PRELIMINARY INJUNCTIVE RELIEF AGAINST GOVERNMENTAL DEFENDANTS: TRUSTWORTHY SHIELD OR SWORD OF DAMOCLES?

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ABSTRACT

Typically, we conceive of preliminary relief as a shield from liability for sanctions triggered by noncompliance with the law during the period when the preliminary injunctive relief was in effect. But is that true? The answer is uncertain. In one case, Edgar v. MITE Corp.*, Justice Stevens and Justice Marshall debated the question but the Court did not reach it. Leading academics have raised the question and noted that the Court has yet to provide an answer. The question is difficult because it implicates the separation of powers, federalism, and due process of law. The answer is vitally important to private citizens who challenge governmental action because their liberty and property are at stake – and the stakes can be very high. I argue that a preliminary injunction must serve as a defense to liability, and I address concerns raised by that conclusion.*

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INTRODUCTION

Private party challenges to government action alleged to have violated statutory or constitutional restrictions are a common feature of civil litigation in our day. In such cases, parties almost invariably appeal to the equitable powers of the court and seek preliminary relief under Rule 65.[1] Such relief is requested on the ground that allowing the government to enforce the challenged restriction would create irreparable harm, and such relief, when provided, has significant consequences for the separation of powers and federalism.[2] The broad reach and power of equity, including the power to award injunctive relief, goes a long way in explaining why the equity jurisdiction of the federal courts continues to command scholarly attention.[3]

This Article considers a critically important but unresolved question presented in cases where a party requests and receives preliminary injunctive relief against governmental defendants. The question is this: if a party secures preliminary relief that bars the government from enforcing a given law while the parties litigate, and

1. *See, e.g.*, Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 676–77 (W.D. Tex. 2014); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012).

2. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012); John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 1020 (2008).

3. *See generally* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power–A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000); Kristin A. Collins, "*A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249 (2010); Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743 (2012); Ofer Grosskopf & Barak Medina, *Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits*, 32 U. SEATTLE L. REV. 903 (2009); Harrison, *supra* note 2; Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53 (1993); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003); H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919 (1994); John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1 (2013); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments,* 67 WASH. L. REV. 257 (1992); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121 (1996).

the challengers of the law do not ultimately prevail on the merits, what consequence, if any, does that preliminary relief have on liability for penalties triggered by noncompliance with the preliminary injunction while it was in effect?[4] Typically, we conceive of preliminary relief as a shield from liability for sanctions triggered by noncompliance during the period when the preliminary injunctive relief was in effect.[5] But is that true?

The answer is uncertain. In one case, *Edgar v. MITE Corp.*, Justices Stevens and Marshall debated the question but the Court did not resolve it.[6] Leading academics have raised the question and noted that the Court has yet to provide an answer.[7] Resolution of the question is difficult because it implicates the separation of powers, federalism, and due process of law. The answer is vitally important to private citizens who challenge governmental action because their liberty and property are at stake—and the stakes can be very high, as illustrated below.

Consider the recent challenges to the Department of Health and Human Services (HHS) Mandate for employers engaged in business for profit. The HHS Mandate requires such employers to provide all FDA-approved contraceptive methods, including abortifacient contraception, and sterilization procedures.[8] The Internal Revenue Code imposed penalties for non-compliance on a per-employee and per-day basis.[9] Employers who wished to conduct their business in a manner consistent with their religious convictions filed suit chal-

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4. This Article is limited to consideration of the effect of preliminary relief in suits against the government. Suits involving private parties merit separate consideration.

5. Edgar v. MITE Corp., 457 U.S. 624, 657 (1982) (Marshall, J., dissenting) ("[I]n the ordinary case, unless the order contains specific language to the contrary, it should be presumed that an injunction secures permanent protection from penalties for violations that occurred during the period when it was in effect . . . .").

6. *Id.* at 647–64 (Stevens, J., concurring and Marshall, J., dissenting).

7. *See* Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement Of Allegedly Unconstitutional Statutes Provide?*, 31 FORDHAM URB. L.J., 657, 664–65 (2004); Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 209 (1977).

8. Group Health Plans and Health Insurance Issues Relating to Coverage of Preventative Services Under Patient Protection and the Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012). The Affordable Care Act required covered employers to "provide coverage for" and "not impose any cost sharing requirements for," "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," and directs the Secretary of United States Department of Health and Human Services to determine what would constitute "preventive care" under the mandate. 42 U.S.C § 300gg–13(a)(4) (2012); *see also* 45 C.F.R. § 147.130(a)(1)(iv) (2016). For an overview of the regulatory framework, see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2788–90 (2014).

9. 26 U.S.C. § 4980D(b)(1).

lenging the HHS Mandate under the Religious Freedom Restoration Act (RFRA).[10]

The procedural history of the Hobby Lobby litigation illustrates the vagaries and risks of the process. Hobby Lobby filed suit in September of 2012, advancing challenges to the mandate under RFRA.[11] The motion for preliminary injunction was denied in the district court.[12] Hobby Lobby appealed that decision and moved for injunctive relief pending appeal, which the Tenth Circuit denied.[13] Hobby Lobby's request for emergency relief was also denied.[14] The *en banc* Court of Appeals for the Tenth Circuit granted expedited consideration of the appeal based on the deadline for complying with the contraceptive-coverage requirement and the potential sanctions for noncompliance.[15] It reversed the district court's decision denying a preliminary injunction, finding that Hobby Lobby had shown a likelihood of success on the merits as well as irreparable harm.[16] Over two years later, the Supreme Court granted review of the interlocutory decision and affirmed the Tenth Circuit's decision awarding preliminary relief.[17] The outcome of that litigation was anything but certain. The circuits split on the RFRA claim at the preliminary injunction stage of several cases, and each of those rulings yielded a split decision.[18] The Supreme Court decision on interlocutory review was also split five-to-four.[19]

Hobby Lobby won, but what if it had lost? By the time the case was before the Supreme Court, Hobby Lobby was potentially liable

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10. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1283–85 (W.D. Okla. 2012).

11. *See id.*

12. *Id.* at 1296–97.

13. *See* Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012).

14. *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012).

15. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013).

16. *Id.* at 1144–45, 1147.

17. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

18. *See Hobby Lobby Stores*, 723 F.3d 1114 (deciding in favor of plaintiff corporation's RFRA claim in a fractured decision with multiple concurrences and partial dissents); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F. 3d 377 (3d Cir. 2013) (rejecting RFRA claims of corporation and owners with a dissent arguing plaintiffs should prevail), *rev'd sub nom.*, *Burwell*, 134 S. Ct. 2751; Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013) (ruling in favor of plaintiffs' RFRA claim in a two-to-one decision); Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013) (ruling in favor of plaintiffs' RFRA claim in a two-to-one decision); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) (ruling in favor of plaintiffs' RFRA claim in a two-to-one decision).

19. *See Burwell*, 134 S. Ct. 2751.

for $435 million in penalties.[20] Would Hobby Lobby be required to pay those penalties?

Significantly, the risk applies across the ideological spectrum. Take, for example, an ongoing challenge to restrictions on abortion providers under a recently enacted state statute in Texas. *Whole Woman's Health v. Lakey* arises from a state law requiring abortion providers to comply with the minimum standards applicable to ambulatory surgical centers.[21] Violations of the statute trigger penalties levied on a per-day basis, with each day constituting a separate offense.[22] The district court found the requirement to be unconstitutional and enjoined enforcement of the statute.[23] The Fifth Circuit stayed the injunction.[24] The Supreme Court stayed the Fifth Circuit's decision and granted a petition for certiorari.[25] The injunction protects abortion providers for the moment, but what happens if the challenge fails in the end? Would abortion providers be liable for statutory penalties?

Scholars such as Vikram Amar raised this question in connection with litigation challenging the Partial Birth Abortion Act of 2003.[26] As Amar noted, there is no clear answer.[27] Indeed, as others have noted, Supreme Court precedent yields confusion,[28] and the resulting uncertainty creates terrible risks for private plaintiffs challenging governmental restrictions.[29] In the HHS Mandate litigation, for example, one court refused to grant preliminary relief on the theory that such relief would be illusory and the employer would be liable

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20. *See* Cathy Cleaver Ruse, *Uphold Religious Liberty: Opposing View*, USA TODAY (Mar. 25, 2014, 8:51 PM), http://www.usatoday.com/story/opinion/2014/03/25/hobby-lobby-supreme-court-family-research-council-editorials-debates/6891583 (noting Hobby Lobby's potential penalty of $1.3 million per day).

21. *See* Whole Woman's Health v. Lakey, 769 F.3d 285, 290 (5th Cir. 2014) (citing TEX. HEALTH & SAFETY CODE ANN. § 245.010 (West 2015)).

22. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 245.015, 245.017 (West 2015).

23. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 676–77 (W.D. Tex. 2014).

24. *Whole Woman's Health*, 769 F.3d at 305.

25. Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 499 (2015).

26. *See generally* Amar, *supra* note 7.

27. *See id.* at 665 (raising the issue and noting that the "Supreme Court has never really made up its mind on any of this").

28. *See* Laycock, *supra* note 7, at 209 (noting "the reality that errors occur in any system"); *see also* Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636, 649–654 (1979) (discussing Supreme Court jurisprudence "in which the Court enjoined state enforcement proceedings against federal plaintiffs or prevented such proceedings by declaring the statute invalid").

29. The focus here is on private citizen challenges to government restrictions, not litigation between private parties, which merits separate treatment because it presents different considerations.

for significant penalties in the amount of $16 million per year if the decision were reversed at the final judgment stage of the litigation.[30] The court rejected the view that preliminary relief would function as a defense to liability for noncompliance while it was in effect and expressed doubt that the Court could insulate the plaintiffs from liability arising under legislation ultimately held to be valid.[31]

The implications of the view just described are potentially devastating for litigants. If a preliminary injunction does not serve as a defense to penalties arising from noncompliance while the injunction is in effect, then preliminary relief is not a trustworthy shield. Quite the contrary, it is akin to a Sword of Damocles poised over the heads of litigants prevailing at the preliminary injunction stage that threatens their doom if the suit fails in the end.

This Article explores this unresolved question and offers an answer. In Part I, this Article briefly surveys the principles governing the award of preliminary relief and the Supreme Court case of *Edgar*, *supra*, which features the most extensive discussion of the issue. Part II briefly surveys the historical development of the equitable jurisdiction of the federal courts—the basis for preliminary injunctive relief—and takes up a line of cases that point to the proper resolution of the issue. In Part III, this Article argues that a preliminary injunction must serve as a defense to liability, and addresses concerns raised by that conclusion.

I. PRELIMINARY RELIEF: SEPARATION OF POWERS AND FEDERALISM

The decision to provide preliminary injunctive relief under Rule 65 provides the immediate context for the question presented. Part I briefly summarizes the principles governing preliminary injunctive relief under Rule 65 because the conditions placed upon preliminary relief are relevant to the separation of powers and federalism issues implicated by the question under consideration.

A. Preliminary Relief Under Rule 65

Article III of the Constitution grants federal courts subject matter jurisdiction over "all Cases, in Law and Equity."[32] The Supreme Court traces its equitable power to the Judiciary Act of 1789, which

30. *See* Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *10 (W.D. Mich. Dec. 2012). Please note that the author appeared for the plaintiffs in *Autocam*, pro bono.

31. *Id.*

32. U.S. CONST. art. III, § 2, cl. 1.

granted jurisdiction over "suits of a civil nature at common law or equity" to the circuit courts created by the Act.[33] It has long held that its jurisdiction over suits in equity empowers it to employ the "system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[34] When we speak of equitable jurisdiction in this context, we mean the power of the federal courts to provide specific types of relief, historically deemed equitable remedies, a question distinct from both personal and subject matter jurisdiction.

The body of equity jurisprudence shaped by the English Court of Chancery provides the standards used to determine equity jurisdiction as well as the principles by which such suits are adjudicated.[35] The Court has said that an "appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."[36] It has suggested that federal courts have an inherent power to provide equitable relief in actions properly before them—a point taken up later.[37]

Rule 65 recognizes that federal courts have the power to provide preliminary relief and imposes procedural limitations on the exercise of that power.[38] Generally speaking, the limitations are designed to address due process concerns such as notice of hearing, opportunity to be heard, and fair notice of conduct prohibited or required by any order.[39] Subsection (c), which requires the party seeking preliminary relief to provide security, is also relevant for reasons that

33. Judiciary Act of 1789, 1 Stat. 73, 78.

34. Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939) (citing Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1869); *In re* Sawyer, 124 U.S. 200, 209–10 (1888); Matthews v. Rodgers, 284 U.S. 521, 525 (1932); Gordon v. Washington, 295 U.S. 30, 36 (1935)).

35. *See* Massachusetts State Grange v. Benton, 272 U.S. 525, 528 (1926); Pennsylvania v. Williams, 294 U.S. 176, 181 (1935).

36. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (quoting Meredith v. Winter Haven, 320 U.S. 228, 235 (1943)).

37. Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–12 (1982). Note the use of "jurisdiction" in the context of equitable jurisdiction refers to the power to provide equitable relief in cases properly before the court; equity jurisdiction does not serve as a free-standing basis for subject matter jurisdiction. The latter must exist before the former applies. *Id.*

38. *See, e.g.*, FED. R. CIV. P. 65(a)(1) (providing that the court "may issue a preliminary injunction only on notice to the adverse party").

39. FED. R. CIV. P. 65(a), (d). FED. R. CIV. P. 65(b) similarly governs temporary restraining orders but those present no unique considerations in terms of the question presented and therefore have been excluded from this inquiry.

will become clear.[40] So too is subsection (e), which excludes certain types of cases from the reach of Rule 65.[41]

The Court has said that the central purpose of the preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held."[42] It calls preliminary relief an "extraordinary and drastic remedy" that is never awarded as of right based solely on the merits but as a discretionary remedy provided while litigation is pending.[43] Because preliminary injunction practice under Rule 65 acts as a preview of the trial process, the parties bear burdens of proof that parallel those they would bear at trial.[44]

The party "seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[45] The Court has emphasized that the party must show a likelihood of irreparable harm—a possibility is insufficient to justify injunctive relief.[46]

In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[47] The Court has indicated that this discretionary power is broad and far-reaching, allowing a federal court to

> act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest . . . . In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be neces-

40. *See infra* Part III.A.

41. FED. R. CIV. P. 65(e); *see infra* text accompanying notes 59–62.

42. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

43. Munaf v. Geren, 553 U.S. 674, 689–90 (2008); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."); Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528, 532 (1960) (noting that the "award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff") (quoting Yakus v. United States, 321 U.S. 414, 440 (1944)).

44. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006).

45. Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008).

46. *Id.* at 22. Laycock has suggested that the requirement of irreparable harm has retained meaningful significance at the preliminary relief stage. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 117, 241 (Oxford Univ. Press 1991).

47. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987).

> sary under the circumstances. Only in that way can equity do complete rather than truncated justice.[48]

Because injunctions can have a significant effect on the public interest, courts should pay particular attention to "the public consequences in employing the extraordinary remedy of injunction."[49] For this reason, a "federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law" just because a statute envisions injunctive relief.[50] In this regard, the Court has said that the "qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."[51]

The Court's decisions show that attention to the public interest has varied implications depending on the facts of the case. When public interests are implicated "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."[52] But it is also true that

> where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.[53]

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48. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (citing Camp v. Boyd, 229 U.S. 530, 551–52 (1913)).

49. *Winter*, 555 U.S. at 24 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312); *see also* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941); Atlas Life Ins. Co. v. W. I. S., Inc., 306 U.S. 563, 569 (1939) (quoting 28 U.S.C. § 384 (1948)) (internal quotation marks omitted) (citing Matthews v. Rodgers, 284 U.S. 521, 525 (1932)) (asserting that equitable remedies are not available where a "plain, adequate[,] and complete remedy may be had at law" and that this rule "protect[s] the states from the encroachments which would result from the exercise of equity powers by federal courts . . ."); Stratton v. St. Louis Sw. Ry. Co., 284 U.S. 530, 534 (1932); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 383–84 (1949) (reversing injunction barring enforcement of a territorial act that regulated teaching foreign languages to children because "where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority, unless exceptional circumstances command a different course").

50. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 193 (1978).

51. Franks v. Bowman Transp. Co., 424 U.S. 747, 789 (1976) (quoting Hecht Co. v. Bowles, 321, 329–30 (1944)).

52. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (citing Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).

53. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312–13 (1982) (quoting Yakus v. United States, 321 U.S. 414, 440 (1944)); *see also Winter*, 555 U.S. at 23 (holding that, even if plaintiff

As noted, Rule 65 requires the party seeking preliminary relief to provide security if such relief is granted.[54] Initially, the decision to require security was left to the discretion of the court, and parties who suffered loss as a result of a preliminary injunction had no remedy if the court did not require security.[55] Although the current security requirement reads as a mandatory condition for receiving preliminary relief, federal courts have retained discretion to waive the requirement in certain circumstances.[56]

Rule 65 expressly excludes from its reach specific statutes that restrict the use of preliminary injunctions.[57] The Supreme Court has also acknowledged that congressional activity can limit judicial discretion in this area at least as a general matter.[58] Here, as elsewhere, the Court requires a "clear statement" on the grounds that the "comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."[59] In practice, this means that the Court cannot use its equitable discretion in a manner that undermines clearly expressed statutory commands.[60] The Court has recently held that it is for Congress, not the

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had shown an irreparable injury, denial of preliminary relief was required given the impact of the injunction on the public interest).

54. FED. R. CIV. P. 65(c).

55. *See* Russell v. Farley, 105 U.S. 433, 437 (1882); W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 770 n.14 (1983); *see generally* Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief*, 52 N.C. L. REV. 1091 (1974) (discussing the evolution of the bond requirement); *see id.* at 1099–1102, app. at 1173–75 (discussing the genesis of the current security requirement in Rule 65).

56. Erin Connors Morton, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L.J. 1863, 1864 (1995).

57. FED. R. CIV. P. 65(e)(1)–(2).

58. *See Weinberger*, 456 U.S. at 313; United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001) (citing Virginian Ry. Co. v. Ry. Emps., 300 U.S. 515, 551 (1937)); *see also* Burlington N. Ry. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 442 (1987) (rejecting preliminary injunction against secondary picketing where Norris-LaGuardia Act deprived federal court of power to enter this relief); Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528, 532 (1960) ("'[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect.' Since the power to condition relief is essential to ensure that extraordinary equitable remedies will not become the engines of injustice, it would require the clearest legislative direction to justify the truncation of that power." (quoting Inland Steel Co. v. United States, 306 U.S. 153, 157 (1939))).

59. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

60. *Oakland*, 532 U.S. at 496 ("[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise."); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978) (enjoining completion of the Tellico Dam based on its view that the statute clearly required such an injunction). For a detailed discussion of this issue and its nuances, see John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 39–53 (2013).

Court, to expand equitable remedies beyond those available to the English Chancery in 1792.[61]

In sum, the Court has provided a good deal of guidance on the principles governing preliminary relief. And here, it has crafted standards that are designed to work with—not against—the law governing the dispute brought to federal court. In this way, preliminary relief is designed to work in harmony with the governing law, whether constitutional or statutory, and therefore its use should be consistent with federalism and the separation of powers.

But Rule 65 is silent on the question presented. It does not address whether the preliminary relief serves as a defense to liability for penalties arising from noncompliance with law under cover of a preliminary injunction where a given law is ultimately upheld.

B. Preliminary Relief: Separation of Powers and Federalism

Edgar v. MITE Corp., which features the most extensive discussion of this issue in the Supreme Court, also does not address the question presented.[62] In that case, MITE issued a tender offer for an Illinois corporation without complying with the Illinois Business Takeover Act, and thereafter filed a federal suit asking for a declaration that the state law was preempted by federal law and violated the Commerce Clause.[63] The federal court entered a preliminary injunction prohibiting the state from enforcing the law,[64] which was backed by criminal and civil penalties,[65] and later entered a permanent injunction.[66] On review in the Supreme Court, an initial question was whether the case was moot because MITE had withdrawn its offer and decided not to go forward with its attempted acquisition.[67] The Supreme Court held that the case was not moot because state officials said they would enforce the statute if it were upheld and therefore did not decide the question considered here.[68]

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61. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 321 (1999) (rejecting the suggestion that equitable powers of federal courts could be used to provide pre-judgment attachment on the grounds that the expansive view of the equity powers of federal courts was inconsistent with the principle that ours is a "government of laws, not of men") (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 12, at 14–15 (1836)).

62. *See* Edgar v. MITE Corp., 457 U.S. 624 (1982).

63. *Id.* at 627–28.

64. *Id.* at 629.

65. *Id.* at 630 n.5.

66. *Id.* at 629.

67. *Id.* at 630.

68. *Id.*

Within this context, Justices Stevens and Marshall debated the effect of a preliminary injunction on liability for noncompliance with law while the preliminary injunction was in effect. In his dissent, Justice Marshall argued that the case was moot, reasoning that the preliminary injunction had the effect of insulating MITE from liability for noncompliance with state law while the injunction was in place, and as a result, there was no live controversy before the Court.[69] Justice Stevens, concurring in the judgment, reasoned that the case was not moot because the preliminary injunction could not insulate MITE from liability if the state law were upheld after review.[70]

In part, Justice Stevens grounded his position on equity practice and the nature of preliminary relief. He began by emphasizing that the decision supporting a preliminary injunction was only a tentative assessment of the merits which could be reversed.[71] The bond requirement of Rule 65(c) "in effect, is the moving party's warranty that the law will uphold issuance of the injunction."[72] Thus, according to Justice Stevens, preliminary relief was not understood to provide immunity for acts based on reliance on a preliminary injunction.[73] Justice Stevens also drew an analogy to declaratory relief which provided a defense to enforcement of a statute, unless reversed, but did not authorize violations of law.[74]

Furthermore, Justice Stevens advanced the more fundamental point that "federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments."[75] Federal courts possess limited jurisdiction and "the federal judiciary can continue to perform its vital function in our governmental structure only if it recognizes the limitations on its own legitimate authority."[76] Justice Stevens acknowledged that the Court had power to enter a preliminary injunction to preserve jurisdiction but thought

69. *Id.* at 655–64 (Marshall, J., dissenting).

70. *Id.* at 647–55 (Stevens, J., concurring). Justice Stevens also argued that the preliminary injunction did not purport to restrain the state from prosecuting MITE, and noted that the focus of this inquiry is whether federal courts have the power to exempt MITE—and others similarly situated—from liability. *Id.*

71. *Id.* at 649–50.

72. *Id.* at 649 & n.1.

73. *Id.* at 649–51.

74. *Id.* at 651–52.

75. *Id.* at 649.

76. *Id.* at 653. Here, Stevens cited his partial dissent in another case where he rejected the notion that federal courts had an inherent authority to issue warrants for surveillance in the absence of statutory authorization. *Id.* at 653–54 (citing U.S. v. N.Y. Tel. Co., 434 U.S. 159, 178 (1977).

the power extended no further than preserving the status quo until a decision was reached.[77]

Justice Marshall, joined by Justice Brennan, argued that, absent language to the contrary, the preliminary injunction must be understood to protect MITE from prosecution or penalties for noncompliance due to reliance on the preliminary relief.[78] Marshall relied on the interest in ensuring compliance with federal law.[79] He also thought intrusion on legitimate state interests was minimal, given the temporary nature of the relief and the ability of the state to enforce the statute prospectively if the law were upheld.[80] Emphasizing that MITE acted in reliance on the preliminary injunction, Marshall reiterated that "reasonable reliance on judicial pronouncements" can provide a "valid defense to criminal prosecution" on due process grounds.[81]

The debate between Stevens and Marshall raises fundamental questions regarding the scope and extent of the power of the federal judiciary. One question concerns the nature of the judicial power, particularly its power to provide equitable relief. Another question concerns the relationship between the federal judiciary and its coordinate branches—the separation of powers. A third question concerns the proper place of the federal courts in the federal system, as illustrated by cases like *Edgar*, in which federal courts enjoin the enforcement of state law pending a final decision on the merits.

The positions taken by Stevens and Marshall each present their own problems. If Stevens is right, the implications are "quite scary," as Amar noted, because Stevens does not clearly identify where the limit to his argument might be.[82] If Marshall is right, the fundamental question is where federal courts get the power to immunize citizens from the penalties that arise from noncompliance with a valid

77. *Id.* at 651–52.

78. *Id.* at 657.

79. *Id.* at 656 n.1, 657–58.

80. *Id.* at 656 n.1.

81. *Id.* at 660 (citing Marks v. United States, 430 U.S. 188, 196–97 (1977)) (reversing conviction for transporting obscene materials on due process grounds because controlling precedent at time of trial broadened liability beyond the controlling precedent at time of conduct); *see* Cox v. Louisiana, 379 U.S. 559, 569–71 (1965) (reversing conviction for illegal picketing where defendant had relied on permission from police officer); Raley v. Ohio, 360 U.S. 423, 437–39 (1959) (reversing conviction for refusal to testify before state commission because witness had relied on opinion of commission chairman that he was privileged to remain silent); United States v. Mancuso, 139 F.2d 90, 92 (3d Cir. 1943) (holding that a defendant could not be liable for ignoring induction notices issued while ex parte order staying induction was in effect).

82. *See* Amar, *supra* note 7, at 666–67 (noting the alarming consequences of Justice Stevens's position).

law.[83] To address these questions fully, we need to place the equity jurisdiction of the federal courts in its historical context and then reexamine these legitimate concerns.

II. FEDERAL EQUITY JURISDICTION AND INJUNCTIVE RELIEF 1789–1920

As Douglas Laycock has noted, there is a Supreme Court decision that is relevant to the question under consideration and suggests an answer: *Oklahoma Operating Co. v. Love*.[84] However, the decision in *Love* is both cursory and cryptic, seemingly raising questions rather than providing answers. Nevertheless, the decision points to the proper answer when seen in context. This Part provides the necessary context by briefly surveying the historical origin and development of the equity jurisdiction of the federal courts, which provides the basis for the power to provide preliminary injunctive relief and, therefore, the basis for the line of cases which produced the decision in *Love*.

A. Federal Equity and Injunctive Relief 1789–1870

As previously indicated, the equity jurisdiction of the federal courts has truly ancient roots, but the closer point of origin is the adoption of equity practice in the colonies and states. Although chancery courts were well established in Great Britain when the colonies took root, they were disfavored because they were associated with the King's effort to undermine common law and aggrandize royal power.[85] But, as Stanley N. Katz has shown, the opposition was directed at the chancery courts—not equity itself—which was incorporated in some fashion in the legal system of the colonies.[86] The states emerged from the American Revolution with judiciaries that were highly varied, had no clear division between trial and ap-

83. *See id*. at 667–68 (posing this question).

84. *See* Laycock, *supra* note 7, at 209 (citing Okla. Operating Co. v. Love, 252 U.S. 331 (1920)).

85. Stanley N. Katz, *The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century in Law*, *in* LAW IN AMERICAN HISTORY 257, 258–65 (Donald Fleming & Bernard Bailyn eds., 1971); *see also* Joseph H. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 22 (1921-1923); SOLON DYKE WILSON, COURTS OF CHANCERY IN THE AMERICAN COLONIES, *reprinted in* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 779 (Ass'n of Am. Law Schs. Ed. 1908); Robert von Moschizisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA L. REV. 287, 288–89 (1927).

86. *See* Katz, *supra* note 85, at 91–137; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 20–21 (1973).

pellate functions, and lacked the hierarchical structure that Article III appears to have ordered.[87] Several states did not have independent courts of equity and tried to combine common law and equity in one institution.[88]

During the Revolutionary and Critical Period, the state judiciaries attempted to administer justice in tumultuous times while subject to interference from the political branches—a problem which led to calls for judicial independence at both the state and federal levels.[89] This likely explains the relative ease with which the delegates to the federal convention drafted Article III; as Judge Friendly observed long ago, "[a] search of the letters and papers of the men who were to frame the Constitution does not reveal that they had given any large amount of thought to the construction of a federal judiciary."[90]

In the Constitutional Convention, the decision to give equity jurisdiction to the federal courts occurred late in the process when William Samuel Johnson of Connecticut offered an amendment extending the federal judicial power to equity as well as law.[91] George Read of Delaware objected to putting jurisdiction over law and equity in the same courts, but the motion still passed.[92] The amendment accounts for the inclusion of equity in Section Two of Article III, which provides that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the

87. WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 27–52 (Wythe Holte & L.H. LaRue eds., 1990); *see also* FRIEDMAN, *supra* note 86, at 96–98 (describing varied judicial systems in the states). As Pfander and Birk have shown, there is good reason to believe the Framers might have drawn on the model provided by the Scottish Judiciary. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1653–83 (2011).

88. FRIEDMAN, *supra* note 86, at 97–98; Kristin A. Collins, *A Considerable Surgical Operation: Article II, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 267–68 (2010).

89. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 154–61 (1969); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1104–56 (1976); John P. Frank, *Historical Bases of the Federal Judicial System*, 23 IND. L.J. 236, 236–70 (1947-48). For an explanation of the term "critical period," see MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, 80–83 (1988). Furthermore, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S 211, 219–25 (1995) for the Court's discussion of the historical situation that created the drive for independent judiciaries. For the longer view on this question, see PHILLIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) and SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY 1606–1787 (2011).

90. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1927).

91. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 460–71 (Max Farrand ed., 1927).

92. *Id.*

United States, and Treaties made, or which shall be made, under their Authority. . . ."[93]

To the extent it was mentioned during the ratification process, the equity jurisdiction of the federal courts was seen as one way the federal courts might displace their state counterparts, which was seen as part of the larger threat the federal government posed to state sovereignty.[94] In addition, there were concerns that the union of law and equity in one court would allow judges to avoid the rule of law, including the right of trial by jury in cases at law, by deciding cases in equity.[95]

The Federalist response is largely comprised of Alexander Hamilton's essays. He defended the grant of equity jurisdiction as an essential means by which the federal courts might do complete justice in cases coming before them.[96] Hamilton also denied that the grant of equity jurisdiction would undermine trial by jury.[97]

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93. U.S. CONST. art. III, § 2, cl. 1.

94. *See* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN (Oct. 10, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (Herbert J. Storing & Murray Dry eds., 1981). The Federal Farmer noted that there "can be but one supreme court in which the final jurisdiction will centre in all federal causes . . . [t]he judicial powers of the federal courts extends in law and equity to certain cases . . . . [T]herefore, the powers to determine on the law, and in equity, and as to the fact, all will concentre in the supreme court[.]" *Id.*; *see also* ESSAYS OF BRUTUS (Jan. 31, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* at 417, 420 (reasoning that as a result of their equity jurisdiction, federal courts "will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution").

95. LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN, *supra* note 94, at 234, 244 ("[F]or if the law restrain him, he is only to step into the shoes of equity, and give what judgment his reason or opinion may dictate . . . ."); *see also* ESSAYS OF BRUTUS, *supra* note 94, at 420; ESSAY OF A DEMOCRATIC FEDERALIST (Oct. 10, 1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 60 (Herbert J. Storing & Murray Dry eds., 1981) (noting the "word *appeal* . . . in its proper signification includes the *fact* as well as the *law*, and precludes every idea of a trial by jury—It is a word of *foreign growth*, and is only known in England and America in those courts which are governed by the civil or ecclesiastical law of the *Romans*. Those courts have always been considered in England as a grievance . . . .").

96. In Federalist No. 80, Alexander Hamilton justified the need for equity jurisdiction on the ground that there is "hardly a subject of litigation between individuals, which may not involve those ingredients of Fraud, Accident, Trust, or Hardship, which would render the matter an object of equitable rather than of legal jurisdiction . . . . [I]t would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction." THE FEDERALIST NO. 80 (Alexander Hamilton).

97. Alexander Hamilton denied that "appeal" had to be understood in its technical sense and suggested use of the term was explained by the fact that the Supreme Court's appellate jurisdiction encompassed both actions at law (in which case appellate review would only be as to facts) and suits in equity (in which case appellate review would encompass both law and fact). *Id.*; *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 653–54, at 647–49 (Isaac F. Redfield ed., 10th ed. 1870).

Apart from the concern expressed by the minority of the Pennsylvania Ratifying Convention that the jurisdiction of the federal courts would "by legal ingenuity . . . be extended to every case, and thus absorb the state judiciaries" and that "[t]he powers of a court of equity, vested by this constitution, in the tribunals of Congress . . . [would] greatly contribute to this [absorption]," there is no record of criticisms leveled specifically at the equity jurisdiction of the federal courts.[98] When ratified by nine states, the Constitution gave us the Federal Constitution with Article III as we know it. But Federalists worried that critics would call another convention that would undermine the new government and that North Carolina and Rhode Island would refuse to ratify the Constitution.[99]

It was in this context that the First Congress met and considered the federal judiciary. Relevant here is "An Act to establish the Judicial Courts of the United States," which has come to be called the Judiciary Act of 1789.[100] William Maclay, who served as the first Senator of Pennsylvania, provides the best evidence of the controversy surrounding the equitable powers of the federal courts and tells us that it centered on Section 16 of the Judiciary Act of 1789, which prohibited federal courts from exercising equity jurisdiction in cases where there was a remedy at law.[101] The critical episode took place on July 13 when Maclay asked Oliver Ellsworth, the principal author of the act, if Ellsworth would join him in an attempt to regain Section 16 which had been struck from the act a few days earlier.[102] According to Maclay, Ellsworth agreed and later that day "spoke long on the subject of a discrimination or some boundary line between the courts of chancery and common law. [Ellsworth] concluded with a motion nearly in the words of the clause we had lost," which the Senate Journal records as adding "plain" and "adequate" before "complete" in the draft language of Section 16.[103]

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98. Nathaniel Breading et al., *The Address and Reasons of Dissent of the Minority Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 156–57 (Herbert J. Storing ed., 1981).

99. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 401–68 (2010).

100. RITZ, *supra* note 87, at 3. For a comprehensive discussion of the Judiciary Act, see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). *See also* Wythe Holt, "*To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (1989).

101. WILLIAM MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES, *in* 1789-90-91 102 (George W. Harris ed., 1880) [hereinafter SKETCHES].

102. *Id.* at 101–02.

103. *Id.* at 102; Warren, *supra* note 100, at 49, 97 & n.107 (citing S. JOURNAL, July 11, at 13).

Maclay seconded the motion and declared his "concurrence in the sentiment for limiting chancery strictly."[104] The need was great, Maclay thought, because

> [i]n England, where by the letter of the law, no suit could be brought in chancery if the common law afforded a remedy, yet such was the nature of that court, and so advantageous had it been found to the practitioners, that it had encroached greatly on the common law.[105]

But, he continued, the "bill . . . before you. . . is something much worse. The line between chancery and common law is broken down. All actions may now be tried in the Federal courts by the judges, without the interruption of a jury."[106]

After a great deal of additional work, the Judiciary Bill passed the Senate on July 17, 1789, with Section 16 providing that suits in equity would not be retained in any case where a "plain, adequate, and . . . complete remedy may be had at law."[107] Although the Judiciary Bill encountered significant challenges in the House, it passed without major changes on September 17, 1789.[108]

There was no discussion of the equity jurisprudence at the time because courts and commentators took it for granted that federal courts were allowed to proceed along the lines of the equity jurisprudence inherited from England. Oliver Ellsworth made the point in 1796.[109] St. George Tucker, using Blackstone's Commentaries for lectures on law at William and Mary linked English equity jurispru-

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104. SKETCHES, *supra* note 101, at 102.

105. *Id.*

106. *Id.* at 104.

107. Warren, *supra* note 100, at 130. Maclay voted against the final version, writing that he had "opposed this bill from the beginning . . . a vile law system, calculated for expense and with a design to draw by degrees all law business into the Federal courts. The Constitution is meant to swallow all the State Constitutions by degrees, and thus to swallow, by degrees, all the State judiciaries." WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA, 1789–1791 117 (Edgar S. Maclay ed., 1890).

108. Warren, *supra* note 100, at 131–32.

109. Grayson v. Virginia, 3 U.S. (3 Dall.) 320, 320 (1796) ("After a particular examination of the powers vested in this Court, in causes of Equity . . . we collect a general rule for the government of our proceedings; with a discretionary authority, however, to deviate from that rule, where its application would be injurious or impracticable. The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of Courts of Admiralty and Equity, constituted on similar principles; but still, it is thought, that we are also authorised [sic] to make such deviations as are necessary to adapt the process and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration, and controul [sic], of the Legislature.").

dence to Section 16.[110] William Rawle, an eminent lawyer writing in Philadelphia, did so as well.[111]

Joseph Story, serving as an Associate Justice of the Supreme Court and Professor of Law at Harvard, thought the reference to "cases in law and equity'" plainly referred to "cases at the common law, as contradistinguished from cases in equity, according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American states were familiarly acquainted."[112] In an effort to define the equity jurisdiction of the federal courts, he suggested that "[p]erhaps the most general, if not the most precise, description of a court of equity . . . is, that is has jurisdiction in cases of rights recognized and protected, by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law."[113]

The Supreme Court immediately began to apply equity in a wide variety of cases.[114] Early on, it took the position that

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110. ST. GEORGE TUCKER'S BLACKSTONE'S COMMENTARIES 440 n.11 (The Lawbook Exch., Ltd. ed., 7th prtg. 2008) (augmenting Blackstone's observation that equity "will not arrogate authority in every complaint . . . upon whatsoever suggestion: and thereby both overthrow the authority of the courts of common law . . . " with the observation that "[n]early in the same spirit is that clause of the act establishing the judicial courts of the United States, which declares 'that suits 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'").

111. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 257–58 (H. Jefferson Powell ed., 2d ed. 2009) (observing that equity jurisprudence was "in no-wise modified or regulated by congress . . . [and] therefore to be drawn directly from the Constitution, and the construction given by the supreme court in this respect must be received as decisive, that the word *equity* there introduced means equity as understood in England, and not as it is expounded and practised [sic] on in different states").

112. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA § 855, at 608 (1886).

113. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33 (1884). Of course, Story's Commentaries provide extensive coverage of areas where equity provided substantive rights. *See, e.g.*, §§ 78–88, at 94–105 (lost documents); §§ 110–40, at 120–422 (re: fraud and mistake); §§ 960–82, at 228–45 (trusts); §§ 1004–34, at 270–301 (mortgages and redemption). The point of significance here is Story's apparent desire to square the gravamen of equity jurisdiction with the language of Section 16.

114. *See, e.g.*, Conway's Ex'rs v. Alexander, 11 U.S. (7 Cranch) 218 (1812) (explaining that equity will defeat efforts to avoid the equity of redemption); Harrison v. Sterry, 9 U.S. (5 Cranch) 289 (1809) (explaining that equity will support an equitable assignment); Viers v. Montgomery, 8 U.S. (4 Cranch) 177 (1807) (refusing specific performance in equity); Pendleton & Webb v. Wambersie, 8 U.S. (4 Cranch) 73 (1807) (sustaining a bill in equity for compelled discovery and an accounting); Skillern's Ex'rs v. May's Ex'rs, 8 U.S. 137 (1807) (refusing to enforce a bond in equity given the lack of performance by the obligee on the bond); Randolph v. Ware, 7 U.S. (3 Cranch) 503 (1806) (applying laches to bar claim in equity); Graves v. Bos. Marine Ins. Co., 6 U.S. (2 Cranch) 419 (1805) (addressing a claim to reform contract in equity); Telfair v. Stead's Ex'rs, 6 U.S. (2 Cranch) 407 (1805) (holding lands of a deceased debtor were

> jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself: and what can justify that assumption but the opinion that cases of this description come within the sphere of its general action? In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles.[115]

By 1818, the Supreme Court emphasized the independence of federal equity from state law—recognizing that some states did not provide for equity jurisdiction so that making federal equity jurisdiction turn on the law of the forum state "would at once extinguish, in such states, the exercise of equitable jurisdiction," from which it necessarily followed that

> the remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.[116]

By 1830, the Court would reject the claim that a legal remedy under state law barred recourse to equity in federal court by observing that it had "been often called upon to consider the sixteenth section of the [J]udiciary [A]ct of 1789, and as often, either expressly or by the course of its decisions, has held, that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy."[117] The Court also took pains to reiterate that "[i]t is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."[118]

During this same period, the implications of the Court's broad view of federal equity jurisdiction for state sovereignty manifested in striking ways. In *Osborn v. President, Directors & Co. of Bank*, the Court rejected challenges to its equitable jurisdiction based on available legal remedies and relied on English practice to allow a suit to enjoin state officials from violating federal law, an action it deemed outside the prohibition of the Eleventh Amendment because the state was not a party.[119] And in *Pennsylvania v. Wheeling & Belmont*

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liable in equity to satisfy the debts of the deceased); Talbot v. Janson, 3 U.S. (3 Dall.) 133 (1795) (barring the use of fraud as a defense).

115. Bodley v. Taylor, 9 U.S. (5 Cranch) 191, 222 (1809).

116. Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222–23 (1818).

117. Boyce's Ex'rs v. Grundy, 28 U.S. (1 Pet.) 210, 215 (1830).

118. *Id.*

119. *See* Osborn v. President, Dirs. & Co. of Bank, 22 U.S. (9 Wheat.) 738 (1824).

Bridge Co., the Court relied upon the common law of public nuisance to order that a bridge crossing the Ohio River be raised to accommodate steamboat traffic or taken down—even though the State of Virginia had authorized construction of the bridge and Congress had funded it.[120]

In 1868, the Court again rejected a challenge to its equity jurisdiction premised on a state law requiring the plaintiff to file suit in probate court on the ground that the "jurisdiction of the courts of the United States . . . cannot be impaired by the laws of the States . . ."[121] That same year, it rejected another attempt to defeat equity jurisdiction based on an available remedy under state law emphasizing that the "sixteenth section of the Judiciary Act of 1789, was only declaratory of the pre-existing rule."[122] The Court found the remedy at law to be inadequate because it gave the plaintiff a basis to recover, although all defendants could not be joined in one action, a "power . . . reserved to a court of equity to act upon a principle . . . that whenever . . . there is a right which the common law, from any imperfection, cannot enforce, it is the province and duty of a court of equity to supply the defect and furnish the remedy."[123]

In the period from 1789 to roughly 1870, the federal courts managed to firmly establish their role in the new federal system, and equity jurisdiction was an essential instrument to that end. As Kristin A. Collins has shown in great detail, the power to craft a free-standing body of equity jurisprudence allowed federal courts to provide both procedural and substantive relief in cases where the state courts could not or would not, thereby contributing to the importance of the federal courts in the new nation.[124] And as Ann Woolhandler has shown, the broad claim for federal jurisdiction over claims "arising under" federal law embraced by the court in *Osborn* allowed federal courts to exercise jurisdiction over a wide range of cases, even in the absence of a statutory grant of federal question jurisdiction.[125] This power was used to craft a body of federal remedies that would provide the precursor to the modern doc-

120. Pa. v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 565–67, 577–79 (1851). The decision was later overturned by *Pa. v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1856).

121. Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868) (citing Hyde v. Stone, 61 U.S. (20 How.) 170, 175 (1858)).

122. Morgan v. Town of Beloit, 74 U.S. (7 Wall.) 613, 618 (1868).

123. *Id.* at 619.

124. Kristin A. Collins, "*A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 257 (2010).

125. Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 98 (1997).

trine of constitutional remedies.[126] Woolhandler and Collins have also shown that federal courts used equity jurisdiction to craft a body of substantive common law along lines that parallel the jurisprudence worked out under *Swift v. Tyson*, a practice that did indeed limit the right to trial by jury in federal courts.[127]

Osborn also provides a striking example of the critical role that equity played in vindicating federal sovereignty in the Early National Period by providing the grounds upon which the federal judiciary claimed the power to restrain unconstitutional conduct by state officials, notwithstanding the Eleventh Amendment.[128] It was equity that gave Marshall the power to enjoin public officials who threatened action alleged to be unlawful.[129] And it was equity that allowed Marshall to act against public officials even when the sovereign was not joined as a party, thereby avoiding the Eleventh Amendment. The decision in *Osborn* provided the archetype for the implied injunctive remedy for constitutional violations we are so familiar with today.[130] Taken together, these developments set the stage for *Oklahoma Operating Co. v. Love*.[131]

B. Federal Equity and Injunctive Relief: 1870–1920

The cases show increasing tension between federal courts and the political branches of the federal and state governments as we move into the last quarter of the Nineteenth Century. Unsurprisingly, the power of federal courts to award equitable relief was at the center of the conflict. The reason is simple: corporations confronted with increased regulation of economic activity almost invariably sought relief in federal court where they could combine the Supreme Court's economic substantive due process jurisprudence with a request for equitable relief so as to secure injunctions that severely limited the

126. *Id.*

127. Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 601–03 (2001).

128. *See* Osborn v. President, Dirs. & Co. of Bank, 22 U.S. (9 Wheat.) 738 (1824).

129. *Id.*

130. *See* John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1 (2013); *see also* Woolhandler, *supra* note 125, at 77–164; Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821, 827 (C.C.D. N.J. 1830) (noting that "[a]n injunction was granted against the United States by this court"). For an example of injunctive relief against federal officials in the period leading up to *Love*, see *United States. v. Lee*, 106 U.S. 196 (1882) (allowing bill in equity against federal officials holding land for use of Arlington National Cemetery).

131. 252 U.S. 331 (1920).

effectiveness of the newly enacted regulatory regimes.[132] As a result of this friction, the Court wrestled with several lines of cases testing the limits of state and federal power to regulate economic activity as well as the extent of its power to effectively nullify state and federal laws by awarding injunctive relief. One sign of the intensity of the conflict is provided by cases in which corporations challenged state laws that required forfeiture of access to the federal courts as a condition for permission to do business in the state—a transparent effort to sideline the federal judiciary.[133] Notwithstanding such efforts, the Court continued to hear cases seeking to enjoin state and federal officers.[134] Here it continued to grapple with how it should square injunctive relief against state officials with the Eleventh Amendment in cases seeking injunctive relief against public officers.[135] And it

132. For insightful overviews of this conflict, see Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991); *Love*, 252 U.S. at 334–36.

133. Home Ins. Co. of N.Y. v. Morse, 87 U.S. 445, 451–53 (1874) (holding the waiver invalid reasoning that a "man may not barter away his life or his freedom or his substantial rights," and finding "[n]one of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by others"); *see also* Terral v. Burke Const. Co., 257 U.S. 529, 530–32 (1922) (collecting cases, acknowledging they could not be reconciled, and holding that the better view was that such waivers were unconstitutional "on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another . . . ;" finding recourse to equity proper because only a decree and injunction could insulate the plaintiffs from the multiplicity of suits for penalties and civil damages that the statute authorized).

134. *See, e.g.*, Philadelphia Co. v. Stimson, 223 U.S. 605, 619–21 (1912) (noting the principle of *Ex parte Young* applied to federal officials); Truax v. Raich, 239 U.S. 33 (1915) (relying on *Ex parte Young* to entertain a bill against the state attorney general and county attorney); Terrace v. Thompson, 263 U.S. 197 (1923) (relying on *Ex parte Young* to entertain a bill against a state official); Goltra v. Weeks, 271 U.S. 536, 545 (1926) (relying on *Ex parte Young* to entertain a bill in equity seeking an injunction against federal officials).

135. For examples of the fine line-drawing this entailed, see the discussion in the following cases: *Allen v. Baltimore & O. R. Co.*, 114 U.S. 311, 316–17 (1885) (noting "[w]here the rights in jeopardy are those of private citizens, and are of those classes which the Constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies, in cases to which its remedies can be applied, that jurisdiction in equity vested by the Constitution of the United States, and which cannot be affected by the legislation of the States" in a suit against public officials of State of Virginia to enjoin collection of taxes said to violate Art. I, § 10 because coupons on bonds were refused in satisfaction of the tax obligation, the court went out of its way to affirm the propriety of equitable relief); *Ex parte Ayers*, 123 U. S. 443, 489 (1887) (finding *Osborn* inapplicable because "where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction"); *Smyth v. Ames*, 169 U.S. 466, 518–19 (1898) (rejecting the claim that the "these suits are in effect, suits

continued its use of equity to enjoin private actions deemed to adversely affect the public interest, even on politically charged social issues in cases like *In re Debs*, one of several fiercely fought battles between labor and capital during this period as militant unionism grew in strength.[136]

It was in this context that the Court rendered the line of decisions that culminated in *Love*. One of the early cases was *Mercantile Trust Co. v. Texas & Pacific Railway Co.*[137] In that case, state law created a commission, gave it the power to set railroad rates, created a presumption that rates set by the commission were reasonable, sanctioned charges above prescribed rates by criminal and civil penalties, and created a private right of action for damages and penalties.[138] Stockholders filed suit seeking an injunction on the ground that the rates were confiscatory and therefore took property without due process of law.[139] The stockholders also alleged that they were effectively deprived of due process because liability for statutory penalties and damages effectively prevented them from challenging the law.[140] The district court found the rates were confiscatory and enjoined the railroads from complying, the state officials from enforcing the penalties or prescribing other rates, and went so far as to prohibit any person from filing actions for damages or penalties under the private right of action provision of the statute.[141]

The case came before the Supreme Court as *Reagan v. Farmers' Loan & Trust Co.*[142] Taking up the challenge to the penalties claim, the Court said

> [t]he argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which . . . in the nature of things, cannot be reached for length of time; that meanwhile a failure to obey those regulations exposes the company . . . to . . . penalt[ies]

against the State, of which the Circuit Court of the United States cannot take jurisdiction consistently with the Eleventh Amendment," by asserting that "it is settled doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment").

136. *See In re* Debs, 158 U.S. 564, 597–600 (1895).

137. *See* Mercantile Trust Co. v. Tex. & Pac. Ry. Co., 51 F. 529, 543–45 (W.D. Tex. 1892) (citing Minn. Rate Cases, 230 U.S. 362 (1913)).

138. *Id.* at 543.

139. *Id.* at 535.

140. *Id.*

141. *Id.* at 543–44.

142. 154 U.S. 362 (1894).

> so enormous as . . . to roll up a sum far above the . . . value of the property . . . .[143]

The Court addressed this contention in part by emphasizing that "no legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity."[144] Consequently, a plaintiff could "find in the Federal court all the relief which a court of equity is justified in giving."[145] The Court affirmed the injunction prohibiting enforcement of the current rates and related penalties and therefore did not reach the challenge to the penalties.[146]

The next case to take up the issue was *Cotting v. Godard*, a suit brought by stockholders of the Kansas City Stock-Yards Company to enjoin a state law regulating rates.[147] The principal claims were that the rates were confiscatory and therefore took property without due process of law and violated equal protection because other stock yards could charge higher rates.[148] On the merits, the Court held that the Act violated equal protection.[149]

Significant here is that the Court, after noting the draconian fines imposed for statutory violations, felt compelled to ask, "[m]ust the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute?"[150] And it went on to note that legislation from other states presented this question as well.[151]

After describing the way these statutes functioned, the Court conceded "[i]t is doubtless true that the State may impose penalties such as will tend to compel obedience . . . and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different . . . ."[152] But it continued,

> when the legislature, in an effort to prevent any inquiry into the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of penal-

143. *Id.* at 394.
144. *Id.* at 395.
145. *Id.*
146. *Id.* at 413.
147. 183 U.S. 79 (1901).
148. *Id.* at 85–100.
149. *Id.* at 114–15.
150. *Id.* at 100.
151. *Id.*
152. *Id.* at 102.

> ties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.[153]

The Court went on to venture the thought that such enforcement regimes would violate due process (as opposed to equal protection) even if all similarly situated persons were subject to the penalties.[154]

These cases set the stage for *Ex parte Young*, which came to the court on a writ of habeas corpus filed by Young, the attorney general for Minnesota.[155] The case was brought by stockholders seeking to enjoin enforcement of railroad rate regulation on the ground that the rates took property without due process of law and denied equal protection.[156] The stockholders also alleged that "no owner or operator . . . could invoke the jurisdiction of any court to test the validity thereof," which effectively deprived them of due process and equal protection.[157]

The circuit court entered a preliminary injunction restraining Young from taking any enforcement action.[158] He did so anyway, was held in contempt, and was placed in nominal custody.[159] When the writ was granted, Young defended on the ground that the "decision of the court . . . holding that it had jurisdiction to enjoin him, as attorney general, from performing his discretionary official duties, was in conflict with the [Eleventh] Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court . . . ."[160] The Court took that case, recognizing its importance in light of the confusion produced by its prior decisions restraining state officials in some case but not others.[161]

It began by taking up the contention that the state laws were "invalid on their face on account of the penalties."[162] After listing the penalties, the Court noted that the "necessary effect and result of

153. *Id.*

154. *Id.* at 101.

155. *Ex parte* Young, 209 U.S. 123, 126–27 (1908).

156. *Id.* at 130.

157. *Id.* at 131.

158. *Id.* at 132.

159. *Id.* at 133–34. Harrison sketches the back-story. *See* Harrison, *supra* note 2. Friedman shows that Young was held in nominal custody which required him to report to the marshal daily. Barry Friedman, *The Story of Ex Parte* Young*: Once Controversial, Now Canon*, *in* FEDERAL COURT STORIES 247, 264 (Vicki C. Jackson & Judith Resnik eds., 2010).

160. *Ex parte Young*, 209 U.S. at 134.

161. *Id.* at 142.

162. *Id.* at 145.

such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity."[163] The Court collected the dicta from *Cotting* and combined it with cases finding an impairment of contract: when state law provided a remedy "so onerous and impracticable as to substantially give none," combined with precedent voiding laws, which negated meaningful judicial review by creating a conclusive presumption that rates set by state law were reasonable and, therefore, constitutional.[164] Relying on these, the Court concluded that

> when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate . . . from resorting to the courts to test the validity of legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply effect its rights.[165]

Justice Brewer, writing for the Court, took up the objection that there is "no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid."[166] This demonstrates Justice Brewer's belief that

> the distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.[167]

The Court held that

> the provisions of the acts relating to the enforcement of the rates . . . by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates.[168]

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163. *Id.* at 146.
164. *Id.* at 146–47.
165. *Id.* at 147.
166. *Id.*
167. *Id.* at 148.
168. *Id.*

In the same vein, the Court later rejected the argument that there was no basis for equity jurisdiction because the "proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings."[169] Here, it noted that the practical result of this approach would be to allow the state to delay proceedings contrary to the claim of right, thereby forcing the plaintiff to comply until an enforcement action were brought while the action was proceeding.[170] Accordingly, the Court reasoned that "[s]uits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense . . . ."[171] It conceded that the company could take this tack but thought that forcing the company to do so at "peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid," was a "risk the company ought not to be required to take."[172] In contrast, "[a]ll the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question."[173]

As for Young's Eleventh Amendment claim, it failed rather famously for reasons that Harrison explains with remarkable clarity.[174] The Court framed the question as

> whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving the Federal Constitution, and obtaining a judicial investigation of the problem, and pending its solution obtain freedom from suits, civil or criminal, by a temporary injunction, and if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings.[175]

After a lengthy review of the cases deemed relevant, it reached the conclusion that the

> various authorities . . . furnish ample justification for the assertion that individuals who, as officers of the State . . .

169. *Id.* at 163.
170. *Id.* at 163–64.
171. *Id.* at 164–65.
172. *Id.* at 165.
173. *Id.*
174. Harrison, *supra* note 2, at 989–1022.
175. *Ex Parte Young*, 209 U.S. at 149.

> threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act . . . may be enjoined by a Federal court of equity . . . .[176]

The next case in the line is *Missouri Pacific Railway Co.*, which arose from a Kansas law that set rates for transportation and created a private right of action awarding $500 in liquidated damages, as well as attorneys' fees and costs to any person who was charged a rate in excess of that required by regulation.[177] A customer brought an action to recover the fee and the company defended on the grounds that the statutory rates were confiscatory and the penalty provisions were arbitrary, unreasonable, and violated due process and equal protection.[178] The Court held that the company was entitled to have its claim heard in a judicial proceeding and that it had no chance but to do so except raising the federal questions as a defense under the state statute.[179]

Again, the Court conceded that significant penalties were essential to secure compliance with laws.[180] Further, it acknowledged that the state court had found due process was satisfied by the ability to raise the federal issues as a defense in an enforcement action.[181] Even so it reversed on the ground that placing parties in this dilemma "in effect to close up all approaches to the courts, and thus prevent any hearing," on the merits.[182] Here again the Court thought there was an obvious distinction between cases where the validity of a law was open to question and those where it was not.[183] While the Court acknowledged that the statute's liquidated damage provision was not of the same magnitude as the penalties, fines, and imprisonment at issue in *Ex parte Young*, it explained that the "liabilities and penalties imposed . . . bring it within the controlling principle . . ." because the proportion to actual damages "is so arbitrary and oppressive that its enforcement would be nothing short of the taking property without due process . . . ."[184]

That the purpose of this line of case was to protect the right to an impartial decision on challenges to state regulation required by due process was made plain in *Wadley*, a case in which a railroad refused

176. *Id.* at 155–56.
177. Mo. Pac. Ry. Co. v. Tucker, 230 U.S. 340, 346 (1913).
178. *Id.* at 346–49.
179. *Id.* at 347.
180. *Id.* at 348.
181. *Id.* at 349.
182. *Id.* at 350.
183. *Id.*
184. *Id.* at 350–51.

to comply with an order that it cease pricing practices found to be unlawful because they were discriminatory.[185] When enforcement proceedings were brought, the railroad raised its federal claims as defenses, and they were rejected.[186] The state supreme court affirmed, and the railroad secured review in the Supreme Court of the United States.

The Court began by noting that the line of cases tracked so far did

> not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but . . . [were] based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of . . . orders legislative in their nature.[187]

It reasoned that statutes which "impose[] heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined."[188] The problem was that

> [l]iability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order.[189]

It followed that

> [i]f a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid.[190]

The corporation's claim nevertheless failed because the Court accepted the state attorney general's argument that the statute, which provided judicial review, had to be construed as authorizing penal-

185. Wadley S. Ry. Co. v. Ga., 235 U.S. 651 (1915).
186. *Id.* at 653.
187. *Id.* at 662.
188. *Id.*
189. *Id.*
190. *Id.* at 662–63.

ties only after the final decision.[191] Based on this construction of the statute, the Court explained that if the railroad had availed itself of judicial review and lost, the "carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication."[192] But, it continued,

> where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful.[193]

The Court affirmed the state supreme court's decision upholding the penalty.[194]

That brings us to *Love*, where a laundry business was subjected to the maximum rate set by the state's corporation commission.[195] The corporation wished to challenge the rate on constitutional grounds but the state statute only allowed review of the commission's order if one drew a charge of contempt from the commission which could lead to fines up of up to $500 per day.[196] Further, appeal from the commission's order was limited to the state supreme court, and was conditioned upon posting a bond in twice the amount of the fine imposed.[197] The corporation filed suit in federal court seeking a preliminary injunction. The Supreme Court granted review of the order denying preliminary relief.[198]

Before the Supreme Court, the corporation argued that the law violated the Fourteenth Amendment because there was no opportunity for judicial review "except by way of defense proceedings for contempt . . . and that the possible penalties for such violation were so heavy as to prohibit resort to that remedy."[199] Finding that the penalties that might result from an unsuccessful appeal to the Supreme Court to be "such as might well deter even the boldest and

191. *Id.* at 666–67.
192. *Id.* at 669.
193. *Id.*
194. *Id.*
195. Okla. Operating Co. v. Love, 252 U.S. 331, 332–33 (1920).
196. *Id.* at 334–35.
197. *Id.* at 335.
198. *Id.* at 332–33.
199. *Id.* at 333.

most confident," the Court concluded that "[o]bviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate."[200] For this reason the Court concluded that the "provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates."[201]

Based on this finding, the Supreme Court held that the corporation was entitled to a preliminary injunction restraining enforcement of the penalties.[202] It also directed the district court to retain jurisdiction "in order to make that relief as full and complete as the circumstances of the case and the nature of the proofs may require."[203] The Court indicated that if the corporation succeeded on the merits of its underlying claim, the rates were confiscatory, and a permanent injunction should issue.[204] But it also went on to provide that even if the rates were found lawful, "a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory."[205]

In this way, the Supreme Court indicated that the grant of preliminary relief by a federal court did protect the litigant from liability arising from a failure to comply with federal law. In doing so, the Court protected access to the judicial process against duly enacted state law. Additionally, it endorsed a principle that implied limitations on the coordinate branches of the federal government. This opinion was a bold step in furtherance of federal judicial power as the later debate between Stevens and Marshall demonstrates.

Even so, it seems likely that none of these developments would have surprised the framers of the federal constitution. In his treatment of equity, Story had ventured the thought that the

> earliest known exercises of equitable jurisdiction . . . applied to remedy defects in the common-law proceedings; and, therefore, that equity jurisdiction was entertained upon the same ground which now constitutes the principal reason if its interference; namely, that a wrong is done, for which there is no plain, adequate, and complete remedy in the

200. *Id.* at 337.
201. *Id.* (citing *Ex parte* Young, 209 U.S. 123, 147 (1908)).
202. *Id.*
203. *Id.*
204. *Id.* at 337–38
205. *Id.* at 338.

courts of common law.[206]

He also notes that, in the great controversy between the courts of law and those of chancery, much of the hostility to chancery was directed "especially to the power of issuing injunctions to judgments and other proceedings in order to prevent irreparable injustice."[207] Writing about the historical development of equity jurisdiction in 1902, Norton Pomeroy thought it was "no exaggeration to say that, during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining prosecution of legal actions, where the defendants sought the aid of chancery, which alone could take cognizance of the equities that would defeat recovery at law against them."[208] As in England, so too in America, equity jurisdiction, particularly the power to enter injunctions, provoked increasing resistance to the federal courts. That resistance produced the decision in *Love*.

III. PRELIMINARY RELIEF: DUE PROCESS, SEPARATION OF POWERS, AND FEDERALISM

Love indicates that federal courts have the power to provide protection from penalties arising from noncompliance with a given law while a preliminary injunction is in effect, even if the law is ultimately upheld. However, the decision gives no rationale and does not answer several critical questions. If the federal courts have this power, where does that power come from? Moreover, how can that power be squared with fundamental constitutional values such as the separation of powers and federalism? Nevertheless, as discussed below, *Love* does provide the answer if we understand its place in the line of cases that led up to its decision.

A. Preliminary Relief and the Requirements of Due Process

In the line of cases that led to *Love*, the Court saw itself addressing colorable challenges to state statutes.[209] The Court confronted en-

206. STORY, *supra* note 113, § 49, at 32. I do not mean to suggest the matter is that simple. Story's Commentaries provided extensive coverage of areas where equity provided substantive rights, as noted in note 113 *supra*. Further, Preis has shown that the idea that "equity follows the law" must be qualified. *See* John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 12–15 (2013).

207. STORY, *supra* note 113, § 51, at 34.

208. 4 J. NORTON POMEROY, JR., EQUITY JURISPRUDENCE § 1360, at 2700 (3d ed. 1905).

209. *Ex parte* Young, 209 U.S. 123, 148 (1908) ("The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of

forcement mechanisms that created what Laycock has called "the *Young* dilemma": the laws effectively forced the plaintiffs to refrain from lawful activity or risk significant penalties if they challenged the law but lost on the merits. The Court viewed these cases as presenting the same basic problem while involving a continuum of penalties leveled against corporations and corporate officers or employees.[210] As Laycock has shown, it was the nature of this dilemma that drove the Court's analysis, and the Court soon applied this principle in a wide variety of cases involving a wide range of harms.[211]

Confronted with this situation, the Court acknowledged legislatures had the power to impose draconian penalties sufficient to compel compliance.[212] However, the Court consistently rejected the

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a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."); Cotting v. Godard, 183 U.S. 79, 100 (1901) (asking, "[m]ust the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute," at the risk of incurring such fines), *quoted in* Mo. Pac. Ry. Co. v. Tucker, 230 U.S. 340, 350 (1913).

210. *See, e.g.*, Okla. Operating Co. v. Love, 252 U.S. 331, 337 (1920) ($500 fine per offense); Shaffer v. Carter, 252 U.S. 37, 47 (1920) (rejecting the claim that the plaintiffs had an adequate remedy at law, finding uncertainty about the scope of review, and finding that the remedy "falls short of indicating—to say nothing of plainly showing—that this procedure would afford an adequate remedy"); Adams v. Tanner, 244 U.S. 590, 596–97 (1917) (reversing dismissal of a bill seeking to restrain a state law restricting employment agencies as an arbitrary and oppressive restriction on the liberty of the plaintiffs to engage in a useful business guaranteed by the Fourteenth Amendment); Truax v. Raich, 239 U.S. 33, 37–39 (1915) (finding recourse to equity proper in suit filed against attorney general of state and county attorney to enjoin enforcement of Arizona anti-alien law as violation of Fourteenth Amendment Due Process as essential to the safeguarding of the rights of property and the right to earn a livelihood and to continue employment unmolested by efforts to enforce void enactments); Wadley S. Ry. Co. v. Georgia, 235 U.S. 651, 652 (1915) (discussing a fine of not more than $5000 for each violation); Minn. Rate Cases, 230 U.S. 352, 380 (1913) (reviewing injunction of railroad rate regulations after noting challenge to severe penalties under the act and that the circuit court sustained jurisdiction based on *Ex parte* Young); *Mo. Pac. Ry. Co.*, 230 U.S. at 348 (discussing liquidated damages of $500 per violation); *Ex parte Young*, 209 U.S. at 145 (discussing violations of freight rates—corporate officers, directors, agents and employees punished for violations by misdemeanor and imprisonment not more than ninety days for each offense; for violations of passenger rates punishment is a felony and a fine not exceeding $5000 or imprisonment for not more than five years or both); *Cotting*, 183 U.S. at 99 (discussing punishments ranging from no more than $100 for first offense to not less than $1000 and six months imprisonment for fourth or subsequent offense); Mercantile Trust Co. v. Tex. & Pac. Ry. Co., 51 F. 529, 531 (C.C.W.D. Tex. 1892) (providing for a penalty of $500 per violation for shipping).

211. *See* Laycock, *supra* note 28, at 648–53.

212. *Cotting*, 183 U.S. at 102 ("[I]t is doubtless true that the State may impose penalties such as will tend to compel obedience . . . and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different . . . ."); *Ex parte Young*, 209 U.S. at 146; *Tucker*, 230 U.S. at 348 (noting that "[e]xperience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that deviations from them be discouraged by adequate liabilities and penalties"); *Wadley*, 235 U.S. at 662 (noting "[t]hese cases do not proceed upon the idea that there is any

argument that raising the federal questions as a defense to an enforcement action was an adequate remedy at law by taking a practical view of the risks borne by plaintiffs given the time it would take to secure a conclusive decision.[213] These competing imperatives created the *Young* dilemma.

The Supreme Court made plain that the solution to the *Young* dilemma was a suit filed in equity seeking a preliminary injunction.[214] That is, the equity jurisdiction of the federal courts allowed the companies, as potential defendants in enforcement actions, to secure injunctive relief as plaintiffs in equity—the equivalent of the declaratory and injunctive relief now available under the federal rules.[215] Of course, the preliminary relief available in equity would not provide any meaningful solution to the *Young* dilemma if the protection provided by the preliminary injunction ceased to exist in cases in which the court resolved the claim against the plaintiff. If the preliminary injunction did not serve as a permanent defense to sanctions arising from noncompliance while the injunction was in effect, then litigating these claims in equity would offer no advantage over the course of action that the court repeatedly rejected as inade-

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want of power to prescribe penalties heavy enough to compel obedience to administrative orders . . .").

213. *Ex parte Young*, 209 U.S. at 163–65 (noting that the practical result of this approach would be to allow the state to delay proceedings contrary to the claim of right, thereby forcing the plaintiff to comply until an enforcement action was brought as well as while the action was proceeding, and "[s]uits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense . . ." and conceding that the company could take this tack but thought that forcing the company to do so at "peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid" was a "risk the company ought not to be required to take"); *Mo. Pac. Ry. Co.*, 230 U.S. at 350 (quoting *Ex parte Young* at length for the proposition that placing parties in this dilemma "in effect close up all approaches to the courts, and thus prevent[s] any hearing" on the merits.); *Love*, 252 U.S. at 333 (noting no opportunity for judicial review of rate "except by way of defense proceedings for contempt . . . and that the possible penalties for such violation were so heavy as to prohibit resort to that remedy").

214. Chi., Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 460 (1890) (Miller, J., concurring) (noting that the proper, if not only, way of seeking judicial relief from a rate was "a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding" enforcement of the rate); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395 (1894) ("[N]o legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity," and therefore the plaintiff could "find in the Federal court all the relief which a court of equity is justified in giving."); *see generally Ex parte Young*, 209 U.S. 123; *Mo. Pac. Ry. Co.*, 230 U.S. at 349; *Wadley*, 235 U.S. at 660 (noting that "[s]uch orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property").

215. *See* Laycock, *supra* note 28, at 639.

quate—raising the federal questions as defenses in an enforcement action.

In this way, the equity jurisdiction of the federal courts provided the historical context in which the Court confronted—and resolved—the *Young* dilemma as a matter of constitutional law. The practice of providing preliminary relief, and the implicit assumption that preliminary injunctive relief served as a defense while in effect, led the Court to its conclusion that access to the courts without the benefit of such preliminary relief was unconstitutional because it effectively deprived citizens of the impartial adjudication required by due process.[216] The Court also made clear that the protection provided by due process applied regardless of whether the plaintiff prevailed on the merits.[217] The Court was balancing the state's legitimate interest in using penalties sufficient to secure compliance with valid laws against the plaintiff's due process right to a resolution of its legal challenge. Therefore, the Court drew a distinction between penalties assessed before and after a judicial decision on the merits—the former were void; the latter were valid.[218] In short, the

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216. *Cotting*, 183 U.S. at 102 ("[W]hen the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."); *Ex parte Young*, 209 U.S. at 146–47 ("[The] necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity . . . when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate. . . . [R]esort[] to the courts to test the validity of . . . legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."); *Tucker*, 230 U.S. at 350 (quoting *Young* at length for the proposition that placing parties in this dilemma "in effect, to close up all approaches to the courts, and thus preventing any hearing," on the merits); *Wadley*, 235 U.S. at 662–63 ("[I]f a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid.").

217. *Ex parte Young*, 209 U.S. at 148 ("[T]he provisions of the acts relating to the enforcement of the rates . . . by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."); *Love*, 252 U.S. at 336–37 ("[S]uch as might well deter even the boldest and most confident," the Court concluded that "[o]bviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate . . . ." For this reason, the Court concluded that the "provisions of the act relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rules.").

218. *Cotting*, 183 U.S. at 102 (noting "if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different . . ."); *Ex parte Young*, 209 U.S. at 145 (quoting *Cotting*, 183 U.S. at 102); *Wadley*, 235 U.S. at 669 (noting that if the railroad had availed itself of judicial review and lost, the

Court's decisions in *Ex parte Young* and *Love* represent a convergence of equitable and constitutional principles centered on a concern for fundamental fairness in litigation against governmental defendants.

Although the remand in *Love* limits the protection provided by the preliminary injunction to claims with a reasonable basis, this in no way changes the equitable and constitutional principles. It simply reflects the procedural posture of the case (interlocutory review in the Supreme Court), as well as the implicit premise of the due process principle that was established in the line of cases leading up to *Love*: there has to be a genuine claim that requires adjudication in order for due process protections to apply. In *Love*, the Court described that claim as one with a reasonable basis.

In *Love*, the Court struck the penalties that burdened access to the federal courts under *Ex parte Young*, relying in part on its decision in a companion case which held that the state law allowed separate penalties for each individual charge in excess of the prescribed rate.[219] The Court in *Love* had also held that the company was entitled to a preliminary injunction—relying on the amended bill for this interlocutory decision and so ruling despite the decision below denying preliminary relief.[220] The direction on remand simply required the district court to confirm that the company's claim had a reasonable basis in fact and therefore deserved the protection provided by the rule in *Ex parte Young*.[221]

Viewed in isolation, the direction on remand in *Love* seems both cryptic and cursory. In context, however, the direction on remand makes perfect sense. Due process requires that a preliminary injunction serve as protection from the *Young* dilemma in cases in which there is a genuine dispute about the lawfulness of the government's application of the law to the private party plaintiff. It is likewise clear that the showing required to secure preliminary injunctive relief satisfies the "reasonable basis" requirement in *Love*. To secure preliminary injunctive relief, a party must show both a likelihood of success on the merits and irreparable harm. Further, it is Laycock's considered view that the irreparable harm requirement retains meaningful significance for judicial decision-making at the prelimi-

"carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication").

219. *See Love*, 252 U.S. at 337.

220. *See id.* at 333–36 (relying on the amended bill to assess the merits).

221. *Id.* at 337–38.

nary injunction stage.[222] In cases that present the *Young* dilemma, a party that has made the showing necessary to secure preliminary relief has necessarily satisfied *Love's* reasonable basis requirement.

B. Separation of Powers and Federalism Revisited

The way in which the Supreme Court came to the holdings in *Ex parte Young* and *Love* also demonstrates that the principle created by this line of cases draws additional strength from principles of the separation of powers and federalism rather than contradicting them as Justice Stevens believed.[223] The reason is simple: when a case is properly before the federal courts, the federal judiciary becomes the means by which to satisfy the requirements of due process. In such cases, the grant of preliminary injunctive relief serves as an essential means of ensuring that the federal courts can perform their core function in our constitutional order.

The idea that preliminary relief is an essential attribute of judicial power is adumbrated by principles and practice across a number of areas. For example, even as the Court foreswore the power to craft a federal common law of crimes in *United States v. Hudson*, it recognized that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, . . . powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[224] In another case decided in this same period, *Bonaparte v. Camden*, Justice Baldwin placed the power to provide preliminary relief in that category, noting that if the case before the court "is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors *and its own principles*, to administer the only remedy which the law allows to prevent the commission of such act."[225] He also explained that courts were traditionally reluctant to provide such relief because if the injunction

222. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 117, 241 (1st ed. 1991).

223. *See supra* text accompanying notes 70–77.

224. United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812).

225. Bonaparte v. Camden, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (emphasis added). Note the parallel between the court's analysis here and Marshall's claim in *Bodley v. Taylor*, 9 U.S. (5 Cranch) 191, 222 (1809) ("[J]urisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself: and what can justify that assumption but the opinion that cases of this description come within the sphere of its general action? In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles.").

were entered in error "there can be no redress, it being the act of a court, not of the party who prays for it."[226]

To the same effect, the Court observed about fifty years later that, because the preliminary injunction was a judicial act, any "damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution."[227] The lack of a remedy for damage caused by an injunction entered in error explains why courts began to require bonds.[228] These cases show that the Supreme Court understood preliminary injunctive relief as a judicial act that the Court itself employs to ensure its ability to perform its constitutionally assigned duty in a meaningful way. Indeed, there is no good reason to see preliminary relief in any other way.

The Supreme Court's observation in *Hudson*, that "certain implied powers must necessarily result to our Courts of justice from the nature of their institution," including the power to fine for contempt, "because [such implied powers] are necessary in the exercise of all others" also supports the view that federal courts have the ability to provide preliminary relief.[229] For just this reason, the Court has held that a court may punish violations of a preliminary injunction even when the underlying order is later reversed.[230] This result parallels the result required by the rule in *Ex parte Young* as applied in *Love*, which attributes validity to preliminary injunctions for the period of their duration quite apart from the final decision on the merits of the underlying claim that supported the award of preliminary relief.

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226. *Bonaparte*, 3 F. Cas. at 827.

227. Russell v. Farley, 105 U.S. 433, 438 (1881) (italics added) (discussing the practice of requiring bonds and holding decision to require security is discretionary); *see also* Hovey v. McDonald, 109 U.S. 150, 161 (1883) (noting that the lower court had power, "if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary," and emphasizing that "[t]his power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or non-exercise is not an appealable matter").

228. *See generally* Dobbs, *supra* note 55 (discussing the evolution of the bond requirement); *see id.* at 1099–1102, app. II (discussing the genesis of the current security requirement in Rule 65).

229. *Hudson*, 11 U.S. at 34.

230. *See* Worden v. Searls, 121 U.S. 14, 27 (1887) (citing *In re* Chiles, 89 U.S. 157 (1874)) (reversing a final decree and remanding with a direction to dismiss the bill, with costs, "but without prejudice to the power and right of the circuit court to punish the contempt referred to in those orders by a proper proceeding. The preliminary injunction was in force until set aside"); United States v. United Mine Workers of Am., 330 U.S. 258, 294 (1947) (noting that violations of a preliminary injunction are "punishable as criminal contempt even though the order is set aside on appeal").

The view that preliminary injunctive relief must serve as a defense to liability can be understood as an essential means to protect access to the federal courts so that the federal judiciary can perform the judicial function. As we have seen, the Court's decisive rejection of the *Young* dilemma based on due process concerns was inextricably intertwined with its concern for access to the judicial branch—seen as the archetypal forum for a fair hearing on the merits during this historical period.[231] In this way, the decision in *Young* converges with precedent in other areas where the Court has taken steps to protect unencumbered access to the federal courts so that they can properly perform their constitutionally assigned function. During this same period, the Court struck down state laws conditioning permission to do business on forfeiture of access to the federal courts, using reasoning that parallels the modern doctrine of unconstitutional conditions.[232] More recently, the Court struck down restrictions on federal funding for legal representation in part because the restraint on subsidized advocacy prohibited "speech and expression upon which courts must depend for the proper exercise of the judicial power."[233] Earlier decisions protecting the freedom of association for the purpose of securing access to the courts have this

231. *See, e.g.*, Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 457 (1890) (striking down state statute that made commission's determination regarding reasonableness of rates conclusive as a violation of due process because it deprived the "company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice"). This case also provided part of the basis for the Supreme Court's rejection of the *Ex parte Young* dilemma on due process grounds. *See id.*; *Ex parte* Young, 209 U.S. 123, 147 (1908). Of course, because the principle was rooted in due process it has quite properly been extended to administrative proceedings as well. *See, e.g.*, Reisman v. Caplin, 375 U.S. 440 (1964) (extending rule in *Ex parte Young* and *Love* to administrative proceedings before IRS); *see also* Gen. Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010) (applying *Ex parte Young* and *Love* rule to administrative proceedings under CERCLA and citing cases). Again, the fundamental Due Process principle still applies in cases where the federal courts, are the forum with responsibility for providing the hearing required by due process.

232. *See supra* note 135. The Court has since retreated from the reasoning of these cases to the extent they suggest that there is a constitutional right to a federal forum, and indeed, expressed skepticism about the need to litigate federal claims in federal court. *See generally* San Remo Hotel, L.P. v. City and Cnty. of San Francisco, 545 U.S. 323 (2005); *see also* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984). This does not diminish the significance of the perceived need to protect access to the federal courts to ensure compliance with due process during this era.

233. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001).

same thrust.[234] These cases represent some of the ways in which the federal courts protect access in order to ensure their ability to perform their core function.[235]

Current practice under Rule 65(c) also reflects a concern to ensure access to the courts for allowing adjudication on the merits. On its face, the language of Rule 65 creates a mandatory security as a condition precedent to preliminary injunctive relief.[236] But federal courts treat the requirement as discretionary, at least in part because requiring security might in some cases subject a party to irreparable harm by depriving it of the benefit of preliminary relief, which is seen as undermining the ability of the court to perform its function properly.[237] In short, there is good reason to believe that the power of the federal courts to provide preliminary injunctive relief derives directly from Article III because it is essential for the federal judiciary to exercise the judicial power in a meaningful way. Precisely because that is the case, an attempt to completely strip the federal courts of their ability to do so would significantly impair the ability of the judicial branch to exercise its core function.[238]

In contrast, recognizing that the federal courts have an inherent power to provide preliminary injunctive relief that serves as a temporary defense to liability does not significantly impair the legitimate prerogatives of the coordinate branches. As we have seen, the governing law requires the party seeking preliminary relief to show a likelihood of success on the merits regardless of whether the claim is constitutional or statutory.[239] As a result, the award of preliminary relief, even if mistaken, represents an exercise of the judicial power

234. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 444 (1963) (voiding a state law that prohibited the association of lawyers for the purpose of seeking legal redress of constitutional rights).

235. For a survey of other ways in which the federal judiciary protects its constitutionally assigned role, see John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CAL. L. REV. 1367 (2007).

236. *See* Atomic Oil Co. v. Bardahl Oil Co., 419 F.2d 1097, 1100 (10th Cir. 1969).

237. *See* Town of Newton v. Rumery, 480 U.S. 386, 394–97 (1987) (discussing policy considerations of contractual provisions that limit access to courts); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (same); *see also* Erin Connors Morton, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L.J. 1863, 1863–906 (1995) (noting that courts have departed from the mandatory language of Rule 65, generally in cases where the inability of a party to post security would force the party to suffer irreparable harm); Dobbs, *supra* note 55, at 1091–1178 (reasoning that federal courts retain discretion regarding the security requirement despite the mandatory language of the rule).

238. This point touches on the larger jurisdiction-stripping debate but that is beyond the scope of this inquiry, which is focused on the legal effect that can be given to preliminary relief in cases falling within a statutory grant of jurisdiction and as to which there is no specific restriction on the power to provide equitable relief.

239. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013).

to say "what the law is" in a case under a standard that is designed to further, not undermine, the controlling law. Moreover, in such cases, the judiciary exercises the purely remedial portion of its equitable power (as opposed to the more substantive component of equity jurisprudence), which makes it the strongest case for judicial power. By the same token, it presents the least risk of improper intrusion into areas entrusted to the other branches. Finally, judicial interference with the ability of the coordinate branches to perform their constitutionally assigned duties is relatively minor, particularly when balanced against the risk of loss to individual citizens, because the interference is temporary.

Significantly, there is reason to believe that Congress has implicitly accepted the Court's resolution of the *Young* dilemma and effectively acquiesced to the proposition that federal courts have to be able to provide preliminary relief that functions as a defense to liability while it is in effect. First, although the decision in *Young* produced a firestorm of criticism, Congress did not respond by stripping federal courts of the power to provide injunctive relief.[240] Instead, it required a three judge panel to rule in such cases and authorized direct appeal to the Supreme Court.[241] *Love* came before the Supreme Court under that statute.[242]

Second, congressional action at the time of the Rules Enabling Act also provides support for the position that federal courts have some measure of inherent power to provide preliminary injunctive relief. Rather than remove the power to provide preliminary injunctive relief wholesale, Congress enacted the Declaratory Judgment Act.[243] The Senate Report supporting the Act specifically cited a case where the Supreme Court used equity to avoid the *Young* dilemma, noting that persons are "not obligated to take the risk of prosecution, fines and imprisonment[,] and loss of property in order to secure an adjudication of their rights."[244] It is true that the purpose of declaratory relief is to avoid the friction created by injunctive relief, but the decision to provide an additional remedy, rather than restrict the power to provide injunctive relief wholesale, suggests an appreciation for

240. *See* John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 444–45 (1930); *see generally* Harrison, *supra* note 2.

241. Mann-Elkins Act of June 18, 1910, ch. 309 § 17, 36 Stat. 557. *See also* Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013 (extending requirement to judicial orders).

242. Okla. Operating Co. v. Love, 252 U.S. 331, 332–33 (1920).

243. Federal Declaratory Judgment Act of 1934, ch. 512, 48 Stat. 955.

244. S. REP. NO. 1005, at 6 (1934) (quoting Terrace v. Thompson, 263 U.S. 197, 216 (1923)). *See generally* Steffel v. Thompson, 415 U.S. 452, 466–73 (1974) (giving a history of Declaratory Judgment Act).

the role such relief plays in the ability of the federal courts to exercise their judicial power.

Admittedly, the view that Congress has acknowledged that federal courts have an inherent power to award preliminary injunctive relief seems at odds with the congressional power to limit the ability of federal courts to enter injunctive relief—one of the most notorious results of the conflict occasioned by the Court's substantive due process jurisprudence.[245] However, the picture is more nuanced and can be seen as featuring an implicit acknowledgement that the ability to provide such relief must exist in at least some circumstances.

For example, the Norris-LaGuardia Act, which is probably the most well-known restriction on the power of federal courts to provide preliminary relief, strikes a careful balance when considered from the standpoint of the ability of federal courts to provide meaningful relief in labor disputes consistent with substantive law or constitutional rights. On the one hand, the Act declares certain practices lawful, provides statutory restrictions on injunctions (often in cases where a damage remedy is adequate), and protects the exercise of constitutional rights.[246] On the other hand, the Act allows courts to enter injunctions under certain circumstances that closely track the requirements for equitable relief that pre-existed the statute.[247]

Likewise, the statutory restriction on state rate regulation is conditioned on the existence of a "plain, speedy[,] and efficient remedy" available in the courts of the state.[248] For its part, the Court has left open the possibility of limiting the anti-injunction provision of the Internal Revenue Code to cases where the legal remedy is adequate, noting that in the ordinary case a remedy at law serves to ensure meaningful judicial review.[249] This line-drawing is not definitive but

245. *See, e.g.*, Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938) (recognizing congressional authority to define and limit injunctions under the Norris-LaGuardia Act). It seems natural that the limitation should be conceived of in jurisdictional terms inasmuch as the power to provide injunctive relief is a feature of equity jurisdiction. *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 208–14 (MacMillan & Co. ed., 1930) (offering jurisdictional rationale for power to restrain injunctive relief). Preis notes the jurisdictional basis as well. *See* John F. Preis, *In Defense of Implied Injunctive Relief In Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 41–42 (2013).

246. 29 U.S.C. §§ 101–05 (2012).

247. *Id.* § 107 (enacting restraint on ability to provide injunctive relief in labor disputes as a jurisdictional limit, but allowing an exception in cases in which the court finds, among other things, a substantial irreparable injury and the absence of an adequate remedy at law).

248. 28 U.S.C. § 1342(4) (2012).

249. *See* 26 U.S.C. § 7421 (2012); Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974) (examining adequacy of legal remedy before observing the statutory restriction on injunctive relief); *see also* Phillips v. Comm'r, 283 U.S. 589, 597–98 (1931).

does support the view that Congress has recognized that the federal courts must be allowed to provide preliminary relief in some cases in order to perform their core function and to avoid separation of powers problems.[250]

The points made above also demonstrate that the direction on remand in *Love* is consistent with the federal system. Much had changed by the time Justice Stevens wrote the opinion in *Edgar v. MITE Corp*. Not long after *Love* was decided, the Supreme Court retreated from a robust review of economic regulation thereby mitigating conflict between the Court and the political branches of the federal and state governments.[251] Another consequence of the tension between the Court and the political branches during this period was the set of legislative restrictions on the power to provide preliminary injunctive relief in specific classes of cases that had provoked the greatest conflict just described.[252] Further, the abstention principles that the Court had begun to develop around the time *Ex parte Young* was decided had reached full flower in modern abstention doctrines, which serve to ameliorate the friction between the federal courts and the states.[253] Finally, the Court had receded from

250. This point touches on the larger "mandatory vesting" debate, but that discussion is beyond the scope of this Article, which is focused on the legal effect that can be given to preliminary relief in cases properly before the federal courts.

251. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

252. *See* Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329–30 (1938) (finding that the district court improperly granted a preliminary injunction under the Norris-LaGuardia Act); *see also* 29 U.S.C. § 107 (2015) (defining the judicial procedure for issuing preliminary injunctions in labor disputes).

253. For early cases moving in the direction of modern abstention doctrines during the period when *Love* was decided, see *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 230 (1908) (remanding a similar rate case like *Ex parte Young*, noting that the "State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission," so "[i]t seems to us only a just recognition of the solicitude with which their rights have been guarded, that [the plaintiffs] should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States"); *c.f.*, Wilcox v. Consol. Gas Co., 212 U.S. 19, 39–40 (1909) ("At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel . . . in their brief . . . . They assumed to criticize that court for taking jurisdiction of this case . . . as if it were a question of discretion or comity, [on the grounds that] there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . ."); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, 207–10 (1929) (relying on *Prentis* to find that a preliminary injunction of a rate regulation was improvidently granted, given complexity of factual and legal issues involved, and availability of state law avenue for review in the courts of the state). The modern abstention doctrines that provide rough parallels are well known. *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); Gov't & Civic Emps. Org. Comm. v. Windsor, 353 U.S. 364 (1957); England v. Louisiana State Bd. of

zealous protection of access to the federal courts characteristic of this period.[254]

However, these changes blinded Justice Stevens to the adverse consequences that his position would have for the legitimate role of the federal courts in the federal system. Those adverse consequences manifested during the period we examined, as states enacted regulatory regimes that thwarted access to federal courts by forcing plaintiffs to advance their claims at risk of liberty and property in an effort to undermine the application of federal law. The Supreme Court has not hesitated to strike down such enforcement schemes because they work to deprive parties of access to the courts as a means of securing the impartial adjudication required by Due Process.

The way the Court moved toward the principles that undergird its decision in *Love* also provides answers to the objections raised by Justice Stevens. As noted earlier, the historical connection between the power of the federal courts and equity practice suggests that the specific power at issue here, i.e., the power to provide preliminary relief pending final decision by the federal judiciary, is in fact properly seen as an indispensable inherent power in at least some cases—those presenting irreparable harm. Justice Stevens also failed to see that in cases involving challenges to state law based on federal law, the power at issue here ultimately stands on the same ground as *Ex parte Young* itself—the Supremacy Clause. In this regard, Justice Stevens was quite right that preliminary relief served to preserve federal jurisdiction. But he failed to appreciate how meaningless that jurisdiction would be if the federal courts did not have the power to protect parties that made recourse to the federal forum. Finally, and most fundamentally, we have seen that the power in question is ultimately from the Due Process Clause itself. While it is true that the Court worked out the principle in terms of access to the federal courts at a time when it closely identified the federal forum with the process that was due, the principle laid down is broader than that and, for this very reason, has survived in the context of administrative adjudications.[255]

Med. Exam'rs, 375 U.S. 411 (1964); Colo. River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976).

254. *See, e.g.*, San Remo Hotel, L.P. v. San Francisco, 545 U.S. 323, 343–45 (2005) (noting that plaintiffs can be required to litigate in state court under state statute or prudential rules, and holding that plaintiffs lost their "right" to have their federal claims litigated in federal court by advancing the same claim in state court) (citing Allen v. McCurry, 449 U.S. 90 (1980)).

255. *See, e.g.*, Reisman v. Caplin, 375 U.S. 440 (1964); *see also* General Elec. Co. v. Jackson, 610 F.3d 110, 118–19 (D.C. Cir. 2010); Emp'rs Ins. of Wausau v. Browner, 52 F.3d 656, 666 (7th

These points also answer the important questions raised by Amar in his tentative exploration of the question. As explained above, there are good grounds to believe that the federal courts have an inherent power to provide preliminary relief as the judicial department moves toward its final decision in a suit properly before it. More fundamentally, in the crucible of conflict that produced the decisions in *Ex parte Young* and *Love*, the Court found that due process prevented the government from forcing private citizens to hazard significant penalties as the price of adjudicating claims with a reasonable basis.

CONCLUSION

As Justice Holmes famously noted, "a page of history is worth a volume of logic."[256] The history traced here shows that a preliminary injunction does indeed serve as a defense to liability for noncompliance with the law during the period the preliminary relief is in effect. This result makes perfect sense. Federal courts were given equity jurisdiction at the outset in order to ensure that they could provide complete justice. Equity jurisdiction, in turn, supported the practice of awarding preliminary relief in cases properly before the federal courts precisely for that reason. The practice of granting preliminary relief so as to ensure the federal courts could provide complete justice, in turn, led the Court to its conclusion that due process prevents the government from dangling the Sword of Damocles over the heads of private citizens who bring good faith challenges to legality of governmental action, which would effectively undermine our ability to secure an adjudication on the merits of our claims. Current practice under Rule 65 demonstrates that the exercise of this power is consistent with—not contrary to—the separation of powers and federalism. Happily, our instinctive answer to the question addressed here—that it would be unfair to impose liability on a party who acted under the protection of a preliminary injunction—turns out to be the legal answer as well.

Cir. 1995); Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 391–92 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986).

256. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).