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Equity's Constitutional Source

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CONSTITUTIONAL LAW (/TAG/CONSTITUTIONAL-LAW) • FEDERAL COURTS (/TAG/FEDERAL-COURTS) • REMEDIES (/TAG/REMEDIES)

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] 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 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 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 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.

1 Zechariah Chafee, Jr., *Foreword* to Equity: Cases and Other Materials on Equity (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. ...

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, 1...

6 *See* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 Stan. L. Rev...

7 US Airways, Inc. v. McCutchen, 569 U.S. 88, 94-95 (2013) (quoting Mertens v. Hewitt Assocs., 508 U...

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.

11 *Grupo Mexicano*, 527 U.S. at 337-42 (Ginsburg, J., concurring in part and dissenting in part); *see* ...

12 *See, e.g.*, *Liu*, 140 S. Ct. at 1942-47 (Sotomayor, J.); *eBay*, 547 U.S. at 390 (Thomas, J.); *McCutch*...

13 *See, e.g.*, David C. Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, ...

14 *See* Douglas Laycock, Modern American Remedies: Cases and Materials 265 (4th ed. 2012); *see also* S...

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, Wrappe...

17 *See, e.g.*, John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 Calif. L....

18 *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1123 (2020) [hereinafter ...

19 *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nat...*

20 U.S. Const. art. III, § 2. For a discussion of why I focus on

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 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.

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 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

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....

22 *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1940-46 (2020) (interpreting "equitable relief" in the...

23 (https://https://www.com/) have not questioned the Court's statutory approach or even mentione...

24 *See, e.g.*, Bray, *supra* note 14, at 16 n.87 (noting that "the Constitution itself refers to a dis...

25 *See* Pfander & Wentzel, *supra* note 6, at 1273; Sohoni, *Lost History*, *supra* note 18, at 928; *see als...*

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, ...

28 *See* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (noting that Congress can withhold equity juris...

29 The exception is those powers exercised by the Supreme Court in its original jurisdiction. *See* Cal...

30 *See, e.g.*, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 232-33 (2002) (Ginsburg, J.,...

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 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.

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 Judgme...*

33 A final note on scope will be helpful. Of the components of equity jurisprudence—rights, procedu...

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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."

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