountain of justice" has no application to the Presidency. On the contrary, the President is obligated to faithfully execute federal-court judgments; she has no power to correct perceived errors in or injustices produced by those decisions.[413] Likewise, Articles I and III grant Congress exclusive authority to establish federal courts and adjust their jurisdictions; these provisions leave no room for the President to create prerogative tribunals of extraordinary relief.[414] And the U.S. Constitution placed even greater restrictions than its early-modern English counterpart on the Executive's influence over the courts: whereas the Crown still retained exclusive power to appoint judges, the President was forced to submit her appointments for Senate approval.[415]

Relatedly, the Constitution secures the judiciary's independence from the Executive. Since the colonial period, Americans understood that limiting executive manipulation of the courts was essential to preserving the rule of law: it would be vain "to look for strict impartiality and a pure administration of justice, to expect that power should be confined within its legal limits and right and justice

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411. Even so, the Constitution did not create a pure system of separated powers. Prakash & Yoo, *supra* note 240, at 922. Instead, it incorporated the concept of checks and balances, drawn from the theory of mixed government, to "buttress[]" separation of powers by enabling each branch to resist the encroachments of the others. VILE, *supra* note 87, at 133.

412. *See* U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

413. *Id.* art. II, § 3 (charging the President to "take Care that the Laws be faithfully executed"). To be sure, the President has occasionally refused to enforce federal-court judgments, typically during times of national crisis. *See, e.g.*, *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487). But as a general matter, the Constitution's text and structure seem to support a relatively robust judicial power to issue binding judgments that the President is obliged to enforce. *See* Baude, *supra* note 32, at 1812-14. *But cf.* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467-73 (2018) (arguing that the executive branch's obligation to comply with federal-court decisions is merely a nonbinding norm).

414. *See* U.S. CONST. art. I, § 8; *id.* art. III §§ 1-2.

415. *See id.* art. II, § 2.

done" if the courts were under executive control.[416] Even in England, the old notion of judges as sharing in executive power persisted to some degree at the Founding.[417] Dispensing with that view by creating a coequal branch vested with "judicial Power" was a key innovation of early American political theory.[418]

The Constitution's structure reflects this innovation. Mirroring the Act of Settlement, Article III gives federal judges life tenure and salary protection during good behavior, which, Hamilton explained, would prevent the judiciary from "being overpowered, awed or influenced by its coordinate branches."[419] And it went further in rejecting the English practice of permitting the Crown to remove judges on address of Parliament; American federal judges would be removable only via impeachment.[420]

Moreover, the Constitution vests the President with only "the executive Power"; she has no independent legislative authority in the mode of a medieval English king.[421] Unlike the British Crown, the President is not part of the legislative branch. To the contrary, the Incompatibility Clause prevents not only the President but also her agents from simultaneously serving in Congress.[422] The President's lawmaking function is thus confined to the purely negative veto, which early American observers saw as an appropriately limited role in the legislative process.[423] Nor was the President authorized to suspend or dispense with congressional statutes; instead, Article II enjoins her to "take Care that the Laws

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416. John Adams, *A Letter to the People of Pennsylvania*, *reprinted in* 2 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at 257, 259 (Bernard Bailyn ed., 1965).

417. *See* GWYN, *supra* note 87, at 101-08.

418. *See id.* at 125; WOOD, *supra* note 397, at 126-34.

419. THE FEDERALIST NO. 78, at 403 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

420. *See* THE FEDERALIST NO. 79, at 410 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (noting this limitation "is consistent with the necessary independence of the judicial character"). The Philadelphia Convention also rejected a proposal to join the President with federal judges in a Council of Revision. *See* WARREN, *supra* note 244, at 185-87, 332-36. Recalling the medieval English Council that drafted statutes on behalf of the Crown, this body would have been empowered to revise and veto legislation. *See* GOEBEL, *supra* note 65, at 227 (observing the Council of Revision "was made plausible by reference to the British usage of the judges sitting both in Parliament and the Privy Council"). Its rejection demonstrates the Framers' commitment to fully disconnecting judges from the executive power. *See id.* at 209 (noting that the Council was rejected in part because many Framers "did not like associating the judiciary with the executive").

421. *See* Calabresi, *supra* note 239, at 1392.

422. *See* U.S. CONST. art. I, § 6; *see also* Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 229 (2007) (arguing that this provision "require[s] strict separations between legislative and executive personnel and functions").

423. *See* VILE, *supra* note 87, at 71-73.

be faithfully executed."[424] There are thus few, if any, relevant similarities between the President and the medieval English king upon whose lawmaking power conscience-based Chancellors depended.

In addition to denying the President a share of the legislative power, the Constitution also sharply separated the judiciary from the legislature.[425] For instance, in a substantial departure from British practice, Article III's case-or-controversy requirement precludes the federal courts from issuing advisory opinions[426] and, more generally, from deciding policy questions that fall within the bailiwick of the political branches.[427] Similarly, the Constitution prohibits judges from serving in Congress, avoiding the prospect of judges drafting statutes in a legislative capacity and later applying those same statutes in their judicial capacity.[428]

The Constitution likewise severely limited legislative control of the courts. Life tenure and salary protection were not securities against executive power only; they were also designed to ensure that the judiciary was fully separated and independent from legislative power or influence.[429] Article III also relocated the final appellate court from the upper house of the legislature, where it resided in England, to an independent Supreme Court, avoiding any intermingling of the legislative and judicial functions.[430] Similarly, the Bill of Attainder Clause[431] represents "a general safeguard against legislative exercise of the judicial function,

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424. U.S. CONST. art. II, § 3.

425. *See* Manning, *supra* note 72, at 56-61.

426. *See* Flast v. Cohen, 392 U.S. 83, 96 (1968); *see also supra* note 268 (citing sources that federal courts were historically understood to be forbidden from issuing advisory opinions).

427. *See* Verkuil, *supra* note 391, at 308.

428. *See* U.S. CONST. art. I, § 6; Manning, *supra* note 39, at 1984 (arguing that the Incompatibility Clause "precludes . . . any system in which legislators play a judicial role"). Convention delegates gave similar reasons for rejecting the Council of Revision: judges should not be involved in making policy or writing legislation; instead, they should impartially apply the law in particular cases. *See* FARRAND, *supra* note 40, at 75 (paraphrasing delegate Elbridge Gerry, who argued that including judges in a Council of Revision would turn "Expositors of the Laws [into] Legislators which ought never to be done"). As Mark Tushnet has explained, the rejection of the Council of Revision ensured that "[l]aw and policy were more cleanly separated" under the Constitution. Mark Tushnet, *Dual Office Holding and the Constitution: A View from* Hayburn's Case, *in* ORIGINS OF THE FEDERAL JUDICIARY, *supra* note 51, at 196, 215.

429. *See* THE FEDERALIST NO. 78, at 402-07 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

430. *See* U.S. CONST. art. III, § 1; *see also* THE FEDERALIST NO. 81, at 418 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (noting that the Supreme Court is "composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain").

431. U.S. CONST. art. I, § 9, cl. 3.

or more simply—trial by legislature."[432] And the Founders understood Article I's grant of legislative powers to exclude the ability to revise or overrule judgments issued by federal courts, a power that had long been exercised by the British Parliament and colonial assemblies.[433] These departures from common-law tradition reflect a concern for restraining both legislative and judicial discretion and limiting the federal courts to faithfully applying the law, rather than altering it on the fly in the mode of medieval English judges.[434]

Clearly, the government created by the Constitution differs markedly from that which gave rise to conscience-based equity. The Framers sought to promote the rule of law—and thereby protect individual liberty—by limiting official discretion, preventing a single institution from both making and applying law, and ensuring governance according to preestablished rules. The Constitution's structure embodies those principles. It is difficult to reconcile that structure's sharp separation of functions with a power like conscience-based equity that depended on a blurring of functions and exalted individual discretion.[435] Indeed, it would make little sense for the Framers, having meticulously demarcated the three branches, to create an office that personified the opposite structural presumptions simply by inserting the single word "Equity" into Article III.[436] As discussed, conscience-based equity had no place in the eighteenth-century English Constitution of semiseparated powers. It is thus even more incongruous with respect to the U.S. Constitution, the structure of which was carefully designed to ensure that judges would exercise "neither FORCE nor WILL, but merely judgment."[437]

On the other hand, the rule-of-law principles that underlay precedent-based equity align more closely with the Constitution's structure. Indeed, limiting the judiciary to administering the system of remedies that comprised precedent-

432. United States v. Brown, 381 U.S. 437, 442 (1965); *see also* Verkuil, *supra* note 391, at 309 (noting that the Clause "prevents the legislature from serving in two capacities—law creator and law enforcer").

433. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-25 (1995).

434. *See* Manning, *supra* note 72, at 56-68.

435. *See* Bray, *supra* note 144, at 43 ("[I]t is reasonable to ask whether [the conscience-based] function of equity can even be legitimate in a constitutional system that distinguishes the legislative power from the judicial.").

436. *See* Pushaw, *supra* note 24, at 828 n.497.

437. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

based equity effectively confines it to acting in the role of courts rather than legislators.[438] The historical record establishes that Article III adopted either conscience-based or precedent-based equity, so those are the only interpretations available. And because the original understanding of the Constitution's structure precludes the creation of any power like conscience-based equity, it also supports — by implication but equally clearly — an inference that Article III adopted precedent-based equity.

C. Early Judicial Practice

Consistent with inferences from constitutional structure, pre-1835 case law suggests that early federal judges understood Article III as incorporating the precedent-based conception of equity. Thus, insofar as text, history, and structure leave uncertain whether "[t]he judicial Power" in "Equity" refers to conscience-based or precedent-based equity, a historically minded Court may well consider the meaning ascribed to those terms by early federal judges as having liquidated that ambiguity.

The history of federal equity practice seems straightforward. Early federal judges consistently opined that their remedial powers in equity were coextensive with and limited to those of the Founding-Era English Court of Chancery.[439] Essentially, the federal judiciary adopted the system of remedies that was being administered by the eighteenth-century Chancellor as the baseline of its equitable authority.[440] While the courts continued to develop that system via the gradual accretion of precedent, they disclaimed authority to substantially depart from settled English principles or create entirely new equitable remedies. Such power, according to the early federal courts, was a fundamentally legislative prerogative.

As was the case in Part III, however, congressional statutes muddle the analysis. In most cases, early federal courts did not identify any positive law requiring them to adhere to precedent-based equity. But at times, they suggested that provisions of the Judiciary Act of 1789 and the Process Act of 1792 did so. If early

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438. *See* John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 85 (2014).

439. *See, e.g.*, Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222-23 (1818) ("[T]he remedies in the courts of the United States, . . . in equity, . . . [are to be] according to the principles of . . . equity, as distinguished and defined in that country from which we derive our knowledge of those principles."); Pratt v. Northam, 19 F. Cas. 1254, 1258 (Story, Circuit Justice, C.C.D.R.I. 1828) (No. 11,376).

440. *See* Collins, *supra* note 53, at 274-77 (noting that early federal equitable remedies "defaulted to English chancery practice"); Jay, *supra* note 245, at 1276 (noting that "British Chancery practice was the primary reference" for early federal equity courts).

courts believed that the Judiciary or Process Acts limited the scope of federal equity to Founding-Era English practice, then it is at least plausible that they were implicitly relying on those statutes—rather than Article III—when describing their equity powers. And if that were true, it would give reason to doubt that these cases actually evidence how early federal judges understood "[t]he judicial Power" in "Equity."

To resolve this uncertainty, I again parse the cases. Specifically, I consider them in four groups: (1) cases in which the court expressly indicated that Article III required adherence to English Chancery practice; (2) cases in which the court adhered to precedent-based equity without identifying a particular source of authority; (3) cases in which the court indicated the Judiciary Act limited federal equity powers; and (4) cases in which the court indicated the Process Act limited federal equity powers. This fine-grained view shows that, while the evidence is perhaps not as conclusive as it initially seems, early federal courts understood Article III as incorporating precedent-based equity.

1. Article III Cases

There was a relatively small set of cases in which early federal courts suggested that Article III itself adopted precedent-based equity, but the opinions were not always models of clarity. For instance, the Supreme Court asserted on several occasions that it could only exercise equity power "in conformity with the settled principles of a court of chancery."[441] But it did not elaborate on what those principles were. Later opinions seemed to indicate that when the Court referred to principles of equity, it meant the rules "defined in that country from which we derive our knowledge of those principles," England.[442] A few cases made that point more directly, but they are of uncertain precedential value. Some referred to equity only in dicta, while others muddied the waters of their constitutional holding by also referencing statutory limits on federal equitable remedies.[443] On

441. Bodley v. Taylor, 9 U.S. (5 Cranch) 191, 223 (1809); *accord* Taylor v. Brown, 9 U.S. (5 Cranch) 234, 255 (1809).

442. *Campbell*, 16 U.S. at 223.

443. *See, e.g.*, Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832) (holding that under the "chancery jurisdiction given by the constitution . . . the remedies in equity are to be administered . . . according to the practice of courts of equity in the parent country" but also suggesting that the 1792 Process Act "has provided that the modes of proceeding in [federal] equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law"); Baker v. Biddle, 2 F. Cas. 439, 452-53 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1831) (No. 764) (holding that both Article III and the Judiciary Act required the federal courts follow to Founding-Era Chancery practice); United States v. Coolidge, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857) (stating in dicta that

net then, these cases offer some support for the proposition that early federal courts understood "[t]he judicial Power" in "Equity" as incorporating precedent-based equity but alone are not dispositive.

2. *Cases that Do Not Identify a Source of Limitation*

By far the largest set of early equity cases were those in which the federal courts adhered to Founding-Era Chancery practice without specifying the source of law requiring them to do so. These cases are worth exploring in some detail because they show how early federal equity jurisprudence adopted the specific aspects of precedent-based equity while rejecting the broad and flexible powers of conscience-based equity.

For starters, early federal equity courts followed precedent.[444] They did not assess each case on its facts and decree what seemed like a just outcome in the mode of conscience-based Chancellors; instead, federal judges applied a settled, rules-based system of remedies. Indeed, individual judges emphasized the importance of following precedent in equity as a means of cabining judicial discretion. As Justice Story put it, where a rule of equity has been established, "the case

because "[t]here is no law of the United States, which provides for the . . . principles of adjudication [in equity,]" the federal courts must proceed "by the rules of equity recognised and enforced in the equity courts of England"). An exception is *Harvey v. Richards*, in which Justice Story stated that "the equity powers and authorities of the courts of the United States are, in cases within the limits of their constitutional jurisdiction, co-equal and co-extensive, as to rights and remedies, with those of the [English] court of chancery." 11 F. Cas. 746, 755 (Story, Circuit Justice, C.C.D. Mass. 1818) (No. 6,184). Once again, later cases were more explicit. *See, e.g.*, Fontain v. Ravenel, 58 U.S. (17 How.) 369, 384 (1854); *id.* at 394-95 (Taney, C.J., concurring) (arguing that the federal courts cannot exercise conscience-based equity powers because Article III's reference to the "judicial power . . . in equity . . . must be construed according to the meaning which the words used conveyed at the time of its adoption; and the grant of power cannot be enlarged by resorting to a jurisdiction which the court of chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the constitution was adopted"); Irvine v. Marshall, 61 U.S. (20 How.) 558, 564-65 (1857); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 563-64 (1851).

444. *See* Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 169 (1825) (noting the availability of equitable relief "must depend upon precedent"); Calloway v. Dobson, 4 F. Cas. 1082, 1083 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 2,325) ("It is certainly proper, in . . . [equity] case[s], for courts to examine precedents, and to respect them."); *see also* John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1447-58 (1998) (describing how the early Marshall Court "adopted an equity jurisprudence . . . typified by strict application of stare decisis").

no longer stands upon general principles," and it is the court's "duty . . . to submit to authority; for nothing can be more dangerous than, upon private doubts, to disturb the landmarks of the law."[445]

Federal judges relied heavily on English Chancery precedents to delineate the principles of equity. They did so both to define the set of equitable remedies available in federal court and the legal standards for granting them.[446] When faced with a question regarding the scope of their equity powers, federal judges looked first to precedent-based Chancery practice.[447] They refused to depart

445. *Richards*, 11 F. Cas. at 758.

446. *See, e.g.*, Massie v. Watts, 10 U.S. (6 Cranch) 148, 158-59 (1810) (relying on "the authority" of English cases to conclude that "the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree"); Herbert v. Wren, 11 U.S. (7 Cranch) 370, 376-77 (1813) (asserting that a claim presented "a proper case for application to a Court of Chancery" because it was in accordance with "the practice which prevails generally in England"); Colson v. Thompson, 15 U.S. (2 Wheat.) 336, 341 & n.a (1817) (relying on eight Founding-Era English Chancery cases for the standards governing specific performance); Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 276-77 (1831) (looking to Chancery practice for the standards governing recission and specific performance); Gilman v. Brown, 10 F. Cas. 392, 399-402 (Story, Circuit Justice, C.C.D. Mass. 1817) (No. 5,441) (consulting English Chancery cases to determine if the court had authority to grant an equitable lien for purchase money); Ogle v. Ege, 18 F. Cas. 619, 620 (Washington, Circuit Justice, C.C.D. Pa. 1826) (No. 10,462) (relying on English authorities to establish the court's power to grant injunctions against patent infringement and the test governing such relief); West v. Randall, 29 F. Cas. 718, 722-23 (Story, Circuit Justice, C.C.D.R.I. 1820) (No. 17,424) (same to establish the court's power to issue a bill of peace); Andrews v. Essex Fire & Marine Ins. Co., 1 F. Cas. 885, 886 (Story, Circuit Justice, C.C.D. Mass. 1822) (No. 374) (same for the court's power to reform a contract); Ward v. Seabry, 29 F. Cas. 208, 208 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 17,161) ("The practice of this court is in strict conformity with that of the English chancery court."). Of English equity rules, the federal courts adhered most stringently to the requirement that a plaintiff establish that she had no adequate remedy at law before proceeding in equity. *See, e.g.*, Hepburn v. Dunlop & Co., 14 U.S. (1 Wheat.) 179, 203 n.d (1816); Kidwell v. Masterson, 14 F. Cas. 458, 459 (C.C.D.D.C. 1827) (No. 7,758) ("No principle is better settled than that, if a party has a full remedy at law, he has none in equity.").

447. *See, e.g.*, *Elmendorf*, 23 U.S. at 169-70 (citing five Founding-Era English Chancery cases for the "rule" that equity would not order a conveyance of real property when the statute of limitations on an ejectment action had run); Hunt v. Rhodes, 26 U.S. (1 Pet.) 1, 16-17 (1828) (relying on a 1781 Chancery case for the "general rule" that reformation could not be granted to relieve against a mistake of law); Greene v. Darling, 10 F. Cas. 1144, 1146-49 (Story, Circuit Justice, C.C.D.R.I. 1828) (No. 5,765) (consulting Chancery practice to determine if the federal courts could grant a setoff as a remedy in equity); Harding v. Wheaton, 11 F. Cas. 491, 494-96 (Story, Circuit Justice, C.C.D.R.I. 1821) (No. 6,051) (carefully parsing multiple lines of English cases to determine the equitable remedies available where a deed is obtained by undue influence).

substantially from the rules embodied in those precedents[448] and consistently disclaimed any quasi-legislative authority to create new equitable remedies or alter existing ones.[449] Thus, where a plaintiff sought relief that was inconsistent with established rules of English equity, the federal courts usually denied the remedy as beyond their authority.

To be sure, early federal courts began to develop an American law of equitable remedies, but they did so in the manner of precedent-based Chancellors. Obviously, there were always questions of first impression, so English precedents could not automatically resolve every legal issue that came before the federal courts. In these cases, English practice served as a baseline: precedent-based equity provided the principles that early federal judges applied to answer questions of first impression. Rather than resolve these cases on the basis of their personal conceptions of justice, courts carefully parsed relevant English cases, distilled a

448. *See, e.g.*, Hughes v. Blake, 19 U.S. (6 Wheat.) 453, 472 (1821) ("[T]he rule of Courts of equity in England is to be applied . . . . [T]he long and established practice of a Court of equity . . . ought not lightly to be departed from."); Wormley v. Wormley, 21 U.S. (8 Wheat.) 421, 441-51 (1823) (adhering to "stubborn" and "settled" rules of equity); Powell v. Monson & Brimfield Mfg. Co., 19 F. Cas. 1218, 1224 (Story, Circuit Justice, C.C.D. Mass. 1824) (No. 11,356) (concluding that "English authorities seem to leave the point entirely at rest; and I have not the courage to undertake to disturb it"); Wisner v. Ogden, 30 F. Cas. 388, 391-93 (Washington, Circuit Justice, C.C.D.D.C. 1827) (No. 17,914) (explaining that only if the question is "unsettled in the English chancery court" may the "circuit courts of the United States . . . adopt that [practice] which is most likely to subserve the ends of justice"); Dunlap v. Stetson, 8 F. Cas. 75, 80 (Story, Circuit Justice, C.C.D. Me. 1827) (No. 4,164) ("[English cases] admonish us, that courts of equity entertain some reserves on this subject; and without a positive authority in its favor, I should feel no inclination to sustain it."); Lyman v. Lyman, 15 F. Cas. 1147, 1151 (Thompson, Circuit Justice, C.C.D. Vt. 1829) (No. 8,628) (relying on "the settled doctrine of chancery"); *Darling*, 10 F. Cas. at 1148-49 (refusing to depart from English rules because while "this court has a general equity jurisdiction . . . it cannot go beyond the principles, which belong to that jurisdiction").

449. *See, e.g.*, *Rhodes*, 26 U.S. at 14 (asserting that to expand the remedy of reformation to relieve against mistakes of law would be "an usurpation of power"); Riddle & Co. v. Mandeville, 9 U.S. (5 Cranch) 322, 328-29 (1809) (responding to the suggestion that "a court of chancery [could] create contracts into which individuals had never entered" by asserting that "[t]he court would, at once, have disclaimed such a power"); Preston v. Tremble, 11 U.S. (7 Cranch) 354, 356 (1813) (rejecting "an attempt to substitu[t]e a bill in equity for an action of trespass"); *Hepburn*, 14 U.S. at 199-200 (describing specific performance on terms other than those in the contract as "an anomaly in the jurisprudence of a court of equity" and refusing to grant relief because "[t]here is no precedent . . . to sanction such a decree"); Thompson v. Tod, 23 F. Cas. 1094, 1097 (Washington, Circuit Justice, C.C.D. Pa. 1817) (No. 13,978) (refusing to grant a remedy that "would be without a solitary precedent to give it countenance"); Wilson v. Wilson, 30 F. Cas. 248, 248-49 (C.C.D.D.C. 1805) (No. 17,848); Sims v. Lyle, 22 F. Cas. 186, 187 (Washington, Circuit Justice, C.C.E.D. Pa. 1822) (No. 12,892).

general principle governing the specific type of relief sought, and attempted to apply that principle to the question at hand.[450]

By applying preestablished principles of precedent-based equity to novel contexts, the federal courts created new precedents to govern future cases. In *Philips v. Crammond*, for example, the court held that it could grant a resulting trust in favor of a partnership over a piece of real property that was purchased by one of the partners with partnership funds.[451] Although Justice Washington did not cite any authority for this particular application of the remedy, he explained that it flowed naturally from the "general principle" of equity that a party who "lay[s] out the money which he holds in his fiduciary character, in the purchase of real property," is accountable to their cofiduciary as a resulting trustee.[452]

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450. For instance, in *Bayley v. Greenleaf*, the Supreme Court confronted a question of first impression over the effect of an equitable lien, namely whether a vendor of land could assert a purchase-money lien against the creditors of the vendee. 20 U.S. (7 Wheat.) 46, 50-57 (1822). The Court noted the doctrine on this point "seems not so well settled." *Id.* at 50. Thus, Chief Justice Marshall "looked into the English authorities for the purpose of inquiring how far the principle has been firmly established in that country," *id.* at 52, and, after reviewing numerous Chancery opinions, concluded that the "weight of authority" was against the power of the courts to enforce the lien, *id.* at 57. For further examples of this mode of analysis, see *Elmendorf*, 23 U.S. at 169-75; Craig v. Leslie, 16 U.S. (3 Wheat.) 563, 577-90 (1818); Gardner v. Gardner, 9 F. Cas. 1167, 1178 (Story, Circuit Justice, C.C.D.R.I. 1823) (No. 5,227) (acknowledging the uncertainty of English decisions but maintaining that "[w]hatever difficulty there may be in reconciling all the cases, there is no diversity as to the principle"); Dexter v. Arnold, 7 F. Cas. 583, 585-88 (Story, Circuit Justice, C.C.D.R.I. 1829) (No. 3,856) (explaining that "case[s] of first impression" in equity must be "decided upon the general principles of courts of equity" and relying on English decisions to establish those principles); Sullivan v. Redfield, 23 F. Cas. 357, 360 (Thompson, Circuit Justice, C.C.D.N.Y. 1825) (No. 13,597); Garnett v. Macon, 10 F. Cas. 12, 31-32 (Marshall, Circuit Justice, C.C.E.D. Va. 1825) (No. 5,245); *Darling*, 10 F. Cas. at 1146-49.

451. 19 F. Cas. 497, 499 (Washington, Circuit Justice, C.C.D. Pa. 1810) (No. 11,092).

452. *Id.* To take another example, in *Riddle & Co. v. Mandeville*, the Supreme Court held, as a matter of first impression, that a holder of a promissory note could obtain relief in equity against a remote endorser of that note. *See* 9 U.S. at 330-31. In explaining its decision, the Court asserted that such relief was permissible because the "analogy [of this remedy] to the familiar case of a suit in chancery by a creditor against the legatees of his debtor is not very remote." *Id.* at 330; *see also* Bank of United States v. Weisiger, 27 U.S. (2 Pet.) 331, 347-48 (1829) (reading *Mandeville* to establish a new, binding principle of equity); Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290, 299 (1817) (relying on an earlier Supreme Court case as establishing the rule "that he who asks for a specific performance must be in a condition to perform himself"); Andrews v. Essex Fire & Marine Ins. Co., 1 F. Cas. 885, 888 (Story, Circuit Justice, C.C.D. Mass. 1822) (No. 374) (describing earlier cases as "conclusive upon" the standards for granting reformation); *Garnett*, 10 F. Cas. at 31-32; Thomas v. Weeks, 23 F. Cas. 978, 980 (Thompson, Circuit Justice, C.C.D.N.Y. 1827) (No. 13,914) (applying "principles well settled in this country and in the English chancery" governing the issuance of injunctions); Lidderdale v. Robinson, 15 F. Cas. 502, 506 (Marshall, Circuit Justice, C.C.E.D. Va. 1824) (No. 8,337) (extending

Over time, deciding such questions of first impression led to an accretion of precedent that elaborated on and even modestly updated the federal system of equitable remedies. As a result, equitable remedies, while remaining rooted in English principles, began to take on an American character.[453]

On the other hand, early federal courts disclaimed any authority akin to conscience-based equity. Even if denying equitable relief would produce the type of hardship that motivated conscience-based Chancellors to intervene, the courts would not act except as sanctioned by precedent.[454] And they applied the preexisting principles of equity even where they harbored doubts about the desirability of a given rule as a policy matter.[455]

Justice Story's circuit opinion in *Conyers v. Ennis* illustrates the early federal courts' grudging attitude toward cases of hardship.[456] Plaintiffs in *Conyers* were

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the remedy of subrogation to permit a surety to assert a creditor's rights against his cosurety because this application of the remedy, even if novel, fit with the general principle "established in the books" that subrogation is available "[w]here a person has paid money for which others were responsible").

453. *Cf.* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 514-17 (2006) (describing a similar process of development in American admiralty law).

454. *See, e.g.*, Crocket v. Lee, 20 U.S. (7 Wheat.) 522, 527 (1822) ("The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a Court of Chancery . . . ."); Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 211 (1822) ("The case of the plaintiff may be, and probably is, a hard one. But to relieve him is not within the power of this Court."); Miller v. Kerr, 20 U.S. (7 Wheat.) 1, 7 (1822) (acknowledging that the "case is a hard one on the part of the plaintiffs" but denying equitable relief); Hunt v. Rousmaniere, 12 F. Cas. 938, 947 (Story, Circuit Justice, C.C.D.R.I. 1821) (No. 6,898) ("[The plaintiff's contract] has turned out unproductive; but this is his misfortune, and affords no ground to [grant reformation]."); Livingston v. Van Ingen, 15 F. Cas. 697, 700 (Livingston, Circuit Justice, C.C.D.N.Y. 1811) (No. 8,420) ("But if [plaintiffs are] absolutely without remedy elsewhere, it does not follow that this court can help them. A court . . . is not to reason itself into jurisdiction from considerations of hardship . . . ."). Later cases made the same point with vehemence. *See, e.g.*, Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655, 658 (1873) ("[T]he total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief . . . . [T]he hardship of the case . . . is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles."); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 121-22 (1873).

455. *See, e.g.*, Slack v. Walcott, 22 F. Cas. 309, 311 (Story, Circuit Justice, C.C.D.R.I. 1825) (No. 12,932) ("Whether the [rule] was originally founded in good sense or not, it is now too late to inquire. It will be sufficient for the court, that it is established."); Powell v. Monson & Brimfield Mfg. Co., 19 F. Cas. 1218, 1223 (Story, Circuit Justice, C.C.D. Mass. 1824) (No. 11,356) ("[W]hatever difficulty I should have had in the first instance in adopting the rule, it appears to me now firmly established . . . ."); *Lidderdale*, 15 F. Cas. at 506 ("I was originally strongly inclined to the opinion that [subrogation should not be available]. But I am satisfied . . . that the decisions are otherwise, and I must acquiesce in those decisions.").

456. 6 F. Cas. 377 (Story, Circuit Justice, C.C.D.R.I. 1821) (No. 3,149).

merchants who sold a large shipment of rice to a fraudulently insolvent customer. As a result of his fraud being discovered, the customer committed suicide shortly after placing the order, and the executors of his estate took possession of the rice and refused payment.[457] Under prevailing law, a merchant could reclaim property from an insolvent customer, but only while that property was in transit. Plaintiffs petitioned the court to expand that remedy "in equity [to] extend to all cases where the property is not paid for, and remains in the hands of the consignee."[458] Despite acknowledging that "[t]his is a case of extreme hardship, and such as might well induce a court to strain after some mode of redress," Justice Story denied relief.[459] He explained that because "the decisions in England have confined the [remedy] to cases where the property is in its transit," the court had no power to abandon that limitation to meet the needs of a particular case.[460]

The federal courts rejected conscience-based equity for much the same reason as their precedent-based English forbears. They described the creation of new remedies as a legislative prerogative; for the courts to usurp that authority violated the separation of powers.[461] To again quote Justice Story in *Conyers*, in response to plaintiffs who urged him to abandon principles of English equity in favor of a "more enlarged rule":

> All argument of this sort is addressed in vain to this court. I do not sit here to revise the general judgments of the common law, or to establish new doctrines, merely because they seem to me more convenient or equitable. My duty is to administer the law as I find it . . . . If there are public mischiefs growing out of its principles, let them be remedied by the legislature.[462]

Considered as a whole, this set of cases supports the inference that early federal judges understood "[t]he judicial Power" in "Equity" to incorporate precedent-

457. *Id.* at 377.

458. *Id.*

459. *Id.*

460. *Id.*

461. *See, e.g.*, Hunt v. Rhodes, 26 U.S. (1 Pet.) 1, 7-8 (1828) (asserting that to create a new remedy is "beyond the province and power of equity" and "can only be done by that despotic power, which is limited only by its own will"); Thomas v. Brockenbrough, 23 U.S. (10 Wheat.) 146, 150 (1825) ("[A] Court of equity has no legislative authority." (quoting Smith v. Clay (1797) 29 Eng. Rep. 743, 744 n.27)); Wilson v. Wilson, 30 F. Cas. 248, 249 (C.C.D.D.C. 1805) (No. 17,848) ("The question then recurs, whether this court can set up the general inequitable nature of the law, as (in itself) a ground of equitable relief? We are clear that it cannot. That it would be an usurpation of legislative, and not an exercise of judicial powers.").

462. *Conyers*, 6 F. Cas. at 377-78.

based equity.[463] To be sure, the judges in these cases did not expressly say as much. But nor did they refer to any statutes prescribing the equitable remedies they could grant. That suggests that the courts were relying on, and thus implicitly interpreting, their inherent equity power under Article III. At the very least, the early federal courts' rejection of conscience-based powers reinforces that the conscience-based conception of equity did not become part of "[t]he judicial Power." As to the powers of the federal government, absence of evidence is often evidence of absence.

3. Judiciary Act Cases

A few early cases interpreted section 11 of the Judiciary Act as limiting the federal courts to exercising only precedent-based equity powers. Federal judges sometimes read that provision, which granted the courts jurisdiction over certain suits "in equity," as "adopt[ing] the principles of [English] chancery" that were "decided before the passage of the [Judiciary] act . . . as the rule in cases of equity in the federal courts."[464]

Insofar as early federal courts did understand section 11 to incorporate precedent-based equity as it stood in 1789, that interpretation actually supports a conclusion that Article III did the same. The relevant language of the two provisions is virtually identical: Article III refers to "all cases . . . in Equity," while section 11 refers to "all suits . . . in equity."[465] As discussed, the Supreme Court typically considers early congressional enactments, and the Judiciary Act in

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463. Admittedly, there were a few cases in which early federal judges used the language of conscience-based equity. *See, e.g.*, Harding v. Handy, 24 U.S. (11 Wheat.) 103, 125 (1826) (relying on "conscience"); Mechs. Bank of Alexandria v. Seton, 26 U.S. (1 Pet.) 299, 309 (1828) (invoking "obvious principles of justice and equity"). But the courts employing this type of rhetoric would generally transition quickly to explain how their decision comported with the settled rules of equity. *See, e.g.*, *Harding*, 24 U.S. at 125 (asserting that the Court's decision to "interpose" was consistent with the "best settled principles" of equity); *Seton*, 26 U.S. at 309 (similarly relying on "a well settled rule in equity"); *see also* Hepburn v. Dunlop & Co., 14 U.S. (1 Wheat.) 179, 203 n.d (1816) (asserting that equitable remedies in contract are "remarkably subject to the exercise of discretion according to the peculiar circumstances of each particular case" so "few inflexible rules can therefore be laid down concerning" them before citing no fewer than thirty English decisions prescribing seven rules regulating the issuance of specific performance).

464. Black v. Scott, 3 F. Cas. 507, 514 (Marshall, Circuit Justice, C.C.D. Va. 1828) (No. 1,464); *accord* Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222-23 (1818); Harrison v. Rowan, 11 F. Cas. 666, 667-68 (Washington, Circuit Justice, C.C.D.N.J. 1819) (No. 6,143); Baker v. Biddle, 2 F. Cas. 439, 443-44, 447-53 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1831) (No. 764).

465. *Compare* U.S. CONST. art. III, § 2, *with* An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789). *See also* WILFRED J. RITZ, REWRITING THE HISTORY

particular, to be weighty evidence of the Constitution's original meaning.[466] Thus, if early federal judges understood "equity" in section 11 to refer to precedent-based Chancery practice, it stands to reason they would have understood "Equity" in Article III the same way.

Put differently, section 11 can reasonably be understood as declaratory of the limits that Article III itself placed on federal equity power. Indeed, some early courts seemed to read section 11 this way: they would cite both Article III and the Judiciary Act as consistent sources of authority tying federal equitable remedies to English Chancery practice.[467] This interpretation is all the more plausible given that early federal courts construed other provisions of the Judiciary Act that regulated federal equity practice in a similar way. For instance, they held that section 16 of the Act, which prohibited federal courts from granting equitable remedies "in any case where plain, adequate and complete remedy may be had at law,"[468] was "merely declaratory, making no alteration whatever in the rules of equity."[469]

4. Process Act Cases

A small number of early cases seemed to locate limits on federal equitable relief in the Process Act of 1792. Specifically, these cases relied on section 2 of that statute, which provided that "the forms and modes of proceeding in [equity] suits . . . shall be . . . according to the principles, rules and usages which belong to courts of equity."[470]

It is unclear what to make of these cases. A few appear to have held that section 2 "governed" the "exercise" of federal equity power and, in particular, that it limited the courts to administering the system of remedies as developed by the

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OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 93-94 (1990) (noting that in Founding-Era legal jargon "suits" was the technical term for "proceedings" in equity).

466. *See supra* notes 49-51 and accompanying text.

467. *See, e.g.*, Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 657-58 (1832).

468. § 16, 1 Stat. at 82.

469. Boyce's Ex'rs v. Grundy, 28 U.S. (3 Pet.) 210, 215 (1830); *see also* New York v. Connecticut, 4 U.S. (4 Dall.) 3, 5 & n.4 (1799) (Paterson, J.) (noting that the no-adequate-remedy "rule was so before, and is so, independent of the provision in the [Judiciary Act]"); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227-28 (1821) (same for the contempt power granted in § 17 of the Act).

470. An Act for Regulating Processes in the Courts of the United States, and Providing Compensation for the Officers of the Said Courts, and for Jurors and Witnesses, ch. 36, § 2, 1 Stat. 275, 276 (1792).

English Court of Chancery in 1789.[471] But other cases read section 2 as concerned primarily with what we would describe today as matters of procedure rather than substantive remedial law,[472] and others implied it was merely declaratory of the preexisting limits on the judicial power in equity cases.[473] Still others construed section 2 as a disclaimer that federal courts need not follow state law in equity cases.[474] This latter interpretation makes some sense given that section 2 also required federal courts to apply state law in cases at law and that several states did not have equity courts in 1792.[475] Thus, section 2's equity provision might have meant that the federal courts were free to grant remedies in equity cases pursuant to their inherent Article III power rather than required to follow discordant or nonexistent state practice.

The text of section 2 does little to resolve these conflicting interpretations. As Kristin A. Collins put it, the Process Act was "riddled with ambiguity."[476] If anything, its reference to "forms and modes of proceeding" suggests a focus on

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471. *See, e.g.*, *Boyle*, 31 U.S. at 648; Livingston v. Story, 34 U.S. (9 Pet.) 632, 655-56 (1835); Mayer v. Foulkrod, 16 F. Cas. 1231, 1234-35 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 9,341); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 221-23 (1818) (suggesting that the Process and Judiciary Acts together required the federal courts to follow English equity practice).

472. *See, e.g.*, Vattier v. Hinde, 32 U.S. (7 Pet.) 252, 273-75 (1833). Many scholars have likewise interpreted section 2 as regulating procedure. *See, e.g.*, Barton, *supra* note 241, at 25-26; Pushaw, *supra* note 24, at 748-49; Barrett, *supra* note 32, at 855-60. Bellia and Clark take a different view. They argue that section 2 was not primarily concerned with procedure but rather "command[ed]" the federal courts to "apply uniform [equitable] remedies on the basis of traditional English practice." Bellia & Clark, *supra* note 23, at 675-76. Though they identify only two cases in which an early federal court cited the Process Act for this proposition, they suggest this dearth of citations is attributable to the "courts quickly internaliz[ing]" the "framework" established by the statute, such that they "rarely had occasion to discuss [it] in their opinions." *Id.* at 655. Only when "disputes arose" over their authority to grant relief did the "federal courts [seek] answers in the Process Acts." *Id.* at 674-77. This explanation is facially plausible, but it fails to account for the numerous cases in which federal courts faced a "dispute" regarding the extent of their equitable powers but made no reference to the Process Act. *See supra* notes 447-461 and accompanying text. Of course, the courts might still have been relying on the Process Act *sub silentio* in those cases, but that assumption is difficult to maintain considering the varying interpretations early federal courts gave the Act and the more straightforward alternative explanation that courts decided those cases on Article III grounds.

473. *See, e.g.*, Bains v. The James & Catherine, 2 F. Cas. 410, 417-18 (Baldwin, Circuit Justice, C.C.D. Pa. 1832) (No. 756) (interpreting the Process Act and Article III as both referring to "[t]he jurisprudence of England" as "the test and standard of reference" in equity cases); United States v. Coolidge, 25 F. Cas. 619, 620 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857).

474. *See, e.g.*, *Mayer*, 16 F. Cas. at 1234-35; *Robinson*, 16 U.S. at 221-22; *see also* Collins, *supra* note 53, at 260 n.40 (arguing that these cases "are better understood as establishing that federal courts would not rely on state classifications of remedies as legal or equitable when determining appropriate treatment of a case in federal court").

475. *See* Pushaw, *supra* note 24, at 748.

476. Collins, *supra* note 53, at 271. Here, Collins is referring to the 1789 and 1792 Process Acts.

procedural matters, though this reading may reflect a modern failure to accurately parse the "eighteenth-century legalese" in which the statute was written.[477] Given the paucity of sources interpreting the provision, it is likely that this ambiguity will remain intractable.[478]

But whatever section 2 actually meant when adopted, it ended up having very little practical effect on the development of federal equitable remedies. As discussed, when the courts faced a question over the scope of their remedial powers, they turned to English practice; they only rarely mentioned the Process Act. And when the statute was repealed in 1948, it had no perceptible impact on federal equity practice.[479]

Thus, given the uncertainty over section 2's meaning and its apparently minimal practical impact on federal practice, the handful of cases applying that statute do not significantly undermine the conclusion that early case law supports reading Article III to adopt precedent-based equity.

D. Synthesis and Implications

Taken together, history, structure, and early practice support a conclusion that "[t]he judicial Power" in "Equity" incorporated the precedent-based conception of equity and rejected the conscience-based conception. Put simply, Article III is both the primary source of and limitation on federal equity power.[480]

Once again, this conclusion differs from the way in which the modern Supreme Court has described the judiciary's equity powers. As discussed, the

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477. Bellia and Clark, *supra* note 23, at 613, 627.

478. *See id.* at 627-28 ("[L]ittle contemporaneous exposition of [the Process Act of 1789 and 1792's] meaning survives.").

479. *See* Duffy, *supra* note 23, at 147 n.173.

480. Harrison has recently advanced an alternative position. *See* Harrison, *supra* note 24, at 1920. He maintains that, at the Founding, equity "was an unwritten body of principles to which Article III point[ed] but . . . [did] not create or adopt." *Id.* To be sure, Harrison's view is conceptually distinct from the conclusion reached in this Article. *See* Sachs, *supra* note 71, at 1823-28 (distinguishing between preexisting legal rules that were incorporated into the linguistic meaning of the Constitution's text and those that the Constitution incorporates only by reference). But despite the fact that we approach this issue from slightly different angles, it is hard to see much daylight between our practical conclusions. As I understand his argument, Harrison believes that: Article III authorizes the federal courts to apply a set of equitable remedies derived from Founding-Era English practice, the courts are permitted to develop that body of law over time by the gradual accretion of precedent, and only Congress can make substantial alterations to the system of federal equity. *See* Harrison, *supra* note 24, at 1931. At least as a practical matter, that account of federal equity power seems broadly consistent with the one set forth in this Article.

Court's new equity jurisprudence has focused almost exclusively on federal statutes in defining the scope of equitable relief available in federal court.

To be sure, Congress has an important role in designing the federal system of equitable remedies. Or, to put it more precisely, Congress *could* have an important role in federal equity. Article III provides only a default set of equitable remedies, which Congress has broad authority to alter. As previously noted, Congress can use its control over federal jurisdiction to regulate the federal courts' exercise of their inherent powers.[481] Consequently, Congress can limit the remedies available in federal court to less than what the courts could otherwise grant pursuant to their inherent Article III power. On the other hand, Congress can also expand or augment the federal equity power.[482] Recall that under precedent-based equity as developed in England, only Parliament could make major alterations to the system of equitable remedies. By adopting that system, the Constitution vested this power in Congress. Thus, any avulsive changes to federal equity practice, such as the creation of new remedies, must be expressly authorized by Congress.

Because Congress can alter the baseline set of federal equitable remedies, one must always determine if it has done so before assessing the permissibility of a particular form of relief. As a practical matter, however, congressional action is rarely determinative of such questions. This is because Congress has seldom exercised its power to alter the constitutional default system of remedies. Though it has restricted the federal courts' ability to issue equitable relief in a few narrow contexts, these are exceptions to otherwise broad grants of equity jurisdiction.[483] The same is true of congressional power to expand federal equity. A few courts and commentators have read particular federal statutes to augment the judiciary's arsenal of equitable remedies, but these examples are few and far between.[484] And the Supreme Court's rule that Congress must legislate with exacting clarity to authorize major departures from traditional equity practice makes

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481. *See supra* notes 318-323 and accompanying text.

482. *See Ex parte* Boyd, 105 U.S. 647, 655-57 (1881). The extent of congressional authority to augment the default system of equitable remedies is unclear. *See* Bray, *supra* note 4, at 1014 n.80 (querying whether there are "any limits on Congress's ability to change the law of equitable remedies" and noting that the "Supreme Court has not given a consistent answer to [this] question"). One might wonder whether the term "Equity" itself creates an outer bound on legislative innovations, much the same way that Article III's reference to "admiralty" limits Congress's ability to expand the federal courts' admiralty powers. *See* Crowell v. Benson, 285 U.S. 22, 55 (1932).

483. *See supra* notes 318-323 and accompanying text.

484. *See, e.g.*, Harmon v. Thornburgh, 878 F.2d 484, 494-95 & nn.19, 21 (D.C. Cir. 1989) (interpreting § 706 of the APA to authorize nationwide injunctions against unlawful administrative action); Sohoni, *The Power to Vacate a Rule*, *supra* note 18, at 1126-27 (same). *But see* CASA de

further alterations fairly unlikely.[485] Thus, the power exercised by federal courts in most equity cases is the inherent remedial authority conferred by Article III, so it is the extent of that power—not any authorized by statute—that delimits the permissible remedies available in federal court.

Grounding the federal equity power in Article III is doctrinally significant because the scope of that power is meaningfully different from that which the Court has read into federal statutes. At first blush, the two actually sound quite similar: the Court has described its statutory equity power as "the 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 separation of the two countries."[486] But its new equity jurisprudence fails to reflect the principles of the precedent-based system that obtained in the Founding-Era Chancery (and the federal courts for much of American history). That system was governed by rules and settled principles, but it was not frozen in time, forever limited to the exact set of remedies granted prior to a certain date. Instead, the Chancellor could continue to develop the law of equitable remedies by applying those settled rules to novel legal and factual circumstances.[487] The Supreme Court's new equity cases leave almost no room for this sort of accretive judicial development—it has declined to grant any remedy that was not "traditionally accorded" or "typically available" in historical equity practice.[488]

In essence, then, the Court's confused equitable originalism is a result of taking the historical turn both too far and not far enough. By stringently applying its historically inflected approach to federal statutes, the Court has raised ahistorical barriers to reasoned judicial elaboration of equity. And by failing to apply its own originalist methodology to "[t]he judicial Power" in "Equity," it has obscured the original understanding of federal equity power. If the Court is truly

Maryland, Inc. v. Trump, 971 F.3d 220, 262 n.8 (4th Cir. 2020) ("[T]he position that § 706 even authorizes, much less compels, nationwide injunctions is baseless."); Harrison, *supra* note 23, at 41-47 (same).

485. *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 328-30 (1944).

486. Grupo Mexicano de Desarrollo v. All. 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)).

487. *See supra* notes 223-227 and accompanying text; *see also* Gordon v. Washington, 295 U.S. 30, 36 (1935) (describing the federal system of equitable remedies as comprising "the principles applied by the English court of chancery before 1789, *as they have been developed in the federal courts*" (emphasis added)).

488. *Grupo Mexicano*, 527 U.S. at 319; Mertens v. Hewitt Assocs., 508 U.S. 248, 256-58 (1993); *see also* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021) (asserting broadly that "[t]he equitable powers of federal courts are limited by historical practice"); Oldham & Steene, *supra* note 16, at 11 (explaining that the Supreme Court treats the question of whether a particular equitable remedy was granted by the English Chancellor in 1789 as "dispositive" in deciding if federal courts can issue that remedy today).

committed to a historical approach to equity, it ought to reevaluate its rigidly time-bound limits on federal equitable remedies.

At the same time, the conclusions reached in this Part do not provide support for those opponents of the Court's new equity cases who advocate a "dynamic" and highly discretionary federal equity power.[489] These critics have essentially argued that the judiciary possesses extraordinary powers to fashion and enforce new equitable remedies in the mode of a medieval Chancellor.[490] But that the federal courts can gradually develop the system of equitable remedies does not suggest that they possess conscience-based powers. On the contrary, as this Part has demonstrated, the quasi-legislative authority exercised by conscience-based Chancellors is inconsistent with the original understanding of "[t]he judicial Power" in "Equity."

The federal equity power conferred by Article III falls between these two extremes. The accretive development of equity under the precedent-based conception is different in kind from both conscience-based equity and the current Court's static approach. In exercising their inherent equity powers, the federal courts cannot alter or abandon settled rules of Founding-Era equity; only Congress can authorize such changes to the federal system of equitable remedies. But the courts can build on that baseline by applying the preexisting rules of equity to new factual, legal, and institutional contexts. Put differently, Article III divides responsibility for the development of federal equity in a familiar way: between adjudication and legislation. As Caleb Nelson has pointed out, the type of law-

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489. Nor do they imply that the judiciary is empowered to alter the meaning of "Equity" in a living-constitution sense. Rather, it is the original meaning of "Equity" that itself authorizes the judiciary to develop the federal system of equitable remedies in a precedent-based way. As Stephen E. Sachs has explained, originalism is best understood as a theory of legal change: "Our law is still the Founders' law, as it's been lawfully changed." Sachs, *supra* note 224, at 838. "The judicial Power" in "Equity" authorizes such lawful change—it permits federal courts to develop equity in the mode of their precedent-based English forebears. Thus, by exercising that authority, the courts are *adhering* to the original meaning of Article III, not altering it. *See id.* at 838-60.

490. *See, e.g.*, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 233 (2002) (Ginsburg, J., dissenting) (criticizing the "Court's equation of 'equity' with the rigid application of rules frozen in a bygone era" and arguing that equity "was and should remain an evolving and dynamic jurisprudence"); *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part) (similar); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 174 (2010) (Stevens, J., dissenting) (similar). This view has been adopted with alacrity by some scholarly commentators, most of whom rely (to varying degrees) on the history of English Chancery in asserting that modern federal courts are vested with something akin to conscience-based powers. *See, e.g.*, Riley T. Keenan, *Judge-Made Equity*, 74 ALA. L. REV. (forthcoming 2023) (manuscript at 19-23), https://ssrn.com/abstract=4011398 [https://perma.cc/T6SJ-FTV6]; Pfander & Formo, *supra* note 30, at 729-30; OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 42-45 (1978); Chayes, *supra* note 17, at 1283 n.11.

making that occurs when a judge "applies a previously recognized rule in a context where its import is uncertain" is different in kind from the work of legislatures, which "make law in the primary literal sense of selecting a norm on the basis simply of its merits and prescribing it *ex nihilo*."[491] The Constitution authorizes federal courts to perform the former, adjudicative function in equity cases while entrusting the latter, fundamentally legislative power to Congress.

In the course of exercising that adjudicative function, the federal courts will gradually clarify, elaborate, and even modestly update the federal system of equitable remedies. Thus, determining if the federal courts can grant a particular remedy is not as simple as checking if that form of relief was "traditionally accorded" by the English Chancellor in 1789.[492] Instead, one must ask if it transgresses any rules of precedent-based equity that were established at the Founding, and, if not, whether its development can be traced to the accretive process of change sanctioned by Article III.[493]

To illustrate how the original understanding of "[t]he judicial Power" in "Equity" might practically affect the remedies available in federal court, this Section concludes by briefly analyzing three hotly debated forms of equitable relief:

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491. Nelson, *supra* note 227, at 13 (internal quotation marks omitted); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (acknowledging that while "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be"); Sachs, *supra* note 60, at 560 (discussing the role of judges as lawmakers).

492. *See Grupo Mexicano*, 527 U.S. at 318-19.

493. One might calibrate the relative priority of these two criteria based on one's views of stare decisis. It is, of course, possible to imagine a modern remedy that has developed over time in a facially permissible, precedent-based way but that is nonetheless inconsistent with a settled Founding-Era rule of equity. Indeed, that is essentially how Andrew S. Oldham and Adam I. Steene describe the *Ex parte Young* injunction. *See* Oldham & Steene, *supra* note 16, at 12, 19 (arguing that *Young* injunctions "assuredly" transgress multiple rules of eighteenth-century English Chancery practice and attributing their development in the federal courts to "a century-long process of equitable expansion through analogy"). Whether the federal courts could continue to grant such a remedy seems to be more a question of constitutional stare decisis than of federal equity power. Commentators have long debated the extent to which courts can and should adhere to erroneous constitutional precedents, see, for example, Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1-4 (2001), and it is not my goal to enter those debates here. But it bears noting that one of the primary arguments advanced in favor of a relatively weak form of stare decisis in constitutional cases—the difficulty of fixing the error outside of the judiciary—is inapplicable in the equity context. *See* Agostini v. Felton, 521 U.S. 203, 235 (1997) ("[Stare decisis] is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."). Under the system of precedent-based equity incorporated by Article III, Congress is empowered to make substantial alterations to the equitable remedies available in federal court and can overturn judicial developments in equity with which it disagrees.

Ex parte Young injunctions, the injunctions against judges and litigants at issue in *Whole Woman's Health v. Jackson*, and nationwide injunctions. Before proceeding, it bears noting that these analyses are tentative. I include them not to take any firm positions on these ongoing debates but to show how the analytical framework that would apply to questions of federal equity power under Article III differs from that applied by the Supreme Court in its new equity cases.

Perhaps no federal equity doctrine stands to benefit more from a rediscovery of equity's constitutional source than the *Ex parte Young* injunction. A *Young* injunction is an order directed at a government officer enjoining her from enforcing an unconstitutional statute or policy.[494] Despite the centrality of *Young* to modern federal courts and constitutional law, its legitimacy has been repeatedly challenged. Recently, scholars have expressed concern that an originalist interpretation of Article III's reference to "Equity" might put the final nail in *Young*'s coffin.[495] The basis for many of these concerns is that *Young* represents a substantial departure from traditional Chancery practice, which confined itself to private law and would not grant injunctions in public law.[496]

Contrary to these premonitions, the original understanding of Article III seems to provide substantial theoretical support for *Young*. First, consider the close analogy between most *Young* injunctions and traditional forms of equitable relief. Often, *Ex parte Young* is invoked by a plaintiff seeking to challenge the enforcement against her of an allegedly unconstitutional enactment.[497] As Harrison has pointed out, that remedy looks a lot like an anti-suit injunction: instead of asserting that a private defendant's suit at law should be enjoined based on fraud or undue influence, the *Young* plaintiff asserts that a government enforcement action should be enjoined based on a different type of unlawfulness, namely the unconstitutionality of the underlying statute.[498] Even in those *Young* suits that do not involve the prospect of an enforcement action, such as school-desegregation or Establishment Clause claims, the remedy requested is rarely

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494. *See Ex parte* Young, 209 U.S. 123, 123 (1908).

495. *See, e.g.*, Pfander & Wentzel, *supra* note 6, at 1273; Sohoni, *Lost History*, *supra* note 18, at 1003-05.

496. *See, e.g.*, Pfander & Wentzel, *supra* note 6, at 1342, 1355 (characterizing *Young* as a "sharp departure from the practice of the High Court of Chancery"); *see also* HARRY WOOLF, JEFFREY JOWELL & ANDREW LE SUEUR, DE SMITH'S JUDICIAL REVIEW 801 (6th ed. 2007) ("The injunction . . . did not come to play a significant part in public law until the 19th century."). Critics of *Young* have attacked it as an impermissible remedial innovation on precisely these grounds. *See* Oldham & Steene, *supra* note 16, at 12-13.

497. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010).

498. Harrison, *supra* note 16, at 997-98.

novel.[499] On the contrary, Founding-Era Chancery routinely enjoined defendants from violating a plaintiff's legal rights, for example, by issuing injunctions against waste or patent infringement. The only difference in these types of *Young* suits is that the right allegedly being violated is created by the Constitution rather than property or patent law.

The importation of these historically private legal remedies into the public-law context appears to be a paradigmatic case of precedent-based equity developing in response to new circumstances. Equity's traditional reluctance to intervene in public-law cases was simply an application of the rule that equitable relief is available only when a plaintiff has no adequate remedy at law.[500] At the Founding, public-law plaintiffs typically *did* have adequate avenues for redress outside of Chancery, namely the prerogative writs of certiorari, mandamus, and prohibition.[501] But as James E. Pfander and Jacob P. Wentzel have demonstrated, changes in American law over the course of the nineteenth century caused those remedies to fall into desuetude, such that they no longer qualified as *adequate* alternative remedies.[502] Equity responded by fashioning the *Young* injunction to fill this gap. In doing so, it did not abandon or alter the adequacy requirement but rather applied that settled rule to a new factual and legal landscape. This is precisely the type of updating to the federal system of equitable remedies that Article III's incorporation of precedent-based equity affirmatively contemplates.

On the other hand, the equitable remedies at issue in *Whole Woman's Health v. Jackson* are probably beyond the federal courts' inherent power. Plaintiffs in *Jackson* sought two primary remedies: (1) an injunction against Texas state-court judges and clerks blocking them from hearing or docketing cases brought pursuant to S.B. 8's private cause of action, and (2) an injunction blocking all potential private plaintiffs from filing S.B. 8 suits.[503] Both of these remedies seem

499. *See* Duffy, *supra* note 23, at 128 n.172 (noting that the remedies granted in equity suits challenging administrative action are typically "garden-variety injunctions with little or no judicial innovation"). Indeed, it is possible to find support in precedent-based equity for some affirmative uses of *Young* injunctions, such as structural-reform injunctions, that have been criticized as judicial innovations. For example, in *Vane v. Lord Barnard*, after enjoining the defendant from committing waste, the Lord Chancellor appointed a special master to take control of and repair the property at issue to its original state. (1716) 23 Eng. Rep. 1082, 1082; 2 Vern 739, 739; *cf.* 2 STORY, *supra* note 33, at 155 (noting that while injunctions are "generally preventative, and protective, rather than restorative" they are "by no means confined to the former"). The ongoing restorative relief issued in *Vane* at least resembles modern structural-reform injunctions, by which a federal court assumes control of a state institution to cure ongoing unconstitutional conduct.

500. *See* Pfander & Wentzel, *supra* note 6, at 1279-80.

501. *Id.* at 1276-77.

502. *Id.* at 1279.

503. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530 (2021).

to exceed the limits placed on federal equity by Article III. At the Founding, English Chancellors were forbidden from issuing anti-suit injunctions against common-law judges.[504] They would enjoin *litigants* from proceeding at law, but they would never enjoin judges from hearing cases. And the federalism concerns implicated when federal judges issue orders to their state-court counterparts reinforced that rule's vitality in American equity.[505] Likewise, the Founding-Era Chancery refused to enjoin nonparties on the grounds that an individual ought not be subject to contempt sanctions without an opportunity to be heard in court.[506] While federal courts softened the edges of this rule by permitting injunctions to run against nonparties who were closely associated with the defendants, such as agents and employees, the rule that a court could not "bind the world at large" remained firmly entrenched.[507] Thus, *Jackson* illustrates an area of convergence between the Court's new equity approach and the Article III equity power; the remedies at issue in that case were so novel as to be impermissible absent congressional authorization under either conception of federal equity power.

Nationwide injunctions present a closer question. This remedy, by which a federal court blocks enforcement of a government policy against everyone, has been attacked by adherents of equitable originalism. These critics argue that modern federal courts are barred from granting nationwide relief without express congressional authorization because that remedy was unknown to Founding-Era English Chancery practice.[508] While it is true that the English Chancellor did not grant nationwide injunctions in 1789, that is not the end of the inquiry as to whether "[t]he judicial Power" in "Equity" includes authority to

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504. *See* MAITLAND, *supra* note 108, at 9 ("[T]he Chancellor's injunction . . . was addressed not to the judges, but to the party.").

505. *See* 2 STORY, *supra* note 33, at 166 ("A writ of injunction . . . is not addressed to [the] courts. . . . The process, when its object is to restrain proceedings at law, is directed only to the parties."); *Ex parte* Young, 209 U.S. 123, 163 (1908) ("[A]n injunction against a state court would be a violation of the whole scheme of our Government.").

506. *See* Iveson v. Harris (1802) 32 Eng. Rep. 102, 104; 7 Ves. Jun. 252, 257 ("[T]he Court has adhered very closely to the principle, that you cannot have an injunction except against a party to the suit.").

507. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir. 1979); *see also* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 462-63 (1837) ("[N]o injunction can be issued against one not party to the suit."); Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13 (1945) ("The courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.").

508. *See, e.g.*, Bray, *supra* note 18, at 424-45; Larkin & Canaparo, *supra* note 19, at 55-57 (2020); DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); Trump v. Hawaii, 138 S. Ct. 2392, 2425-26 (2018) (Thomas, J., concurring).

issue such relief today. For one thing, precedent-based equity did have an established tradition of granting group-wide relief through "bills of peace."[509] And it is possible to ascribe the gradual development of modern nationwide injunctions from these historical antecedents as a judicial response to the sorts of factual, legal, and institutional changes that can drive the accretive growth of precedent-based equity.[510] On the other hand, one might argue that nationwide injunctions transgress a settled rule of Founding-Era equity, namely that bills of peace bound both sides of a suit.[511] Nationwide injunctions bind only the government; if a plaintiff fails in her attempt to obtain such relief, another plaintiff can try again. Taken together, this conflicting evidence suggests at least that the originalist legitimacy of nationwide injunctions is more plausible than their critics have been willing to admit.

To reiterate, these conclusions are tentative. It is not my intention to take a firm position on the relationship between the Article III equity power and the particular remedies discussed in this Section. Instead, I raise these issues to make the more modest observation that recovering equity's constitutional source has the potential substantially to alter the trajectory and framing of many current debates over federal equity power.

CONCLUSION

This Article has offered two observations regarding the original understanding of "[t]he judicial Power" in "Equity." First, those terms likely encompass an inherent authority to grant equitable remedies, such that the federal courts are automatically possessed of that power once created and vested with jurisdiction by Congress. Second, that power is coextensive with the precedent-based conception of equity as administered by the English Court of Chancery in 1789.

The implications of these conclusions are profound. In essence, this Article suggests that the Supreme Court has taken a wrong turn in implementing its own historicist approach to equity. By tying federal equity power to particular statutes, the Court has obscured equity's constitutional source and adopted an ahistorically cramped understanding of that power.

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509. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 132-59, 218 (1987).

510. *See generally* Sohoni, *Lost History*, *supra* note 18 (ascribing the rise of nationwide injunctions partially to the emergence of the modern administrative state).

511. *See* POMEROY, *supra* note 384, at 461-62, 467-68.

But these are far from the only issues that arise when one begins to consider the significance of Article III's reference to "Equity."[512] For instance, what are the dimensions of congressional authority in developing the federal system of equitable remedies? One might wonder whether the term "Equity" limits Congress's power to alter the set of equitable remedies available in federal court, much as Article III's reference to "cases" and "controversies" limits congressional authority to create new substantive rights.[513] A similar question could be asked about the interaction between state law and Article III equity. Specifically, when adjudicating equity cases arising under state law, are federal courts obligated to follow the relevant state remedial scheme, or may they rely on their inherent power?[514] And there are myriad potential lines of inquiry as to whether specific equitable remedies comport with the limitations imposed by Article III. Finally, looking somewhat further afield, one might consider whether any constitutional amendments have augmented the scope of the Article III equity power.

Each of these questions merits further inquiry, and I hope to take them up in future work. My objective here was a modest one: to establish an initial baseline understanding of "[t]he judicial Power" in "Equity" on which future analyses can build. In a sense, then, this Article is only the first step on a longer journey to elaborate the contours of equity's constitutional source. Given the significance of equitable remedies in modern federal jurisprudence, it is a journey I believe well worth taking.

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512. Indeed, this Article's thesis raises questions even outside the domain of federal equity jurisprudence. Perhaps most significantly, it suggests that Article III's reference to "[t]he judicial Power" in "Law"—which appears in the same clause as its reference to "Equity"—may vest the federal courts with an inherent power to grant legal remedies. *See* U.S. CONST. art. III, § 2. Such a reading of Article III could have implications for numerous doctrinal and scholarly debates, including, to take just one example, the question of whether the Supreme Court possesses supervisory power over the lower federal courts, an authority that some scholars have traced to the common-law remedies of mandamus, prohibition, and certiorari issued by the English Court of King's Bench. *See* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1442-65 (2000). Whether Article III encompasses inherent authority to grant these or other legal remedies is an important and complex issue that I hope to take up in future work.

513. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

514. *Cf.* Gordon, *supra* note 295, at 254 (noting that the relationship between the *Erie* doctrine and federal equity power "remains mired in confusion").