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FEDERAL JUDICIAL POWER AND FEDERAL EQUITY WITHOUT FEDERAL EQUITY POWERS

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This Article discusses the ways in which the federal courts do and do not have equity powers. Article III courts have the judicial power, which enables them to apply the law, primary and remedial. Applicable remedial law often includes the law of equitable remedies, so the federal courts have the power and obligation to give remedies pursuant to equitable principles. The law of equitable remedies, written and unwritten, is external to the courts, not created by them, the same way written law is external to the courts. Because the unwritten law of equitable remedies is found largely in judicial practice, courts contribute to the development of that law by adding to the body of practice. That practice is a body of sub-constitutional law, subject to change by Congress when it exercises one of its enumerated powers. The Constitution neither adopts the law of equitable remedies nor authorizes the federal courts to make the principles of equity in the way a legislature creates statutory law. For that reason, the Constitution in important respects does not confer equitable powers on the courts. These conclusions have significant implications. First, because the Constitution does not adopt principles of equity, Framing-era equity practice is not binding law today. That practice, however, provides important information about Framing-era understandings of judicial power and cases and controversies. Second, when Congress changes the law of equitable remedies, it is not invading the judicial power and so is not subject to separation-of-powers limitations. When Congress has power to adopt the law of remedies but not the primary legal rule at issue, however, Congress must respect the distinction between primary and remedial law. Congress may not use its power over remedies to change primary rules it cannot change directly. Third, the absence of legislative-type power in the federal courts entails limits on their ability to innovate with respect to equitable remedies. In order to gain insight into the acceptable degree of judicial innovation, in contrast with innovation that only a legislature may adopt, the Article discusses several important Supreme Court cases that developed the law of equitable remedies in public law litigation.

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INTRODUCTION

The federal courts have judicial power, and with it administer the written and unwritten law of equitable remedies. In that sense, they have equity powers. But in another important sense the federal courts do not have equity powers under the Constitution. The Constitution does not itself adopt, incorporate, or receive principles of equity in a way that would limit Congress's power to alter those principles. Nor does the Constitution confer on the federal courts an authority to recognize or develop the principles of equity that resembles an independent grant of law-making power. Unwritten principles of equity are law that is external to the courts and the judicial power, and is as external and binding on them as is written law like statutes.

This Article sets out and defends the understanding of the relation between the federal courts and the law of equitable remedies just described. That understanding has important implications for the relevance of Framing-era equity practice to the Article III jurisdiction, for the limits on Congress's power to alter federal equitable remedies law, and for the limits on the courts' authority to innovate with respect to the unwritten law of equitable remedies. Those implications follow from the status of the law of equitable remedies as a body of sub-constitutional principles that the courts find and that they make only in a limited sense, a sense that brings with it important restrictions.

Section I elaborates on the basic thesis of the Article. That Section briefly describes the argument about equity powers that I reject, then shows why equitable remedies are the subject of a body of law that the courts apply, as they apply other bodies of law. As I also explain, the reference to equity in Article III is consistent with equity's status as external, sub-constitutional law.

Section II turns to a topic of longstanding and current interest: the significance for constitutional purposes of equity practice from the time the Constitution was adopted. Because the Constitution itself does not incorporate principles of equity, those principles are not fixed as of the time of the Framing. Framing-era equity practice is nevertheless important because it provides substantial information about Framing-era understanding of cases and controversies and judicial power.

Section III addresses Congress's authority to make and change the law of equitable remedies. That authority is limited, but the limits do not come from separation of power. When Congress adopts a new rule about equitable remedies, it is not invading the judicial power. The federal courts do not have equity powers that resist invasion the way the President's pardon power resists invasion by Congress, for example. Limits arise because some of Congress's powers extend to

remedies but not to the primary rule that remedies enforce. When Congress exercises one of those powers, it is limited by the principle that power over a remedy is not power over the rule being enforced. Congress must respect that principle when it enforces the constitutional amendments that confer enforcement powers, and when it provides the federal courts with remedial principles that the courts apply to primary law that Congress does not make.

Section IV discusses the extent to which the federal courts may permissibly innovate in the field of equitable remedies. Although courts do not make or alter the unwritten law through legislative-type acts, they do make and alter it in the process of developing it and applying it to new circumstances. In order to supply an improved understanding of the Supreme Court's practice of innovation, and the steps that are acceptably limited as opposed to those that are controversially large, I examine several leading twentieth-century Supreme Court cases that are landmarks in federal equity. To sharpen the analysis, I identify three fundamental aspects of cases involving equitable remedies: the configuration of parties and interests, the interest that supports that plaintiff's claim to relief, and the discretion courts exercise in formulating decrees, especially decrees that control the conduct of the government. I argue that most of the innovations found in those important cases were comparatively modest. The three largest changes, I suggest, remain somewhat controversial and so give some indication of the limits of acceptable change by the judiciary. That examination of practice helps prick out the line between the relatively small steps that courts may take and larger steps that must be left for legislative action.

I. HOW ARTICLE III COURTS ADMINISTER EQUITY WITHOUT HAVING EQUITY POWERS

This Part argues that Article III courts do not have equity powers, with equity powers defined in a way set out in Section A. Section B then explains why the federal courts lack such powers but administer federal equity by treating it as a source of binding norms that are external to them in the same way the Constitution and statutes are. Section B elaborates on the conception of courts as transparent to external law, including remedies law; shows how the Constitution adopts that conception for the federal courts; and explains that the references to equity in the Constitution do not undermine that conclusion. Section B concludes by assembling the components set out previously into a brief statement of the relation between judicial power and equity powers, and the way in which federal courts do and do not have the latter because they have the former.

A. Equity Powers and the Possibility That Equity Is Adopted by Article III or Generated by Judicial Acts of Legislation

This Article rejects one view of federal equity and federal equity powers. According to that view, the source of the equitable principles that federal courts apply is ultimately the Constitution. Either the Constitution itself adopts principles of equity, or it empowers the courts to adopt them much as Congress makes statutes.

Those two possible sources are familiar from debates over the federal common law. In the Founding-era debate on that subject, the theory that the Constitution itself received the common law was raised but rejected.[1] Much more recently, the idea that the common law is the product of judicial legislation that is much like legislative legislation has become widespread.[2] The common-law powers of the federal courts have been debated in those terms, and thus on the assumption that the federal courts have or might have the authority to generate common law as a legislature generates statutes.[3] That way of thinking about the common law can be applied to equity.

B. The Federal Courts as Transparent to Principles of Equity That They Find but Do Not Make

This Section shows that the Constitution assumes that equity is a body of legal norms that is external to the courts the way statutes are. The federal courts administer the principles of equitable remedies and, insofar as those principles remain unwritten, contribute to the principles' development by their decisions. Article III does not contain those principles, and the courts it creates do not make the principles of equity the way a legislature makes statutory law.

1. The Relations Between Courts and Legal Principles That Are External to Them

This Article explicates a familiar, perhaps seemingly simple-minded, understanding of the relationship between the courts and the

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1 *See* Stewart Jay, Essay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV 1003, 1088 (1985) (discussing the claim in the 1790s that the Constitution made the common law applicable throughout the United States).

2 *See, e.g.*, Louise Weinberg, *Federal Common Law*, NW. U. L. REV. 805, 805 (endorsing as "the true position" the view that "there are no fundamental constraints on the fashioning of federal rules of decision" by judges).

3 *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (assessing claims of law-making power by the federal courts on the assumption that judicial law making closely resembles legislative law making).

law. According to that understanding, the law is external to the courts. Courts take legal rules as inputs in performing their function and are in a sense transparent to the law. That relationship is easiest to grasp with respect to legal rules that directly govern the rights, duties, and other relations of private people. Promisors on contracts have obligations to perform and promisees have correlative rights to performance. That relationship is created by the law and exists whether or not any court has reason to inquire into it. When they decide contract cases, courts identify the parties' preexisting relations and decide accordingly.

Just as rules of primary law can be external to the courts, so can the law of remedies. The connection between courts and remedies law is perhaps closer than that between courts and primary law, so it is important to see how remedies law too can be given to, not created by, the courts.

A remedy is a legally binding step taken by the court that is designed to bring the parties' actual positions into conformity with the requirements of the law. A damages judgment is designed to restore the wealth of the plaintiff that was lost by the wrongdoing of the defendant. A preventive injunction against a tort is designed to keep the tort from happening and thereby keep the defendant from moving the plaintiff away from the plaintiff's rightful position. Rightful positions are determined by the primary legal rules, which directly govern the parties, not the courts. Contract damages and specific performance serve to restore or maintain the promisee's rightful position as defined by the contract, which itself is primary law.[4]

When a court gives a remedy, it exercises legal power. Damages judgments and injunctions create new obligations for the defendant. Creating an obligation is an exercise of power.[5] Statutes that impose duties of conduct do so through exercises of legislative power. When courts issue injunctions, they too create duties concerning conduct and do so by exercising power. Courts do not have legislative power, so their ability to bring about a change in parties' legal positions requires the exercise of some other power. The ability to bring about a change by giving a remedy is remedial power. The power conferred

4 *See* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1, 14–15 (5th ed. 2019) (describing the difference between primary and remedial law, and the function of remedies as restoration of the plaintiffs' rightful position).

5 Courts are not limited to remedies that change legal positions. A court can also decide on the already-existing legal positions of the parties, and make that decision binding on the parties through a declaratory judgment.

by Article III is the judicial power, which enables courts to give remedies.[6]

When courts give remedies, they implement the law of remedies. Remedies law, like the primary law of contract, is abstract, although a remedy in a case is concrete. The principle that specific performance can be given in response to a prior or threatened breach of contract is part of the law of remedies. Remedies law tells courts which remedies they may give and when to give them. Although that law to some extent empowers the courts, by pointing out the remedial steps that may be taken, it also binds them as the primary law does. If a remedy is mandatory, for example, a court must give it. Insofar as the law of remedies sets out the criteria that guide discretionary decisions, a court must use those criteria. Remedies law is as external to the courts as is statutory law or the law of contract.

That understanding of remedies law, and equitable remedies law, as external to the courts is familiar to students of equity. The status of equity as a body of principles adumbrated by the courts of many jurisdictions but not associated specifically with any one jurisdiction is visible in the title of the first great American equity treatise. In 1836, Justice Story published *Commentaries on Equity Jurisprudence, As Administered in England and America*.[7] In the preface, Story explained that he sought to "bring together some of the more general elements of the System of Equity Jurisprudence, as administered in England and America."[8] He referred to a single system of jurisprudence, not one at London and another at Washington and a third at Dover, Delaware.

To say that law is external to the courts and not the product of judicial law creation is not to deny that courts make law in the sense of taking policy into account. Courts routinely point to policy considerations in applying statutes, and no doubt often consider their own views of sound policy, as they would if they were members of a legislature.[9] But a court that makes legislative-type judgments in that sense does not engage in law production the way a legislature does.

Just as judicial consideration of policy does not imply that courts create legal rules, neither does the practice of following precedent. In a practical sense, a court that sets a binding precedent has made law.

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6 U.S. CONST. art. III, §§ 1–2.

7 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA (Boston, Hilliard, Gray & Co. 1836).

8 *Id.* at v.

9 *See, e.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1661–62 (2021) (Barrett, J.) (looking to the undesirable consequences of a reading of the statute as grounds to reject that reading).

Later decisionmakers will follow the court's decision, even if that decision conflicts with the view of the law's content they otherwise would take.[10] The practice of following stare decisis for statutory decisions, however, shows that setting precedents is distinct from law creation as done by the legislature. Statutory precedents are about statutes and presuppose a statute that can be expounded authoritatively.

Seeing legal rules as external to the courts is easiest with respect to statutes and other written law, like the Constitution. When the law is a writing produced by a process other than adjudication, its content can be separated from what the courts do with it. Judicial gloss on a statute is readily seen as gloss—as commentary and explanation that is about a text and thus distinct from the text. Matters are more complicated when the law is unwritten, and especially when courts find it in part by reading earlier judicial decisions. Much of federal equity remains unwritten, so the relationship between the courts and unwritten law is central to this Article.

Unwritten law can be external to the courts just as written law can be. Custom and practice are a leading form of unwritten law. When the authoritative custom and practice is not that of the courts themselves, courts that follow it look to an external source. Merchant practice, for example, is found by learning about the activities of merchants and the principles that guide those activities.[11]

When courts treat custom and practice as authoritative, they often regard their own prior decisions as the relevant practice. A court that contributes to the authoritative body of decision is making law in a way, just as a commodities broker can contribute to an authoritative body of merchant practice. Even that kind of judicial law making is very different from legislation. First, a court deciding according to judicial custom looks to an external source. That source may include the court's or the judges' own earlier decisions, but at the point of decision those earlier decisions are fixed. Second, the contribution of any one case, even one that becomes a leading case, is just one point in the pattern. Stare decisis may make a highest court's leading case binding, but that effect comes from stare decisis, not from deciding according to judicial practice.

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10 *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) (to treat a prior decision as precedent is to treat it as significant for the current decision even if the current court regards the prior decision as erroneous).

11 *See* Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 213–14 (2013) (describing the use by the Court of King's Bench under Chief Justice Mansfield of special juries composed of merchants to identify merchant practice and apply it to commercial cases).

A legislature, in contrast to a court, is not bound by its earlier decisions. Much of the work of legislatures is to revise existing statutes.[12] And when a legislature adopts a new statute, that statute is not just one episode in the development of a practice. The new statute is authoritative, and can wipe away all that has gone before.

Courts thus decide according to rules about their own jurisdiction and procedure, and rules about the remedies they give, just as they decide according to rules that govern the parties' primary legal relations.[13]

2. The Constitution and the Relation Between Article III Courts and the Law

This subsection shows that the Constitution assumes that the federal courts have the relation to the law just described. Those courts decide cases under legal principles that they take as given and do not create.

Seeing the courts as deciding according to law that is given to them is familiar, perhaps naïve. Because that conception of courts is so commonplace, finding it in the Constitution would not be surprising. The Drafters took for granted features of the different institutions of government that were familiar when it was framed. They were not seeking to develop new conceptions of legislative, executive, and judicial power. The assumptions on which they worked with respect to those powers, which are manifested in the document, were assumptions about legislatures, executive institutions, and courts in general.

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12 The 1990 amendments to the Clean Air Act, for example, were described as the product of "one of the longest—and hardest fought—legislative battles in recent congressional history" by a representative who was a leading participant in drafting and adopting those changes to existing statutory law. Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENV'T L. 1721, 1723 (1991). In the years leading up to the amendments, "thousands of hours were spent developing, debating, and blocking legislative proposals," and "millions of dollars were spent on lobbying by interest groups." *Id.*

13 The conception of courts and judicial power as transparent to the law corresponds to a similar conception of executive power. Executive officials carry out the law, which they do not create. *See* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1169 (2019) (arguing that the Article II executive power is an "empty vessel" awaiting laws requiring execution that would fill it). The executive is the conduit through which the abstract requirements of the law are turned into practical activities, from operating post offices to arresting criminal suspects. In similar fashion, courts are the conduit through which the abstract requirements of the law are authoritatively applied to concrete disputes.

A leading example of the relationship between courts and the law appears at the beginning of the jurisdictional list in Article III. Article III provides that the "judicial Power of the United States shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties" already made and yet to be made.[14] The Constitution and treaties are written law, produced by a process that does not involve the courts.[15] Federal statutes, which are laws of the United States, are written law created by another process that does not involve the courts.[16]

Article III's list thus shows that courts sometimes decide according to norms that they do not produce the way Congress, the treaty-making process, and the Constitution-making process produce written law. Another part of Article III provides examples of legal rules with a source external to the courts that bind the courts with respect to their own operations. The Treason Clause includes primary law, procedural law, and remedies law. It defines treason, and thereby lays down a rule of primary conduct.[17] The Clause also lays down a rule of evidence, providing that treason convictions require either confession in open court or the testimony of at least two witnesses to the same overt act.[18] And the Clause limits the remedy for treason, ruling out corruption of blood and forfeiture beyond the life of the traitor.[19] That written law can govern judicial procedure and remedies may seem a proposition too obvious to need confirmation, but in any event the Constitution confirms it.

3. The Constitution's References to Equity

Article III mentions "equity," but the appearance of that word neither incorporates equity into American law nor authorizes the courts to create or amend equity principles through acts that resemble those of a legislature rather than a court that works with a body of unwritten law.

Article III refers to equity once. It extends the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the

14 U.S. CONST. art. III, § 2.

15 *See id.* art. V (setting out process for adopting and amending the Constitution); *id.* art. II, § 2 (setting out the process for making treaties).

16 *See id.* art. I, § 7 (setting out process for making federal laws).

17 *Id.* art. III, § 3 (defining treason).

18 *Id.* (requiring the testimony of two witnesses to the same overt act, or confession in open court, for conviction of treason).

19 *Id.* (providing that Congress may declare the punishment for treason but that attainder of treason shall not work corruption of blood or forfeiture except during the life of the person convicted).

Laws of the United States, and Treaties made, or which shall be made, under their Authority."[20] The suggestion that the Constitution thereby adopts equity as it stood in 1788 cannot be sustained. If Article III incorporates equity, it even more clearly incorporates admiralty law. Shortly after conferring the federal-question jurisdiction, Article III extends the judicial power to "all Cases of admiralty and maritime Jurisdiction."[21] The admiralty head of jurisdiction is defined by that body of law, whereas the federal-question jurisdiction is defined by federal law, not equity. The admiralty jurisdiction is thus tied to the substance of admiralty law more closely than the federal-question jurisdiction is tied to the substance of equity. But at the time of the Framing and for more than a century, admiralty law was understood as a body of customary law that was shared by maritime nations generally.[22] Just as admiralty law was an unwritten body of principles to which Article III points but that it does not create or adopt, so is equity.

Besides not adopting equity, Article III's reference to it does not empower the courts to change the principles of equity through legislative-type acts. That reference cannot be the source of law-making authority tied to the judicial power because it covers only the federal-question jurisdiction. Article III signals that limited coverage in two ways. First, the last of the case-denominated heads of jurisdiction, admiralty, is itself defined by a body of norms as is the federal-question jurisdiction. That reference to another body of law defeats any inference that the entire list is governed by the initial mention of law and equity as to federal-question cases. Second, the list has another discontinuity. It switches from cases to controversies, and none of the controversy-denominated heads of jurisdiction mentions equity.[23] That absence is especially striking because in the early decades under the Constitution, federal equity developed mainly in diversity, a controversy-denominated head. Federal courts thus readily exercised equity jurisdiction, and adumbrated equity principles, in cases to which the mention of equity was not relevant. That mention cannot

20 *Id.* § 2.

21 *Id.* (extending judicial power to admiralty and maritime cases).

22 The fundamental contemporary work on the status of admiralty as non-federal general law, and the status of general law in the American legal system, is William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

23 *See* U.S. CONST. art. III, § 2 (setting out three categories of "cases" to which the judicial power extends and then listing categories of "controversies" to which the power extends).

be the source of their authority to decide according to, and shape, equity.

Mentioning law and equity in the federal-question jurisdiction performed an important but more modest function.[24] Doing so emphasized that the grant was comprehensive. By resting federal-question jurisdiction on the substantive law to be applied, the Framers raised a question. How did that way of defining jurisdiction interact with the division of authority between the courts of law and equity that was familiar from English practice? Law and equity might themselves have been seen as distinct bodies of substantive law.[25] The answer was 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. The question concerning a head of jurisdiction based on the substance of the rules being applied did not arise with respect to other heads of jurisdiction, other than admiralty, which are not so defined. Confirmation that the reference to law and equity was by way of clarification appears in the judiciary provision prepared by the Federal Convention's Committee of Detail. That draft of the Constitution does not mention law and equity.[26] The Committee apparently took that point for granted.[27] .

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24 A grant of jurisdiction in equity can be a limit on a court's powers. At the time of the Framing, equity courts gave only equitable and not legal remedies. Had Congress decided to have a wholly divided lower-court bench, it could have given federal equity courts jurisdiction only in equity. It has never done that. The one court the Constitution itself establishes, the Supreme Court of the United States, is a court of law, equity, and admiralty. The Federal Convention considered separate supreme courts of law, equity, and admiralty, but decided instead to establish one highest court. *See Trump v. Hawaii.* 138 S. Ct. 2392, 2424–28 (2018) (Thomas, J., concurring).

25 The possibility that law and equity might have been seen as distinct bodies of substantive law was one reason Blackstone went to considerable length to argue that the difference between the two sets of courts concerned their procedures and remedies, not the substance of the legal principles they applied. 3 WILLIAM BLACKSTONE, COMMENTARIES *436–38 (arguing that law and equity courts share a "parity of law and reason" and are distinguished by "the different modes of administ[e]ring justice in each").

26 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 186–87 (Max Farrand ed., 1911) (extending federal jurisdiction to a list of cases, some defined by the substantive law to be applied, such as "all cases arising under laws passed by the Legislature of the United States," without mentioning law or equity in any of the heads of jurisdiction).

27 The Committee of Detail consisted of John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson. *Id.* at 97 (listing members of the Committee of Detail). The Committee had considerable legal sophistication; three of its members—Rutledge, Ellsworth, and Wilson—later would serve on the Supreme Court of the United States. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 3–4 (1985) (listing Rutledge, Wilson, and Ellsworth as Justices). Randolph served as Attorney General under Washington. *See* DAVID P. CURRIE,

4. Judicial Power and Equitable Power

I now bring the threads together and explain how the federal courts do and do not have equity powers. They have judicial power, which enables them to decide under the applicable law. When remedies law applies, it calls for courts to take steps that change legal relations. Those steps are taken with judicial power. With the same power, courts conclusively apply primary law that comes from the Constitution, federal statutes, treaties, state law, or foreign law. Judicial power enables courts to decide cases and take all the steps needed to do so. Possessing judicial power, courts have the authority to give remedies, including equitable remedies. In that sense and only that sense do they have equitable powers.

From the beginning, the federal courts have assumed that their remedial authority includes giving the remedies known to the unwritten principles of equity as those principles existed when the federal courts began and have been developed since. Unwritten federal equity is thus part of the body of norms, external to the courts, that they apply using judicial power. That is the situation that the federal courts describe when they say that they have equitable powers. In saying so, they are correct.

But the statement that federal courts have equity powers is not correct if taken to mean that their remedial authority has some source other than the unwritten law as modified by statute and other sources of binding norms

II. THE RELEVANCE AND IRRELEVANCE OF FRAMING-ERA EQUITY

One current debate concerns what might be called equity originalism. The debate turns on the relevance today of the content that equity had when the Constitution was adopted. An example of the issues and their importance relates to so-called universal injunctions—injunctions that affect the defendant's conduct with respect to everyone, not only the parties before the court. One argument against universal injunctions is that they were unknown at the time of the Framing, that the Constitution adopts the principles of equity as they stood when it was adopted, and that therefore federal courts have no authority to give that relief.[28]

THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 154 n.168 (1997) (referring to Randolph as the Attorney General).

28 Justice Thomas expressed doubts about universal injunctions, on grounds related to equity as it stood at the time of the Framing, without conclusively taking a position on the question, in a concurring opinion in *Trump v. Hawaii*. 138 S. Ct. 2392, 2424–28 (2018)

The status of equity as a body of norms that are neither found in the Constitution nor made by the courts has implications for the significance of equity's content when the Constitution was adopted. I discuss two. Equity as it stood at the time of the Framing is irrelevant in one respect but relevant in another.

A. The Status of Equity as Sub-Constitutional Law and Equity Originalism

One criticism of innovations in equitable remedies, such as universal injunctions insofar as they are innovations, is that the content of equity was fixed when the Constitution was adopted and does not allow for innovation. The major premise of that argument—that rules fixed by the Constitution may not be changed by legislatures or courts—is of course correct. But the minor premise—that equitable principles were fixed by the Constitution—is not correct.[29]

As this Article has explained, equity was a body of unwritten law when the Constitution was adopted. Article III did not enact equity any more than it enacted the common law. Equitable remedies principles had the same place in the legal hierarchy as the general law merchant and the law of admiralty. Those principles could be changed by exercises of legislative power. To the extent that courts may develop equitable principles through their decisions, they were free to do so.

B. Framing-Era Equity and the Article III Judicial Power

Framing-era equity nevertheless bears on important constitutional issues concerning Article III. Article III does not adopt the principles of equity or empower courts to do so. Rather, Article III extends federal judicial power to listed cases and controversies.[30] According to longstanding interpretation, Article III thereby limits the courts it empowers. They may exercise only judicial power, and may do so only by deciding the kinds of proceedings that qualify as cases or

(Thomas, J., concurring) (discussing difficulties raised by the arguable departure of universal injunctions from Framing-era equity practice).

29 Justice Scalia's opinion for the Court in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, treats the content of equity at the time of the Framing as imposing limits on permissible judicial innovation in equity, 527 U.S. 308, 322 (1999) (stating that equitable "flexibility is confined within the broad boundaries of traditional equitable relief"), but distinguishes the courts' authority to innovate from that of Congress. *Id.* at 329 (leaving "any substantial expansion of past practice to Congress.").

30 U.S. CONST. art. III, §2.

controversies. If a court is asked to decide a legal issue in some other kind of proceeding, it may not do so.[31]

Like many concepts, cases and controversies and judicial power are in part understood inductively. Established examples of the concept perform two functions in understanding the abstractions involved. First, an established example is presumptively within the concept. Second, generalization from the common features of familiar instances provides information about the abstract concept and its limits.

When Article III was adopted, many forms of legal proceeding were familiar and hence recognized as cases or controversies subject to judicial power. Equity proceedings were a major part of that body of recognized exercises of judicial power.[32] Framing-era equity thus provides examples that figure in fleshing out the abstract terms the Constitution uses.

The current debate over so-called universal injunctions provides an example of the bearing of Framing-era equity on the meaning of Article III. A universal injunction is one that controls the defendant's behavior as to everyone, not only the plaintiff or plaintiffs.[33] The primary constitutional objection to universal injunctions is that because courts resolve cases and controversies between parties, remedies must be confined to parties. One response is that when the Constitution was adopted, forms of universal injunctions were available. Bills of peace, for example, are argued to have been equitable relief to non-parties.[34] A counter response is that bills of peace were a precursor of today's class actions, in which the number of parties can be large but relief runs only to parties.[35]

In understanding Article III on the issue of universal injunctions, both presence and absence at the time of the Framing can matter. A Framing-era equitable practice that constitutes a universal injunction as understood today—which bills of peace may or may not—would be strong evidence that the relevant concepts included universal injunctions. Inference from absence is less direct, but also possible. If

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31 *See* Allen v. Wright, 468 U.S. 737, 750 (1984) (stating that the case or controversy requirement of Article III is a source of constitutional jurisdictional limitations such as the requirement of standing).

32 *Trump v. Hawaii*. 138 S. Ct. at 2646 (Thomas, J., concurring).

33 *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 n.5 (2017).

34 *See* Brief of Respondent at 79, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) (pointing to bills of peace as Framing-era equity practice similar to universal injunctions).

35 *See* Bray, *supra* note 33, at 426 (arguing that bills of peace are analogous to today's class actions, not universal injunctions).

the equitable remedies that were familiar in the late eighteenth century have a common feature, induction from that common feature to the abstract concepts is reasonable. A common feature of being party specific, if found in then-established equitable remedies, would support the inference that party specificity is a component of the abstract concepts of cases and controversies.

Equity practice from the time of the Framing thus can provide significant information about the content of Article III, even though that content does not include the principles of equity themselves.

III. CONGRESS'S AUTHORITY TO MODIFY THE LAW OF REMEDIES AND THE LIMITS OF THAT AUTHORITY

A correct understanding of federal equity has implications for congressional power concerning federal remedies law. That power is constrained, but the constraints do not come from separation of powers. Rather, the constraints come from the relations between primary law and the law of remedies.

If the Constitution itself incorporated or adopted the principles of equity, then Congress's power over federal equitable remedies would be limited. Congress cannot alter legal rules that come from the Constitution. Congress cannot change the term of senators from six to eight years. And even if the intrinsic flexibility of equity allows some congressional development of principles that the Constitution itself adopts, that development would be limited to the basic contours the Constitution sets out. In similar fashion, if the Constitution conferred equity-making power on the courts, Congress would not be able to override the courts' exercises of that power. Congress cannot countermand the exercise of powers vested elsewhere by the Constitution. Congress cannot, for example, decide who may and who may not receive a pardon.[36] The President makes those decisions.

As explained above, the Constitution does not incorporate equity, nor does it empower the courts to make equity principles the way it empowers Congress to legislate and the President to grant pardons. When Congress legislates concerning equitable remedies in federal court, it does not seek impermissibly to modify rules created by the Constitution, nor does it trench on another branch's power.

Congress's power over federal equity nevertheless is significantly limited, because it sometimes is a power only over remedies and not the primary rule. Congressional power to legislate concerning remedies in federal court has three main sources. First, Congress sometimes

36 *See* United States v. Klein, 80 U.S. 128 (13 Wall. 1872) (holding that Congress may not undo the effect of a presidential pardon).

has the power to choose the primary rule, as for example when it regulates commerce.[37] Second, several constitutional amendments lay down rules and give Congress power to enforce them.[38] Third, under the so-called horizontal scope of the Necessary and Proper Clause, Congress has power to supply the law of remedies the federal courts use.[39]

In the latter two categories, Congress has power over the remedy but not over the primary rule. The Thirteenth Amendment's prohibition on slavery and involuntary servitude is not subject to congressional modification, but Congress has power to enforce it.[40] Many cases in federal court turn on primary law that Congress does not control, notably the Constitution and state law, but Congress can supply the applicable law of remedies.

Congress's remedy-only powers pose a danger of improper expansion of congressional authority, but not an expansion into zones of decision exclusively within the judicial power. Rather, the danger arises because a power over the remedy can in practice amount to a power over the content of the primary rule. As Holmes's Bad Man understands, if the only remedy for breach of contract is expectation damages, promisors in effect have an option to perform or pay, and not a duty to perform.[41] As Holmes of course understood, prospective injunctions have practical effects that are different from the effects of the retrospective monetary remedies characteristically given at law.[42] Prospective injunctions closely resemble primary duties of conduct: they direct the defendant to take specified actions, and are backed by the threat of punitive and not only compensatory sanctions via contempt.[43] As a result, an injunction can for practical purposes amount to a substitute for the primary rule it enforces.

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37 *See* U.S. CONST. art. I, § 8 (granting Congress the power to regulate commerce).

38 *See, e.g.*, *id.* amend. XIII, § 2 (granting Congress the power to enforce the amendment through appropriate legislation).

39 *See id.* art. I, § 8 (granting Congress power to make all laws necessary and proper to carry into execution its own powers and those of other departments of the federal government).

40 *See id.* amend. XIII.

41 *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (explaining that to the bad man "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else").

42 When Holmes referred to the duty to keep a contract "at common law," he spoke with his characteristic precision and brevity. He was not talking about specific performance. *Id.*

43 *See* 18 U.S.C. § 402 (2018) (making violation of a federal court's order the crime of contempt).

An instructive illustration of the problem of blurring the line between power over remedies and power over primary law comes from one of the three companion cases to *Brown v. Board of Education*.[44] In *Belton v. Gebhart*,[45] the nation's preeminent equity tribunal rejected school segregation without rejecting the principle of primary law that separate but equal education was constitutional.[46] Chancellor Seitz concluded that the only way to ensure education of equal quality for all students was to desegregate the Delaware schools. He therefore entered a remedial order directing the creation of unitary school systems.[47] The Chancellor took equal educational quality as the plaintiffs' rightful position and devised a remedy that would achieve that position. In Seitz's view, ending segregation was the only way to achieve the rightful position.[48] The Court of Chancery thus in effect resolved the great issue of the constitutionality of separate-but-equal schools while rejecting separation only through the remedy, not in the primary rule. Power over the remedy can amount to power over the rule.

Another example of how power over the remedy can amount to power over the primary rule comes from the nineteenth century. In *Belton*, the law of remedies can be said to have expanded a primary right. In the previous century, a major issue under the Contracts Clause was the danger that the law of remedies might be used in effect to contract primary rights. Under the Contracts Clause, states may not pass laws that "impair[] the Obligation of Contracts."[49] Even before Holmes, judges and lawyers understood human nature well enough to know that the obligation of a contract is found in the remedies as well as the primary duty to perform. When states abolished imprisonment for debt, some creditors objected that their debtors' obligations had been impaired because the remaining remedies were substantially weaker.[50] The Supreme Court found that some legislative changes in remedies might amount to impairments, but that the elimination of imprisonment for debt did not do so.[51] Strong enough remedies

44 347 U.S. 483 (1954).

45 87 A.2d 862 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Del. 1952).

46 *Id.* at 869–70.

47 *Id.* at 868, 871 (requiring desegregation as a remedy for inequality and rejecting a remedy that would be limited to equalization).

48 *Id.* at 871.

49 U.S. CONST., art. I, § 10 (providing that no state shall pass any law "impairing the Obligation of Contracts").

50 *See* Mason v. Haile, 25 U.S. (12 Wheat.) 370, 372 (1827).

51 *See id.* at 381 (finding that release of debtors from prison operates only on the remedy, and only on part of the remedy, and does not impair the obligation of the contract).

remained to enforce debtors' primary obligations. Some effective remedy had to be available, because of the close connection between right and remedy.[52]

Belton and the debtors' prison cases did not involve congressional power over remedies, but similar problems can arise when Congress has power over the remedy and not over the primary rule. In cases like *Katzenbach v. Morgan*[53] and *City of Boerne v. Flores*,[54] the danger is that Congress is using its enforcement power in effect to change a constitutional rule. Congress has no power over the substance of the Constitution.

The Constitution is not the only body of law that Congress has no power to modify. Rights created under state law are subject to congressional control only to the extent the Constitution grants Congress power to affect those rights. Were Congress to change the law of remedies in federal court by eliminating an important contract remedy in diversity cases with state-law contract rights at issue, the danger would be that it was in effect changing state-law private rights over which Congress has no power. Congress may neither expand nor contract rights created by the Constitution, and in the absence of an enumerated power over the law at issue, it may neither expand nor contract private rights created by state law.

When Congress has power over the remedy but not the primary rule, any threat is to the principle of enumerated powers, which has an important federalism component, and to the legal advantages created and protected by sources of law that Congress has no power to change. The threat is not to the judicial power.

Whole Woman's Health v. Jackson,[55] from 2021, provides a useful example of the issues connected with changes in the law of remedies that have important effects on primary legal positions. In its S.B. 8 statute, Texas undertook to eliminate a familiar remedy: the anticipatory suit for injunctive and declaratory relief, brought by a regulated party against an enforcement official, designed to raise the constitutional issues that would arise with the parties reversed in an

52 *See* Bronson v. Kinzie, 42 U.S. (1 How.) 311, 316 (1843) (discussing the line between permissibly changing remedies and impermissibly impairing the obligation of a contract).

53 384 U.S. 641, 64859 (1966) (approving a broad rule enforcing the Fourteenth Amendment).

54 521 U.S. 507, 532 (1997) (finding that the Religious Freedom Restoration Act had gone beyond enforcing the Fourteenth Amendment and had impermissibly changed the primary rule).

55 142 S. Ct. 522 (2021).

enforcement proceeding.[56] As the Supreme Court has explained, preenforcement review of that kind is a very useful remedy. If they can bring anticipatory proceedings, regulated parties can avoid the risk associated with violating an arguably unconstitutional rule and raising their defense as enforcement defendants.[57] The risk is that the rule will be found constitutional and a sanction imposed. In light of that risk, regulated parties might comply with an unconstitutional rule, which then would never come before the courts.[58]

The limits of congressional power over remedies alone would matter were Congress to restrict anticipatory proceedings in federal court in constitutional cases or cases governed wholly by state law. I will not offer a full treatment of that issue here, but will seek to identify a crucial question, one that goes to the heart of equity and federal equity. The question is whether the *Ex parte Young*-type anticipatory proceeding is always an additional remedy that goes beyond the Constitution's requirements, or is sometimes constitutionally mandatory.[59] I will briefly sketch the argument that the remedy is discretionary and the argument that it is constitutionally mandatory.

Ex parte Young itself uses standard equitable analysis, and thereby illustrates how its anticipatory remedy can be seen as additional and not required. In *Young*, the regulated parties were railroads subject to a rate regulation adopted by the Minnesota legislature that was enforced with strong penalties if it was violated.[60] As with Texas's S.B. 8, one goal of Minnesota's strong penalties was to keep the railroads from violating the regulation and raising a constitutional defense in an enforcement proceeding.[61] As Justice Peckham explained in *Young*, that defense was the equity plaintiffs' remedy at law.[62] The dangers of violating and defending made that remedy inadequate, and justified an injunction that would obviate the need to violate the rate regulation.[63]

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56 *See id.* at 530–31 (describing the enforcement system for S.B. 8, the Texas regulation of abortion at issue).

57 *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 153 (1967).

58 *See id.* (explaining that preenforcement review of regulations allows regulated parties to avoid the choice between complying with the rule and violating it and running the risk of penalties).

59 The Court approved anticipatory injunctive proceedings raising a constitutional challenge to a regulatory statute in *Ex parte Young*, 209 U.S. 123, 168 (1908).

60 *See id.* at 127–29.

61 *See id.* at 141.

62 *See id.* at 141–42.

63 *See id.* at 163–65 (finding that the inadequacy of the remedy at law of violating the regulation and defending in an enforcement proceeding justified equitable relief).

The argument that *Young*-type injunctions are never constitutionally required relates to their equitable character. Equity is a distinct body of principles, not itself found in the Constitution, that provide additional support for legal advantages, support that goes beyond the minimum that is otherwise available. When the Constitution protects liberty of conduct, the Constitution supplies its own baseline remedy. Unconstitutional rules about conduct are legally inoperative, and are to be recognized as such by any court that decides a case in which the rule is relevant. That baseline remedy is at work in enforcement proceedings, in which unconstitutional rules are disregarded.[64] Whether equity gives additional remedies that go beyond the baseline depends on the content of equity, not the Constitution. Because Congress controls that content of remedial equity in federal court, it may decide that anticipatory remedies are undesirable despite their benefits, and limit their availability. Congress may exercise wholesale the discretion that the Court in *Young*, applying equitable principles, exercised retail.

The argument that *Young*-type injunctions are sometimes constitutionally required works by likening constitutional protections of liberty of conduct to constitutional protections of private rights of property and contract. The Court's nineteenth-century cases about contract remedies assume that the obligation of contracts includes not only the primary rules that require promisors to perform, but also an entitlement of promisees to an effective remedy.[65] With the protected legal interest so defined, a change in the law of remedies can be an impermissible contraction of that interest—an impairment of the obligation of a contract. The argument that *Young*-type injunctions are sometimes constitutionally mandatory attributes a similar remedial component to constitutionally protected liberty of conduct. Not only are people legally immune from unconstitutional rules about what they may do, the reasoning goes, they are also constitutionally entitled to an effective judicial remedy to ensure that they will be able to engage in the conduct that is protected. If the bare immunity that is relied on in an enforcement proceeding is not enough, practically speaking, then more is required. According to this argument, the Constitution itself requires that inadequate remedies at law be supplemented to ensure adequate remedial protection. That reasoning does not exactly

64 *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019) (holding that an unconstitutional criminal statutory rule is "no law at all" and is to be disregarded in an enforcement proceeding).

65 *See, e.g.*, Bronson v. Kinzie, 42 U.S. 311, 316 (1843) (explaining that states may change contract remedies but may not so restrict remedies as to eliminate the promisee's right to performance).

read equity into the Constitution, but rather reads in an entitlement to some effective remedy. Declaratory relief at law would be adequate, for example, but the call for some effective remedy is also a basic principle of equity.

As that sketch of the issues shows, an important question in cases like *Whole Woman's Health* is about the content of the Constitution, and the possibility that state or federal rules about equitable remedies might be inconsistent with the Constitution's primary rules. Any threat posed by the power over remedies is to constitutionally protected interests, not to the separation of powers.

IV. THE STATUS OF EQUITY AS UNWRITTEN LAW EXTERNAL TO THE COURTS AND THE LIMITS OF JUDICIAL INNOVATION IN EQUITY

This Part addresses a crucial question about federal equity, a question that arises from equity's character as a body of legal principles external to the courts: How substantial must an innovation in equity be so that only a legislature, and not a court, may permissibly adopt it?

Were federal equity the product of a judicial power to make law the way legislatures make it, that question would not arise. Courts could make any change a legislature could make. But although courts shape unwritten customary law by contributing to the body of custom and providing explanations of the custom and their applications of it, they do not have the kind of power over unwritten law that legislatures have.

American courts have not produced a generally accepted account of the limits of their authority to innovate in administering the unwritten law. Instead, on this higher-order question concerning custom and practice, they have proceeded through custom and practice. Courts have applied the principle that the permissible scope of innovation is limited in specific contexts, and have not produced a well-established theory concerning the permissible degree of innovation. Probably the most famous verbal formulation of the principle is more striking than useful, as perhaps should not be surprising given its source. Justice Holmes famously said that courts innovate at the molecular but not the molar level. Figures of speech are not theory.[66]

This Article does not present a theory either, but does seek to take steps toward producing one. I will address the problem of deciding whether an innovation in remedies law is limited enough so that a court may properly make that innovation, or is so large that the

66 "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

innovation should be left to the legislature. Using the method of building inductively from examples, I will briefly discuss six twentieth-century cases that are important building blocks of contemporary public law federal equity. Four of the cases are known landmarks: *Ex parte Young*,[67] *Brown v. Board of Education*,[68] *Baker v. Carr*,[69] and *Goldberg v. Kelly*.[70] Another is well known to specialists in administrative law: *American School of Magnetic Healing v. McAnnulty*.[71] The sixth is not nearly as famous as it deserves to be: *Truax v. Raich*.[72]

To assess the permissible degree of judicial innovation, I identify three important issues as to which those cases innovated. For each case, I ask how large an innovative step that case took as to each issue. The first issue involves questions of what today would be called standing or the plaintiff's cause of action—the legal principles that identify proper parties to seek judicial relief. The second involves litigation structure—the relations among parties and their legal interests that are proper for a judicial proceeding. The third issue involves the scope of equitable remedies—the extent to which a court may direct the conduct of the defendant, including directing the policy choices of government entities.

All three issues—causes of action, litigation structure, and courts' authority to exercise discretion in directing the defendant's conduct through an injunction—are of course central to public law litigation and are subjects of continuing controversy. Universal injunctions, for example, present problems of litigation structure because they involve relief that reaches beyond the parties to the case.

The six cases can usefully be put in three groups that reflect the main ways in which they represented innovation. *Young* and *Truax* made possible new forms of litigation through which the constitutionality of regulatory statutes could be tested. *American School of Magnetic Healing*, *Brown*, and *Goldberg* enabled beneficiaries of government programs to raise constitutional and statutory challenges to the way in which the government was administering the benefit programs at issue. *Baker* enabled voters to bring to court a distinct

67 209 U.S. 123 (1908).

68 347 U.S. 483 (1954).

69 369 U.S. 186 (1962).

70 397 U.S. 254, 26163 (1970) (holding that termination of welfare benefits constitutes a deprivation of property that may be accomplished only pursuant to proceedings that satisfy the Due Process Clause).

71 187 U.S. 94, 111 (1902) (approving an injunction directing the Postmaster General to deliver mail to the plaintiff, despite the Postmaster General's finding that the plaintiff's business was fraudulent).

72 239 U.S. 33, 43 (1915) (holding that an Arizona restriction on the number of noncitizens an employer could employ was unconstitutional).

harm—reduction in the practical power of the franchise by rules of legislative apportionment—and seek a novel remedy—a judicial order affecting the drawing of legislative districts.[73]

I explain that once the issues are understood properly, the most substantial innovations were in *Truax*, *Brown*, and *Baker*. The other three put down landmarks that were not far from markers already in place.

The three larger innovations supply important data concerning the permissible scope of judicial development. *Truax* involved principles of so-called third-party standing that have long been controversial and remain controversial today. After the first few decades after *Brown*, the Court drew back from the aggressive steps it had authorized with respect to judicial control of discretionary government decisions. After *Baker*, the Court created a doctrine that limited judicial discretion in addressing legislative apportionment. All the more aggressive extensions of federal equity thus provoked enough doubts and second thoughts to suggest that they were at or near the limits of permissible judicial innovation.

A. Suits in Which Regulated Parties Seek Injunctions Against the Institution of Enforcement Proceedings

Twice in the first two decades of the twentieth century the Court approved forms of proceeding in equity that facilitated challenges to the constitutionality of statutory regulations of private conduct. Both cases involved what today would be called economic regulation.

In *Ex parte Young*, the Court approved a form of equitable relief that has become a staple of constitutional and administrative law. Regulated parties, in *Young* railroads, sued the official responsible for bringing enforcement proceedings against them.[74] In *Young* the official was Minnesota Attorney General Edward Young.[75] The Court found that the injunctive proceeding was an appropriate forum in which the railroads could raise constitutional objections that they otherwise would raise as defendants in enforcement proceedings.[76]

In *Truax*, the Court approved a suit against an enforcement official to restrain enforcement proceedings, but that suit was not brought by a regulated party who was a potential defendant. In *Truax*,

73 *Baker*, 369 U.S. at 188.

74 *See Ex parte* Young, 209 U.S. 123, 129 (1908).

75 *See id.*

76 *Id.* at 168 (finding that suit to enjoin enforcement proceedings was an appropriate remedy).

the regulated party was an employer and the plaintiff was an employee of that employer.[77] *Truax* thus was a step beyond *Young*.

Young was a major step, and resolved a hotly contested question, but the major step and the contest did not involve available remedies under federal equity. Equity had long provided forms of litigation in which prospective defendants could sue prospective plaintiffs and raise the issues that would arise between them were suit brought with the parties reversed.[78] The major step and the contest involved sovereign immunity, which the Court found did not bar that kind of suit.[79]

With respect to litigation form, *Young* involved a familiar configuration of parties and interests. The case did resolve a novel issue and so broke some new ground, but the novel issue arose because of an innovation by the Minnesota legislature, not the Court. The legislature had adopted an enforcement system with strong penalties.[80] Those penalties were designed to keep the railroads from using the standard mode of constitutional litigation in which a regulated party violates a statute and raises a constitutional defense.[81] Litigating as a defendant, the Court found, was the equity plaintiffs' remedy at law. That remedy was inadequate because of the risk of strong sanctions were the rates to be upheld in an enforcement proceeding.[82]

Young also rested on familiar principles concerning parties' relevant interests and judicial remedies. As regulated parties and potential defendants, the railroads had two interests that the courts already respected in enforcement proceedings. In a proceeding to enforce a regulatory statute, the defendant has an interest in avoiding the penalties that may be imposed and an interest in being free of the restriction on liberty of conduct imposed by the regulation. Regulated parties rely on those same interests in *Young*-type anticipatory proceedings. In *Young* the remedy was in form an injunction and in substance the recognition of a defense. Neither was a new development, and the

77 *See Truax*, 239 U.S. at 35–36 (describing Arizona law that limited the employment of noncitizens by employers and Raich's suit against enforcement officials seeking an injunction against enforcement proceedings against his employer, Truax, who was aligned as a defendant along with the enforcing officials).

78 *See* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 997–1000 (2008) (describing longstanding equitable practice that enabled potential defendants at law to become plaintiffs in equity and present their defenses in equitable proceedings).

79 *Id.* at 996–97 (describing the sovereign immunity issue in *Young*). As the Court explained in *Truax*, *Ex parte Young* had resolved the question whether a suit to enjoin enforcement proceedings was inconsistent with sovereign immunity. *Truax*, 239 U.S. at 37.

80 *See* Harrison, *supra* note 78, at 992.

81 *See id.* at 991–92 (describing the Minnesota enforcement system).

82 *See Ex parte Young*, 209 U.S. 123, 164–65 (1908) (finding that the remedy at law of a defense in an enforcement proceeding was inadequate).

injunction did not require that the court exercise discretion concerning the defendant's activities. *Young* thus involved no major innovation as to any of the three issues concerning equitable remedies that I have identified.

Truax was a greater innovation in one respect. The equity plaintiff's interest was a well-known ground of equitable protection: the economic interest in employment.[83] No judicial discretion as to the defendant's conduct was called for, because the question was simply whether to enjoin enforcement of an allegedly unconstitutional statute.[84] The litigation form, however, was novel. Unlike *Young*, *Truax* was not simply an enforcement proceeding with the parties reversed. The plaintiff sought an injunction against the institution of enforcement proceedings against someone else—his employer.[85] *Truax* thus did not involve the familiar litigation form in which the plaintiff presents an argument that would be a defense were the plaintiff the defendant, nor the familiar litigation form in which the plaintiff requests an injunction against conduct that was well understood to be an invasion of property rights.

The Court has never indicated any second thoughts about the availability of that kind of injunctive relief. Later cases, however, suggest that *Truax* does not have much generative force, but instead rests on controversial premises. In the 1930s, the Court decided several cases that denied attempts by private parties to raise constitutional objections to federal programs that imposed economic harm on them. In those cases, the Court stressed private wrong as the proper ground of equitable intervention and found that economic injury caused by an unconstitutional statute was not by itself private wrong.[86] Those cases are not easy to square with *Truax*, which involved economic harm but arguably no private wrong. When the Court became more reluctant to adjudicate constitutional challenges to regulation, its decisions showed that cases like *Truax* were on the border of permissible litigation structures.

Much more recently, the Justices have once again become troubled by third-party standing as a means to raise constitutional

83 *See Truax*, 239 U.S. at 38 (pointing to the constitutional protection of the plaintiff's right to earn a livelihood).

84 *See id.* at 39.

85 *See id.* at 36.

86 *See, e.g.*, Ala. Power Co. v. Ickes, 302 U.S. 464, 467, 470 (1938) (holding that injury inflicted by lawful competition supported by allegedly unconstitutional federal assistance is not a private wrong and so does not confer standing to sue the Secretary of the Interior for an injunction against implementing the program).

challenges to statutes.[87] Their doubts do not suggest any inclination to reconsider cases like *Truax*, but they do reflect the understanding that allowing one party to rely on another's rights, as the issue is described, is a substantial and sometimes doubtful step.

B. Suits by Beneficiaries Concerning Public Benefit Programs

In *American School of Magnetic Healing*, *Brown*, and *Goldberg*, beneficiaries of a public benefit program created by statute claimed that they were denied benefits unlawfully, and sought injunctions directing the government to administer the program lawfully. The two earlier cases involved in-kind benefits: postal services and public education. *Goldberg* involved cash benefits. In all three, questions of sovereign immunity lurked in the record, but those questions are not relevant to the development of federal equity, as they were not relevant in *Young*.[88]

Except for the presence of a government agency as defendant, the litigation form in all three cases was standard and required no innovation. The plaintiff argued that the defendant had a duty to provide the plaintiff with a benefit and was not doing so, and sought an injunction directing that the defendant fulfill the duty. In all three cases, the court easily could conclude that the remedy at law was inadequate. Enforcement of affirmative duties is as ordinary as specific performance.

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87 *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2322–23 (2016) (Thomas, J., dissenting) (raising doubts about the Court's acceptance of third-party standing as a way to raise constitutional issues).

88 In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court addressed the sovereign immunity question that the parties had passed over in *Goldberg*. *Edelman* is thus the counterpart to *Young* with respect to public benefit programs, holding that injunctive relief concerning such programs is consistent with sovereign immunity. *Id.* at 673. Although *Edelman*'s holding is often understood to rest on the prospective nature of the relief sought, that account is hard to reconcile with the Court's opinion. The opinion, seeking to prick out the line between permissible and impermissible relief against governments, puts specific performance on the impermissible side. *Id.* at 666–67 (explaining that not all equitable relief against state officers is consistent with sovereign immunity and giving specific performance as an example of an impermissible remedy). Specific performance is a prospective remedy. A more plausible explanation of the Court's approach is that in cases involving public benefit programs, the court is not enforcing an unconditional obligation of the government, like the obligation to pay damages for a past tort or to perform a contract already made. Rather, in cases like *Edelman* and *Brown*, relief is conditional on the continued operation of the benefit program. While the program is in place, it creates the equivalent of the kind of private right that the courts have long protected from unlawful deprivation by government officials.

A more difficult question involved the plaintiffs' interests—their standing or cause of action in contemporary terminology—but while somewhat difficult, the question took a well-known form. Party A bore a duty to take an action that would benefit party B. Judge Cardozo might have asked whether A's duty ran to B.[89] Today, the question would be whether B has standing or a cause of action. Answering that question in the affirmative is not a substantial innovation in the law of equitable remedies. To decide whether the beneficiary of a public program may sue, the courts apply standard remedies principles to the relevant primary law.[90] Finding that the Postmaster General's duty to deliver the mail runs to the persons who send mail is an important decision, but whether that decision was correct turned on the postal statutes. Principles of equity do no more than pose the question, as they pose the question with respect to the welfare program at issue in *Goldberg*.

In three of those four cases, the remedy sought was straightforward, if intrusive, and did not require that the court exercise much judgment about the administration of a public program. The American School of Magnetic Healing, for example, asked that the Postmaster General be directed to deliver the mail.[91]

One of the cases, though, did lead to remedies in which courts exercised a great deal of policy judgment about public programs. *Brown* produced desegregation orders that were often highly detailed. Those intrusive decrees proved extremely controversial, not only in public debate but on the courts themselves. In more recent decades, the Supreme Court has been much more skeptical of judicial control of public institutions than it was in the years soon after *Brown*.[92] Rather than providing an example of a permissible development of federal equity, the more intrusive desegregation decrees are examples of discretionary remedies that arguably went beyond the breaking point.

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89 *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928) (Cardozo, J.) (concluding that the defendant's duty to take due care did not run to the plaintiff).

90 For example, in the early school segregation case *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 198 (1849), the Supreme Judicial Court of Massachusetts addressed the lawfulness of racial segregation in an action on the case brought by the parent of a child who was entitled to a public education.

91 *See* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109 (1902) (describing plaintiff's request that the Postmaster General be required to deliver the mail to it).

92 An example of a later case in which the Court was more skeptical of judicial control of public institutions is *Missouri v. Jenkins*. 515 U.S. 70 (1995). In that case, the Court stressed the requirement that remedies in desegregation cases be tailored to undoing the effects of prior unlawful government decisions. *Id.* at 98–100 (finding that the district court's remedy went beyond the permissible goal of undoing the effects of prior unconstitutional decisions).

C. Legislative Apportionment

In *Baker v. Carr*,[93] the Court held that federal courts could entertain constitutional challenges to apportionment of population among state legislative districts under the Equal Protection Clause. As to two of the issues I have identified, *Baker* was not an innovation. The courts had long treated the right to vote as a property right, so that denial of it could give rise to tort damages.[94] The litigation form was quite similar to *American School of Magnetic Healing* and *Brown*. A plaintiff with rights under a public program asked that the program be administered in a way that respected those rights.

On the third issue, *Baker* was more of an innovation. Judicial involvement in districting raised the possibility that courts would be called on to make the kind of political judgments that legislatures make in drawing district lines. When it addressed the substance of the constitutional rules at issue, the Court produced a doctrine that substantially constrains judicial discretion by focusing on a single factor in districting. In *Reynolds v. Sims*,[95] the Court found that the Constitution "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[96] A requirement that districts be equipopulous eliminates a great many considerations that may call for the exercise of judicial policy choice. In later cases, the Court made the doctrine even more mechanical, with a presumption in favor of districting plans that have no more than a 10% deviation from strict population equality.[97]

Most recently, the Court refused altogether to enter the highly contentious field of partisan gerrymandering. In *Rucho v. Common Cause*,[98] the Court found that claims based on the use of partisan considerations in drawing district lines present political questions and are not within the jurisdiction of the Article III courts.[99] The Court found that none of the tests to identify impermissible political party-based districting met "the need for a limited and precise standard that

93 369 U.S. 186 (1962).

94 *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 482–83 (2d ed., Chicago, Callaghan & Co. 1888) (1878) (describing cases in which denial of right to vote by election officials gave rise to an action for damages).

95 377 U.S. 533 (1964).

96 *Id.* at 568.

97 *See, e.g.*, Harris v. Ariz. Indep. Redistricting Comm'n, 578 U.S. 253, 255 (2016) (applying the presumption that deviations of less than 10% are permissible).

98 139 S. Ct. 2484 (2019).

99 *Id.* at 2500, 2508.

is judicially discernible and manageable."[100] The proposed tests lacked "a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties."[101] The Court drew back from embracing judicial discretion as to the allocation of power among political parties. The most substantial innovation concerning equitable remedies in *Baker* was the Court's willingness to allow judges to exercise some discretion on those issues, and ever since the Court has sought to find limits on the role of equity courts.

Several of the Court's landmark cases extending equitable remedies are quite modest when examined in detail. The three most substantial extensions—in *Truax*, *Brown*, and *Baker*—developed equity in ways that were later doubted and cabined. Although no form of words will capture the actual practice of federal equity on this topic or any other, it is fair to say that the federal courts move carefully and interstitially when they innovate. Developments that come closer to the molar scale have produced controversy and some reconsideration.

CONCLUSION

When Holmes defined the object of the lawyer's study as "the prediction of the incidence of the public force through the instrumentality of the courts,"[102] he also recognized the difference between the courts and the sources of law on which they rely.[103] Seeing that difference can be especially difficult when law is unwritten, as is much of the body of principles governing equitable remedies in federal court.[104] Unwritten equity principles nevertheless are part of the law the courts apply, and are not the product of judicial legislation. The Article III judicial power has the same relationship to equity that it has to the Constitution, treaties, and statutes. That power enables the federal courts to apply equity, and sometimes to do equity, and only in that sense is it an equity power.

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100 *Id.* at 2502.

101 *Id.*

102 Holmes, *supra* note 41, at 457.

103 Holmes pointed out that "[t]he means of the study are a body of reports, of treatises, and of statutes" reaching back into history. *Id.* His inclusion of statutes reflects the authority of statutory law for the courts.

104 When the Supreme Court sets out the requirements for preliminary relief, for example, it is usually not interpreting a statute. *See, e.g.*, Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008) (setting out standards for preliminary relief in nonstatutory federal equity).