

THE *EX PARTE YOUNG* CAUSE OF ACTION: A RIDDLE, WRAPPED IN A MYSTERY,
INSIDE AN ENIGMA

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SUMMARY

Ex parte Young's¹ bill in equity—a non-statutory equitable cause of action for relief from constitutional violations—is an odd beast, difficult to reconcile with historical practice or modern federal-courts jurisprudence.

At the Founding, federal courts understood Congress to have given them the power to recognize non-statutory equitable actions that could have been brought in the English Court of Chancery in 1789. The *Ex parte Young* cause of action, which developed from the slow creep of federal equitable common law, was not among those traditional equitable actions.

Measured against modern standards—standards that otherwise disfavor judicially-created causes of action—the *Ex parte Young* cause of action appears even more alien. And it is unclear how to square *Young* with federal statutes such as 42 U.S.C. § 1983 and the Declaratory Judgment Act.

We discuss each of these issues in turn. But first, let's talk about *Ex parte Young* itself.²

I. *EX PARTE YOUNG*

Ex parte Young was an original habeas action in the Supreme Court. It arose out of nine derivative suits brought by railroad shareholders against their own railroads and the Attorney General of Minnesota, Edward T. Young.³ The shareholders were mad about railroad regulation. During the twilight of the gilded age and as the twentieth century dawned, a series of political movements—the Grangers, the Populists, the Progressives—used state law to regulate how much railroads could charge.⁴ These laws made “those who were to use the railroads”—farmers and everyday passengers—“the final arbiters as to what . . . was reasonable” to “pay for such use.”⁵ In 1907, Minnesota passed a series of such laws, preventing

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¹ 209 U.S. 123, 149 (1908).

² Portions of this article are drawn from Judge Oldham's concurrence in *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (en banc). *See id.* at 494 (Oldham, J. concurring).

³ *See Young*, 209 U.S. at 129.

⁴ *See* Barry Friedman, *The Story of Ex Parte Young*, in *FEDERAL COURT STORIES* 251–52 (Vicki C. Jackson & Judith Resnik eds., 2010).

⁵ Charles Francis Adams, Jr., *The Granger Movement*, 120 N. AM. REV. 394, 395 (1875).

the railroads from charging more than two cents per passenger per mile.⁶ And Young convinced the legislature to impose stiff penalties for any violation of this state-imposed rate.⁷

The shareholders sued their own railroad corporations to forbid them from following Minnesota's rate laws because the laws were allegedly unconstitutional under, *inter alia*, the Fourteenth Amendment.⁸ As part of that intra-corporate dispute, the shareholders also sued Young to stop him from enforcing those state laws. After a hearing, the district court found the rates indeed violated the Fourteenth Amendment and issued a preliminary injunction to keep Young from enforcing the rates.⁹ Young disobeyed that injunction by filing suit against the railroads anyway. The court held Young in contempt, which of course is what he wanted.¹⁰ Young then sought a writ of habeas corpus from the Supreme Court, arguing that the injunction he violated was invalid.¹¹ Why? Young said he could not be haled into court because the suit against him was effectively a suit against the State of Minnesota, prohibited by "the Eleventh Amendment."¹²

The Supreme Court disagreed. The Supreme Court's opinion reached two conclusions

⁶ *Perkins v. N. Pac. Ry. Co.*, 155 F. 445, 456 (C.C.D. Minn. 1907).

⁷ Friedman, *supra*, at 260–61.

⁸ *Young*, 209 U.S. at 129–30.

⁹ *Id.* at 132.

¹⁰ *Id.* at 133–34; Friedman, *supra*, at 264.

¹¹ *Young*, 209 U.S. at 126–27.

¹² *Id.* at 132. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. CONST. amend. XI. By its terms, the Amendment does not apply in situations—as in *Young* itself—where a citizen sues his own State (or a public official of that State). *See Young*, 209 U.S. at 123 (noting that the suit that led to the contempt order against Young was brought against him by a Minnesota citizen). Still, the Supreme Court has often used "Eleventh Amendment immunity" as a synonym for the States' broader constitutional sovereign immunity. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (using "state sovereign immunity" and "Eleventh Amendment immunity" interchangeably); *cf. id.* at 54 (explaining that the Court understood the Eleventh Amendment to "confirm[]" "the presupposition" that "each State is a sovereign entity in our federal system" (quotation omitted)); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1496 (2019) ("Although the terms of [the Eleventh] Amendment address only . . . specific provisions . . . [.] the natural inference from its speedy adoption is that the Constitution was understood . . . to preserve the States' traditional immunity from private suits." (quotation omitted)); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2263–64 (2021) (Gorsuch, J., dissenting) (explaining that "Eleventh Amendment immunity" is a "misnomer" because it accurately describes only one of "two distinct federal-law immunities from suit" enjoyed by the States (quotation omitted)).

relevant here. First, Young could be sued, notwithstanding the State's sovereign immunity.¹³ Second, and of central importance to this article, an equitable cause of action would open the federal courts to suits like the one against Young.¹⁴ The Court explained that "[t]he question of sufficiency of rates is important and controlling; and, being of a judicial nature, it ought to be settled at the earliest moment by some court."¹⁵ And "when a Federal court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment, to the exclusion of all other courts."¹⁶ In other words, a federal cause of action was available to seek equitable relief against state officers.

II. YOUNG AND THE HISTORY OF EQUITY

Understanding and evaluating *Young* in its historical context requires us to understand litigation at the time of the Founding. But it is impossible to follow the path of American legal history without ending up in England.¹⁷ And the development of equity is no exception.

A. English Litigation before the Founding

i. Law

Litigation in the common-law courts of our mother country looked very different from litigation today. Our modern federal system has only "one form of action—the civil action."¹⁸ Back in eighteenth-century England, there were at least nine legal forms of action¹⁹ (or "forms of proceeding").²⁰ "Each form of proceeding was," essentially, "its own miniature legal proceeding."²¹ The form of action dictated which writ the plaintiff would obtain to commence

¹³ *Young*, 209 U.S. at 159–60; see also *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) ("[W]hen a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes.").

¹⁴ *Young*, 209 U.S. at 165–166.

¹⁵ *Id.* at 166 (emphasis added).

¹⁶ *Ibid.*

¹⁷ See Andrew S. Oldham, *Official Immunity at the Founding* 4–5 (manuscript) (available at <https://ssrn.com/abstract=3824983>) ("Official Immunity").

¹⁸ FED. R. CIV. P. 2.

¹⁹ See 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON PLEADING vi (New York, Robert M'Dermut 1809) (listing "*assumpsit*, debt, covenant, detinue, case, trover, replevin, trespass[,] and ejectment"); 3 WILLIAM BLACKSTONE, COMMENTARIES *273 (listing the writs of debt, detinue, trover, trespass, entry, ejectment, and case).

²⁰ Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 634 & n.113 (2015).

²¹ *Id.* at 634; see also 9 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 336 (1st ed. 1926) ("[U]nder the common law procedure a plaintiff must choose some one of the forms of action, and [] the procedural rules which he must obey were determined largely by his choice.").

the lawsuit, the method of ensuring the adversary's attendance at court, the availability of default judgment, and—most importantly—the available relief.²²

The pleading requirements were unique to each form of action, and highly technical. It was only if a plaintiff could “pigeon-hole” his underlying legal right into a pre-existing form of action that he could obtain relief.²³ A plaintiff who wanted to sue for a private nuisance, for instance, could bring an “assize of nuisance” to have the nuisance abated and to recover damages.²⁴ But that form of proceeding was available only to freeholders, so a would-be plaintiff who leased the property that suffered from the nuisance was out of luck.²⁵ The lessee could instead bring an “action on the case.”²⁶ That form of proceeding was available to freeholders *and* lessees.²⁷ But an action on the case would only get the plaintiff damages; it couldn't be used to obtain an order permitting the plaintiff to abate the nuisance.²⁸

Or consider a party who wanted to sue for breach of contract. The variables a plaintiff would have had to consider are mind-numbing. Was the contract under seal? Were damages liquidated or unliquidated? If the contract required the payment of money by instalments, was the whole debt due? Was the plaintiff confident about the number of defendants? Was the defendant an executor? Depending on the answer to each question, the plaintiff might find himself unable to rely on—or required to use—a particular form of action.²⁹ What's more, the plaintiff's choice was irrevocable.³⁰ And “the choice of the wrong writ involved the loss of the action, even though all the merits were with the plaintiff.”³¹ For example, “[i]t might well be that after a plaintiff had declared in trespass, the facts proved disclosed a cause of action in case; and if that happened he lost his action.”³²

The form of action, then—and the relief it supplied—“had the effect of limiting and

²² FREDERIC WILLIAM MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 296–97 (1910); *see also, e.g.*, THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 135 (5th ed. 1956) (“The amount of discretion which jurors might exercise varied with the form of action.”).

²³ MAITLAND, *supra*, at 298.

²⁴ 3 BLACKSTONE, *supra*, at *221.

²⁵ *Id.* at *220–21.

²⁶ *Id.* at *220.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *See* 1 CHITTY, *supra*, at *88, *93–94, *101, *113, *138.

³⁰ MAITLAND, *supra*, at 298.

³¹ 9 HOLDSWORTH, *supra*, at 248.

³² *Ibid.*

defining the right of action itself.”³³ “[O]nly if there was a form of proceeding that provided a remedy could it be said that there existed a cause of action at law.”³⁴ So, to the eighteenth-century litigant, forms of action, causes of action, and remedies were all inextricably intertwined: “The enumeration of writs,” with their pre-defined remedies, “and that of actions, ha[d] become . . . identical.”³⁵

In addition to the ordinary writs, litigants could also turn to the so-called “prerogative writs,” including the writs of mandamus, certiorari, prohibition, *quo warranto*, and habeas corpus.³⁶ Brought by a private citizen but in the King’s name, these writs served to keep in check officers, official boards, and government commissions, although they were unavailable against the King himself or his high-level ministers.³⁷ Like the ordinary writs, the prerogative writs were creatures of law (rather than equity), and were brought in the King’s Bench, the principal law court.³⁸

ii. Equity

According to the familiar account, equity emerged in the English Court of Chancery as

³³ HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 8 (2d Am. ed. 1831); see also Bellia & Clark, *supra*, at 632; MAITLAND, *supra*, at 300 (“[T]he forms of action are given, the causes of action must be deduced therefrom.”).

³⁴ Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 781 (2004).

³⁵ STEPHEN, *supra*, at 8.

³⁶ Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L. J. 523, 527–30 (1923).

³⁷ See THOMAS TAPPING, THE LAW & PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS AS IT OBTAINS BOTH IN ENGLAND, AND IN IRELAND *173 (Phila. ed. 1853) (“It may be here generally stated, that the writ of mandamus lies for all offices of a public nature, whether spiritual, temporal, corporate, etc., judicial or ministerial.” (footnotes omitted)); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269–70 (1961) (“Public Actions”); Louis L. Jaffe, *Suits against Governments & Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2, 15 (1963) (“Sovereign Immunity”); James E. Pfander & Jacob Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1299–1305 (2020); FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 422 (1905 ed.).

³⁸ See *Public Actions*, *supra*, at 1269–70; GOODNOW, *supra*, at 421 (“If any one was aggrieved by an act of a subordinate officer of the Crown, he had the right to appeal to the Crown, which was the fountain of justice, and such an appeal went to the court of king’s bench.”). The Supreme Court has incorrectly referred to the writ of mandamus as an equitable form of relief. Compare *Great-W. Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 215 (2002), with *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 614 (1838) (“[T]he remedy by mandamus . . . is a writ, in England, issuing out of the king’s bench.”), and Samuel L. Bray, *The Supreme Court and the New Equity*, 69 VAND. L. REV. 997, 1000 (2015) (describing the characterization of mandamus as equitable as a “clear error[]”).

a flexible counterpart to the rigidity of the forms of action at law.³⁹ But, over time, equity matured “into a precise legal system encompassing certain recognized categories of cases.”⁴⁰ By the mid-eighteenth century, Blackstone observed that law and equity had become “equally artificial systems, founded in the same principles of justice and positive law,”⁴¹ “governed by established rules[,] and bound down by precedents, from which [courts] do not depart.”⁴²

A plaintiff would begin a suit in equity by filing a “bill.”⁴³ The contents of the bill varied depending on the relief sought.⁴⁴ And as with the legal forms, the bill would only entitle the plaintiff to relief if he could fit his facts into one of the recognized categories of equitable actions.⁴⁵ Consider, for example, a “bill of peace.”⁴⁶ The bill could be used to resolve “the possession of a common”⁴⁷ (among other land disputes), but not “where a right [was] disputed

³⁹ See, e.g., MAITLAND, *supra*, at 4–7; *Missouri v. Jenkins*, 515 U.S. 70, 127 (1995) (Thomas, J., concurring).

⁴⁰ *Jenkins*, 515 U.S. at 127 (Thomas, J., concurring).

⁴¹ 3 BLACKSTONE, *supra*, at *434; see also 9 HOLDSWORTH, *supra*, at 393 (“In equity, the system of pleading resulted in so artificial a statement of the case, and the system of procedure spun the suit out to such an interminable length, that the whole subject matter of the suit often went in costs before a conclusion was reached.”).

⁴² 3 BLACKSTONE, *supra*, at *432; see also 1 HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY viii (1817) (similar); 9 HOLDSWORTH, *supra*, at 335 (“We have seen that, by the end of the seventeenth century, the principles of equity had begun to develop into a fixed system. But this development had only just begun; and it was not till the following century that this process was completed.” (footnote omitted)); PLUCKNETT, *supra*, at 692 (“It is in the period from the Restoration in 1660 down to the beginning of the eighteenth century that equity finally achieves its new form of a consistent and definite body of rules, and the chancellors accept the conclusion that equity has no place for a vague and formless discretion.”).

⁴³ 9 HOLDSWORTH, *supra*, at 343, 379, 394; 1 J. C. PERKINS, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 351 (1st Am. ed. 1846).

⁴⁴ See 1 PERKINS, *supra*, at 360 (explaining that a bill had to contain “a prayer for relief suitable to [the plaintiff’s] case”).

⁴⁵ 9 HOLDSWORTH, *supra*, at 344 (“[T]here emerged a body of rules as to which of these various types of bill it was proper to file in different circumstances . . . —rules which may be compared with the common law rules as to the differences between the forms of action.”); *Jenkins*, 515 U.S. at 127 (Thomas, J., concurring) (“Each . . . specific action[] . . . called for a specific equitable remedy.”); see also, e.g., 2 MADDOCK, *supra*, at *144–56 (listing the necessary parties for many different kinds of bill); cf. 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 135, at 118 (1881) (commenting on “the English national devotion to established forms” in equity).

⁴⁶ 1 MADDOCK, *supra*, at *138.

⁴⁷ *Id.* at *139.

between two persons only,”⁴⁸ or where the plaintiff claimed a right to land “in contradiction to a public right.”⁴⁹ Or take a “bill to establish a modus,” which could be used to obtain an order that the plaintiff pay money instead of tithes (a portion of the plaintiff’s crops), but only after the plaintiff had been sued for those tithes, and only if the plaintiff was a landowner, not merely an occupier of the land.⁵⁰

Or consider injunctions, perhaps the most familiar aspect of equity practice. An individual could file a bill for an injunction to put an end to litigation in a court of law, but only “in such cases [] as concern mere civil rights.”⁵¹ A bill “brought for relief against a proceeding at law upon a criminal prosecution . . . or any writ which is mandatory and not remedial” would be dismissed.⁵² Again, the entitlement to a remedy and the right to proceed by bill were coextensive.⁵³

B. Equity at the Founding

This more developed version of equity made its way over to the newly independent states. As Justice Story explained, “[i]n England, and in the American States, which have derived their jurisprudence from that parental source, Equity has a restrained and qualified meaning.”⁵⁴ That is, there were “certain principles, on which Courts of Equity act[ed], which [we]re very well settled. . . . Courts of Equity ha[d], in this respect, no more discretionary power than Courts of Law.”⁵⁵

Still, many Americans were distrustful of equity. Among the skeptics were the Anti-Federalists, who objected to the Framers’ proposal to extend the judicial power to cases “in equity,”⁵⁶ fearing that the phrase “mean[t] to give the judge a discretionary power,”⁵⁷ unconstrained by “any fixed or established rules.”⁵⁸ The Federalists, Hamilton chief among them, responded that “the principles by which that relief [was] governed [were] now reduced

⁴⁸ *Id.* at *140 (emphasis omitted).

⁴⁹ *Id.* at *139.

⁵⁰ *Id.* at *202.

⁵¹ JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL 120 (2d ed. 1787).

⁵² *Ibid.*

⁵³ Bellia, *supra*, at 784 (“[A] plaintiff had a cause of action at law or in equity only if judicial relief was available through a particular form of proceeding.”).

⁵⁴ 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 25, at 21 (2d ed. 1839).

⁵⁵ *Id.* § 20, at 18; *see also* Bellia, *supra*, at 790 n.45.

⁵⁶ U.S. CONST. art. III, § 2.

⁵⁷ Federal Farmer XV, in 2 THE COMPLETE ANTI-FEDERALIST 322 (H. Storing ed. 1981).

⁵⁸ Brutus XI, in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 420.

to a regular system.”⁵⁹ And, years later, Justice Story devoted thirty pages of his authoritative treatise on equity to addressing the charge that equity had no principled limits.⁶⁰

The distrust resurfaced when it came time for Congress to establish the federal courts.⁶¹ It did not help that the States had taken drastically different approaches to incorporating equity into their respective legal systems—a consequence of “[e]quity’s mixed reception in the colonies.”⁶² “In some states in the union, no court of chancery exist[ed] to administer equitable relief.”⁶³ “In some of the those states, courts of law recognize[d] and enforc[e]d . . . all the equitable claims and rights.”⁶⁴ “[I]n others, all relief [was] denied and [] equitable claims and rights [were] to be considered as mere nullities at law.”⁶⁵ The result was that “the deviations in America from the established principles of equity were far more considerable than from those of the common law.”⁶⁶

Congress’s solution was to adopt the equitable principles that subsisted in England, where—as even the Anti-Federalists conceded—“[t]he word equity . . . had . . . acquired a precise meaning,” and “chancery proceedings [had been] reduced to system.”⁶⁷ Congress implemented this solution through the Process Act of 1792, which provided that “the forms and modes of proceeding in suits . . . of equity . . . [were to be] according to the principles, rules, and usages which belong[ed] to the courts of equity . . . , as contradistinguished from courts of common law.”⁶⁸ The early Supreme Court interpreted this passage to mean that “the

⁵⁹ THE FEDERALIST NO. 83, at 504 n. (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶⁰ STORY, *supra*, at 1–30.

⁶¹ See Bellia & Clark, *supra*, at 613 (explaining that “anti-Federalist concerns about consolidated national power at the expense of the states” influenced Congress’s decisions when creating the lower federal courts in 1789).

⁶² Kristin A. Collins, “*A Considerable Surgical Operation*”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L. J. 249, 267 (2010).

⁶³ *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222 (1818).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*; see also Federal Farmer XV, in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 322 (“In New-England, the judicial courts have no powers in cases in equity, except those dealt out to them by the legislature, in certain limited portions, by legislative acts. In New-York, Maryland, Virginia, and South Carolina, powers to decide, in cases of equity, are vested in judges distinct from those who decide in matters of law.”).

⁶⁶ Joseph Story, *Address Delivered before the Members of the Suffolk Bar, at their Anniversary, at Boston* (Sept. 4, 1821), in THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL, AND POLITICAL, OF JOSEPH STORY, LL.D., NOW FIRST COLLECTED 405, 425 (1835); see also Collins, *supra*, at 268.

⁶⁷ Federal Farmer XV, in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 322.

⁶⁸ Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. Congress had passed a temporary Process Act in 1789, but its direction that equitable proceedings follow “the civil law,” Act of Sept. 29, 1789, ch. 21 § 2, 1 Stat. 93, 94, caused confusion. See Collins, *supra*, at 270 & n.92. In 1828,

[equitable] remedies in the courts of the United States, [were] to be, . . . not according to the practice of state courts, but according to the principles of . . . equity, as distinguished and defined in that country from which we derive our knowledge of those principles.”⁶⁹ In other words, federal courts were to look to the jurisprudence of English Chancery practice at the time of the Founding, and not to state law, to determine whether a party was entitled to an equitable remedy.⁷⁰

This “equitable remedial rights doctrine”⁷¹ soon became “settled doctrine.”⁷² And it had serious teeth. Recall that, unlike today, a court could not simply award equitable relief to any plaintiff with a meritorious cause of action—specific kinds of equitable relief were tied to specific kinds of equitable actions. So the power over remedies was not just the power over the ultimate relief; it was also the power to say what kinds of bills were deserving of particular kinds of equitable relief—that is, the power to determine in what kinds of cases a plaintiff had

Congress extended the 1792 Act to States admitted to the Union after 1789. *See* Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278-80.

⁶⁹ *Robinson*, 16 U.S. (3 Wheat.) at 222–23; Collins, *supra*, at 274–75 (“By the late 1810s, it was [] well established that a uniform corpus of remedies applied in actions brought in federal equity cases, remedies that were derived from federal and English sources rather than state law or state equity principles.”).

⁷⁰ *See Mayer v. Foulkrod*, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (Washington, Circuit Justice) (“[A]s to suits in equity, state laws, in respect to remedies, whether prior or subsequent to the [Process] [A]ct of 1792, could have no effect whatever on the jurisdiction of the court, the act having prescribed a rule, by which the line of partition between the law and equity jurisdiction of those courts is distinctly marked.”); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832) (“In the exercise of [equity] jurisdiction, the courts of the United States are not governed by the state practice, but the Act of congress of 1792, ch. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of law.”); *Pennsylvania v. Wheeling & Bridge Co.*, 54 U.S. (13 How.) 518, 563–64 (1851) (“The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. . . . [W]here relief can be given by the English chancery, similar relief may be given by the courts of the Union.”); Collins, *supra*, at 276–77 (“[E]quitable remedies in federal court would conform to a national standard and default to English chancery practice, regardless of the remedies available in the forum state courts, in law or equity. This would be so even when those state remedies were defined in a statute, and even when those remedies would result in a different outcome.”).

⁷¹ *See* Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 220 & n.12 (2018).

⁷² *Boyle*, 31 U.S. (6 Pet.) at 658; *accord Fletcher v. Morey*, 9 F. Cas. 266, 270 (C.C.D. Mass. 1843) (Story, Circuit Justice) (“[I]t has been long [] settled in the courts of the United States, that the equity jurisdiction and equity jurisprudence administered in the courts of the United States are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular state, where the court sits.”).

a “right to proceed in a federal court sitting in equity.”⁷³ That meant recognizing causes of action that weren’t provided for by state law and that couldn’t be found in federal statutes.⁷⁴

Take *Fletcher v. Morey*,⁷⁵ an 1843 decision by Justice Story in a diversity suit. Fletcher filed a “bill assert[ing] an equitable lien against” the property of Morey “as security for advances [Fletcher] made . . . under [a Massachusetts] agreement.”⁷⁶ Concluding that “there [was] an[] equitable lien . . . under the agreement, which ought to be enforced specifically in equity,” Justice Story relied almost exclusively on English precedent.⁷⁷ And he rejected Morey’s argument that Fletcher would not have been able to bring a bill for an equitable lien in Massachusetts state court:

It is no answer to say, that no remedy is provided for the enforcement of such liens by the state jurisprudence in the state courts. . . . [I]t has been long since settled in the courts of the United States, that the equity jurisdiction and equity

⁷³ *Kelleam v. Md. Cas. Co.*, 312 U.S. 377, 382 (1941); *see also, e.g., Pusey & Jones Co. v. Hansssen*, 261 U.S. 491, 494–95, 499 (1923) (refusing to enforce a state statute permitting unsecured creditors of an insolvent company to file a bill to have a receiver appointed because federal courts did not traditionally recognize that kind of bill and “that which the [state] statute confer[red] [was] merely a remedy”); 1 POMEROY, *supra*, § 91, at 76 (“Remedial rights are those which a person has to obtain some appropriate remedy when his primary rights have been violated by another.”); 2 JOHN BOUVIER, *A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW* 340–41 (1839) (“The remedies for the enforcement of contracts are generally by action,” with the “form of these depending on the nature of the contract”); *id.* at 342 (“If the injury affect . . . an equitable right, or if it can be better investigated in a court of equity, then the remedy is by bill.” (emphasis omitted)); Comment, *The Equitable Remedial Rights Doctrine*, 55 YALE L.J. 401, 411 (1945) (explaining that “remedial” “sometimes refer[red] to the ultimate relief granted by a court,” but “frequently” had a broader meaning that included the entitlement to file suit).

⁷⁴ Bellia & Clark, *supra*, at 616 (“[T]he Process Act[] . . . adopted . . . traditional forms of proceeding in equity . . . as the causes of action available in federal court.”); Morley, *supra*, at 238 (“Uniform, federally established equitable standards governed all aspects of injunctive relief in both federal question and diversity cases, including whether such relief was available in a particular case.”); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 107 (1997) (“Federal courts, moreover, followed federal notions of who was a proper claimant in equity. Particularly, the desire to enforce federal rights in diversity suits could lead to recognition of a right of action . . . in federal court for persons who likely would have been unable to sue in state court under comparable circumstances.” (footnote omitted)).

⁷⁵ 9 F. Cas. 266.

⁷⁶ *Id.* at 269–70.

⁷⁷ *See id.* at 270.

jurisprudence administered in the courts of the United States are coincident and co-extensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular state, where the court sits.⁷⁸

Fletcher typifies early equity practice in federal court. There was no state cause of action, and no provision of federal law explicitly permitting a plaintiff to bring a bill in federal court to enforce a contractually created equitable lien. But federal courts considered themselves capable of affording traditional equitable remedies. And that meant recognizing traditional equitable causes of action.

C. Evaluating *Young* against Historical Practice

History explains why the *Ex parte Young* Court believed it had the power to announce non-statutory equitable causes of action. But understanding this history is only half the battle. We must still compare the bill in *Young* to equitable actions brought in the English Court of Chancery in 1789—a consideration the Supreme Court continues to treat as dispositive.

Consider *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,⁷⁹ where the Supreme Court addressed whether a district court, “in an action for money damages,” “has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed.”⁸⁰ To resolve that issue, it asked “whether the relief [plaintiffs] requested . . . was traditionally accorded by courts of equity”—specifically, the “High Court of Chancery in England” in 1789.⁸¹ The answer was no.⁸² True, courts had traditionally entertained “creditor[s] bills” to prevent fraudulent conveyances, but those bills “could be brought only by a creditor who had already obtained a judgment establishing the debt.”⁸³ Refusing to recognize a new form of equitable relief, the Court rejected the dissent’s demand to expand the equity power of the federal courts beyond its traditional scope: “To accord a type of relief that has never been available before . . . is to invoke a default rule[] not of flexibility but of omnipotence.”⁸⁴

The question we must ask is therefore the same whether we consider history relevant for its own sake,⁸⁵ or we look to history because that is what *Grupo Mexicano* demands: In the late eighteenth century in England, could a plaintiff have maintained a bill in equity simply by arguing that a government officer was violating or was about to violate his rights?

⁷⁸ *Id.* at 270–71.

⁷⁹ 527 U.S. 308 (1999).

⁸⁰ *Id.* at 319.

⁸¹ *Ibid.*

⁸² *Id.* at 320–21.

⁸³ *Id.* at 319.

⁸⁴ *Id.* at 322 (quotation and citation omitted).

⁸⁵ See *Official Immunity*, *supra*, at 4 (“English [legal history] matters to the originalist enterprise.”).

The answer is, assuredly, no. As Professor James Pfander has explained, “early equity concerned itself primarily with the enforcement of private rights (contract and property) and rarely offered relief in connection with public-law disputes.”⁸⁶ Public accountability came in the courts of law through damages actions (against officials other than the Crown)⁸⁷ and the prerogative writs,⁸⁸ not in the Court of Chancery through the injunction. On that point, Lord Chief Justice Coke could not have been clearer:

[T]o *this court of King’s Bench* belongs authority[] . . . to correct errors . . . and misdemeanors . . . tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law.⁸⁹

In other words, judicial oversight of public officials was a matter for King’s Bench—for the law courts, not for Chancery. What’s more, the applicability or validity of the law under which an official acted would have been litigated only if the official raised that law as a defense.⁹⁰ There was no general entitlement to sue to enjoin an officer from enforcing a law.

⁸⁶ James E. Pfander & Wade Formo, *The Past & Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 728 n.25 (2020); see also Pfander & Wentzel, *supra*, at 1278 n.36 (“In England and the United States alike, courts of equity rarely engaged with matters of public law until well after 1789.”); M. H. Matthews, *Injunctions, Interim Relief and Proceedings against Crown Servants*, 8 OXFORD J. L. STUD. 154, 154 (1988) (noting “[t]he unavailability of injunctive relief against the Crown or its servants in English law”); Bernard Schwartz, *Forms of Review Action in English Administrative Law*, 56 COLUM. L. REV. 203, 214 (1956) (“The injunction . . . has not been important as a method of judicial review in English administrative law. The reason is that injunctions have never been available against the Crown or its servants.”); GOODNOW, *supra*, at 422 (“Originally, . . . the injunction does not seem to have been made use of commonly against officers.”).

⁸⁷ See *Sovereign Immunity*, *supra*, at 1, 15–16. For example, *Wilkes v. Wood* and *Entick v. Carrington*, two foundational English cases that influenced the framing of the Fourth Amendment, were common-law actions for damages for trespass. See *id.* at 15–16; *Official Immunity*, *supra*, at 12–14.

⁸⁸ See *supra* note 37 and accompanying text.

⁸⁹ *James Bagg’s Case*, (1615) 77 Eng. Rep. 1271, 1277–78 (footnote omitted) (emphasis added); see also S. A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L. J. 40 (1951).

⁹⁰ See Sina Kian, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of Hans v. Louisiana and Ex parte Young*, 61 STAN. L. REV. 1233, 1247 (2009) (“[W]hen an officer claimed a law or other authorization as his defense, the court was invited to review the validity of such an authorization.”); Edward A. Purcell, Jr., *Ex parte Young and the Transformation of the Federal Courts, 1890-1917*, 40 U. TOL. L. REV. 931, 964 (2009) (“Prior to *Young*, plaintiffs suing government officials . . . resorted to the Constitution only in reply to negate an official’s defense of lawful authority.”).

It is no surprise, then, that attempts to find a historical equivalent to the *Ex parte Young* cause of action typically focus on the legal prerogative writs, not on English Chancery practice.⁹¹ The Supreme Court, for example, has said that “[t]he ability to sue to enjoin unconstitutional actions by state and federal officials is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.”⁹² But the source the Court cited recounts the role of mandamus and certiorari—two prerogative writs issued by King’s Bench, a law court, not the equitable Court of Chancery—in supplying a mechanism for judicial review.⁹³

More recent attempts to explain *Young* as a form of anti-suit injunction⁹⁴ are also difficult to square with historical equity practice. Eighteenth-century English courts would not grant an injunction against the sovereign.⁹⁵ And, as we noted earlier, criminal prosecutions could not be enjoined.⁹⁶ Nor could injunctions be used to stop legal proceedings merely because a party asserted an irreparable harm. Rather, equity would only interfere if the party invoked an equitable defense that the law courts would not recognize, such as fraud, mistake, or accident⁹⁷—none of which were at play in the litigation that gave rise to *Young*.

These limitations on the use of equitable bills made their way into early American practice. Justice Story was emphatic that “Courts of Equity . . . will not interfere to stay proceedings in any criminal matters, or in any cases not strictly of a civil nature.”⁹⁸ And

⁹¹ See, e.g., Pfander & Wentzel, *supra*, at 1292 (“To understand the origins of specific relief against unlawful executive action, one must shift the focus from the traditions of equity to those of common law.”); *id.* at 1292 n.112 (recognizing “the traditional inability of the High Court of Chancery to enjoin the Crown or its officers”); James E. Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government*, 91 NW. U. L. REV. 899, 968 (1997) (“[C]ommon-law rights of action against government officers provided the predicate for . . . *Ex parte Young*.”).

⁹² *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (citing Louis L. Jaffe & Edith Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956)).

⁹³ See Jaffe & Henderson, *supra*, at 350–61.

⁹⁴ See John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989 (2008).

⁹⁵ 3 BLACKSTONE, *supra*, at *428–29 (“Nor can chancery give any relief against the king, or direct any act to be by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee.”); PERKINS, *supra*, at 164; James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 194 (2016); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 425 (2017).

⁹⁶ See *supra* note 52 and accompanying text.

⁹⁷ See, e.g., 1 MADDOCK, *supra*, at *111; MITFORD, *supra*, at 116.

⁹⁸ 2 STORY, *supra*, § 893, at 177; see also 4 POMEROY, *supra*, § 1361, at 2701–02 (“The principle is well established, and is universal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action . . . although it may be demonstrated that the complainant in equity (generally the

contemporary treatise writers agreed that anti-suit injunctions were available only to vindicate the equitable defenses of fraud mistake, and accident.⁹⁹

It was also settled that “State Courts [could not] enjoin proceedings in the Courts of the United States; nor the latter in the former Courts.”¹⁰⁰ Justice Story explained that a federal court, “as a court of equity, possesses no revisory power over the acts of the state tribunals in the exercise of their jurisdiction. It has no authority to compel them to do their duty, or to abstain from the exercise of their functions. It belongs *ad alium examen* [to another tribunal].”¹⁰¹ State courts, he continued, were “entirely competent to administer full relief in the suits pending therein.”¹⁰²

History, then, cannot completely explain *Young*’s bill in equity. Equity at the Founding was not a free-floating warrant to do justice, but a fixed set of known principles.¹⁰³ Early federal courts understood themselves to have the power to apply those principles by recognizing traditional equitable bills. An injunction to halt the enforcement of an unconstitutional law was not among them. In 1789, a bill like the one the railroad shareholders filed would have been dismissed for failure to state a claim.

III. YOUNG IN THE MODERN WORLD

If the *Ex parte Young* cause of action is at odds with the Founding-era understanding of federal equitable power, why was the Court so confident about its decision? Well, not for the first time, the Anti-Federalists proved to be right.¹⁰⁴ What started as a directive to federal courts to follow fixed Chancery practice morphed into something much less constrained.

defendant at law) had a valid legal defense.”); *id.* § 1361, at 2702 n.4 (“Criminal proceedings will never be enjoined.”); David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 84–87 (2011) (explaining that the treatises on which Professor Harrison relied concerned injunctions against *civil* actions and that many of the same treatises expressly ruled out the possibility of enjoining criminal proceedings); Pfander & Wentzel, *supra*, at 1339–42 (explaining that Harrison’s account cannot be squared with traditional equity practice).

⁹⁹ See Pfander & Dwinell, *supra*, at 212–13 & nn. 237–38.

¹⁰⁰ 2 STORY, *supra*, § 900, at 185–86; see also JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 348 (1863) (“Nor will the courts of the United States enjoin proceedings in a state court.”).

¹⁰¹ *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1322 (C.C.D. Mass. 1845) (Story, Circuit Justice).

¹⁰² 2 STORY, *supra*, § 900, at 185–86.

¹⁰³ Bellia & Clark, *supra*, at 675 (“No matter how broad [federal] discretion [over equity], Congress did not give federal courts free reign to derive or create causes of action from ambient general law in cases of equity.”).

¹⁰⁴ See, e.g., Andrew S. Oldham, *The Anti-Federalists: Past as Prologue*, N.Y.U. J.L. & LIBERTY 451, 459–60 (2019) (recounting the Anti-Federalists’ warning that the immorality of slavery would inevitably lead to national unrest).

As the author of a treatise on equity observed a year after *Young*, “[t]he federal courts of equity, though professing to enforce the general jurisprudence of the English court of chancery, have nevertheless built up a distinct system of equitable doctrines, suited to the needs of the community and civilization over which they exercise judicial authority.”¹⁰⁵ Application of this distinct system led federal courts to recognize substantive equitable rights even in diversity cases where state law required a different outcome.¹⁰⁶ And, in 1851, the Supreme Court announced that it considered federal equity power to be “the common law of chancery,”¹⁰⁷ mirroring its roughly contemporaneous assertion in *Swift v. Tyson* that federal courts had the power to disregard state courts and determine diversity cases at law on the basis of “general principles and doctrines of commercial jurisprudence.”¹⁰⁸

But our conception of federal courts has come a long way since *Swift*. And it is unclear whether the Supreme Court would recognize the *Ex parte Young* cause of action if the Court considered the case for the first time today.

A. The Evolution of American Equity

Ex parte Young’s cause of action is a little less of a mystery when treated as a creature of federal equitable common law. So understood, *Young* represents the end point of a century-

¹⁰⁵ 1 THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE § 94, at 58 (1909).

¹⁰⁶ See, e.g., *Fletcher*, 9 F. Cas. at 270 (enforcing an equitable lien that was unenforceable under State law); *Flagg v. Mann*, 9 F. Cas. 202, 223 (C.C.D. Mass. 1837) (Story, Circuit Justice) (concluding that the parties were tenants in common and that a contrary ruling by Massachusetts’s highest court in a case brought by the same parties was not “conclusive upon this court”); *Lamson v. Mix*, 14 F. Cas. 1055, 1056 (C.C.S.D.N.Y. 1837) (“The state laws furnish the rule of decision in the courts of the United States in cases at common law. But the equity jurisdiction of those courts is one and the same in every state, and is in no respect dependent upon the local law.” (citation omitted)); Collins, *supra*, at 277, 287–90 (discussing these and other decisions); *Boyle*, 31 U.S. (6 Pet.) at 654 (“The chancery jurisdiction given by the constitution and laws of the United States, is the same in all the states of the union, and the rule of decision is the same in all.”); *Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130, 137 (1887) (“While the courts of the Union are required by the statutes creating them to accept, as rules of decision in trials at common law, the laws of the several states, except where the constitution, laws, treaties, and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit.”).

¹⁰⁷ *Wheeling & Bridge Co.*, 54 U.S. (13 How.) at 563.

¹⁰⁸ 41 U.S. (16 Pet.) 1, 22 (1842); see also Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 619 (2001) (“As was true in actions at law that were explicitly governed by the Rules of Decision Act, the substantive law that applied in federal equity proceedings was frequently either federal or general law rather than state law.”); Morley, *supra*, at 244 (“Equity came to resemble the ‘general law’ that federal courts applied on the common law side of their dockets.”).

long equitable mission creep—the contours of federal equitable power shifting almost imperceptibly year-on-year, but in the long-run departing dramatically from equity’s English origins.¹⁰⁹

Start with *Osborn v. Bank of United States*,¹¹⁰ one of the Court’s earliest departures from English practice.¹¹¹ *Osborn* involved an Ohio law that levied a sizable annual tax on the Bank of the United States.¹¹² The law empowered the State auditor, Ralph Osborn, to collect the tax by walking into the Bank and taking goods and money equal to the value of the tax.¹¹³ The Bank sought and received an order from a federal court enjoining Osborn from executing the law, which the Bank considered unconstitutional.¹¹⁴ But Osborn, it seems, ignored the injunction. One “J. L. Harper, who was employed by Osborn to collect the tax, and well knew that an injunction had been allowed, proceeded by violence to the office of the Bank at Chilicothe, and took therefrom 100,000 dollars, in specie and bank notes, belonging to, or in deposit with, the [Bank].”¹¹⁵ Harper then delivered the funds to the State treasurer, and the Bank obtained a new injunction preventing Osborn, Harper, and the treasurer from “using or paying away the coin or notes taken from the Bank.”¹¹⁶

Osborn argued that the injunctions should not have been granted “[b]ecause[] the case made in the bill d[id] not warrant the interference of a Court of chancery by injunction”¹¹⁷—after all, public-law disputes were not traditionally the stuff of equity. The unlawful invasion of private property, even by public officials, was traditionally actionable at law for trespass and remediable by damages.¹¹⁸ And the adequacy of a legal remedy was an absolute bar to a suit in equity.¹¹⁹

¹⁰⁹ See Shapiro, *supra*, at 85–86 (“[T]he *Young* Court . . . appeared not to be relying on common law tradition (or on state law) so much as extending those traditions by analogy to the cases allowing relief against more traditional violations of property rights by federal and state government officials.”).

¹¹⁰ 22 U.S. (9 Wheat.) 738 (1824).

¹¹¹ See Pfander & Wentzel, *supra*, at 1283–84 (explaining that *Young* “[b]uil[t] on a principle first embodied in *Osborn*.”).

¹¹² *Osborn*, 22 U.S. (9 Wheat.) at 740.

¹¹³ *Ibid.*

¹¹⁴ *Id.* at 740–41.

¹¹⁵ *Id.* at 741.

¹¹⁶ *Id.* at 742.

¹¹⁷ *Id.* at 828.

¹¹⁸ See *id.* at 840; cf. *Official Immunity*, *supra*, at 13–15.

¹¹⁹ Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (“[S]uits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.”).

But Chief Justice Marshall was no fool. He affirmed the grant of the injunction, even while acknowledging that an injunction “ha[d] [n]ever been granted in such a case as this.”¹²⁰ He observed that injunctions were frequently issued “to restrain a person from violating an exclusive privilege” or “franchise” “by participating in it.”¹²¹ True enough—traditionally, an injunction was often available to protect a plaintiff’s right of exclusivity over property like a patent or copyright.¹²² But Osborn was not attempting to exercise an exclusive privilege or franchise held by the Bank.

That otherwise important distinction was no obstacle to the Chief Justice. He reasoned that the effect of the tax would be “to disable the [*Bank*] from using it[s] privilege” through the “total destruction of its franchise, of its chartered privileges, so far as respected the State of Ohio.”¹²³ And because “the injury is greater if the whole privilege be destroyed than if it be divided” through unauthorized use, Marshall opined that “the reason for the interference of the court [was] strengthened [rather] than weakened.”¹²⁴

The Chief Justice thus transformed a traditional injunction for enforcing the exclusivity of a property right into something more amorphous and less rooted in history.

Of course, *Osborn* alone would not have been enough to justify the bill in *Young*. The cause of action recognized in *Osborn* rested on an expansive theory of trespass, a common-law tort, rather than a belief that a constitutional wrong is always a basis for the exercise of federal equity jurisdiction.¹²⁵ And as late as 1888, the Supreme Court (in *In re Sanyer*) treated as void an injunction to restrain a state prosecution because “it ha[d] been settled in England that a bill to stay criminal proceedings [was] not within the jurisdiction of the Court of Chancery.”¹²⁶

But the equitable creep continued. In *Davis & Farnum Manufacturing Co. v. Los Angeles*,¹²⁷ the Supreme Court again rejected an attempt to enjoin an official from enforcing a criminal law. The Court affirmed the dismissal of the bill on the basis that the plaintiff had an adequate remedy at law.¹²⁸ And, in dicta, it offered a somewhat confusing summary of the holding in *In re Sanyer*:

That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of

¹²⁰ *Osborn*, 22 U.S. (9 Wheat.) at 841.

¹²¹ *Ibid.*

¹²² See, e.g., 2 STORY, *supra*, §§ 930–31, at 209–210.

¹²³ *Osborn*, 22 U.S. (9 Wheat.) at 840–41.

¹²⁴ *Id.* at 841.

¹²⁵ See *infra* note 134 and accompanying text.

¹²⁶ 124 U.S. 200, 210, 221 (1888).

¹²⁷ 189 U.S. 207 (1903).

¹²⁸ *Id.* at 220–21.

the rights of property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray in *In re Sanyer*, that no further reference to prior authorities is deemed necessary.¹²⁹

It is unclear whether the Court meant that federal courts had “no general power to enjoin or stay criminal proceedings . . . or to prohibit the invasion of the rights of property,” or if it meant that “the invasion of the rights of property” was an *exception* to the general rule against enjoining criminal proceedings. If the Court believed that *Sanyer* carved out a property-rights exception to the injunction bar, it is not clear why. *Sanyer* mentioned property rights only in the course of its *rejection* of the power to enjoin prosecutions:

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses . . . is to invade the domain of the courts of common law.¹³⁰

No matter. In 1904, the Court cited *Davis* for the proposition that “[i]t is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity.”¹³¹ It seems, then, that over the course of just two decisions, the Supreme Court identified an exception that has no obvious source,¹³² and then made this exception the general rule, available for the Court to employ in *Young*.

Still, the Court in *Young* had one more step to take. As Justice Perkins explained, “the injury complained of” in *Osborn* and its progeny was “an actual and direct trespass upon or interference with tangible property.”¹³³ That is, the earlier cases followed the traditional rule that a plaintiff could sue an official only by identifying a breach of a common-law right (such as trespass to property).¹³⁴ But, in *Young*, the injury (as Justice Perkins understood it) was not

¹²⁹ *Id.* at 217.

¹³⁰ *Sanyer*, 124 U.S. at 210.

¹³¹ *Dobbins v. Los Angeles*, 195 U.S. 223, 241 (1904).

¹³² See Shapiro, *supra*, at 86 n.70 (observing that the exception does not appear in contemporaneous treatises or pre-*Dobbins* decisions).

¹³³ *Young*, 209 U.S. at 167.

¹³⁴ See *In re Ayers*, 123 U.S. 443, 499 (1887) (“There is nothing[] . . . in the judgment in [*Osborn*], as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank, which consisted of the unlawful seizure and detention of its property. It was conceded throughout the case, in the argument at the bar and in the opinion of the court, that an action at law would lie, either of trespass or detinue, against the defendants as individual trespassers guilty of a wrong in taking the property of the complainant illegally.”);

a specific common-law tort but “the threatened commencement of [a] suit[] . . . to enforce [an] act.”¹³⁵ The Court brushed away this once-dispositive distinction with little effort: “The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act is not of a radical nature.”¹³⁶

With that, a century-long process of equitable expansion through analogy was complete. The Court had shifted “from the granting of relief against wrongs to tangible property to the granting of relief against the constitutional wrong of enforcing an invalid law.”¹³⁷

B. The Rejection of Federal Common Law

Whatever the propriety of *Ex parte Young*’s bill in equity in 1908 (when *Young* was decided), the notion that federal courts can engage in general common-law rulemaking was put to rest in *Erie Railroad Co. v. Tompkins*¹³⁸ and *Guaranty Trust Co. v. York*.¹³⁹

Purcell, *supra*, at 964 (“Prior to *Young*, plaintiffs suing government officials had to plead a common-law cause of action and resorted to the Constitution only in reply to negate an official’s defense of lawful authority.”).

¹³⁵ *Young*, 209 U.S. at 167; *see also id.* at 192 (Harlan, J., dissenting) (“There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, a wrong or trespass, and a *suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State.*”).

¹³⁶ *Young*, 209 U.S. at 167.

¹³⁷ Shapiro, *supra*, at 87; *see also* Henry M. Hart, Jr., *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954) (explaining that “[t]he Court . . . came to neglect” its trespass theory and “[b]y almost imperceptible steps it appears to have come to treat the remedy of injunction as conferred directly by federal law for any abuse of state authority which the view of federal law ought to be remediable”); Woolhandler, *supra*, at 131–32 (explaining how “the concept of the general law trespass began to fade, to be replaced with a cause of action that was perceived to be constitutionally sourced” and that “form[ed] the basis of modern constitutional implied rights of action”); Pfander & Wentzel, *supra*, at 1276 (“Courts in the United States relied on English common law forms to oversee the nascent administrative state, well into the nineteenth century. Then, slowly, as the courts of equity came to perceive common law remedies as inadequate, they offered injunctive relief that drew its inspiration from the common law. . . . By the early twentieth century, the transition from law to equity in public law was largely complete. In 1908, building on common law antecedents, *Ex parte Young* confirmed and solidified the federal judicial power to oversee governmental action through injunctive remedies.”).

¹³⁸ 304 U.S. 64 (1938).

¹³⁹ 326 U.S. 99 (1945).

i. *Erie*

In *Erie*, the Supreme Court “correct[ed]” the “unconstitutional assumption of [lawmaking] powers by the Courts of the United States”.¹⁴⁰ The “Constitution . . . vests the federal government’s ‘legislative Powers’ in Congress and reserves most other regulatory authority to the States.”¹⁴¹ Federal causes of action are therefore Congress’s to authorize.¹⁴² And federal courts cannot “formulate federal common law” causes of action merely because Congress “vested jurisdiction in the[m].”¹⁴³

Because of *Erie*, identifying the cause of action in federal litigation today is usually a simple affair. For diversity cases, state law provides it.¹⁴⁴ For federal-question cases, courts generally look to federal statutes.¹⁴⁵ Specifically, courts must “determine . . . whether a legislatively conferred cause of action encompasses [that] particular plaintiff’s claim.”¹⁴⁶ In other words, courts “ask[] whether this particular class of persons ha[s] a right to sue under this substantive [federal] statute.”¹⁴⁷ This inquiry helps courts stay in their lane: reliance on Congressionally-enacted statutes forbids a court from “apply[ing] its independent policy judgment to recognize a cause of action that Congress has denied” or “limit[ing] a cause of action that Congress has created.”¹⁴⁸

And how do courts determine if a federal statute authorizes a cause of action? Simply put, they look at the text. For instance, the text of the cause of action provided by the Administrative Procedure Act is not hard to find: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a

¹⁴⁰ *Erie*, 304 U.S. at 79; see also *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (“[T]here is ‘no federal general common law.’” (quoting *Erie*, 304 U.S. at 78)); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (“Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.”); Andrew S. Oldham, *Sherman’s March (In)to the Sea*, 74 TENN. L. REV. 319, 325 (2007).

¹⁴¹ *Rodriguez*, 140 S. Ct. at 717.

¹⁴² *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.”).

¹⁴³ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–42 (1981); cf. *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (“With the demise of federal general common law, a federal court’s authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress.”).

¹⁴⁴ See 28 U.S.C. § 1652; *Erie*, 304 U.S. at 78.

¹⁴⁵ See *Gunn v. Minton*, 568 U.S. 251, 257–58 (2013).

¹⁴⁶ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014).

¹⁴⁷ *Ibid.* (quotation omitted).

¹⁴⁸ *Id.* at 128; cf. *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (“Federal courts, it was early and famously said, have ‘no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.’” (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))).

relevant statute, is entitled to judicial review thereof.”¹⁴⁹ And the text of the Clean Water Act provides, among other things, a capacious cause of action for “any citizen” “against any person . . . who is alleged to be in violation” of “an effluent standard or limitation” or “an order issued” about such “standard or limitation.”¹⁵⁰ In the main, “using traditional tools of statutory interpretation,” the statutes tell the courts who can sue, who can be sued, and the remedies available.¹⁵¹

Sometimes the inquiry is less straightforward because the Supreme Court has inferred a cause of action from a statute that is silent on the issue.¹⁵² Nevertheless, in these implied-cause-of-action cases, the text of the statute remains paramount.¹⁵³ After all, “a plaintiff suing under an implied right of action still must show that the statute manifests an intent ‘to create not just a private right but also a private remedy.’”¹⁵⁴ But “where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit.”¹⁵⁵

No matter how the cause-of-action inquiry proceeds—explicitly or implicitly—the Congressionally-enacted text remains the lodestar. At times, the text has provided the slenderest of reeds. For instance, in interpreting the Alien Tort Statute, the Supreme Court held that this apparently “jurisdictional” statute was phrased in such a way as to show “the common law would provide a cause of action for [a] modest number of international law violations.”¹⁵⁶ But still the Court relied on some text, somewhere.

ii. *Guaranty Trust*

It did not take long for the Supreme Court to realize that its approach to general federal law in *Swift v. Tyson* was a symptom of a wider disease that had extended to equity.¹⁵⁷ So, in

¹⁴⁹ 5 U.S.C. § 702.

¹⁵⁰ 33 U.S.C. § 1365.

¹⁵¹ *Lexmark*, 572 U.S. at 127.

¹⁵² See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979).

¹⁵³ *Alexander*, 532 U.S. at 286.

¹⁵⁴ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Alexander*, 532 U.S. at 286).

¹⁵⁵ *Id.* at 286.

¹⁵⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004); see 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”). But see Bellia & Clark, *supra*, at 612 (arguing that “the claim that early federal courts relied on ‘the common law’ in the abstract to supply causes of action in civil suits rests on a false historical premise”).

¹⁵⁷ *Guar. Tr.*, 326 U.S. at 102 (“[T]he real significance of *Swift v. Tyson* lies in the fact that it did not enunciate novel doctrine. Nor was it restricted to its particular situation. It summed up prior attitudes and expressions in cases that had come before this Court and lower federal courts for at least thirty years, at law as well as in equity.”).

Guaranty Trust, the Court confirmed that “the principle of *Erie*,” which was “an action at law,” “extended” “to [] suit[s] in equity.”¹⁵⁸

The Process Act could not stand in the way of this holding. The Court took the view that the statute served no purpose: “[T]his enactment gave the federal courts no power that they would not have had in any event when courts were given ‘cognizance,’ by the first Judiciary Act in 1789 of equity.”¹⁵⁹

Still, the Court explained that “the suits in equity of which the federal courts have had ‘cognizance’ ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery.”¹⁶⁰ In other words, equity in federal court is “subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery.”¹⁶¹

iii. Evaluating *Young* against Modern Practice

How, then, can *Young*’s cause of action be explained today? It does not rest on statutory text, so it is difficult to explain after *Erie*. It does not fall within the traditional scope of English Chancery practice, so it is also difficult to explain under *Guaranty Trust*. And it cannot be

¹⁵⁸ *Id.* at 107; see also *Rublin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 205 (1938) (explaining that the *Erie* doctrine “applies though the question of construction arises not in an action at law, but in a suit in equity.”); Collins, *supra*, at 337 (“In the first several pages of the opinion, Justice Frankfurter unequivocally extended the *Erie* principle to federal cases in which equitable remedies were sought. *Guaranty Trust* finally eviscerated the federal uniform equity doctrine, largely ending equity’s reign as a distinctive site of nonstate, judge-made law in federal diversity jurisdiction cases.” (footnote omitted)).

¹⁵⁹ *Id.* at 105. Professor Kristin Collins makes a compelling argument that “Justice Frankfurter’s account [in *Guaranty Trust*] of early federal equity power is [] suspect” and that “Frankfurter and at least one other Justice were well aware that the *Guaranty Trust* opinion took significant liberties with the historical sources.” Collins, *supra*, at 338–39. She relies in part on a memorandum Justice Frankfurter wrote of a telephone call with Chief Justice Stone:

I have now read your opinion in the York case and I must say that you have performed a considerable surgical operation with great delicacy. I say considerable surgical operation because I think that there was a good deal more of historical material to clear away than the uninformed reader might realize—and you had to deal with it as delicately as you did if it was to be avoided in your decision.

Id. at 339 (quoting Memorandum of Felix Frankfurter (Mar. 17, 1945), in PAPERS OF FELIX FRANKFURTER, Harvard Law Library, Series 7, Subseries G, Paige Box #12, No. 264).

¹⁶⁰ *Guar. Tr.*, 326 U.S. at 105.

¹⁶¹ *Id.*; see also Morley, *supra*, at 220 (“*Guaranty Trust* requires federal courts to apply a uniform body of equitable principles tracing back to the English Court of Chancery—as interpreted by the Supreme Court—when deciding whether to grant equitable relief, regardless of whether the underlying claim arises under federal or state law.”).

justified as a vestigial form of “judicially recognized common law.”¹⁶² Granted, the Court has admitted that “it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition.”¹⁶³ But the current approach is to accept this tradition in “only limited areas,” such as “admiralty disputes and certain controversies between States.”¹⁶⁴ The *Ex parte Young* cause of action, of course, stems from neither and does not appear to be so limited.

Nor does it find its home in the text of the Constitution. For example, the Supreme Court has reaffirmed that causes of action do not come from the Supremacy Clause: “the Supremacy Clause is not the ‘source of any federal rights,’ and *certainly* does not create a cause of action.”¹⁶⁵ Instead, the Supremacy Clause is a rule of decision: “It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.”¹⁶⁶ Under modern federal courts doctrines, then, *Young* appears to be a solution in search of statutory authorization.

C. *Young* and Federal Statutes

What’s more, it’s not obvious how we’re supposed to square the implied equitable cause of action in *Ex parte Young* with federal statutes.

i. Section 1983

The cause of action seems at odds with 42 U.S.C. § 1983. Section 1983—like an *Ex parte Young* action—is a vehicle for arguing that a state law or regulation is inconsistent with the Constitution or preempted by a federal statute.¹⁶⁷ If those kinds of claims can be brought under section 1983, it’s not obvious why we need a non-statutory cause of action that does the same thing.¹⁶⁸

¹⁶² R. FALLON, J. MANNING, D. MELTZER, & D. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 745 (7th ed. 2015).

¹⁶³ *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 (1981).

¹⁶⁴ *Rodriguez*, 140 S. Ct. at 717.

¹⁶⁵ *Armstrong*, 575 U.S. 320, 324–25 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)) (emphasis added).

¹⁶⁶ *Id.* at 325.

¹⁶⁷ See *Monell v. N.Y.C. Dep’t of Social Servs.*, 436 U.S. 658, 700–01 (1978) (“[Section 1983] was intended to provide a remedy . . . against all forms of official violation of federally protected rights”); *Golden State Transit Corp.*, 493 U.S. at 107 n.4 (“[A] Supremacy Clause claim based on a statutory violation is enforceable under § 1983 only when the statute creates ‘rights, privileges, or immunities’ in the particular plaintiff.”).

¹⁶⁸ Cf. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.”).

Of course, some courts have held that certain would-be plaintiffs like states, political subdivisions, or municipalities can't sue under section 1983.¹⁶⁹ But it's not clear that makes any difference. If those courts are wrong and the claims may go forward under section 1983, then the would-be plaintiffs don't need *Ex parte Young*.¹⁷⁰ But if those courts are right, it further undermines any reliance on *Ex parte Young*. When Congress has "express[ly] provi[ded] . . . one method of enforcing a substantive rule," it "suggests that Congress intended to preclude others" recognized by the courts.¹⁷¹ To find such a cause of action "when there is no such right under the pertinent statute itself[] would effect a complete end-run around th[e] [Supreme] Court's . . . 42 U.S.C. § 1983 jurisprudence."¹⁷²

And that's exactly how we approach causes of action in other contexts. Take *Bivens v. Six Unknown Federal Narcotics Agents*.¹⁷³ In *Bivens*, "the [Supreme] Court broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim."¹⁷⁴ When a federal statute, a state statute, or an administrative proceeding would provide an alternative form of relief, the Court has generally declined to recognize a *Bivens* action.¹⁷⁵ So, for example, there's no *Bivens* action against the United States for employment disputes because there are already "comprehensive procedural and substantive provisions giving meaningful remedies."¹⁷⁶ Same for social security disputes,¹⁷⁷ and those against private prisons.¹⁷⁸ The analysis doesn't change just because the other avenues

¹⁶⁹ See, e.g., *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1255–56 (5th Cir. 1976); cf. *Moor v. County of Alameda*, 411 U.S. 693, 699 (1973) ("[Section 1983] was intended to provide *private parties* a cause of action." (emphasis added)).

¹⁷⁰ Cf. *Golden State Transit Corp.*, 493 U.S. at 108 n.4.

¹⁷¹ *Sandoval*, 532 U.S. at 290.

¹⁷² *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 619 (2012) (Roberts, C.J., dissenting).

¹⁷³ 403 U.S. 388 (1971).

¹⁷⁴ *Hernandez*, 140 S. Ct. at 741. The Court inferred this cause of action from the Constitution itself. *Ibid.* And one member of the *Bivens* Court likened it to the "presumed availability of federal equitable relief against threatened invasions of constitutional interests"—that is, the *Young* cause of action. *Bivens*, 403 U.S. at 404 (Harlan, J., concurring in the judgment). The Supreme Court has declined to expand *Bivens* in every case it has considered over the last four decades. *Hernandez*, 140 S. Ct. at 743.

¹⁷⁵ See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) ("[I]f Congress has created 'any alternative, existing process for protecting the [injured party's] interest' that itself may 'amoun[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007))).

¹⁷⁶ *Bush v. Lucas*, 462 U.S. 367, 368 (1983).

¹⁷⁷ See *Schweiker v. Chilicky*, 487 U.S. 412, 426–27 (1988).

¹⁷⁸ See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72–74 (2001).

of relief don't provide the same remedies as *Bivens* would—still no *Bivens*.¹⁷⁹ And it still doesn't change when those avenues of relief can only be pursued in state, not federal, court.¹⁸⁰

It's therefore unclear why the *Ex parte Young* cause of action would not be interpreted similarly—especially when section 1983 exists and the state courts provide alternative avenues for relief.

Consider a plaintiff who wants a federal court to enjoin a state judge to prevent an alleged violation of the Constitution.¹⁸¹ Under section 1983, “injunctive relief shall not be granted” “against a judicial officer for an act or omission taken in such officer’s judicial capacity” “unless a declaratory decree was violated or declaratory relief [i]s unavailable.”¹⁸² Permitting the use of the *Ex parte Young* cause of action—which has no such restrictions—under these circumstances would render the limitations in section 1983 superfluous. No reasonable litigant would use section 1983 to sue a state judge; he would simply rely on *Young* and avoid section 1983 altogether.¹⁸³

ii. Declaratory Judgment Act

It's also unclear how to reconcile the *Ex parte Young* cause of action with the Supreme Court's precedents under the Declaratory Judgment Act. Obviously, that Act does not create a standalone cause of action. Rather, “the operation of the Declaratory Judgment Act is procedural only.”¹⁸⁴ It allows parties who would otherwise be defendants to seek relief as plaintiffs.¹⁸⁵ The base requirement is that the plaintiff must face a “threatened” action from the defendant, which “would necessarily present a federal question.”¹⁸⁶

The Supreme Court has expressed a wariness, however, about allowing declaratory judgment actions that raise only preemption questions. For example, the Court has denied jurisdiction over a case where a state regulatory authority sought a declaration that its own regulations were not preempted by federal law.¹⁸⁷ This hesitancy reflects a centuries-old duty

¹⁷⁹ See *Minneci v. Pollard*, 565 U.S. 118, 129 (2012) (“State-law remedies and a potential *Bivens* remedy need not be perfectly congruent.”).

¹⁸⁰ *Id.* at 129, 131.

¹⁸¹ See, e.g., *Freedom from Religion Found., Inc. v. Mack*, 4 F.4th 306, 310 (5th Cir. 2021) (presenting similar facts).

¹⁸² 42 U.S.C. § 1983.

¹⁸³ See *Mack*, 4 F.4th at 312 n.5.

¹⁸⁴ *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937).

¹⁸⁵ See, e.g., *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191, 197 (2014); HART & WECHSLER, *supra*, at 842–43.

¹⁸⁶ *Medtronic*, 571 U.S. at 197 (quotation omitted).

¹⁸⁷ See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 19, 103 (1983).

to avoid issuing advisory opinions about the validity of certain laws.¹⁸⁸ And as Justice Jackson once explained, federal courts cannot be used to “establish” legal defenses—such as preemption—“to hold in readiness for [future] use.”¹⁸⁹ Instead, the federal courts can exercise their limited duty to say what the law is when a party is actually at “risk of suffering penalty, liability, or prosecution” by a state.¹⁹⁰

Moreover, even threatened injury by a State may not be sufficient for the federal courts to weigh in under the Declaratory Judgment Act. That’s because federal courts should “not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.”¹⁹¹ As the Supreme Court later explained, “it is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings” through federal equitable intervention.¹⁹² In other words, the federal courts will steer clear of using declaratory judgments to interfere in state-law disputes—even if there are questions of federal law buried in the litigation.¹⁹³

Given this hesitancy to intervene in state-law disputes in declaratory judgment proceedings—where Congress textually authorized relief—one might reasonably wonder too about the judicially-created *Ex parte Young* cause of action in cases involving state-law disputes.¹⁹⁴ After all, members of the Court have described the *Young* cause of action as “the pre-emptive assertion in equity of a defense that would otherwise have been available in the

¹⁸⁸ *Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968); Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793), in 3 CORRESPONDENCE & PUBLIC PAPERS OF JOHN JAY 488–89 (Johnston ed. 1891).

¹⁸⁹ *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 245 (1952).

¹⁹⁰ *Ibid.*

¹⁹¹ *Id.* at 249.

¹⁹² *Dombrowski v. Pfister*, 380 U.S. 479, 484–85 (1965); see also *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (“[S]tate courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law.”).

¹⁹³ *Cf. Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 154 (1908) (denying federal jurisdiction where the “Federal question” was merely what “the defense of defendants would be”).

¹⁹⁴ *Cf. Wycoff*, 344 U.S. at 247 (“Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system.”).

State's enforcement proceedings at law"¹⁹⁵—the same situation that is often undeserving of declaratory relief.¹⁹⁶

To be sure, the Supreme Court has articulated that the power to craft federal common law is at its apogee “in interstitial areas of particular federal interest.”¹⁹⁷ And with this understanding, it might make some sense for the federal courts to hear a federal case about federal actors using a federal equitable cause of action.¹⁹⁸ But it's quite another thing to say that this “federal interest” subsists in a case primarily or exclusively involving state actors.

* * *

In the end, there are plenty of reasons to worry about recognizing a non-statutory cause of action against state officials at equity. During the debates on the ratification of the Constitution, the Anti-Federalists expressed deep fears that the federal courts would run roughshod over the States. For example, Brutus worried that federal “judges will be interested to extend the power of the courts, and to construe the constitution as much as possible, in such a way as to favour it.”¹⁹⁹ This inevitable growth of federal judicial power, he warned, would lead to “an entire subversion of the legislative, executive and judicial powers of the individual states.”²⁰⁰ And they feared that equity would supply the vehicle for effecting that change.²⁰¹ Query what they'd think about *Young*'s riddle today.

¹⁹⁵ *Stewart*, 563 U.S. at 262 (Kennedy, J., concurring); accord *Douglas*, 565 U.S. at 619 (Roberts, C.J., dissenting).

¹⁹⁶ See *Wycoff*, 344 U.S. at 245

¹⁹⁷ *Sosa*, 542 U.S. at 726.

¹⁹⁸ See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

¹⁹⁹ Brutus XI, ¶ 2.9.140, in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 420.

²⁰⁰ *Id.* at ¶ 2.9.139; see also *Observations on the New Constitution, And on the Federal and State Conventions, By a Columbian Patriot*, in 4 THE COMPLETE ANTI-FEDERALIST 270, 276.

²⁰¹ See *supra* notes 57–58 and accompanying text.