



## ARTICLE

## The Common Law Origins of *Ex parte Young*

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**Abstract.** Important recent scholarship has come to question the origins and legitimacy of the *Ex parte Young* proceeding, a cornerstone of modern constitutional litigation. Deploying a historically inflected methodology that we call equitable originalism, scholars and jurists have sought to confine federal equity power to the forms of equitable intervention common in the English High Court of Chancery at the time judicial power was first conferred on the lower federal courts in 1789. Such limits have led some to question the power of federal courts to grant affirmative *Ex parte Young* relief and to issue national or universal injunctions.

This Article explores the *Ex parte Young* action and the power of federal courts to issue affirmative constitutional remedies in its name. It shows that equity's traditional reluctance to intervene in public law matters reflected the perceived adequacy of the common law writs—mandamus, certiorari, and prohibition—as tools for oversight of the administrative state. Over time, equity adapted. *Ex parte Young* confirms a nineteenth-century transition in which the injunction absorbed the lessons of the common law writs and evolved into the primary mode of judicial control of administrative action. Equitable originalism could reverse such adaptation, returning equity to its private law eighteenth-century form and undermining modern constitutional remediation.

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## Introduction

With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere . . . [T]he review and correction of the proceedings must be obtained by the writ of certiorari.

—*Ewing v. St. Louis* (1867)<sup>1</sup>

In the review of the quasi-judicial decisions of these federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the States, is performed by writs of certiorari.

—*Crowell v. Benson* (1932)<sup>2</sup>

*Ex parte Young*<sup>3</sup> occupies a central place in the Supreme Court’s public law canon, empowering the lower federal courts to entertain suits to enjoin allegedly unconstitutional state action.<sup>4</sup> Yet important recent scholarship questions the origins and legitimacy of some forms of *Ex parte Young* relief. Deploying an equitable traditionalism that echoes originalist themes in Supreme Court jurisprudence,<sup>5</sup> this scholarship assigns significant weight to

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1. 72 U.S. (5 Wall.) 413, 418 (1867) (emphasis omitted). The Court in *Ewing* dismissed a bill in equity that sought to enjoin the mayor and city council of St. Louis from enforcing condemnation orders alleged to be unlawful because those orders were rendered in excess of the officials’ statutory and constitutional authority. *Id.* at 413 (statement of the case); *id.* at 418-19.
  2. 285 U.S. 22, 75 (1932) (Brandeis, J., dissenting) (emphasis omitted). The Court in *Crowell*, by contrast to *Ewing*, recognized a suit to enjoin a deputy commissioner from enforcing a compensation order that exceeded the United States Employees’ Compensation Commission’s statutory and constitutional authority. *Id.* at 36-37, 65 (majority opinion). Justice Brandeis dissented, urging greater judicial deference to the factual record on review of the Commission’s order. *See id.* at 66-67 (Brandeis, J., dissenting).
  3. 209 U.S. 123 (1908). In *Ex parte Young*, the Court upheld an injunction barring Minnesota’s attorney general from enforcing statutory railroad rates that were thought to have violated a railroad’s procedural and substantive due process rights under the Fourteenth Amendment. *See infra* Part I.A.
  4. *See* 17A CHARLES ALAN WRIGHT & ALAN R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4231 (West 2019) (characterizing *Ex parte Young* as “one of the three most important decisions the Supreme Court of the United States has ever handed down,” alongside *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816)).
  5. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318-29 (1999) (defining the modern scope of equitable power by reference to that of the High Court of Chancery in 1789, when Congress first conferred such authority on the federal courts). For a discussion of the originalist strands in the Supreme Court’s recent equity jurisprudence, see Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 999-1000, 1009-14 (2015) (documenting the Court’s recourse to “history and tradition” in defining the scope of equitable relief across “many substantive areas” of private law). As Bray notes, Justice Scalia in *Grupo Mexicano* admitted a measure of equitable flexibility, but insisted that such flexibility take place

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the history of equity during “days of ‘the divided bench,’ before law and equity merged.”<sup>6</sup> In one such piece, John Harrison proposed to ground the *Ex parte Young* doctrine in equity’s power to issue antisuit injunctions,<sup>7</sup> a revision that was thought to narrow *Ex parte Young*’s legitimate modern scope significantly.<sup>8</sup> In a second important paper, Samuel Bray has drawn on equity’s past in questioning the power of federal courts to issue national or universal injunctions.<sup>9</sup> Invoking Bray’s view that national injunctions are “unthinkable”

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within the broad boundaries of traditional equitable relief, defined in historical terms. *Id.* at 1010 n.61. For a criticism of both the history and method on display in *Grupo Mexicano*, see generally James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723 (2020) (arguing that the adequacy of presuit attachment remedies at law may help explain why courts of equity did not traditionally issue asset-freeze injunctions on behalf of prejudgment creditors).

6. *US Airways, Inc. ex rel. US Airways, Inc. Emp. Benefits Plan v. McCutchen*, 569 U.S. 88, 94-95 (2013) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)).
7. See John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989 (2008). Antisuit injunctions were a “staple of equity for centuries,” *id.* at 990, but were limited in important respects. Notably, while the High Court of Chancery would stay suits brought before common law courts to enforce private contract or property rights, it did so only to vindicate equitable defenses, such as “fraud, mistake, [or] accident,” that common law did not recognize. See GEO. TUCKER BISPHAM, *THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY* §§ 407, 409-413 (Philadelphia, Kay & Brother 1874).
8. See *infra* Part I.A. Courts, including the Supreme Court, have echoed Harrison’s view to this effect. See *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring) (“*Ex parte Young* . . . recognized a narrow limitation on state sovereign immunity, permitting railroad stockholders to enjoin enforcement of unconstitutional rate regulations. That negative injunction was nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State’s enforcement proceedings at law.” (citing Harrison, *supra* note 7, at 997-99)); *In re Trump*, 928 F.3d 360, 373-75 (4th Cir. 2019) (asserting that *Ex parte Young* actions “involve[] the ‘anti-suit injunction,’ a traditional equitable remedy that ‘permit[s] potential defendants in legal actions to raise in equity a defense available at law’” (second alteration in original) (quoting *Mich. Corr. Org. v. Mich. Dep’t of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014) (citing Harrison, *supra* note 7, at 997-99))), *vacated on reh’g en banc*, No. 18-2486, 2020 WL 2479139 (4th Cir. May 14, 2020). Yet in contending that antisuit injunctions served to vindicate defenses *available* at common law, these accounts get the history backward, suggesting part of the tension in Harrison’s view of the relief granted in *Ex parte Young*. *Cf. supra* note 7; *infra* Part IV.A.1.b.
9. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) [hereinafter Bray, *Multiple Chancellors*]. Methodologically, Bray argues that the “equitable doctrines and remedies of the federal courts must find some warrant in the traditional practice of equity, especially as it existed in the Court of Chancery in 1789.” *Id.* at 425. But he does not subscribe to equitable originalism. Bray elsewhere acknowledges that, in light of “the gap between equity’s past and present, sometimes a translation has to be made.” *Id.* at 423; see also Samuel L. Bray, *Form and Substance in the Fusion of Law and Equity*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* 231 (Dennis Klimchuk et al. eds., 2020) (drawing on metaphors of translation to explore  
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by the standards of “traditional equity,”<sup>10</sup> Justice Thomas wasted little time in asserting that they “appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts.”<sup>11</sup> And just earlier this year, amidst the Supreme Court’s growing (and divisive) trend of summarily granting the Trump Administration’s emergency applications for stays of national injunctions, Justice Gorsuch agreed that those injunctions “have little basis in traditional equitable practice.”<sup>12</sup>

*Ex parte Young*’s vulnerability to originalist applications of equitable traditionalism only underscores the concerns that have dogged the decision since its appearance during the *Lochner* era.<sup>13</sup> Many, like David Currie, who

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varying approaches to the recovery of a useful equity in a postfusion world); Bray, *supra* note 5, at 1011-12 (rejecting equitable originalism).

10. Bray, *Multiple Chancellors*, *supra* note 9, at 420, 425, 456-57; *see also infra* Part I.B. Bray’s conclusion has been complicated by Mila Sohoni, whose recent article posits that the equitable “lineage” of the universal injunction is “more venerable” than critics have recognized. Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924 (2020) [hereinafter Sohoni, *Lost History*]. Bray and Sohoni have since traded online responses about their debate. *See* Samuel Bray, *A Response to The Lost History of the “Universal” Injunction*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 6, 2019), <https://perma.cc/T8H2-FC27>; Mila Sohoni, *A Reply to Bray’s Response to The Lost History of the “Universal” Injunction*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 10, 2019), <https://perma.cc/XD2X-38MG>.
11. *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see also id.* at 2427-29 (citing Bray, *Multiple Chancellors*, *supra* note 9, at 425-27, 438, 440-45, 451).
12. *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (citing Bray, *Multiple Chancellors*, *supra* note 9, at 425-27). In suggesting that the absence of precedent in equity’s past places the national injunction beyond the constitutional limits of federal judicial power, Justices Thomas and Gorsuch—and perhaps a majority of the Court—have adopted a view Bray anticipated in discussing the equitable originalism of Justice Scalia and the Court’s recent embrace thereof in matters of private law equity. *See* Bray, *supra* note 5, at 1010 nn.60-61 (noting that while Justice Scalia allowed for the possibility that Congress might supplement equitable remedies by statute, the historical limits of equity might inform conceptions of the scope of federal judicial power under Article III).
13. *See generally* Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247, 274 (Vicki C. Jackson & Judith Resnik eds., 2010) (confirming *Ex parte Young*’s “firm” place “in the pantheon of federal jurisdiction” as well as its enduring controversial features). Barry Friedman’s “story” of *Ex parte Young*, as well as Harrison’s reconceptualization of it, was one of a variety of scholarly reflections coinciding with the recent centennial of the Court’s decision, also including David L. Shapiro, *Ex parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011); Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101 (2008); Symposium, *Ex parte Young: A Centennial Recognition*, 40 U. TOL. L. REV. 819 (2009) (contributing an array of perspectives from Rochelle Bobroff, Charlton C. Copeland, James Leonard, Marcia L. McCormick, Edward A. Purcell, Jr., David Sloss, and Michael E. Solimine); Larry Yackle, *Young Again*, 35 U. HAW. L. REV. 51 (2013); and Sina Kian, Note, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of Hans v. Louisiana and Ex parte Young*, 61 STAN. L. REV. 1233 (2009). *See also* James Leonard, *Ubi Remedium Ibi Jus, or, Where There’s a Remedy*,  
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celebrate *Ex parte Young*'s framework for judicial review, continue nonetheless to question the seemingly "outlandish conceptual justification" which the Court apparently "concocted to support" its singular assertion of equity power.<sup>14</sup> In particular, four features of the *Ex parte Young* proceeding have been thought to demand more satisfactory explanations: (1) the Court's conclusion that officer suits, despite effectively tying the hands of the state, do not implicate sovereign immunity; (2) the Court's approval of equitable relief in the absence of any threatened tortious invasion of common law rights; (3) the Court's willingness to proceed without identifying an explicit federal cause of action;<sup>15</sup> and (4) the Court's issuance of injunctive relief to stay what would have been a criminal enforcement proceeding, over which equity traditionally lacked concurrent jurisdiction.<sup>16</sup> The *Ex parte Young* action provides the modern framework for suits against federal as well as state government officials,<sup>17</sup> thus setting the stage for the issuance of "national" or

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*There's a Right: A Skeptic's Critique of Ex parte Young*, 54 SYRACUSE L. REV. 215, 219 (2004).

14. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 4 (1964); see also *infra* Part I.A.
15. For a recapitulation of these first three features, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 42-43 (2000). See also *infra* Part I.A. Purcell documents another concern as well, which we address only briefly here: the view that *Ex parte Young* embodies a declaratory judgment "exception" to the well-pleaded complaint rule. Cf. *infra* notes 485, 492 and accompanying text.
16. See *In re Sawyer*, 124 U.S. 200, 210 (1888) ("The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers."); *Attorney-Gen. v. Utica Ins. Co.*, 1 N.Y. Ch. Ann. 412, 417 (1817) ("If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of [the Court of Chancery], which was intended to deal only in matters of civil right resting in equity . . ."); BISPAM, *supra* note 7, § 424 ("Proceedings in criminal courts will not be interfered with by injunction . . ."); see also James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 212-14 (2016) (noting the tension between Harrison's antisuit account of *Ex parte Young* and equity's traditional lack of concurrent jurisdiction in criminal matters); cf. Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 225 (1936) (noting the growing use of law enforcement injunctions issued at the behest of government plaintiffs as a "significant development" in postbellum equity). For further discussion, see notes 457-61 and accompanying text below.
17. On the extension of *Ex parte Young* relief to suits against federal officials, see RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 892-93 (7th ed. 2015) (collecting authorities).

“universal” injunctions<sup>18</sup>—a topic that many scholars have confronted in recent years.<sup>19</sup>

One can question this turn to history as the measure of federal equity today. Times and contexts have changed; equitable forms tailored to an eighteenth-century English constitutional monarchy may not fit the remedial needs of suitors in a twenty-first century republic. But accepting the premise

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18. The debate over injunctions whose protections extend to nonparties, typically referred to as “national” or “universal” injunctions, has thrown up an array of terminological and taxonomic possibilities. “No term,” as Bray noted, “is perfect.” Bray, *Multiple Chancellors*, *supra* note 9, at 419 n.5. A growing scholarly consensus holds that such injunctions are best understood as “universal” because their defining feature is to protect nonparties from unlawful government action without regard to geographic scope. See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018) (“[T]he dispute is about *who* can be included in the scope of the injunction, not *where* the injunction applies or is enforced.”); Sohoni, *Lost History*, *supra* note 10, at 924 n.17 (“I use *universal* because the term ‘universal’ foregrounds ‘the real point of distinction,’ which is that ‘the injunction protects nonparties,’ rather than the geographic scope of the injunction.” (quoting Bray, *Multiple Chancellors*, *supra* note 9, at 419 n.5)); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 350 (2018) (noting that the “significant feature” of injunctions in immigration cases is that “[t]hey prohibit enforcement of the challenged law, regulation, or policy against the universe of people who might be subject to enforcement of the challenged law, regulation or policy, whether parties to the constitutional litigation or otherwise”); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (2018) (Thomas, J., concurring) (“[Universal] injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties—not because they have wide geographic breadth.”); cf. *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (“Whether framed as injunctions of ‘nationwide,’ ‘universal,’ or ‘cosmic’ scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case.”).

We seek to avoid the debate between “national” and “universal” by focusing on the forms and breadth of relief available at common law to command or nullify the actions of administrative bodies. In public actions brought on behalf of communities, the common law writs were often deployed to decide the legality of government action as a general matter, thereby conferring nonparty-protective benefits outside the equitable tradition of class action litigation. See *infra* Part IV.B.

19. In addition to those of Bray, Sohoni, Frost, and Wasserman, recent perspectives on national or universal injunctions include Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); and Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017).

Bray and others have questioned the issuance of universal injunctions from the perspective of judicial *policy* as well as judicial *power*. See, e.g., Bray, *Multiple Chancellors*, *supra* note 9, at 457-65, 473-79 (noting the importance of percolation and concerns with forum shopping as factors undercutting routine issuance of national injunctions). But see Clopton, *supra*, at 20-39 (arguing for broader nonmutual collateral estoppel against the government and questioning prudential arguments against universal injunctions). We focus not on policy but only on the way history complicates arguments about federal equity power under Article III.

that historical precursors can help inform the scope of appropriate equitable relief today, one must take care to get the history right. To do so requires an examination of equity in its historical context—not in isolation from, but in relation to, the relief available at common law. Such was the teaching of the English legal historian Frederic Maitland.<sup>20</sup> Rather than describing a separate legal system, Maitland (and others) conceived of equity as an “appendix added on to” or a “gloss written round” common law, whose code was necessarily incomplete without the additions of equity.<sup>21</sup> Because equity emerged as a “supplementary” system which “at every point . . . presupposed the existence of common law,” Maitland understood that changes in the common law would call forth responses by courts of equity.<sup>22</sup> It was a mistake, Maitland held, to view equity as a “castle in the air,” divorced from the common law rules it was designed to “fulfil.”<sup>23</sup>

Heeding Maitland’s advice that gaps in equity may reflect the perceived adequacy of alternative remedies, this Article explores what we call the common law origins of *Ex parte Young*. Judicial control of administrative action originated in the English court of King’s Bench, the supreme court of common law. Courts in the United States relied on English common law forms to oversee the nascent administrative state well into the nineteenth century. Then, as the courts of equity came to perceive common law remedies as inadequate, they offered injunctive relief that drew inspiration from the common law. That trend accelerated sharply in the latter half of the nineteenth century, entering the Supreme Court soon after the Civil War and spreading to the lower federal courts once Congress granted them general federal question jurisdiction in 1875. By the early twentieth century, the transition from law to equity in public law was largely complete. In 1908, building on common law antecedents, *Ex parte Young* confirmed and solidified the federal judicial power to oversee governmental action through injunctive remedies.

The story begins in seventeenth-century England, where litigants invoked the power of King’s Bench to curb the excesses of the burgeoning administrative state.<sup>24</sup> Over time, King’s Bench developed a series of writs,

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20. See F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION 17-20 (A.H. Chaytor & W.J. Whittaker eds., 1910 reprt.).

21. *Id.* at 18-19 (asserting that without equity’s gloss to round off its sharp edges, the common law often proved “barbarous, unjust, [and] absurd” in the postfeudal era); cf. Francis Bacon, Speech on Taking His Place in Chancery (May 7, 1617), in 4 THE WORKS OF FRANCIS BACON 486, 488 (London, J. Crowder & E. Hemsted 1803) (“[T]he chancery is ordained to supply the law, and not to subvert the law.”).

22. MAITLAND, *supra* note 20, at 18-19.

23. *Id.* at 17-19.

24. See *infra* Part II.A.

variously described as “prerogative,”<sup>25</sup> “extraordinary,”<sup>26</sup> and “supervisory,”<sup>27</sup> to correct the unlawful administration of government.<sup>28</sup> These “administrative” writs (as we choose to call them here) of certiorari, mandamus, and prohibition—the pillars of common law’s system of administrative oversight—enabled public rights suitors to test the legality of action by early administrative bodies such as commissions, boards, and justices of the peace.<sup>29</sup> When these challenges were successful, they resulted in the issuance of specific relief, in the form of judgments to *quash* (certiorari),<sup>30</sup> *command* (mandamus),<sup>31</sup>

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25. See, e.g., Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 527 (1923).

26. See, e.g., JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 39-40 (1927).

27. See James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518-19 (2001). The writs in question also animate the Supreme Court’s “supervisory” role in relation to inferior courts within the judicial branch, see *id.* at 1548, 1591-92, but we highlight their use in empowering courts to oversee government officials in original actions—the very function that the Court in *Marbury* declined to perform.

28. See *infra* Part II.B.

29. See *infra* Part II.C.

30. On the form of certiorari judgments, see 2 BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, A COLLECTION OF FORMS OF PRACTICE AND PLEADING IN ACTIONS, WHETHER FOR LEGAL OR EQUITABLE RELIEF, AND IN SPECIAL PROCEEDINGS 718 (New York, John S. Voorhies 1864) (alterations in original):

Whereupon, and mature deliberation being thereupon had, it seems to this court, that the aforesaid decision of the said Board of Police is [*or*, that the discharge granted by said J.L., county judge of \_\_\_\_\_, *or*, that the order, adjudication and warrant of removal of the said J.L., justice of the peace, &c., are] manifestly erroneous and void in law.

Therefore it is ADJUDGED that the decision [*or*, discharge, *or*, adjudication and removal] aforesaid be, and the same is [*or*, are], hereby reversed, annulled and altogether held for naught [*or*, quashed, *as the case may be*].

Quash retains much the same meaning today. See *Quash*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “quash” as “[t]o annul or make void; to terminate” or “[t]o suppress or subdue; to crush”).

31. On mandamus judgments, see THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS, AS IT OBTAINS BOTH IN ENGLAND, AND IN IRELAND 5 (London, William Benning & Co. 1848):

In its form, it is a command issuing in the Queen’s name from the Court of [Bancum Regis], and directed to any officer, person, artificial person, or corporation within the Queen’s dominions, requiring the performance of some act or duty therein specified, the execution of which, such Court has previously determined to be consonant to right and justice.

One mandamus case that we discuss below in notes 233-45 and the accompanying text nicely illustrates the form such judgments took. See Transcript of Record at 21-22, *Union Pac. R.R. v. Hall*, 91 U.S. 343 (1876) (No. 584) (alternative writ of mandamus):

Now, therefore, we, being willing that full and speedy justice should be done in the premises, do hereby command you, the said Union Pacific Railroad Company, its officers and agents, to operate the whole part of your said railroad from Council Bluffs westward, and including that portion of your said road between Council Bluffs and Omaha and constructed over and across the said bridge [over the Missouri River], as one continuous line, for all purposes of communication, travel, and transportation, and especially to start your regular through

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or *prohibit* (prohibition)<sup>32</sup> official action in conformance with law. Notably, these judgments bore significant resemblance to injunctions, in that they ordered a defendant to take or not to take specified action, on pain of contempt.<sup>33</sup> Importantly, too, the judgments were sometimes thought to disable an illicit course of government action as a general matter, thereby conferring benefits on similarly situated nonparties.<sup>34</sup> Armed with these administrative writs, King’s Bench served as the preeminent “guardian of public rights” in England for well over two centuries.<sup>35</sup> The primacy and perceived adequacy of such proceedings at common law help explain why courts of equity long declined to interpose in matters of public law.<sup>36</sup>

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freight and passenger trains westward bound from Council Bluffs, and to run your eastward-bound trains of both descriptions through and over the said bridge, to Council Bluffs, and to run and operate your said trains to and from said Council Bluffs under one uniform time-schedule and freight and passenger tariff, with the remainder of your said road, and to wholly desist and refrain from operating said last-mentioned portion of said road as an independent and separate line, and from causing and requiring freight or passengers bound westward or eastward to be transferred as aforesaid at said Omaha, or that you appear before our said . . . circuit court of the United States for the district of Iowa . . . and show cause why you refuse to obey our said writ.

32. For an early prohibition judgment, see *United States v. Peters*, 3 U.S. (3 Dall.) 121, 132 (1795):

You, therefore, are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in any wise touching, before you, nor any thing in the said District Court attempt, nor procure to be done, which may be in any wise to the prejudice of the said *Samuel B. Davis*, or the said *corvette*, or vessel of war, called the *Cassius*; or in contempt of the laws of the *United States*: And also, that from all proceedings thereon you do, without delay, release the said *Samuel B. Davis*, and the said *corvette*, or vessel of war, called the *Cassius*, at your peril.

33. As noted above, the administrative writs operated much the way injunctions do today. The writ of prohibition was akin to a negative or preventative injunction, operating to prohibit government actors from taking specific actions. The writ of mandamus was akin to an affirmative or mandatory injunction, operating to command government actors to take a specific action. The writ of certiorari was more complex, but served largely to quash an administrative order, the practical effect of which was often, much like the writ of prohibition, to prevent it from being carried out. Importantly, though, the orders or judgments in such proceedings did not use the language of injunction as such, but instead served to delineate the boundaries of lawful government activity, enforced through the threat of contempt. See *infra* notes 265-68, 502, 508 and accompanying text. We thus characterize the administrative writs as providing “specific” rather than “injunctive” relief.

34. See *infra* notes 189-93, 235-47, 261-69, 297-312 and accompanying text.

35. TAPPING, *supra* note 31, at 9; see also *infra* Parts II.B-C.

36. In England and the United States alike, courts of equity rarely engaged with matters of public law until well after 1789. See FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 422 (1905) (“Originally . . . the injunction does not seem to have been made use of commonly against officers.”); LORD WOOLF ET AL., *DE SMITH’S JUDICIAL REVIEW* 800-01 (6th ed. 2007) [hereinafter DE SMITH] (“[H]istorically the intrusions of equity upon the domain of public law were desultory and selective. The injunction, still pre-eminently a private law remedy, did not come to play a significant part in public law until the 19th century.”); Bernard Schwartz, *Forms of Review Action in English Administrative Law*, 56 COLUM. L. REV. 203, 214 (1956)

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Over the course of the nineteenth century, however, courts more actively deployed their equitable powers in public law controversies, reflecting concerns with the comparative adequacy of the old common law writs and the influential writings of John Norton Pomeroy, a leading American scholar of equity.<sup>37</sup> Pomeroy valued judicial review of executive agencies and recognized that the common law had long provided the mechanism for such oversight. But as documented in his 1881 treatise, courts at the state level were actively substituting the injunction for the increasingly cumbersome administrative writs of mandamus, certiorari, and prohibition.<sup>38</sup> Pomeroy encouraged courts of equity to take up this more active role in public law for several reasons. For starters, the “Reformed Procedure” of the New York Field Code was sweeping across the state procedural landscape, merging law and equity into a single proceeding and erasing “all external distinctions” between legal and equitable modes of process.<sup>39</sup> More fundamentally, Pomeroy perceived that the writs of common law had become “wholly inadequate” to relieve “public burden[s]” in the late nineteenth century.<sup>40</sup> Because equity jurisdiction could “embrace[] all

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(“[I]njunctions have never been available against the Crown or its servants.”); *see also* Attorney-Gen. v. Utica Ins. Co., 1 N.Y. Ch. Ann. 412, 421 (1817) (dismissing a bill to enjoin a governmental insurance company from exceeding its statutory powers for want of equity jurisdiction because the “whole question, upon the merits,” was “one of law, and not of equity,” as it was “well understood” that “public offenses” fell within the “uniform and undisputed cognizance” of the courts of law). *But see infra* note 112 (discussing limited instances in which English courts of equity reviewed the legality of government action). By “public law,” we mean “judicial review of administrative action . . . or what is commonly called administrative law.” Evan Fox-Decent, *The Constitution of Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 9, at 116, 116.

Courts of equity did interpose at times to abate public nuisances. *See* BISPHAM, *supra* note 7, § 439; *see also* *Utica*, 1 N.Y. Ch. Ann. at 418 (noting a division among authorities, with some contending that proceedings to abate a public nuisance amounted to criminal matters, over which equity lacked jurisdiction). When local government was the moving force behind such an impediment, courts of equity would enjoin the responsible officer with a view toward compelling the government to adopt some mechanism to compensate the owner for the contemplated taking of property. *See* Gardner v. Trs. of the Vill. of Newburgh, 1 N.Y. Ch. Ann. 332, 334-35 (1816) (Kent, C.) (enjoining government interference with property rights in a watercourse “unless a just indemnity be afforded”); *cf.* United States v. Lee, 106 U.S. 196, 209-12 (1882) (entertaining suit against federal officers to decide if the United States had good title to property that later became Arlington National Cemetery). Such suits, however, did not typically involve matters of public law.

37. For a brief assessment of Pomeroy’s career as a major figure in remedies, see Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 216-20 (2008).

38. *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 258-260, 270, 334 (San Francisco, A.L. Bancroft & Co. 1881); *see also* 3 *id.* § 1345 (1883).

39. *See* 1 *id.* at vi.

40. 1 *id.* § 260 (discussing in particular the enforcement of unlawfully imposed state and local taxes).

civil cases . . . in which there [was] not a full, adequate, and complete remedy at law,”<sup>41</sup> and because equity as a whole offered “superior . . . procedure” and “greater power . . . to do complete justice” than the common law,<sup>42</sup> Pomeroy urged courts to use the bill for injunctive relief as an appropriate, indeed preferred, mode of enforcing public rights in the modern era.<sup>43</sup>

With state courts showing the way,<sup>44</sup> federal courts embraced the injunction as a substitute for the administrative writs well before the turn of the twentieth century.<sup>45</sup> By 1932, as Justice Brandeis’s dissenting opinion in *Crowell v. Benson* recognized, federal equity had evolved into a firmly established system of administrative control, and had done so by absorbing common law norms.<sup>46</sup> *Ex parte Young* can thus be understood as incorporating the Fourteenth Amendment’s limitations on state action—informed by the foundational principle of English administrative law that no one is above the law<sup>47</sup>—into modes of government oversight whose migration to equity was then well

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41. 1 *id.* § 132.

42. 1 *id.* § 175.

43. See 1 *id.* § 260; *infra* text accompanying notes 346-51.

44. See, e.g., *Williams v. Cty. Court*, 26 W. Va. 488, 500-03 (1885) (“I fully concur with Pomeroy, that these cases do clearly establish the principle [that equity may interfere with the proceedings of public authorities], [which] he has deduced from them. I also concur with him, that these principles settled by these decisions are sound; and that the principles laid down by Judge Cooley . . . are not only unsound but are opposed to the decided weight of authority.”); see also *infra* Part III.C.1.

45. See *infra* Part III.C.2.b; see also *Degge v. Hitchcock*, 229 U.S. 162, 170-71 (1913) (concluding that the petitioners could not seek “the extraordinary writ of certiorari” against the Postmaster General of the United States, an executive branch official because they “had the right” to seek an injunction “in a court of equity”). For an account that both criticizes the Court’s misunderstanding of certiorari and celebrates its switch to equity, see Schwartz, *supra* note 36, at 213-14 (describing *Degge* as clearly mistaken in its hierarchy of remedies, but viewing the switch to injunctive forms of relief as a major improvement in the machinery of administrative law).

46. See 285 U.S. 22, 75 (1932) (Brandeis, J., dissenting); see also *supra* note 2 and accompanying text.

47. The English legal historian Albert Venn Dicey famously called this principle—that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals” for “every act done without legal justification”—the “rule of law.” A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (6th ed. 1902); see also James E. Pfander, *Dicey’s Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 744-45 (2019) (describing Dicey’s conception of the common law action against government officials as the cornerstone of the rule of law in England); cf. MASS. CONST. pt. 1, art. XXX (declaring the “government of this commonwealth” to be “a government of laws and not of men”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The Government of the United States has been emphatically termed a government of laws, and not of men.”).

underway.<sup>48</sup> Rather than search for antisuit analogues in the High Court of Chancery, scholars and jurists might do well to trace *Ex parte Young* to the Reconstruction Amendments and the American adoption of the common law administrative writs to ensure compliance with law.<sup>49</sup>

This four-Part Article links the common law origins of *Ex parte Young* to modern debates over its remedial legitimacy. Part I recounts the scholarly discussion to which the Article contributes, focusing first on the persistently controversial features of *Ex parte Young* and Harrison's effort to address them by means of the equitable antisuit model. Part I also describes Bray's kindred rejection of the national injunction, in part on grounds of traditional equity. Part II turns from equity to the common law, placing the writs of mandamus, certiorari, and prohibition in historical context as part of a judicial response to the growth of administrative activity in early seventeenth-century England. Part III recounts the American story, tracing a change from antebellum reliance on common law tools to a postbellum emphasis on equitable remedies. Part III shows that, by the time of *Ex parte Young*, the availability of injunctive relief from unlawful government activity was well grounded in state and federal remedial law.

Part IV considers what we might learn from rooting *Ex parte Young* less in the Chancery tradition of antisuit litigation than in the common law tradition of administrative control through public actions. Common law courts had long since resolved the problem that modern scholars find most perplexing in *Ex parte Young*: how to square the proceeding with the state's sovereign immunity from suit. English common law viewed the administrative writs as orders from the Crown, compelling subordinate officials to comply with law. Sovereign immunity did not apply to such proceedings, or indeed to any public action brought in the name of the Crown against officials who exceeded their legal authority. Similarly, the administrative law writs provided ample authority for directing official compliance with law even in the absence of any threat by the official defendant to inflict tortious injury. Finally, the history we recount helps to explain how the courts came to view a simple grant of jurisdiction as a warrant for equitable interposition, without the need for any express statutory right to sue. These explanations of *Ex parte Young* complicate scholarly efforts to link and limit the proceeding to equity's use of antisuit injunctions to enforce private law rights.

The common law origins of *Ex parte Young* may also shed light on the claim that the Article III judicial power of federal courts, historically understood, did not extend to the issuance of universal or nonparty-protective orders.

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48. Cf. Shapiro, *supra* note 13, at 86-87 (characterizing *Ex parte Young* as part of "two gradual transitions" in the development of remedies against constitutional wrongs).

49. See *infra* Part IV.A.

While relief in equity traditionally ran against (and in favor of) the parties before the court, the administrative writs were sometimes deployed to ensure that official conduct stayed within the bounds of law as a more general matter. Conceived of in England as public actions brought in the name of the Crown, the administrative writs were sometimes used in the United States to seek relief on behalf of the community as a whole. While one struggles to locate their precursors in the practice of the High Court of Chancery, nonparty-protective orders arise more naturally from a common law tradition of judicial control of administrative activity. When subject to judicial oversight through the common law writ of certiorari, for example, administrative conduct was quashed and rendered invalid as a general matter. That tradition, in turn, deserves consideration in any assessment of the questions Justice Thomas has raised about Article III judicial power to issue relief that extends beyond the parties before the court.

Part IV concludes with some reflections on remedial method in constitutional litigation. If we have correctly identified the origins of *Ex parte Young* as rooted less in any specific framing-era tradition of equity than in a common law practice that equity absorbed in the nineteenth century, we have perhaps also identified a problem with forms of equitable traditionalism that too rigidly define injunctive relief by reference to eighteenth-century norms. A jurisprudence of constitutional remedies that measures the legitimate scope of modern federal equity by looking to the practices of the High Court of Chancery, circa 1789, will capture only a partial view of the remedies available to suitors in the early republic. More troubling yet, it may also deprive equity of its characteristic ability to adapt to changes in the remedial system as a whole. Rather than making effective remedies available for the constitutional challenges of today, a jurisprudence of equitable originalism threatens, in Maitland's prophetic words, to create castles in the air.

## I. The Scholarly Debate

Recent challenges hardly mark the first time that scholars have debated the legitimacy of the *Ex parte Young* action. When it appeared in 1908 as the jurisdictional poster child of the *Lochner* era, *Ex parte Young* faced scrutiny from Progressive scholars and politicians and triggered a series of legislative responses.<sup>50</sup> More than a century later, as *Ex parte Young* has come to achieve a

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50. See Friedman, *supra* note 13, at 248-53 (situating *Ex parte Young* in the context of the ongoing class warfare before and during the *Lochner* era); see also *id.* at 268-71 (discussing political reactions to the decision). For a summary of contemporaneous legal commentary on *Ex parte Young*, see Pfander & Dwinell, *supra* note 16, at 155-66. For impressive treatments of the Progressive response to the *Lochner* era, see generally FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930) (tracing the rise  
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staid respectability, questions linger about the degree to which it provides a legitimate foundation for the exercise of Article III's equity power today.<sup>51</sup> This Part describes those controversies through the lens of recent scholarship, starting with the *Ex parte Young* decision and its problematics: (1) the Eleventh Amendment "fiction," (2) the lack of common law tort, (3) the lack of an express right to sue, and (4) the provision of injunctive relief in a criminal setting. To address these difficulties, Harrison's creative work reimagines *Ex parte Young* as an injunction to restrain proceedings at law, a standard tool of equity. Bray's argument builds on Harrison's antisuit model in urging that standard principles of equity forbid federal courts from enjoining government action with respect to nonparties on a national basis.

A. *Ex parte Young*

Coming only eighteen years after the Court broadened state immunity from suit under the Eleventh Amendment,<sup>52</sup> *Ex parte Young* caused an immediate stir.<sup>53</sup> Building on a principle first embodied in *Osborn v. Bank of the*

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of the federal labor injunction, a primary target of the Norris-LaGuardia Act of 1932 and one reason the Wagner Act of 1935 assigned adjudicative power to a federal agency); and PURCELL, *supra* note 15.

51. Often, questions of legitimacy focus less on the problematics of *Ex parte Young* than on the rise of the structural injunction in the wake of *Brown v. Board of Education*, 349 U.S. 294 (1955). See John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1129, 1160-61 (1996) (criticizing Warren Court remedial doctrines as "exceed[ing] by an entire order of magnitude those of the Progressive Era" and urging reliance on the "original understanding of the judicial power"). Anticipating Harrison, John Yoo argues that a federal court's "traditional remedial powers" define the outer bounds of judicial power and provide no support for the "imposition of affirmative obligations upon states." *Id.* at 1123-24, 1129-30.
52. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (construing the Eleventh Amendment to bar citizens from suing states in federal court, even when the suit is brought by a citizen of the defendant state pursuant to general federal question jurisdiction). On the origins of the Eleventh Amendment and its expansion in *Hans*, see generally James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998). For the analogous doctrine of federal sovereign immunity, see *Price v. United States*, 174 U.S. 373, 375-76 (1899) ("The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.").
53. For an early critique of the decision, see Henry H. Furth, *The Case of Ex parte Young as a Dangerous Precedent*, 77 CENT. L.J. 308, 308 (1913) ("Unless the writer of these lines is greatly mistaken in his views, the Supreme Court, in the opinion filed in that case, exhibits as complete a disregard of some of the fundamental principles of decision as is found in the books."). For a more detailed account, see Friedman, *supra* note 13, at 268-71.

*United States*,<sup>54</sup> *Ex parte Young* held that a suit to enjoin a state officer from taking unlawful action does not implicate the state's sovereign immunity because an officer whose conduct transgresses the bounds of federal law becomes "stripped of his official or representative character" and may be "subjected . . . to the consequences of his individual conduct."<sup>55</sup> Having enunciated that principle, the Court proceeded to uphold an injunction on behalf of a railroad's shareholders to restrain Edward Young, the Minnesota Attorney General, from enforcing "confiscatory" statutory railway rates held to violate due process under the Fourteenth Amendment.<sup>56</sup> Although time has run away with the decision's substantive due process predicate,<sup>57</sup> its procedural and remedial holdings remain of enormous consequence.

Challenging the injunction and a contempt sanction issued to enforce it, Young argued that the shareholders' suit for injunctive relief was "in effect" a suit against the state of Minnesota in contravention of the Eleventh Amendment.<sup>58</sup> In resolving this complicated question, Justice Peckham sorted

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54. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 852 (1824) ("[T]he framers of the constitution contemplated the distinction between cases in which a State was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record."). In *Osborn*, counsel for the Bank cited *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809)—an early mandamus case in which the Supreme Court directed a district court judge to execute a judgment whose practical effect was to claw back funds wrongly held by a state treasurer—as the first to establish the party-of-record rule of sovereign immunity. *See Osborn*, 22 U.S. (9 Wheat.) at 797 (argument of the respondents). The Court later described *Peters* as the "earliest case" in which the "true rule" was "laid down." *United States v. Lee*, 106 U.S. 196, 209 (1882).

55. 209 U.S. 123, 159-60 (1908).

56. *See id.* at 148. Young sought habeas review of the contempt decree that the lower federal court issued to punish his violation of the injunction against the enforcement of the statutory rates. *See id.* at 126-29 (statement of the case). The Court supposed that the habeas proceeding provided a proper vehicle for testing the legality of the underlying injunction in an appeal from the imposition of contempt sanctions. *But see Walker v. City of Birmingham*, 388 U.S. 307, 317-21 (1967) (holding that appeals from contempt sanctions do not ordinarily enable a party to test the legality of the underlying injunction).

57. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (describing the *Lochner* doctrine of substantive economic due process as having "long since been discarded").

58. *Ex parte Young*, 209 U.S. at 134 (statement of the case); *id.* at 142 (majority opinion). The proceeding Young later initiated in state court, in defiance of the federal injunction, was a mandamus action to compel the railroad to comply with state law. *Id.* at 133-34 (statement of the case). All participants appear to have been justified in viewing the mandamus proceeding as essentially identical to the sorts of criminal enforcement actions that lay beyond the concurrent jurisdiction of equity as historically understood. *See, e.g., In re Sawyer*, 124 U.S. 200, 211 (1888) (observing that the High Court of Chancery "has no jurisdiction to grant an injunction to stay proceedings on a mandamus; nor to an indictment; nor to an information; nor to a writ of prohibition" (quoting *Montague v. Dudman* (1751) 28 Eng. Rep. 253, 254; 2 Ves. Sen. 396, 398)).

through what the Court had previously viewed as “two classes of cases.”<sup>59</sup> On the one hand were those “attempt[ing] to make the State itself, through its officers, perform [an] alleged contract,” which had been characterized as suits against the State.<sup>60</sup> On the other hand were cases seeking to enjoin defendants who, “claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff,” which were consistently held not to be suits against the State.<sup>61</sup> In addition to *Osborn*, Justice Peckham cited nearly a dozen more decisions since 1872 in which the Court had rejected Eleventh Amendment challenges to the issuance of injunctive relief against the unlawful acts of state officers.<sup>62</sup> Based on this distinction, Justice Peckham concluded that the shareholders’ suit was not barred by the Eleventh Amendment.<sup>63</sup> In support of equitable relief, Justice Peckham found that the railway’s right at common law to invoke constitutional defenses to a state-initiated criminal prosecution for violating the statutory rates was “plainly inadequate.”<sup>64</sup>

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59. See *Pennoyer v. McConnaughy*, 140 U.S. 1, 9-10 (1891) (first drawing the distinction); *Reagan v. Farmers’ Loan & Tr. Co.*, 154 U.S. 362, 388-89 (1894) (reiterating the distinction); see also Friedman, *supra* note 13, at 253-59 (discussing the “two . . . lines of doctrine”).

60. *Ex parte Young*, 209 U.S. at 151 (majority opinion) (citing *Hagood v. Southern*, 117 U.S. 52, 67 (1886); and *In re Ayers*, 123 U.S. 443, 504 (1887)); accord *Pennoyer*, 140 U.S. at 10 (further citing *Louisiana v. Jumel*, 107 U.S. 711 (1883); *Antoni v. Greenhow*, 107 U.S. 769 (1883); and *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446 (1883)).

61. *Pennoyer*, 140 U.S. at 10; accord *Ex parte Young*, 209 U.S. at 152-58.

62. See 209 U.S. at 150-62 (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857 (1824); *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1873); *Poindexter v. Greenhow* (The Virginia Coupon Cases), 114 U.S. 270, 296 (1885); *Tindal v. Wesley*, 167 U.S. 204 (1897); *Pennoyer*, 140 U.S. at 9; *Reagan*, 154 U.S. at 392-93; *Smyth v. Ames*, 169 U.S. 466, 518 (1898); *Prout v. Starr*, 188 U.S. 537, 542 (1903); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 283 (1906); *McNeill v. S. Ry. Co.*, 202 U.S. 543, 544-59 (1906) (statement of the case, arguments, and majority opinion); *Miss. R.R. Comm’n v. Ill. Cent. R.R. Co.*, 203 U.S. 335, 340 (1906); and *Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1876)). Justice Peckham might also have cited a few more. See, e.g., *In re Tyler*, 149 U.S. 164, 191 (1893) (“[T]hat the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State . . . has never been departed from.”); *Allen v. Balt. & Ohio R.R. Co.* (The Virginia Coupon Cases), 114 U.S. 311, 317 (1885) (“[T]he jurisdiction in equity to grant the relief prayed for by injunction, and the propriety of its exercise, are alike indisputable.”). The sole outlier in this line of cases was *Fitts v. McGhee*, in which the Court denied injunctive relief against enforcement of the Alabama railway acts. 172 U.S. 516, 533 (1899). But the problem in *Fitts* was that the officers named as defendants were not “specially charged with the execution of [the] state enactment alleged to be unconstitutional,” but rather were named as arbitrary stand-ins for the state. See *id.* at 529-30; see also *Ex parte Young*, 209 U.S. at 157-58 (noting this distinction).

63. *Ex parte Young*, 209 U.S. at 159-60 (citing *Ayers*, 123 U.S. at 507).

64. See *id.* at 165.

Writing only for himself in an ardent dissent, Justice Harlan characterized the majority decision as an unfortunate extension of settled law.<sup>65</sup> He feared that the majority's "principle" of officer suability "would work a radical change in our governmental system" by "enabl[ing] the subordinate Federal courts to supervise and control" state "official action . . . as if [states] were 'dependencies' or provinces"—a "condition of inferiority never dreamed of . . . when the Eleventh Amendment was made a part of the Supreme Law of the Land."<sup>66</sup> Justice Harlan asserted that the suit was "clear[ly]" one "in legal effect, against the State" because its sole "object" was "to tie the hands of the State" from enforcing its railway acts by suing the Attorney General not in his "individual[]" capacity but rather "as, and only because he was," the enforcing officer.<sup>67</sup> To conclude otherwise was, in Justice Harlan's view, to "evade[] or amend[]" the plain language of the Eleventh Amendment "by mere judicial interpretation."<sup>68</sup> Moreover, Justice Harlan asserted that even if federal courts could enjoin state officers from committing a "trespass" or other common law "wrong," as the Court did in *Osborn*, there was a "wide difference" between such suits and those like *Ex parte Young*, which sought "merely to test the constitutionality of a state statute" without identifying any tortious injury.<sup>69</sup>

If less than fully persuasive in its treatment of prior cases,<sup>70</sup> Justice Harlan's dissent nonetheless poses questions of legitimacy that continue to shape reactions to *Ex parte Young*. Justice Harlan's concerns with sovereign immunity and non-tort-based injunctive relief have remained at the heart of

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65. See *id.* at 169 (Harlan, J., dissenting). Justice Harlan had previously taken an extremely narrow view of government immunity from suit and had dissented from some prior decisions that recognized the doctrine. See, e.g., *Int'l Postal Supply Co. v. Bruce*, 194 U.S. 601, 610-17 (1904) (Harlan, J., dissenting) (disputing the majority's expansive conception of federal sovereign immunity and citing *Pennoyer* for the proposition that suits against a state official do not implicate sovereign immunity from suit). He had also drafted the Court's unanimous opinion rejecting state sovereign immunity in *Smyth*, 169 U.S. 466. In announcing that he now took a much broader view of state immunity, Justice Harlan admitted that his change of position was a matter of some "embarrassment." *Ex parte Young*, 209 U.S. at 169 (Harlan, J., dissenting).

66. *Ex parte Young*, 209 U.S. at 174-75 (Harlan, J., dissenting).

67. *Id.* at 173-74.

68. *Id.* at 182-83.

69. *Id.* at 191-92 (emphasis omitted).

70. Justice Harlan argued primarily that prior decisions had overruled the *Osborn* line of cases, such that suits "against [a state's] officers, agents and representatives" would implicate the Eleventh Amendment when the state was "the only real party." *Id.* at 196-97 (emphasis omitted) (quoting *Mo., Kan. & Tex. Ry. Co. v. Mo. R.R. & Warehouse Comm'rs*, 183 U.S. 53, 58-59 (1901)). But Justice Harlan's reading was one the Court had expressly rejected in *In re Ayers*, 123 U.S. 443, 487-88, 499-500 (1887), as well as in several cases thereafter, see *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902); *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362, 389 (1894); *Pennoyer v. McConaughy*, 140 U.S. 1, 9-10 (1891).

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the *Ex parte Young* debate for over a hundred years.<sup>71</sup> The sovereign immunity issue has largely consumed the discussion, with scholars in wide agreement that the Court’s “central holding relies on a ‘legal fiction’ that characterizes particular actions as state action” for purposes of establishing the state’s responsibility for a due process violation, yet “non-state action” for purposes of Eleventh Amendment immunity.<sup>72</sup> By the late twentieth century, the Court itself had taken to calling this discrepancy “the Eleventh Amendment fiction of *Ex parte Young*.”<sup>73</sup> Even scholars who have welcomed the fiction on a normative level have remarked on its “distinct air of unreality.”<sup>74</sup> Apart from the Eleventh Amendment fiction, Justice Harlan’s complaint that the government officer in *Ex parte Young* had committed no “private wrong” has given rise to “another fiction” that now defines the doctrine’s legacy.<sup>75</sup> Although it has received somewhat less scholarly attention over the years, the question of how the Court justified intervention in the absence of any private wrong may gain new prominence in light of the Court’s decision in *Armstrong v. Exceptional Child Center, Inc.*, which cited as precursors to *Ex parte Young* three private harm cases involving injunctions against trespasses.<sup>76</sup>

*Exceptional Child* highlights a third apparent problem with the *Ex parte Young* action: the lack of an express or statutory right of action.<sup>77</sup> While 42 U.S.C. § 1983 provides a statutory framework for enforcement of constitutional

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71. See, e.g., Edward A. Purcell, Jr., *Ex parte Young and the Transformation of the Federal Courts, 1890-1917*, 40 U. TOL. L. REV. 931, 931, 961-62 (2009).

72. Charlton C. Copeland, *Ex parte Young: Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 844 n.2, 846-47 (2009).

73. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 712 (1978) (Powell, J., concurring); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984).

74. See MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 155 (1980).

75. Harrison, *supra* note 7, at 1011; see also *id.* at 1017 (suggesting that “[p]erhaps Peckham meant to identify a new kind of trespass”); Sohoni, *Lost History*, *supra* note 10, at 1003-04 (noting that *Ex parte Young*’s injunction against the Attorney General’s “nontortious filing of a[n] [enforcement] complaint” has been “heralded” as an “innovati[ve]” equitable remedy).

76. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 838-39, 844 (1824); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); and *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845)). Intriguingly, Justice Scalia’s majority opinion also explained that “[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.” *Id.* at 1384 (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 LAW Q. REV. 345 (1956)). Below, we explore the possibility that Justice Scalia embraced an account of the common law origins of *Ex parte Young* not unlike our own. See *infra* notes 541-43 and accompanying text.

77. See Harrison, *supra* note 7, at 1020-22 (discussing the problem before *Exceptional Child*).

norms against state actors, the Court's emphasis on the need for statutory authorization could pose a threat to the enforcement of several federal statutory rights.<sup>78</sup> Thus, in *Seminole Tribe v. Florida*, the Court found that the Indian Gaming Regulatory Act's prescription of a "detailed remedial scheme" to enforce certain rights thereunder manifested Congress's intent "to preclude the availability" of implied injunctive relief.<sup>79</sup> In *Exceptional Child*, which likewise found *Ex parte Young* relief to be impliedly displaced under section 30(a) of the Medicaid Act, the Court reiterated that the "power of federal courts of equity to enjoin unlawful executive action is subject to . . . implied statutory limitations," rejecting a view that depicted the cause of action as inherent in the Supremacy Clause.<sup>80</sup> Concern with the viability of implied rights of action in the federal context in particular has been fueled by the attrition of the implied *Bivens* action,<sup>81</sup> which was narrowed in *Ziglar v. Abbasi*.<sup>82</sup> Such cases have raised

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78. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) ("Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity . . .").
79. 517 U.S. 44, 73-76 (1996). Vicki Jackson has written on this topic. Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495 (1997). Jackson's article evoked a response from David Currie. David P. Currie, *Response, Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547 (1997). For additional examples of scholarly treatment, see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 40; and Henry Paul Monaghan, *Comment, The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996).
80. See *Exceptional Child*, 135 S. Ct. at 1385-87. *But cf.* Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 265 (2011) (Kennedy, J., concurring) (asserting that the Court "wields *Young* in the name of the Supremacy Clause . . . to vindicate important federal rights"). For *Exceptional Child*'s impact on implied *Ex parte Young* rights of action, see generally Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893 (2016) (reviewing SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT* (2015)); Henry Paul Monaghan, *Essay, A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807 (2016); and Note, *Congressional Intent to Preclude Equitable Relief—Ex parte Young After Armstrong*, 131 HARV. L. REV. 828 (2018).
81. The *Bivens* action provides an implied federal right of action to seek damages (as opposed to injunctive relief) against federal officers for violations of constitutional rights. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The *Ex parte Young* doctrine was thought to help justify the *Bivens* decision. See *id.* at 404 (Harlan, J., concurring in the judgment) (invoking the *Ex parte Young* doctrine in noting "the presumed availability of federal equitable relief against threatened invasions of constitutional interests"). The attrition of the judge-made *Bivens* action, discussed below, may thus put corresponding pressure on *Ex parte Young*, especially as applied to federal officers.
82. 137 S. Ct. 1843, 1858-63 (2017); see also *Hernandez v. Mesa*, 140 S. Ct. 735, 749-50 (2020) (demonstrating the narrowness of the *Bivens* action after *Ziglar*).

questions as to the effectiveness of *Ex parte Young*'s implied action as a vehicle for enforcement of statutory rights.<sup>83</sup>

Against this backdrop, Harrison sought to resolve some of *Ex parte Young*'s puzzles by reconceiving of the action in terms of traditional equity. Harrison argued that *Ex parte Young* did not "use[] a legal fiction" or "entail[] a paradox" with regard to sovereign immunity and did not "recognize[] a new cause of action founded in the Constitution."<sup>84</sup> He reached these conclusions for much the same reason: The action involved merely "a standard tool of equity, an injunction to restrain proceedings at law."<sup>85</sup> As Harrison explained, "[a]nti-suit injunctions have been a staple of equity for centuries," enabling a party as plaintiff to "enforce in equity a legal position that would be a defense" to a common law proceeding.<sup>86</sup> Harrison saw this effectively defensive posture as obviating all three of *Ex parte Young*'s problems. Because sovereign immunity permits a defendant to assert a defense to a prosecution, there was no need for an Eleventh Amendment fiction.<sup>87</sup> Because antisuit injunctions operate on their own principles, there was no need for a trespass or other tortious injury to enable equitable interposition.<sup>88</sup> And because neither antisuit injunctions nor affirmative defenses require statutory causes of action, the Court did not need to imply one at all, let alone one uniquely applicable to government officers.<sup>89</sup> Viewing the railroad's action as merely a defense to the Attorney General's hypothesized enforcement action supplied the waiver of sovereign immunity, the ground for injunctive relief, and the cause of action all in one.

In proposing an antisuit model to account for the injunctive relief issued in *Ex parte Young*, Harrison did not set out "to justify . . . the doctrine [that the decision] announced."<sup>90</sup> To the contrary, Harrison's limited antisuit model of the *Ex parte Young* doctrine could pose a threat to the "century's worth of cases" that go well beyond the antienforcement context, and on whose back the Court has reoriented "the law of government accountability."<sup>91</sup> As other scholars have recognized, the antisuit model permits "a federal court enjoining an unconstitutional . . . law" to "do one thing, and one thing only": prevent the enforcement of the law "against the plaintiff alone, for it is only that plaintiff

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83. See, e.g., Monaghan, *supra* note 80, at 1827-28.

84. Harrison, *supra* note 7, at 990.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1022.

89. *Id.*

90. *Id.* at 1008.

91. See Pfander & Dwinell, *supra* note 16, at 213-14.

who is the prospective defendant in a[n] . . . enforcement action.”<sup>92</sup> Such an understanding of the *Ex parte Young* action conforms to Harrison’s perception of the limited power of a court to decree a constitutional violation on the part of government actors.

To Harrison, *In re Ayers* drew the relevant distinction between negative and mandatory decrees; only those that provide “wholly negative” relief, by which “nothing is being demanded” of the state except to recognize the dismissal of a hypothetical enforcement action, avoid the bar of sovereign immunity.<sup>93</sup> A decree “[d]irecting an affirmative act” of the government, on the other hand, “would be a problem” for Harrison’s model.<sup>94</sup> As a result, the antisuit model preserves the *Ex parte Young* action only for the enforcement of constitutional (and perhaps statutory) “limitations.”<sup>95</sup> Its refusal to authorize the enforcement of official “duties”<sup>96</sup> could threaten the federal courts’ power to decree in cases like *Seminole Tribe* (“duty to negotiate”),<sup>97</sup> *Brown v. Board of Education* (duty to desegregate),<sup>98</sup> and more generally to issue structural or even mandatory injunctions.<sup>99</sup>

To be sure, Harrison did not claim that history demands the abrogation of the *Ex parte Young* action under the compulsion of a theory of equitable originalism. Rather, he sought to reimagine the origins of the doctrine in keeping with a narrower vision of the essentially negative scope of *Ex parte Young* relief.<sup>100</sup> While the doctrine would survive, such a reimagining casts doubt on the validity of many of the directive and mandatory remedies that have issued in its name.<sup>101</sup>

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92. See Sohoni, *Lost History*, *supra* note 10, at 942.

93. See Harrison, *supra* note 7, at 1004-06.

94. *Id.* at 1006.

95. See *id.* at 1006, 1022.

96. See *id.* at 1022.

97. *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996).

98. See 347 U.S. 483, 495 (1954).

99. For a discussion of the “legitimacy” of structural injunctions vis-à-vis “the appropriate role of federal judicial power in our society,” see generally William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

100. For a similar argument based on an originalist conception of traditional equitable power, see generally Yoo, *supra* note 51.

101. For a historically inflected defense of structural relief, see generally Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (drawing on the many ways in which courts of equity administered complex private relationships in defending the remedial legitimacy of structural injunctions in public law proceedings).

B. National Injunctions

Embracing Harrison’s conception of the antisuit origins of *Ex parte Young*, Bray has questioned the issuance of what have come variously to be known as universal or national injunctions. With characteristic insight and learning, Bray found that the “national injunction is a recent development in the history of equity, traceable to the second half of the twentieth century” and theretofore without precedent in the annals of chancery.<sup>102</sup>

Beginning with the premise that the “equitable doctrines and remedies of the federal courts” today “must find some warrant in the traditional practice of equity, especially as it existed in the Court of Chancery in 1789,”<sup>103</sup> Bray set out to discover whether any precedent supports the issuance of national antienforcement injunctions, an inquiry that led him to the “uncomplicated” conclusion that national injunctions have “no” roots in traditional equity.<sup>104</sup> In light of that history, and a set of policy arguments based on forum shopping and the need for percolation, Bray argued that a federal court “should not award a national injunction” under any circumstances, “[n]o matter how important the question and no matter how important the value of uniformity.”<sup>105</sup> Instead, Bray concluded that all injunctions against government officers, including at the state and local levels, should be limited to “enjoining the defendant’s conduct only with respect to the plaintiff.”<sup>106</sup>

Bray’s historical inquiry drew upon Harrison’s antisuit model, helping explain why the original practice of “English and American” courts of equity was said to “restrain the defendant’s conduct vis-à-vis the plaintiff, not vis-à-vis the world.”<sup>107</sup> Bray posited that the antisuit model accounted for the way in which chancellors “once thought of injunctions against” unlawful policies, in which equitable relief was available “only to the extent that there was . . . a threatened enforcement action” against an individual party.<sup>108</sup> Similarly, Bray attributed the latter-day rise of national injunctions, which he traced to the last few decades of the twentieth century,<sup>109</sup> largely to an “ideological shift[]” in the nature of injunctive relief—away from the traditional antisuit model, in which judges passively “failed to apply” an invalid policy against a particular plaintiff,

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102. See Bray, *Multiple Chancellors*, *supra* note 9, at 420.

103. *Id.* at 425; *accord id.* at 423.

104. See *id.* at 425 (emphasis omitted).

105. *Id.* at 420.

106. *Id.*

107. *Id.*

108. *Id.* at 449.

109. *Id.* at 437-45 (dating the national injunction to the D.C. Circuit’s decision in *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963)).

and toward a thoroughly modern one, in which judges may entertain “freestanding” requests to “strick[e] down” such policies on a universal basis.<sup>110</sup>

Subtly argued and reasoned, Bray’s study examined the history of equitable practice in England and the United States.<sup>111</sup> Bray found that “there were no injunctions against the Crown” and “nothing remotely like a national injunction” before the time of the Constitution’s framing.<sup>112</sup> For Bray, then, equitable traditionalism was thought to yield a powerful argument against the propriety of universal or national injunctions. But with his focus on the nature of equitable interposition at a specific time in the past, Bray paid less attention to a corresponding public law practice in the common law courts. Such a methodological approach may slight the substantial remedial tradition that developed at common law and later migrated to equity. We examine that tradition in the next two Parts, exploring the rise of England’s administrative writs, their introduction into the courts of the United States, and their eventual incorporation into forms of equitable interposition that would lead to *Ex parte Young*.

## II. The English Foundations: 1600-1789

To understand the origins of judicial control of unlawful executive action, one must shift the focus from the traditions of equity to those of common law. To that end, this Part documents the way in which the Court of King’s Bench, England’s “supreme court of common law,”<sup>113</sup> consciously crafted and deployed

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110. *Id.* at 445.

111. *See id.* at 425-45.

112. *Id.* at 425. On the traditional inability of the High Court of Chancery to enjoin the Crown or its officers, see note 36 and accompanying text above. This inability was confirmed by the Crown Proceedings Act of 1947, which reaffirmed the ban on injunctions even as it opened the courts to suits for declaratory relief. *See* M.H. Matthews, *Injunctions, Interim Relief and Proceedings Against Crown Servants*, 8 OXFORD J. LEGAL STUD. 154 (1988) (discussing the Crown Proceedings Act 1947, 10 & 11 Geo. 6 c. 44, § 21 (Eng. & Scot.)).

To say that the High Court of Chancery generally declined to issue injunctions directed at the Crown and its officers is not to say that equity entirely declined to interpose. For an account of litigation against the Crown in Chancery’s petty bag office on the so-called petition of right, *monstrans de droit*, and traverse of office, see 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 235-37 (1903); and James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 909-14 (1997). The Court of Exchequer also granted some forms of equitable relief in litigation against the Crown. Pfander, *supra*, at 914-15 (citing *Pawlett v. A-G* (1667) 145 Eng. Rep. 550; *Hardres* 465).

113. 3 WILLIAM BLACKSTONE, COMMENTARIES \*41-42; *see also* Frank J. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 497 (1891) (calling it “the highest court in the land”).

the administrative writs of mandamus, certiorari, and prohibition as means to supervise administrative action. It first sketches the emergence of the English administrative state in the late sixteenth century, and then traces the rise and regularization of the administrative writs as a means of testing and ensuring the legality of official action.

A. From Privy Council to King's Bench

What we call the “administrative state” began in England in the second half of the sixteenth century, when an “unprecedented increase in legislation” assigned new problems of governance to localized tribunals.<sup>114</sup> No longer simply “decid[ing] controversies,” these lower bodies started to “administer government” in an extrajudicial capacity,<sup>115</sup> as by carrying out novel and elaborate programs of poor relief, marshland drainage, public works, public lands acquisition, alehouse licensing, and economic regulation; by laying and collecting taxes to fund such programs; and by issuing orders, bylaws, and ordinances to implement them.<sup>116</sup> In rural areas, such powers accrued largely to the county-based justices of the peace and other statutory bodies like the commissioners of sewers.<sup>117</sup> But in the newer corporate towns, they were entrusted to municipal officials like mayors and aldermen.<sup>118</sup> Together, these “gentlemen justices of the peace” and their urban counterparts would carry on

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114. EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 9 (1963); *see also id.* at 1-3. For more on “the foundational period of administrative law” in sixteenth century England and the “commonly held” misconception among contemporary English scholars (not unlike their American counterparts) that such law “is of recent origin,” *see generally* Paul Craig, *English Administrative Law History: Perception and Reality*, in JUDICIAL REVIEW IN THE COMMON LAW WORLD: ORIGINS AND ADAPTATIONS (Swati Jhaveri & Michael Ramsden eds., forthcoming 2020).

115. Goodnow, *supra* note 113, at 515.

116. *See* HENDERSON, *supra* note 114, at 2-3, 9-11, 18-25, 28-35, 38-42; *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 205 (1965). Edith Henderson emphasizes the importance of poor relief in particular, noting that “[t]here are many oddities in the history of law, but nothing [is] odder than the fact that so much of the early development of modern administrative law is to be found in the cases on the poor law.” HENDERSON, *supra* note 114, at 143.

117. *See* HENDERSON, *supra* note 114, at 10-11, 28. Created in 1532, the commissions of sewers had authority over all things water and drainage, including “walles, streames, ditches, bankes, gutters,” and, of course, “sewers.” *Id.* at 28 (quoting 23 Hen. 8 c. 5 (1531-1532) (Eng.)). For a broader overview of the courts of specialized, non-common law jurisdiction, *see* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 9-18 (1971). For more detailed accounts, *see* 1 HOLDSWORTH, *supra* note 112, at 300-401 (discussing all manner of commercial, admiralty, ecclesiastical, criminal, military, and forest courts). *See also* 3 BLACKSTONE, *supra* note 113, at \*61-85 (similar).

118. HENDERSON, *supra* note 114, at 35-45; 1 HOLDSWORTH, *supra* note 112, at 128-29.

much of the “day-to-day administration” of English government until well into the nineteenth century.<sup>119</sup>

On most accounts, this expansion of the role of government posed new threats to the rights of individual subjects,<sup>120</sup> who found themselves “so at the mercy of administrative officers” that “some protection” against the abuse of power became necessary.<sup>121</sup> Yet in 1600, neither the central courts of law nor the High Court of Chancery had power to supervise such administrative activity.<sup>122</sup> The Court of Common Pleas had jurisdiction over civil actions between ordinary subjects.<sup>123</sup> The Court of Exchequer, an offshoot of the treasury, specialized in enforcing “royal accounts and debts.”<sup>124</sup> Chancery handled private law matters in cases where equitable titles, rights, or remedies were at issue,<sup>125</sup> and did so almost exclusively in the context of resolving property disputes.<sup>126</sup> The Court of King’s Bench,<sup>127</sup> for its part, oversaw a shrinking docket of criminal matters, trespasses, and appeals from inferior courts.<sup>128</sup>

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119. Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1270 (1961) (identifying “poor relief, roads, sanitation, [and] price regulation” as the predominant administrative projects “[f]rom 1688 to 1835”); cf. 1 BLACKSTONE, *supra* note 113, at \*338-39 (classifying “sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor” as the Crown’s “principal subordinate magistrates” as of the late eighteenth century).

120. See HENDERSON, *supra* note 114, at 1-3.

121. See GOODNOW, *supra* note 36, at 368.

122. See *infra* text accompanying note 130. For an overview of the courts (both central and itinerant) of common law, as well as the High Court of Chancery, see BAKER, *supra* note 117, at 29-46. For a more comprehensive account, see 1 HOLDSWORTH, *supra* note 112, at 73-123, 194-235.

123. See BAKER, *supra* note 117, at 25-26. For more on Common Pleas, known as “the lock and key of the common law,” see 1 HOLDSWORTH, *supra* note 112, at 34-35, 74-78 (quoting EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS* 99 (London, M. Flesher 1644)).

124. BAKER, *supra* note 117, at 35; see also 1 HOLDSWORTH, *supra* note 112, at 100-07.

125. See 1 POMEROY, *supra* note 38, § 130. For comprehensive treatments of the many titles, rights, and remedies recognized in equity, see generally BISPHAM, *supra* note 7, §§ 49-582; 2 POMEROY, *supra* note 38, §§ 822-974 (1882) (rights); 2 *id.* §§ 975-1087 (titles); 3 *id.* §§ 1088-1314 (1883) (titles); and 3 *id.* §§ 1315-1421 (remedies and rights).

126. See BISPHAM, *supra* note 7, § 402 (noting that “the writ of injunction” is “used to prevent injuries to property”); *id.* § 453 (“[T]he jurisdiction of equity is exercised solely on the ground of protection to property . . .”); cf. 1 POMEROY, *supra* note 38, § 359 (describing all rights enforceable in equity as “rights of property or rights analogous to property”).

127. The name King’s Bench reflects the fact that “the king used formerly to sit . . . in person,” 3 BLACKSTONE, *supra* note 113, at \*41, and was “supposed always to be present in it,” GOODNOW, *supra* note 36, at 421. See also BAKER, *supra* note 117, at 25. For more on the history of the Court of King’s Bench, see 1 HOLDSWORTH, *supra* note 112, at 78-83.

128. BAKER, *supra* note 117, at 31-33; see also 1 HOLDSWORTH, *supra* note 112, at 83-100.

For much of the sixteenth century, apart from suits for tort-based damages at common law and applications to contest imprisonment through habeas corpus,<sup>129</sup> a subject could challenge the legality of administrative action only in the Privy Council—less a court of justice than a central executive department that was known tellingly as “the King in Council.”<sup>130</sup> The Council’s judicial power derived from the practice of the Tudor and Stuart monarchs of reserving for their closest advisors all cases affecting the Crown.<sup>131</sup> Yet the Council proved incapable of supervising the administrative state. For starters, it offered only the traditional common law remedy of damages, which often failed to resolve the problem while burdening local government.<sup>132</sup> More fundamentally, Crown influence deprived the Council of the independence needed to resolve public disputes impartially,<sup>133</sup> such that it often aimed to “keep[] the peace and . . . settl[e] the whole controversy” rather than to do “justice to a petitioner.”<sup>134</sup> On occasion, the Council went as far as to imprison suitors until they agreed to abandon their claims.<sup>135</sup> These high-handed tactics were among the reasons that Parliament, in the midst of its own struggle against the Crown, abolished the Council’s judicial authority in 1641.<sup>136</sup> Thereafter, new means were needed by which citizens could test and demand “the legality of official activity.”<sup>137</sup>

Displaying remedial flexibility that one might have expected from a court of equity, King’s Bench stepped into the breach by repurposing the three writs at the center of our account.<sup>138</sup> But although these writs had roots in earlier

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129. On the role of the common law suit for damages, in both England and the United States, see Pfander, *supra* note 47, at 744-47, 754-61. On the rise of habeas in seventeenth-century England to contest imprisonment, see AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 21-33 (2017).

130. See HENDERSON, *supra* note 114, at 25-28; see also 1 HOLDSWORTH, *supra* note 112, at 265-66, 279-81.

131. See 1 HOLDSWORTH, *supra* note 112, at 265 (“The Privy Council usually consisted of the five great officers of state . . . [along with] the archbishops of Canterbury and York, and from ten to fifteen other members.”); JAFFE, *supra* note 116, at 205 (describing the Crown’s aim during this time to “make all matters involving its interests subject to its control” through the Privy Council).

132. See HENDERSON, *supra* note 114, at 10, 24-25, 34-35; JAFFE, *supra* note 116, at 205.

133. See JAFFE, *supra* note 116, at 205.

134. HENDERSON, *supra* note 114, at 74.

135. See *id.* at 33.

136. See Michael Stuckey, *A Consideration of the Emergence and Exercise of Judicial Authority in the Star Chamber*, 19 MONASH U. L. REV. 117, 163-64 (1993). As Stuckey recounts, the subset of the Council that exercised the judicial function came to be known as the High Court of Star Chamber, whose infamous political trials precipitated its abolition at the hands of Parliament. *Id.* at 117-18.

137. HENDERSON, *supra* note 114, at 45.

138. See DE SMITH, *supra* note 36, at 784-87, 794-95.

eras, before their seventeenth-century transformation they all served only to review what we would call judicial action, not administrative action. Certiorari had worn many hats since the thirteenth century, but served in large part during the fifteenth and sixteenth centuries to remove criminal indictments (and other judicial proceedings) from justices of the peace and other inferior courts to King's Bench for trial or retrial.<sup>139</sup> Another "ancient" common law writ, prohibition had long served to keep specialized courts, especially ecclesiastical (as well as admiralty and perhaps equity) courts, "[with]in their jurisdiction."<sup>140</sup> As for mandamus, its origins lay in the so-called "writ of restitution," which cropped up in only one reported case before the seventeenth century and appears to have served to protect officers and litigants of the central courts from unlawful arrest by a local court.<sup>141</sup> By the mid-seventeenth century, these writs that "began as executive commands aimed at avoiding judicial proceedings" had evolved, paradoxically, into the "central mechanism[s] for the judicial control of executive action."<sup>142</sup>

#### B. The Rise of Administrative Writs

Sir Edward Coke played a key role in developing the administrative writs.<sup>143</sup> Having first articulated the doctrine of judicial review as Chief Justice of Common Pleas (in a case in which he deployed an ordinary writ of false imprisonment to test the legality of the Royal College of Physicians' disciplinary action against an unlicensed practitioner of medicine),<sup>144</sup> he set out as Lord Chief Justice of King's Bench to establish writs that could be relied on to oversee government activity. He began in *Hetley v. Boyer*, deploying a writ

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139. See DE SMITH, *supra* note 36, at 784-85; HENDERSON, *supra* note 114, at 91-93. For more on the "miscellaneous" early functions of the writ of certiorari, which Henderson likens to "the medieval equivalent" of the sovereign's command to "[g]et me the file on such and such a matter," see HENDERSON, *supra* note 114, at 83-93. See also DE SMITH, *supra* note 36, at 780-81.

140. HENDERSON, *supra* note 114, at 120; accord DE SMITH, *supra* note 36, at 785-86; see also 1 HOLDSWORTH, *supra* note 112, at 93-94.

141. HENDERSON, *supra* note 114, at 49 (discussing *Middleton's Case* (1574) 73 Eng. Rep. 752; 3 Dyer 332b); see also DE SMITH, *supra* note 36, at 794-95.

142. DE SMITH, *supra* note 36, at 781 (emphasis omitted).

143. On Sir Edward Coke's importance, see Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 194 tbl.3 (1984) (listing Coke as a top-ten influence on founding-era political thought, second only to Blackstone among English jurists); and John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1771-72 (2008) (noting that Coke has been described as "the most important common law jurist in English history").

144. See *Bonham's Case* (1610) 77 Eng. Rep. 646, 647, 650, 652; 8 Co. Rep. 113b, 114a, 116a-b, 118a.

of certiorari to quash an assessment made by the Northampton County commissioners of sewers and reasoning that the commissioners had acted arbitrarily and thus unlawfully in satisfying a tax imposed on the “whole township” against the property of one man.<sup>145</sup>

Later, in *Bagg’s Case*,<sup>146</sup> Lord Chief Justice Coke articulated “the rationale on which mandamus was later based practically out of whole cloth.”<sup>147</sup> James Bagg was a resident (or “burgess”) of Plymouth who had been deprived of his freedom, or “disenfranchis[e]d” of his “office” of “freeman,” by the mayor and city council.<sup>148</sup> After a characteristically “useless” attempt to obtain relief in the Privy Council,<sup>149</sup> Bagg sought a writ of restitution in King’s Bench on the theory that the “cause” of his being kicked out of Plymouth—that he had disrespected one mayor after another in public “as well in gesture as in words”—had no legal basis.<sup>150</sup> Reaching the merits, Lord Chief Justice Coke agreed that the mayor and common council had overstepped the bounds of law, holding that “no freeman” could be disenfranchised without “authority . . . by the express words of the charter, or by prescription” or else conviction “by [due] course of law.”<sup>151</sup> Because neither ground was satisfied, Lord Chief Justice Coke directed the council to restore Bagg “to his franchise and freedom.”<sup>152</sup> Even more striking was his novel jurisdictional theory,<sup>153</sup> which implied a boundless power to review official activity in asserting that

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145. See (1614) 79 Eng. Rep. 287, 287; Cro. Jac. 336, 336.

146. James Bagg’s Case (1615) 77 Eng. Rep. 1271; 11 Co. Rep. 93b (also spelled “James Bagge’s Case”).

147. JAFFE, *supra* note 116, at 331; see also HENDERSON, *supra* note 114, at 46 (“Legal tradition . . . picks up the story of mandamus with *James Bagge’s Case* . . .”); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 825 (1969) (stating that Lord Chief Justice Coke “made a massive assertion of mandamus jurisdiction” in *Bagg’s Case*); Jaffe, *supra* note 119, at 1270 (asserting that *Bagg’s Case* gave “panoramic scope” to the writ of mandamus); Jenks, *supra* note 25, at 530 (noting that *Bagg’s Case* founded the “important writ of *Mandamus*,” one of Lord Chief Justice Coke’s “numerous contributions . . . to the efficiency and dignity of the King’s Bench”).

148. *Bagg’s Case*, 77 Eng. Rep. at 1271-72, 1277, 11 Co. Rep. at 93b-94a, 97b.

149. See HENDERSON, *supra* note 114, at 47.

150. *Bagg’s Case*, 77 Eng. Rep. at 1271-72, 1274, 11 Co. Rep. at 93b-94a, 95a. Bagg called one mayor “a cozening knave,” another “a seditious fellow,” and a third an “insolent fellow,” the last of whom he also mocked by “turning the hinder part of his body in an inhuman and uncivil manner towards” him and “scoffingly, contemptuously, and uncivilly, with a loud voice,” beckoning him to “[c]ome and kiss.” *Id.* at 1274-76, 11 Co. Rep. at 95a-96b (quoting James Bagg).

151. *Id.* at 1279, 11 Co. Rep. at 99a.

152. *Id.* at 1277, 1281, 11 Co. Rep. at 98a, 99b.

153. See HENDERSON, *supra* note 114, at 65-76 (concluding that Lord Chief Justice Coke’s theory had “no precedent,” was “singularly unsupported by authority” that was “any less general” than the Magna Carta, and “had not a shred of legal theory to support or explain it” (quoting Patrick’s Case (1665) 83 Eng. Rep. 54, 56; Raym. Sir. T. 100, 104)).

to this Court of King's Bench belongs [the] authority, not only to correct errors in *judicial* proceedings, but other errors and misdemeanors *extra-judicial*, tending to the breach of peace, or oppression of the subjects, or . . . *any manner of misgovernment*; so that *no* wrong or injury, either public or private, can be done but that it shall be (here) reformed . . . by due course of law.<sup>154</sup>

Opposition to Lord Chief Justice Coke's project of judicial review shortened his tenure; just one year later, he was dismissed from the bench for good.<sup>155</sup> Yet his "central belief . . . in the supremacy of the common law" lived on.<sup>156</sup> Even his royalist successor, Lord Chief Justice Montagu, who also asserted "the supremacy of the common law over every one *except* the king,"<sup>157</sup> not only continued to issue writs of restitution, but did so in circumstances beyond the "restitution formula" of *Bagg's Case*.<sup>158</sup> By 1646, the writ had taken the name of "mandamus," a reflection of its new capacity to command the performance of a wide and growing range of administrative duties.<sup>159</sup> This expansion was facilitated by both the jurisdictional foundation that Lord Chief Justice Coke laid in *Bagg's Case* and an analogy to the writ of prohibition, which the Justices characterized expansively as serving, like mandamus, "to enforce the statute" in question.<sup>160</sup>

Meanwhile, *Commins v. Massam*<sup>161</sup> cemented the availability of certiorari to quash an unlawful administrative order. Not coincidentally, this decision came down (after nearly a decade of argument<sup>162</sup>) on the eve of the English Civil War and soon after Parliament abolished the Privy Council's judicial power, leaving King's Bench to absorb its jurisdiction over administrative officers.<sup>163</sup> Like *Hetley*, *Commins* involved an order by the sewer commissioners,

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154. *Bagg's Case*, 77 Eng. Rep. at 1277-78, 11 Co. Rep. at 98a (emphasis added) (footnote omitted).

155. See HENDERSON, *supra* note 114, at 70. Sir Edward Coke's dismissal as Lord Chief Justice in 1616 was also hastened by his efforts to establish King's Bench as superior to the High Court of Chancery, which attracted strong opposition from both Francis Bacon and King James. Cf. James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 13-14 (2013) (describing Bacon's success in preserving equity's power to enjoin proceedings and judgments at common law). See generally John P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127 (1941) (discussing the broader context of Lord Chief Justice Coke's removal after clashing with Lord Chancellor Ellesmere).

156. HENDERSON, *supra* note 114, at 69-70; see also DICEY, *supra* note 47, at 189.

157. HENDERSON, *supra* note 114, at 127.

158. See *id.* at 80.

159. See *id.* at 80-82 (discussing *Luskins v. Carver* (1646) 82 Eng. Rep. 488; Style 7).

160. *Id.* at 128-29 (discussing *Le Parish de S. Balaunce* (1619) 81 Eng. Rep. 973; Palmer 50).

161. (1642) 82 Eng. Rep. 473; March, N.R. 196.

162. HENDERSON, *supra* note 114, at 102.

163. See DE SMITH, *supra* note 36, at 787; 1 HOLDSWORTH, *supra* note 112, at 92, 290-92; Goodnow, *supra* note 113, at 499.

here one assessed against a renter of certain flood-prone lands the full cost of a replacement seawall.<sup>164</sup> Although the court ultimately upheld the order as lawful,<sup>165</sup> the decision's lasting significance lay in the majority's willingness to test its legality in the first place.<sup>166</sup> In holding that certiorari lay to "correct[]" the commissioners' proceedings wherever they exceeded their "jurisdiction," *Commins* drew again upon the writ of prohibition, which, much like the certiorari to quash, served (Justice Heath claimed) to keep non-common law bodies from proceeding "where they ought not."<sup>167</sup> Echoing Lord Chief Justice Coke's theory of judicial review in *Bagg's Case*, Justice Heath justified the intervention of King's Bench by asserting that there was no such body "whatsoever but [wa]s to be corrected by this Court."<sup>168</sup> After *Commins*, this position was no longer subject to serious controversy.

### C. The Institutionalization of Administrative Law

From the mid-seventeenth through the mid-nineteenth centuries,<sup>169</sup> King's Bench zealously oversaw "the business of local government" by "keeping subordinate bodies within their legal limitations by writs of certiorari and prohibition" and "ordering them to perform their duties by writs of mandamus."<sup>170</sup> Certiorari and mandamus in particular quickly established themselves as "the twin pillars of the common law of judicial control,"<sup>171</sup> the former serving to quash unlawful exercises of discretionary authority and the latter to compel the performance of nondiscretionary duties. The "steady" and "continuous growth" of these remedies "through some of the most turbulent years of English history" (those of the civil war) was not only "[o]ne of the most

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164. See *Commins*, 82 Eng. Rep. at 473, March, N.R. at 196 (statement of the case).

165. See *id.* at 473, March, N.R. at 197 (Mallet, J); *id.* at 473, March, N.R. at 197 (Heath, J); *id.* at 475, March, N.R. at 202 (Bramston, CJ).

166. See *id.* at 473, March, N.R. at 197 (Heath, J); *id.* at 474, March, N.R. at 199 (Bramston, CJ).

167. See *id.* at 473, March, N.R. at 197-98 (Heath, J).

168. *Id.* at 473, March, N.R. at 197.

169. See generally TAPPING, *supra* note 31 (discussing mandamus practice through the mid-1800s).

170. DE SMITH, *supra* note 36, at 787. Although much of the remediation was directed at local courts and tribunals, one should not assume that these were matters of only local concern or that the courts lacked power to decide matters with respect to central government activity. Administration was decentralized yet extended throughout the realm, as was the administrative work of the tax collectors and sewer commissioners. One close study of the period explains that most legislatively granted administrative authority was vested in local commissions and justices of the peace. See Craig, *supra* note 114; see also *supra* notes 114-19 and accompanying text. Localism was thus an artifact of the administrative structure of the day rather than a restriction on the power of the superior courts.

171. JAFFE, *supra* note 116, at 176, 328.

fascinating aspects” of their development,<sup>172</sup> but also reflected the stabilizing impulses underlying the common law tradition.

In their ultimate forms, the writs of certiorari and prohibition were effectively mirror images of each other, differing only in their timing of review: While prohibition issued to prevent unlawful action before it took place, certiorari issued to quash unlawful action that had already been taken.<sup>173</sup> Otherwise, both writs served the same purpose: to remove the record of an inferior body’s “judicial” proceedings for summary review of its “jurisdictional” determinations.<sup>174</sup> In practice, both the judicial and jurisdictional elements of this formula were much broader than they sound to modern ears. Judicial proceedings included any matter presented in quasi-judicial or administrative tribunals,<sup>175</sup> while “jurisdictional” determinations encompassed “every issue of law.”<sup>176</sup> As such, any “noncompliance” with the terms of the organic statute, including failure to follow “procedural steps,” to make required findings of fact, or to issue the correct remedy, would result in a judgment that the proceedings were void as coram non judge, or “without jurisdiction.”<sup>177</sup> Even after the idea of “jurisdiction” began to separate from mere legal errors in the eighteenth century, many years of precedent, together with “the obligation to do justice,”

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172. HENDERSON, *supra* note 114, at 1-2.

173. *See* DE SMITH, *supra* note 36, at 895.

174. *See* JAFFE, *supra* note 116, at 166, 192; *see also* DE SMITH, *supra* note 36, at 788. *Compare* Goodnow, *supra* note 113, at 515-16 (discussing certiorari), *with* Jenks, *supra* note 25, at 528 (discussing prohibition).

175. In this context, “judicial” action encompassed the proceedings of “any body of persons” vested by law, *R v. Local Gov’t Bd.* (1882) 10 QBD 309 (AC) at 321 (Brett, LJ), with “some right or duty to decide” on individual rights, regardless of whether such body would “ordinarily be called a court” or whether its actions would “be ordinarily termed ‘judicial acts,’” *R v. Woodhouse* (1906) 2 KB 501 (AC) at 535 (Fletcher Moulton, LJ); *cf.* *Groenwelt v. Burwell* (1700) 91 Eng. Rep. 134, 134; 1 Salkeld 144, 144-45 (referring to the Royal College of Physicians as a “Court” not “exempt from the superintendency” of King’s Bench). One reason for this characterization was that, throughout the period in question, administrative bodies operated as courts of record, meaning they acted after conducting hearings that generated records. *See* HENDERSON, *supra* note 114, at 34-36, 112-16; JAFFE, *supra* note 116, at 166.

Note that the administrative record remains an important key to judicial review under the Administrative Procedure Act (APA), pursuant to which federal agencies must make administrative records even when engaging in the most informal of proceedings. *See* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-20 (1971) (holding that the record “compiled by the agency” must form “the basis for review” of its decision under 5 U.S.C. § 706).

176. HENDERSON, *supra* note 114, at 158; *see also id.* at 143-45 (describing “the eighteenth-century doctrine”).

177. *See id.* at 112, 150-56.

combined to “call[] for a scope of review which was much broader than that suggested by conceptual logic” of jurisdictional boundaries.<sup>178</sup>

The writ of mandamus, meanwhile, developed into a writ “of a most extensive remedial nature,” issuing “in all cases where the party hath a right,” under any source of law, “to have any thing done, and hath no other specific means of compelling it’s [sic] performance.”<sup>179</sup> Mandamus served to compel no less than “an infinite number” of public and quasi-public duties, which Blackstone found “impossible to recite minutely,” whose performance had been wrongfully refused.<sup>180</sup> The thread connecting these innumerable duties was the judicial perception that they were all “ministerial,” or nondiscretionary.<sup>181</sup> In this respect, every act of government that was not “discretionary” for purposes of certiorari and prohibition was “ministerial” for purposes of mandamus.<sup>182</sup> Moreover, as with the writs of certiorari and prohibition, the issuance of a mandamus depended exclusively on “the character of the act or decision that was impugned,” and not that “of the body that had acted or decided”—in other words, no officer was above such a writ.<sup>183</sup> Accordingly, throughout the eighteenth and nineteenth centuries, English courts readily deployed all three administrative writs to review the legality of official government activity.

Although different rules governed their operation, the administrative writs shared one important feature: They all operated “as public proceedings brought in the King’s name.”<sup>184</sup> In fact, these common law proceedings were

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178. *Id.* at 158.

179. 3 BLACKSTONE, *supra* note 113, at \*110; *see also* TAPPING, *supra* note 31, at 11 (“[T]he jurisdiction of [mandamus] . . . comprehends . . . all cases for which there exists no legal remedy.”).

180. 3 BLACKSTONE, *supra* note 113, at \*110; *see also* DE SMITH, *supra* note 36, at 795. A recent study of English records reveals that between the thirteenth and nineteenth centuries, the English law books contained approximately 6,600 citations to certiorari, 5,500 to prohibition, and 7,100 to mandamus. *See* Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 36-37 (Oxford Legal Studies, Research Paper No. 44, 2016), <https://perma.cc/NS2J-LLXB>. Craig reports that the same period featured claims against commissioners based on theories of trespass (approximately 3,200), trover (approximately 1,900), action on the case (approximately 1,100), and replevin (approximately 1,000). *Id.* at 37.

181. *See* GOODNOW, *supra* note 36, at 295.

182. *See* DE SMITH, *supra* note 36, at 788.

183. *See id.* at 789-90 (discussing certiorari and prohibition). As De Smith explains, English courts thus extended all three writs, including mandamus, to officers of the central government during the nineteenth century. *See* DE SMITH, *supra* note 36, at 789-90; *see also* 3 BLACKSTONE, *supra* note 113, at \*110 (noting that mandamus issues to “any . . . within the king’s dominions”).

184. JAFFE, *supra* note 116, at 462.

“public” in each of three important senses. First, the writs were typically prosecuted in the name of the Crown (typically “R” for “Rex” (King) or “Regina” (Queen)<sup>185</sup>), such that when they issued, they did so as a “command[]” issuing from the monarch herself, as if still sitting in person on the Bench.<sup>186</sup> Second, the writs issued to correct the wrongs of public officers, not “mere private wrongs” inflicted by ordinary citizens.<sup>187</sup> Third, the writs were often pursued as public actions, in which individuals sought the correction of public wrongs on behalf of the public at large.<sup>188</sup> Prohibition (and perhaps certiorari) could even be sought by “stranger[s],” or parties extrinsic to the administrative determination in question, on the theory that “a usurpation of jurisdiction was a contempt of the Crown” that any party was encouraged to challenge.<sup>189</sup> As for mandamus, while it issued to effectuate a “specific legal right,”<sup>190</sup> the right in question did not have to be specific to the petitioner; to the contrary, mandamus could issue to compel the performance of duties owed to the public as a whole.<sup>191</sup> Because the administrative writs served “to vindicate the public

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185. See, e.g., *R v. Archbishop of Canterbury* (1807) 103 Eng. Rep. 323; 8 East 213; *R v. Barker* (1762) 97 Eng. Rep. 823; 3 Burr. 1265; *The Case of Cardiffe Bridge (R v. Inhabitants in Glamorganshire)* (1700) 91 Eng. Rep. 135; 1 Salkeld 146; *R v. St. John’s Coll.* (1693) 87 Eng. Rep. 366; 4 Mod. 233; *R v. Plowright* (1686) 87 Eng. Rep. 60; 3 Mod. 94.

186. See 3 BLACKSTONE, *supra* note 113, at \*41, \*110 (discussing mandamus); see also TAPPING, *supra* note 31, at 5 (characterizing mandamus as “a command issuing in the Queen’s name from the Court of [Bancum Regis]”).

187. See TAPPING, *supra* note 31, at 5 (discussing mandamus).

188. See Berger, *supra* note 147, at 819-21, 824-27; Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 480-82, 498, 526 (1994); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396-97 (1988) [hereinafter Winter, *The Metaphor of Standing*]; see also Jaffe, *supra* note 119, at 1270-74 (discussing mandamus). We observe this aspect of the public action for its remedial implications, and have no occasion to join the discussion on the implications for the law of standing. For further discussions, see generally Berger, *supra* note 147; Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); Winter, *The Metaphor of Standing, supra*; Steven L. Winter, *What If Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL’Y F. 155 (2001); and Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

189. DE SMITH, *supra* note 36, at 791 (discussing prohibition); *id.* at 792-94 (discussing certiorari).

190. See *Archbishop of Canterbury*, 103 Eng. Rep. at 326, 8 East at 219-20 (“There ought in all cases to be a specific legal right . . . to found an application for a mandamus.”).

191. See Jaffe, *supra* note 119, at 1270. Tapping’s treatise collects a host of examples, including cases commanding the relocation of public documents, the establishment of uniform toll rates, the raising of church rates, the collection of borough rates, the maintenance of canal banks, and the laying of highways. See TAPPING, *supra* note 31, at 50-51, 60, 66, 131. For an outstanding example from the Supreme Court’s nineteenth-century jurisprudence of the mandamus qua public action, see *infra* notes 233-45 and accompanying text (discussing *Union Pacific Railroad Co. v. Hall*, 91 U.S. 343 (1876)). See *footnote continued on next page*

interest in the enforcement of public obligations,”<sup>192</sup> it made sense that ordinary members of an aggrieved public could seek them.

The notion of relief sought by a relator on behalf of the public was not, however, limited to these writs, nor even to writs issued by King’s Bench. Alongside those of mandamus, certiorari, and prohibition, scholars often include the writ of scire facias, to cancel letters patent, among the prerogative or common law writs that took hold in eighteenth-century England.<sup>193</sup> Issued out of the Court of Chancery and litigated in Chancery’s common law branch rather than in one of the superior courts of common law, scire facias came to play a prominent role in patent litigation.<sup>194</sup> To be sure, English law contemplated private *inter partes* litigation between the owner of a patent and an alleged offender, without the involvement of public actors.<sup>195</sup> Any resulting

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*also infra* Part III.B.2 (discussing how mandamus served as the preeminent vehicle for the public action in state courts during the nineteenth century). For an account of the Roman law origins of the public action, or *actio popularis*, and its operation in Scots law, see James E. Pfander, *Standing to Sue: Lessons from Scotland’s Actio Popularis*, 66 DUKE L.J. 1493, 1531-33 (2017).

192. Berger, *supra* note 147, at 818 n.11 (quoting Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961)); see also DE SMITH, *supra* note 36, at 793 (noting that certiorari could be sought by “members of a local community who ha[d] a special grievance” merely “by virtue of their membership of that community”).

193. As one of us has previously discussed, letters patent were issued in England as parchment evidence of an ownership interest conferred by the Crown. See Pfander, *supra* note 112, at 915 n.54. See generally THOMAS CAMPBELL FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 236-37 (London, V. & R. Stevens & G.S. Norton 1851) (citing 2 BLACKSTONE, *supra* note 113, at \*346). The range of ownership interests so memorialized was quite broad, including offices, manors, fairs, import licenses, and manufacturing privileges. See FOSTER, *supra*, at 237-38. Litigation to contest or nullify letters patent began with the issuance of a writ of scire facias on the common law side of Chancery. See JOSEPH CHITTY, JR., A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 330-31 (London, Joseph Butterworth & Son 1820). For an account of the use of scire facias in litigation over the charter rights of the New England colonies, see Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1454-57, 1465 (2019).

The federal government in the early Republic issued letters patent to those who had received grants of land and to those who had obtained a “patent” for an invention. See Pfander, *supra* note 112, at 915 n.54. Commissions to Justices of the Supreme Court were also based on the form of letters patent. See *id.*

194. See 1 HOLDSWORTH, *supra* note 112, at 235-37 (describing the law side of Chancery as including such proceedings as petitions for the writ of scire facias to cancel letters patent as well as petitions of right, *monstrans de droit*, and traverse of office to allow the subject to interplead with the Crown as to the ownership of property).

195. See Christopher Beauchamp, *Repealing Patents*, 72 VAND. L. REV. 647, 655-57 (2019). Beauchamp notes that scire facias “presented a complicated mix of private and public action”: While “private individual[s] prejudiced by a wrongfully granted patent . . . had the right to sue in the name of the king,” such petitioners “needed leave from the Attorney General.” *Id.* at 655-56. But the fiat of the attorney general was often available

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determination of invalidity was understood to bind only the parties to the proceeding.<sup>196</sup> But the writ of scire facias went further, precipitating a proceeding that might cancel the patent and operate for the benefit of the public at large.<sup>197</sup> Proceedings on the writ of scire facias thus resembled other public actions, in which individuals were entitled to pursue relief in the form of a judicial order that quashed or invalidated official action and could redound to the benefit of the public as a whole.

Despite being thought of as actions brought “in the name of the Crown,”<sup>198</sup> and despite their “prerogative” label, the availability and issuance of the administrative writs did not depend on the will of the Crown. Rather, the Crown’s “superintendency”<sup>199</sup> in such cases was based on the idea that the king’s *judges* were authorized to dispense royal justice. The judges ran the show.<sup>200</sup> As early as 1644, Sir Edward Coke’s *Institutes of the Laws of England* (published posthumously in part) asserted the view that the king had “wholly left matters of judicature . . . to his Judges.”<sup>201</sup> That idea took firm hold in 1701, when the Act of Settlement granted judges life tenure subject only to removal by Parliament for good cause.<sup>202</sup> By the early eighteenth century, then, the “judicial power to control administration” was fully “autonomous.”<sup>203</sup> The writs’ “prerogative” characterization reflected the tendency of Blackstone and Lord Chief Justice Mansfield “to attribute all good things to a benevolent monarch.”<sup>204</sup> As for the notion that their prerogative character subjected the writs to discretionary limitations, in practice the only grounds on which they would be refused was where the petitioner had “an adequate alternative remedy” or was “guilty of unreasonable delay or misconduct.”<sup>205</sup>

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“as a matter of course,” provided the petition disclosed a viable claim. See FOSTER, *supra* note 193, at 249.

196. Beauchamp, *supra* note 195, at 657.

197. *Id.* at 655-57.

198. See GOODNOW, *supra* note 36, at 422.

199. See, e.g., Groenwelt v. Burwell (1700) 91 Eng. Rep. 134, 134; 1 Salkeld 144, 144 (“[N]o Court can be intended exempt from the superintendency of the King in this Court . . .”).

200. See JAFFE, *supra* note 116, at 179.

201. COKE, *supra* note 123, at 71; see also DICKINSON, *supra* note 26, at 78-79, 95.

202. See 12 & 13 Will. 3 c. 2 (1701) (Eng.).

203. JAFFE, *supra* note 116, at 349; accord Jenks, *supra* note 25, at 532.

204. Jenks, *supra* note 25, at 534 (discussing Blackstone and Lord Chief Justice Mansfield); see also DE SMITH, *supra* note 36, at 782 (discussing Lord Chief Justice Mansfield).

205. DE SMITH, *supra* note 36, at 783. This equitable-style inquiry into adequate alternative remedies has led the Supreme Court to mislabel mandamus as an equitable remedy in the present day. See *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215 (2002). Historically, the administrative writs, although extraordinary remedies at common law, took priority over adequate alternative remedies in equity. See TAPPING, *supra* note 31, at 22 (“Where a legal right exists, it is no answer to an application for a  
*footnote continued on next page*”).

As fully independent remedies, the administrative writs came of age in the eighteenth century, especially under Lord Chief Justices Holt and Mansfield.<sup>206</sup> These jurists articulated the authoritative statements of certiorari and mandamus to which American courts would later refer. Lord Chief Justice Holt is best recalled for two certiorari opinions: the *Cardiffe Bridge* case, in which he stated that “wherever any new jurisdiction [was] erected” by an “Act of Parliament,” its actions were “subject to the inspections of this Court by writ of . . . certiorari and mandamus”;<sup>207</sup> and *Groenwelt v. Burwell*, in which he reiterated that no “inferior jurisdiction” could be “intended exempt from the superintendency of . . . this Court.”<sup>208</sup> As for Lord Chief Justice Mansfield, who “characterized mandamus with something of Coke’s flourish,”<sup>209</sup> the opinion he signed in *Rex v. Barker* famously asserted that whenever a subject was “dispossessed” of a public right, and had “no other specific legal remedy,” the courts of common law “ought to assist by a mandamus; upon reasons of justice” and “public policy, to preserve peace, order, and good government.”<sup>210</sup> Quoted prominently in *Marbury v. Madison*,<sup>211</sup> this “sweeping assertion[.]” may well have influenced the American Framers’ view of the propriety of judicial control of executive action.<sup>212</sup>

### III. The Evolving American Practice: 1789-1900

Justice Brandeis captured something essential in *Crowell v. Benson*, crediting state courts with using the common law forms of administrative oversight that were later incorporated into federal equity.<sup>213</sup> To be sure, *Marbury v. Madison* gave federal judicial voice to the King’s Bench tradition even as the Court

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mandamus, to shew that there is also a remedy in equity; for when the Court refuses to grant the writ, because there is another specific remedy, it means a specific remedy *at law*.”).

206. See DE SMITH, *supra* note 36, at 787 (discussing certiorari and prohibition); *id.* at 795-96 (discussing Lord Chief Justice Mansfield); HENDERSON, *supra* note 114, at 113-15 (discussing Lord Chief Justice Holt); Jaffe, *supra* note 119, at 1281 (discussing mandamus).

207. *The Case of Cardiffe Bridge (R v. Inhabitants in Glamorganshire)* (1700) 91 Eng. Rep. 135, 135; 1 Salkeld 146, 146.

208. (1700) 91 Eng. Rep. 134, 134; 1 Salkeld 144, 144.

209. JAFFE, *supra* note 116, at 211.

210. (1762) 97 Eng. Rep. 823, 824; 3 Burr. 1265, 1266; see also *id.* at 824-25, 3 Burr. at 1267 (adding that mandamus “was introduced, to prevent disorder from a failure of justice, and defect of police,” such that “it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one”).

211. See *infra* note 216 and accompanying text.

212. See Berger, *supra* note 147, at 825.

213. See *supra* note 2 and accompanying text.

declined to perform that task in the first instance or to identify any alternative source of statutory power to issue administrative writs.<sup>214</sup> At the state level, by contrast, the administrative writs of mandamus and certiorari remained highly potent and readily available means of controlling executive action. The transition from law to equity on which Justice Brandeis remarked nonetheless began in state courts, which issued injunctions against unlawful taxes in the mid-nineteenth century. Federal courts followed the state turn to equity shortly after the Civil War, establishing the injunction as a substitute for the missing writs in a series of diversity cases. After Congress adopted the 1875 grant of general federal question jurisdiction, federal courts issued a spate of administrative law injunctions that set the stage for *Ex parte Young*. We first describe the antebellum federal experience and then turn to the states.

#### A. Federal Courts

In *Marbury*, of course, Chief Justice John Marshall held that the Supreme Court lacked original jurisdiction under Article III to issue the writ of mandamus, King’s Bench style, directly to an executive officer.<sup>215</sup> But before doing so, Chief Justice Marshall was careful to incorporate the common law of administrative oversight into federal law. Quoting Lord Chief Justice Mansfield, Chief Justice Marshall asserted that “[w]henver . . . there is a right” of “public concern,” and a suitor is “dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice” and “public policy, to preserve peace, order and good government.”<sup>216</sup> Chief Justice Marshall noted that Madison had a duty “prescribed by law” to deliver Marbury’s commission;<sup>217</sup> that, despite being one of the “heads of departments,” he was nonetheless “amenable to the laws of [his] country” in his official conduct;<sup>218</sup> and that his refusal to deliver the commission was thus an

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214. Congress finally granted original mandamus jurisdiction to federal courts in the 1962 Mandamus Act. See Pub. L. No. 87-748, § 1(a), 76 Stat. 744, 744 (1962) (codified at 28 U.S.C. § 1361 (2018)). For more on the impetus for the Act’s tardy adoption, see Clark Byse, *Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1479-84, 1506-08 (1962).

215. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution . . . .”); see also Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (purporting to vest the Court with the “power to issue . . . writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States” (footnote omitted)).

216. 5 U.S. (1 Cranch) at 168-69 (quoting *R v. Barker* (1762) 97 Eng. Rep. 823, 824; 3 Burr. 1265, 1266).

217. *Id.* at 158.

218. *Id.* at 164.

“illegal act”<sup>219</sup> that presented “a plain case for a mandamus.”<sup>220</sup> Yet constitutional limits on its original jurisdiction meant that the Supreme Court could not issue the writ in the first instance.<sup>221</sup>

Notwithstanding *Marbury’s* attempt to preserve the viability of mandamus review in the lower federal courts, the potential scope of federal administrative writ review was later sharply narrowed. Chief Justice Marshall’s successor, Roger Taney, believed that “interference of the Courts with . . . the ordinary duties of the executive departments of the government” would produce “nothing but mischief.”<sup>222</sup> Chief Justice Taney thus used *Decatur v. Paulding* to recognize a broad zone of executive discretion that lay beyond the control of mandamus.<sup>223</sup> The widow of Stephen Decatur brought the action to compel the Secretary of the Navy to pay a pension in accordance with the supposed demands of federal law.<sup>224</sup> But rather than interpret the statute to determine whether Mrs. Decatur was entitled to the pension claimed, as did Justice McLean in dissent,<sup>225</sup> Chief Justice Taney disclaimed jurisdiction to review the Secretary’s interpretation of the statute<sup>226</sup>—a move that enjoyed little support in mandamus tradition.<sup>227</sup> In effect, then, Chief Justice Taney generally immunized heads of departments, who were “continually required to exercise judgment and discretion” when “expounding the laws . . . of Congress,” from

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219. *Id.* at 170.

220. *Id.* at 173.

221. *Id.* at 175-76. The conventional account treats section 13’s grant of mandamus power in the Judiciary Act of 1789 as the “perfect” candidate for constitutional invalidation because “no one cared about” it. Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 368. *But see* Pfander, *supra* note 27, at 1523-49, 1580-87 (noting the importance of the mandamus tradition in public law and arguing that Chief Justice Marshall pursued a “strategy of conservation and eventual reclamation” by way of the Court’s appellate docket).

222. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840).

223. *See id.* at 515-16.

224. *Id.* at 513-14. Technically, the Secretary referred the question to the Attorney General, whom Chief Justice Taney treated like the official “legal adviser . . . provided by law for the heads of departments” and thus entitled to deference in his resolution. *See id.* at 514-15.

225. *See id.* at 517 (McLean, J., dissenting) (“The law is directory and imperative, and admits of the exercise of no discretion, on the part of the Secretary.”).

226. *See id.* (majority opinion).

227. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 948 (2011) (observing that mandamus was a “de novo” form of review, such that the reviewing court “exercised independent judgment in determining whether a government official had violated a nondiscretionary duty”); *cf.* JAFFE, *supra* note 116, at 181-82 (stating that only “[o]nce a court decides” for itself that the law provides a zone of administrative discretion must it refuse to “interfere with an administrative choice” within that zone).

the scrutiny of the federal courts.<sup>228</sup> In the wake of *Decatur*, judicial review of administrative action was limited to that which “clearly exceed[ed] the statutory mandate” in question.<sup>229</sup> Mandamus review thereafter declined,<sup>230</sup> issuing only in the most obvious cases, such as where the officer’s duty was confined to issuing an already granted land patent.<sup>231</sup> Even though the Supreme Court began to uphold the issuance of injunctions in lieu of the administrative writs in the 1860s and 1870s, judicial review of high-level federal executive action did not become routine until the twentieth century.<sup>232</sup>

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228. See *Decatur*, 39 U.S. (14 Pet.) at 515-16.

229. Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 804-06 (1986); see also PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1381 (2d ed. 1973); Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 300 (1948).

230. See, e.g., *United States v. Lynch*, 137 U.S. 280, 286 (1890); *Sec’y v. McGarrahan*, 76 U.S. (9 Wall.) 298, 311-14 (1870); *Comm’r of Patents v. Whiteley*, 71 U.S. (4 Wall.) 522, 533-34 (1867); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 303-05 (1855); *United States ex rel. Tucker v. Seaman*, 58 U.S. (17 How.) 225, 230-31 (1855); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 129-32 (1849); *Brashear v. Mason*, 47 U.S. (6 How.) 92, 100-03 (1848).

The D.C. Circuit Court likewise registered *Decatur*’s message that mandamus no longer reached the bulk of executive action. See *McElrath v. McIntosh*, 16 F. Cas. 74, 82 (C.C.D.C. 1848) (No. 8,781) (“In the exercise of this discretion, this court has no right to guide or control the executive officer, or to entertain any appeal from his decision.”); *Ex parte Schaumburg*, 21 F. Cas. 654, 654 (C.C.D.C. 1846) (No. 12,442) (“[T]he subject of the petition is one which the constitution has confided exclusively to the executive discretionary power, and . . . it is not for this court to inquire into the grounds or reasons of the president’s action in the case.”).

Prior to *Decatur*, the Circuit Court for the District of Columbia—whose power to issue writs of mandamus, unique among lower federal courts, the Supreme Court confirmed in *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 621-26 (1838)—had issued writs of mandamus in all five cases in which the issue arose. See *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 714 (C.C.D.C. 1837) (No. 15,517), *aff’d*, 37 U.S. (12 Pet.) 524 (1838); *Deneale v. Young*, 7 F. Cas. 460, 460 (C.C.D.C. 1820) (No. 3,785); *United States v. Washington*, 28 F. Cas. 414, 414 (C.C.D.C. 1819) (No. 16,646); *Brent v. Justices of the Peace*, 4 F. Cas. 64, 65 (C.C.D.C. 1807) (No. 1,840); *United States v. Deneale*, 25 F. Cas. 817, 817 (C.C.D.C. 1801) (No. 14,946); see also *Kennedy v. Gorman*, 14 F. Cas. 313, 314 (C.C.D.C. 1833) (No. 7,702) (issuing certiorari to quash an order of justices of the peace as “absolutely void because coram non iudice”); cf. *Homans v. Moore*, 12 F. Cas. 445, 445 (C.C.D.C. 1838) (No. 6,655) (mem.) (reiterating the availability of certiorari, but denying the writ on the merits).

231. See *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 68 (1884); *United States v. Schurz*, 102 U.S. 378, 403 (1880).

232. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 509-10 (3d ed. 1972); cf. *Roberts v. United States*, 176 U.S. 221, 231 (1900) (rediscovering the principle that an officer’s “construction” of a statute, despite requiring “a judgment from its language what duty he is directed . . . to perform,” does not “necessarily . . . make the duty . . . anything other than a purely ministerial one”). Yet as the next Subpart makes clear, state courts were better equipped to address executive action. What’s more, the Supreme Court

*footnote continued on next page*

Despite *Decatur* and the transition away from common law control of public action, specific grants of statutory mandamus authority reveal the mostly untapped potential of such relief in the nineteenth century. Consider *Union Pacific Railroad Co. v. Hall*,<sup>233</sup> in which two Iowa merchants sought mandamus in the Circuit Court for the District of Iowa to compel a publicly chartered railroad to operate its roads and bridges “as one continuous line” for “all purposes of communication, travel and transportation.”<sup>234</sup> At issue was the railroad’s practice of operating its bridge over the Missouri River, between Nebraska and Iowa, “as an independent and separate line” by requiring “freight [and] passengers bound” in either direction to transfer in Nebraska.<sup>235</sup> In addition, the railroad operated the “bridge transfer” pursuant to a variety of distinct “[r]ules and regulations,” including different time schedules and higher freight and passenger tariffs; sometimes it even refused to operate the bridge altogether.<sup>236</sup> Framed in the language of mandamus, the petition sought to have the railroad “refrain” from enforcing these policies, as if it sought an order that was equal parts affirmative and negative.<sup>237</sup> On the merits, the circuit court agreed that all of the challenged policies except for the tariffs were contrary to the organic statute, and it issued the writ as otherwise requested.<sup>238</sup> On appeal, the Supreme Court affirmed.<sup>239</sup>

The mandamus issued and affirmed in *Hall* represents an early and revealing instance of mandamus-based relief, broadly protecting nonparties

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maintained contact with state mandamus as a remedy, evaluating on direct review state court decisions that refused to grant mandamus relief in circumstances where it provided the most sure-footed remedy for the violation at hand. Indeed, as Ann Woolhandler reports, the Court would on occasion force mandamus on state courts in order to remedy the state’s violation of the Contracts Clause. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 113 (1997) (invoking *Louisiana v. Pilsbury*, 105 U.S. 278 (1882), for the proposition that the Court compelled the state to furnish a mandamus remedy in its own courts that the state legislature had meant to foreclose).

233. 91 U.S. 343 (1876).

234. *Hall v. Union Pac. R.R. Co.*, 11 F. Cas. 268, 269 (C.C.D. Iowa 1875) (No. 5,950) (quoting Act of July 2, 1864, ch. 216, § 15, 13 Stat. 356, 362), *aff’d*, 91 U.S. 343 (1876); see also Transcript of Record, *supra* note 31, at 5 (original petition).

235. See *Hall*, 91 U.S. at 343-44.

236. Transcript of Record, *supra* note 31, at 4-9 (exhibits A-C).

237. See *id.* at 5 (original petition).

238. *United States ex rel. Hall v. Union Pac. R.R. Co.*, 28 F. Cas. 345, 348-52 (C.C.D. Iowa 1875) (No. 16,601), *aff’d sub nom. Hall*, 91 U.S. 343. As initially issued, the writ of mandamus enjoined the tariffs universally as well, until the court decided that they were in fact lawful. See Transcript of Record, *supra* note 31, at 21-22 (alternative writ of mandamus).

239. *Hall*, 91 U.S. at 356.

from the railroad's unlawful policies.<sup>240</sup> Commanding the railroad "to operate the whole . . . railroad . . . as one continuous line, for all purposes," the circuit court framed the relief in universal terms, without qualification or reference to the petitioners.<sup>241</sup> Rather, the judgment referred to the railroad's "freight," "passengers," and "trains" in general; invoked the "great damage and inconvenience" that the challenged action caused "the public at large" to suffer; and directed the railroad to "wholly desist" from continuing it.<sup>242</sup> The judgment, in other words, appears to have contemplated protection from the entity's unlawful policies for *all* customers.<sup>243</sup> The Supreme Court left this remedy intact; indeed, no one suggested that its scope should have been confined to the immediate parties.<sup>244</sup>

The breadth of the remedy affirmed in *Hall* represents a logical outgrowth of public law litigation under the administrative writs as they had developed at common law. As the Supreme Court noted, "a decided preponderance" of English and state court authorities held that mandamus could be sought by relators on behalf of the public as a whole.<sup>245</sup> Rooted in the Roman law construct of the *actio popularis*, such public actions allowed individuals to pursue certain commonly held claims to prevent a failure of justice.<sup>246</sup> As one significant corollary to the recognition of such proceedings, suitors in public actions were not compelled to show that the activity in question caused them a distinctly felt injury.<sup>247</sup> The willingness of courts in public actions to dispense with an injury requirement has played a central role in debates over the history of the modern standing doctrine.<sup>248</sup> We would add that the scope of relief approved in such public action cases as *Hall* also appears to follow from the public-

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240. *Hall* arose under an 1873 act of Congress granting original "jurisdiction" in the "proper Circuit Court . . . to hear and determine all cases of mandamus" for the narrow purpose of compelling the congressionally created railroad company (akin to a federal agency) "to operate its road as required" by the organic statute. *Hall*, 91 U.S. at 343 (emphasis omitted) (citing Act of Mar. 3, 1873, ch. 226, § 4, 17 Stat. 485, 509). The power of the circuit court did not depend on *Kendall*.

241. See Transcript of Record, *supra* note 31, at 21-22 (alternative writ of mandamus).

242. *Id.*

243. Although the circuit court ultimately struck the reference to the tariffs, it did so only after finding on reconsideration that they were lawful under the statute. See *Hall*, 28 F. Cas. at 348-52.

244. See *Hall*, 91 U.S. 343 at 343-56; *id.* at 356 (Bradley, J., dissenting); Transcript of Record, *supra* note 31 (disclosing no challenge to the scope of the decree).

245. *Hall*, 91 U.S. at 355-56 (majority opinion); see also *supra* text accompanying notes 188-92 (discussing English practice); *infra* text accompanying notes 295-309 (discussing state court practice).

246. See Pfander, *supra* note 191, at 1520-28, 1531-33.

247. *Id.* at 1527; see also Winter, *The Metaphor of Standing*, *supra* note 188, at 1401.

248. See Pfander, *supra* note 191, at 1498-1506.

regarding nature of the proceeding. *Hall* demonstrates that, just as an individual can bring suit on behalf of a group of affected citizens, so too can the individual suitor in a public action procure relief that confers a benefit on members of the public as a whole.

## B. State Courts

If they faltered at the federal level, the administrative writs fared much better at the state level, where they remained important “organ[s] of administrative oversight and control”<sup>249</sup> for much of the nineteenth century. Taking the path rejected in *Marbury*, state supreme courts quickly claimed power to issue the writs to state executive officers by virtue of “the traditional power” of high courts of common law “to exercise supervisory authority.”<sup>250</sup> In time, many state legislatures extended the original jurisdiction to lower courts, with supreme courts reverting to a more familiar appellate role.<sup>251</sup> Treating the administrative writs like “ordinary action[s],”<sup>252</sup> state courts routinely enabled individual suitors to test the legality of official conduct. They relied in particular on certiorari and mandamus, which served as the “twin pillars of the common-law system” of judicial control of executive action.<sup>253</sup> By contrast, the writ of prohibition was often confined to the oversight of lower courts, and failed to reach executive action.

### 1. Certiorari

As early as 1794, in *State v. Justices of Middlesex County*,<sup>254</sup> the Supreme Court of New Jersey articulated a “remarkably comprehensive [certiorari] jurisdiction” that became a “characteristic instrument of judicial control in that

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249. Pfander, *supra* note 27, at 1524 n.35.

250. *Id.* at 1535; see Louis L. Jaffe, *The Right to Judicial Review* (pt. 1), 71 HARV. L. REV. 401, 418 (1958) (“Once independence was won, . . . the American courts successfully claimed the prerogative-writ jurisdiction of King’s Bench.” (citing *Strong’s Case*, Kirby 345 (Conn. 1787); *Runkel v. Winemiller*, 4 H. & McH. 429 (Md. 1799); *Howard v. Gage*, 6 Mass. (5 Tyng) 462, 463-64 (1810); and *State v. Justices of Middlesex Cty.*, 1 N.J.L. 244 (1794))).

251. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 632 (1838) (Taney, C.J., dissenting) (discussing an 1806 act of the Maryland legislature extending such jurisdiction to county courts). Although most of the cases that appear in this Subpart are discussed in the context of supreme court opinions, the majority of them began in lower state courts. See, e.g., *Lawton v. Comm’rs of Highways*, 2 Cai. 179, 182-83 (N.Y. Sup. Ct. 1804) (affirming the trial court’s denial of certiorari on the merits). The New York Supreme Court was the state’s high court until 1846. See *infra* note 270.

252. See Goodnow, *supra* note 113, at 501 (discussing certiorari). As this Subpart illustrates, the same was true for all three administrative writs.

253. JAFFE, *supra* note 116, at 328.

254. 1 N.J.L. 244.

state.”<sup>255</sup> *Justices of Middlesex County* involved a writ of certiorari to quash a decision of certain justices of the peace “for fixing on a place” to build a county courthouse and jail on the ground that the decisionmaking process had been tainted by “fraud” and other “illegal practices.”<sup>256</sup> In extending the writ to the justices’ entire “proceedings,” the court drew upon the insights of “Lord Coke” and “Lord Mansfield,” which showed that the court’s common law power encompassed “general and universal” jurisdiction to correct “the proceedings of officers appointed to execute particular laws” wherever they acted “contrary to that law.”<sup>257</sup> Rejecting the argument that the decision was not subject to review as judicial action, the court embraced Lord Chief Justice Coke’s theory from *Bagg’s Case* of a judicial power “not only . . . to correct errors in judicial proceedings, but other errors and misdemeanors *extrajudicial*, tending to . . . any . . . manner of misgovernment.”<sup>258</sup>

If *Hall* illustrates the scope of relief in public actions brought to control federal instrumentalities, the state writ in *Justices of Middlesex County* similarly tied the scope of relief to the public character of the proceeding. There, the court recognized the propriety of a suit brought by “some of the [i]nhabitants”

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255. JAFFE, *supra* note 116, at 467; *see also* Goodnow, *supra* note 113, at 526 (“New Jersey . . . took a much more liberal view of [the writ of certiorari] from the beginning.”).

256. *See* 1 N.J.L. at 244, 252. The alleged illegality included that unqualified individuals were allowed to vote, that the ballot box showed evidence of tampering, and that the electors were bribed to cast their lots for New Brunswick. *See id.* at 244-45.

257. *See id.* at 248-52.

258. *Id.* at 249-50 (emphasis added) (quoting James Bagg’s Case (1615) 77 Eng. Rep. 1271, 1277-78; 11 Co. Rep. 93b, 98a). Much like Lord Chief Justice Coke’s original expression of the common law’s power of judicial review, the court’s holding did not sit well with the executive branch. In a hand-written “endorsement” appended the following year to the official report, the Chief Justice noted that “on error” before the “*Governor and Council* this judgment was reversed 8 to 3,” on “the ground . . . that the *Supreme Court* had no jurisdiction.” *Id.* at 255.

Yet it is unclear whether this cryptic addendum had any impact, given that the Supreme Court of New Jersey continued to recognize a “remarkably comprehensive jurisdiction in certiorari” as “the characteristic instrument of judicial control in that state.” JAFFE, *supra* note 116, at 467. Later that very year, the court held that certiorari lay even to review legislative action in the form of a bylaw or ordinance of a city council. *See State v. Corp. of New Brunswick*, 1 N.J.L. 450, 451 (1795) (per curiam); *see also* Berger, *supra* note 147, at 834-35 (noting that *New Brunswick* demonstrates how American courts “adapt[ed] English practice to the problem of dealing with invalid laws”).

New Jersey’s approach to certiorari remained self-consciously broad for years. *See Treasurer of Camden v. Mulford*, 26 N.J.L. 49, 53 (1856) (“Whatever may be the rule upon this subject adopted in other states, it is certain that the remedy by *certiorari* in this state is more extensive and efficacious, and rests upon broader, and, as we apprehend, upon more reasonable ground.”); *see also* Goodnow, *supra* note 113, at 510 (citing *Treasurer of Camden* in noting that “[t]he New Jersey courts have wholly rejected” the distinction between administrative and judicial action).

of Middlesex County and allowed them to seek relief on behalf of *every* aggrieved inhabitant, without regard to their party status.<sup>259</sup> This was true with regard both to the (indivisible) decision of where to build the county courthouse and jail, which the court had to quash all at once, as well as “all acts founded on” that decision, including “the assessments” which had been levied to pay for the construction.<sup>260</sup> Because “[n]o” resident could “be legally compelled to pay” the unlawful assessments, the court declared them to be “of no validity” with regard to every taxpayer, reasoning that it was “far better” to vacate the unlawful action “in *toto* at once” to prevent the “unnecessary expense and trouble” of requiring everyone to “work[] out his own redress by a separate suit.”<sup>261</sup> As with the mandamus relief in *Hall*, the countywide certiorari in *Justices of Middlesex County* manifests the manner in which courts of common law, when deploying the administrative writs to restrain unlawful government action, did so on behalf of the relevant public.

Other state supreme courts deployed the writ of certiorari broadly as well. Massachusetts followed New Jersey in allowing individuals to pursue public actions in the name of the Commonwealth, a practice that Nathan Dane traced to 1805.<sup>262</sup> In a series of decisions, the Massachusetts court agreed to subject the commissioners of local highway construction to judicial review;<sup>263</sup> rejected the argument that the scope of the writ of certiorari was limited to criminal matters;<sup>264</sup> and confirmed that the usual remedy on a writ of certiorari was an order to quash, on pain of contempt.<sup>265</sup> Thus, in *Commonwealth v. Peters*, the petitioners sought review of a local committee’s decision laying out a road, and

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259. See 1 N.J.L. at 244-45, 255.

260. See *id.* at 255.

261. *Id.* at 252, 255.

262. See 5 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 92 (Boston, Cummings, Hilliard & Co. 1824) (citing *Commonwealth v. Peters*, 2 Mass. (1 Tyng) 125 (1806)); see also Goodnow, *supra* note 113, at 511-12 (“The New Jersey rule has been practically adopted in several other commonwealths . . .” (citing *Swann v. Mayor of Cumberland*, 8 Gill 150 (Md. 1849); *City of St. Charles v. Rogers*, 49 Mo. 530 (1872); *Preble v. City of Portland*, 45 Me. 241 (1858); and *State ex rel. Flint v. Common Council of Fond du Lac*, 42 Wis. 287 (1877))).

263. See *Peters*, 2 Mass. (1 Tyng) at 127-28 (opinion of Sedgwick, J.) (noting the conventional view that the writ of certiorari ensured oversight of tribunals acting outside the course of the common law).

264. See *Commonwealth v. Coombs*, 2 Mass. (1 Tyng) 489, 489 (1807) (statement of the case).

265. See 5 DANE, *supra* note 262, at 85 (explaining that, following issuance and return of the writ, the superior court “then proceeds to act, and quash or affirm”); *id.* at 93 (“When a certiorari is delivered to a justice, . . . it is a *supersedeas*, and any after proceeding is a contempt . . .”); see also *Coombs*, 2 Mass. (1 Tyng) at 493 (directing that the “proceedings must necessarily be quashed”).

they secured an order quashing the decision below.<sup>266</sup> Certiorari was said to operate as a “*supersedeas*,”<sup>267</sup> thus nullifying the order of the local board or tribunal. If after receiving notice the justices or commissioners undertook any subsequent enforcement efforts on the basis of the quashed order, such as proceedings aimed at compelling local citizens to pay for the infrastructure project at hand, then those justices or commissioners were subject to contempt.<sup>268</sup> By eliminating the order as a lawful basis on which to proceed, certiorari conferred legal protection on all citizens within the ambit of the quashed order, whether they appeared as parties before the superior court or not.

As an expansive tool of judicial review, certiorari evolved into “the chief means by which [state courts would] review administrative action” throughout the nineteenth century.<sup>269</sup> Consider the influential case of *Lawton v. Commissioners of Highways*, in which the Supreme Court of Judicature of New York, citing the *Cardiffe Bridge* case and other English authorities, declared it “a position beyond contradiction” that certiorari lay “not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen.”<sup>270</sup> As the Supreme Court of Illinois put it near the end of the century, in *Drainage Commissioners v. Giffin*, “[t]he body or officers acting need not constitute a court of justice in the ordinary sense”; rather, it sufficed that their proceedings be “what is sometimes termed ‘*quasi judicial*,’”<sup>271</sup> which (as in the English practice) encompassed “the acts of a host of administrative authorities.”<sup>272</sup> In addition to commissioners of highways, drains, and more,<sup>273</sup>

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266. See *Peters*, 2 Mass. (1 Tyng) at 125-27 (statement of the case); *id.* at 127 (opinion of Parker, J.); *id.* at 127-28 (opinion of Sedgwick, J.); *id.* at 128 (opinion of Parsons, C.J.).

267. See 5 DANE, *supra* note 262, at 93.

268. See 4 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 362 (London, George Strahan 1748) (noting that an attempt to levy distress and thereby raise funds to expend on a quashed highway construction order would operate as a contempt only where the justice had notice of the quashing order); see also 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 359 (London, E. & R. Nutt & R. Gosling 1736) (stating that it is contempt for a lower court to proceed after certiorari has been granted).

269. Goodnow, *supra* note 113, at 493; see also JAFFE, *supra* note 116, at 165-75 (comparing the use of certiorari in various states).

270. *Lawton v. Comm’rs of Highways*, 2 Cai. 179, 182 (N.Y. Sup. Ct. 1804). The Supreme Court of New York did not take on its modern character as a statewide court of original jurisdiction until the state constitution of 1846. Compare N.Y. CONST. of 1821, art. V, with N.Y. CONST. of 1846, art. VI, § 3. The New York Court of Appeals made its appearance as the state’s high court at the same time. Compare N.Y. CONST. of 1821, art. V, with N.Y. CONST. of 1846, art. VI, § 2.

271. 25 N.E. 995, 997 (Ill. 1890).

272. Goodnow, *supra* note 113, at 513; see also *supra* note 175 and accompanying text.

273. See, e.g., *City of Bangor v. Cty. Comm’rs*, 30 Me. 270, 271-72 (1849).

such bodies included justices of the peace,<sup>274</sup> boards of assessors<sup>275</sup> and supervisors,<sup>276</sup> school trustees,<sup>277</sup> state superintendents,<sup>278</sup> and especially city councils.<sup>279</sup>

## 2. Mandamus

With respect to mandamus, state courts drew upon “plain and simple” principles from familiar sources.<sup>280</sup> When a party had “a legal right” whose enjoyment required “the discharge of a ministerial duty on the part of a public officer,” and “no other adequate remedy” to enforce such right, mandamus lay to compel the “discharge” of such duty.<sup>281</sup> A “ministerial” duty was simply one “imposed expressly by law” or “arising necessarily, as an incident to the office” in question and “involving no discretion in its exercise.”<sup>282</sup> Moreover, while mandamus could not control the manner in which discretion was exercised or correct general legal errors—that was left to certiorari—it remained capable of compelling mandatory exercises of discretion as well as of correcting abuses of discretion, where such discretion was exercised in a “capricious, arbitrary, or oppressive” manner.<sup>283</sup>

Mandamus thus paired a “narrow compass” of review with a broad conception of the scope of official action subject to review.<sup>284</sup> As in England, “[t]he question of whether the writ[] would issue in any particular case” depended only on “the character of the act or decision that was impugned,” and

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274. *See, e.g.,* *People ex rel. Bingham v. Village of Brighton*, 20 Mich. 57, 68 (1870).

275. *See, e.g.,* *People ex rel. W. R.R. Corp. v. Bd. of Assessors*, 40 N.Y. 154, 155 (1869) (statement of the case).

276. *See, e.g.,* *People ex rel. Oneida Valley Nat'l Bank v. Bd. of Supervisors*, 51 N.Y. 442, 443 (1873) (statement of the case).

277. *See, e.g.,* *Miller v. Trustees of Schools*, 88 Ill. 26, 27 (1878) (statement of the case).

278. *See, e.g.,* *State ex rel. Moreland v. Whitford*, 11 N.W. 424, 424 (Wis. 1882).

279. *See, e.g.,* *Mayor of Macon v. Shaw*, 16 Ga. 172, 185 (1854); *Parks v. Mayor of Bos.*, 25 Mass. (8 Pick.) 218, 225 (1829); *State ex rel. Denison v. City of St. Louis*, 1 S.W. 757, 757 (Mo. 1886).

280. *See* *State ex rel. Charleston, Cincinnati & Chi. R.R. Co. v. Whitesides*, 9 S.E. 661, 662 (S.C. 1889).

281. *Id.* The questions governing its issuance were thus (1) whether the officer's action consisted of a ministerial, that is, nondiscretionary duty, (2) whether a legal right depended on such duty, and (3) whether there was no other adequate remedy to vindicate that right. *Id.*

282. *Id.*

283. *See* *State ex rel. Adamson v. Lafayette Cty. Court*, 41 Mo. 221, 226 (1867); *see also* TAPPING, *supra* note 31, at 14 (“It must, however, be clearly understood, that although there may be a discretionary power, yet if it be exercised with manifest injustice, the Court of [King's Bench] is not precluded from commanding its due exercise . . .”).

284. *See* *Whitesides*, 9 S.E. at 662.

not the “character of the body that had acted or decided.”<sup>285</sup> While state courts often issued the writ to garden-variety local officers such as parish clerks,<sup>286</sup> county commissioners,<sup>287</sup> and city councils,<sup>288</sup> practice evolved as the century wore on to reach state officers of the highest levels, including auditors, treasurers, and controllers;<sup>289</sup> secretaries of state;<sup>290</sup> attorneys general;<sup>291</sup> and even governors.<sup>292</sup> Such breadth was again consistent with the views of a leading early digest on American law, which detailed the many uses of mandamus at King’s Bench before Thomas Tapping did.<sup>293</sup> Like their English counterparts, state courts exercising mandamus recognized that, under the common law tradition in which they sat, “no officer [was] placed above the restraining authority of the law,” which was “universal in its behests.”<sup>294</sup>

The most noteworthy feature of mandamus at the state level was that which the Supreme Court put on display in *Hall*: its manifestation as one of the “most significant prototypes of the public action” (alongside its negative counterpart, “the bill in equity for an injunction”),<sup>295</sup> in which a citizen “affected no differently from any other person” could bring an action to vindicate a “public right” on behalf of the whole affected community.<sup>296</sup> Drawing on what the Court itself noted in *Hall*,<sup>297</sup> the “great weight” of state

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285. DE SMITH, *supra* note 36, at 789.

286. *See, e.g.,* Proprietors of St. Luke’s Church v. Slack, 61 Mass. (7 Cush.) 226, 228 (1851) (statement of the case); *id.* at 239 (majority opinion).

287. *See, e.g.,* Whitesides, 9 S.E. at 661 (statement of the case); *id.* at 663 (majority opinion) (denying mandamus on the merits).

288. *See, e.g.,* People *ex rel.* Burke v. Mayor of Bloomington, 63 Ill. 207, 208 (1872).

289. *See, e.g.,* Wood v. Strother, 18 P. 766, 767 (Cal. 1888) (auditor); Love v. Baehr, 47 Cal. 364, 366 (1874) (treasurer); People *ex rel.* McCauley v. Brooks, 16 Cal. 11, 24 (1860) (controller).

290. *See, e.g.,* State *ex rel.* Brickman v. Wilson, 26 So. 482, 485 (Ala. 1899).

291. *See, e.g.,* People *ex rel.* Demarest v. Fairchild, 67 N.Y. 334, 336-37 (1876) (denying mandamus on the merits).

292. *See, e.g.,* Magruder v. Swann, 25 Md. 173, 212 (1866) (“The deduction from a comparison of all the authorities cited is, that the Governor, like all other officers in the discharge of mere ministerial duties, is subject to the writ of *mandamus*, which cannot be denied to a suitor in such a case without acknowledging an authority higher than the law.”); *see also* Cotten v. Ellis, 52 N.C. (7 Jones) 545, 550 (1860); State *ex rel.* Whiteman v. Chase, 5 Ohio St. 528, 534 (1856).

293. *See* 6 DANE, *supra* note 262, at 320-34 (1823).

294. *Whiteman*, 5 Ohio St. at 534.

295. JAFFE, *supra* note 116, at 462.

296. Jaffe, *supra* note 119, at 1267.

297. *See* Union Pac. R.R. Co. v. Hall, 91 U.S. 343, 355 (1876) (“There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer.”).

court authority recognized “the doctrine that any private person” could seek a writ of mandamus “to enforce a public duty” owed to the public as such.<sup>298</sup> Examples of the many public duties compelled by state courts include the holding of a county election,<sup>299</sup> the opening of a public road,<sup>300</sup> the levying of a tax to pay for a public road,<sup>301</sup> the maintenance of ferry tolls,<sup>302</sup> the operation of public railcars,<sup>303</sup> the release of public funds for the navigational improvement of a creek,<sup>304</sup> the soliciting of bids to publish state supreme court reports,<sup>305</sup> the inspection of records pertaining to liquor licenses,<sup>306</sup> and the relocation of government offices.<sup>307</sup> Consistent with the English authorities, such decisions entertained “[n]o doubt” that “where the object” of the mandamus was “the enforcement of a public right,” it was “the People” who were “regarded as the real party” in interest, such that the writ could be sought by anyone “interested, as a citizen, in having the laws executed, and the right in question enforced” on behalf of all similarly situated citizens.<sup>308</sup> Appropriately, such public actions were called the “citizen’s mandamus.”<sup>309</sup>

### 3. Prohibition

The failure of the writ of prohibition to take hold as a true “administrative” writ in state (or federal) courts helped pave the way to expanding equitable interposition. Throughout the nineteenth century, prohibition was largely confined to reviewing “judicial” action in the literal sense, as distinguished from “ministerial,” “administrative,” or “executive” functions.<sup>310</sup> In contrast to their English forerunners, then, state courts treated

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298. *Attorney Gen. v. City of Boston*, 123 Mass. 460, 479 (1877); *see also* *Cty. Comm’rs v. People ex rel. Metz*, 11 Ill. 202, 207-08 (1849); *State ex rel. Adkins v. Lien*, 68 N.W. 748, 749 (S.D. 1896) (noting that mandamus served “to enforce . . . [a] public duty”).

299. *See, e.g., Wampler v. State ex rel. Alexander*, 47 N.E. 1068, 1068 (Ind. 1897).

300. *See, e.g., People ex rel. Case v. Collins*, 19 Wend. 56, 58 (N.Y. Sup. Ct. 1837).

301. *See, e.g., Johnston v. Supervisors of Herkimer Cty.*, 19 Johns. 272, 275 (N.Y. Sup. Ct. 1822) (per curiam).

302. *See, e.g., City of Boston*, 123 Mass. at 464-65.

303. *See, e.g., State ex rel. Grinsfelder v. Spokane St. Ry. Co.*, 53 P. 719, 719 (Wash. 1898).

304. *See, e.g., Metz*, 11 Ill. at 203 (statement of the case).

305. *See, e.g., People ex rel. Ayers v. Bd. of State Auditors*, 4 N.W. 274, 274-75 (Mich. 1880).

306. *See, e.g., State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 333-34 (1879).

307. *See, e.g., State ex rel. Currie v. Weld*, 40 N.W. 561, 561 (Minn. 1888).

308. *Metz*, 11 Ill. at 208 (majority opinion).

309. JAFFE, *supra* note 116, at 470.

310. *See, e.g., Sherlock v. Mayor of Jacksonville*, 17 Fla. 93, 97 (1879); *State ex rel. West v. Justices of the Cty. Court*, 41 Mo. 44, 49-50 (1867); *Ex parte Braudlacht*, 2 Hill 367, 368 (N.Y. Sup. Ct. 1842) (adding that the court “might as well be called on to prohibit a sheriff from executing a writ of replevin, because he had not taken a bond”); *Jackson v.*

*footnote continued on next page*

certiorari and prohibition differently. While in petitions for certiorari, state courts tended to patch over the emerging distinction between “judicial” and “administrative” action with the term “quasi-judicial,”<sup>311</sup> they used the same distinction to defeat use of prohibition to control “administrative” officers like “commissioners” and “tax collectors.”<sup>312</sup> Such narrow readings may have been the product of the leading scholarly commentaries of the day, including Blackstone’s, which implicitly characterized the prohibition as issuing only against “courts” in the modern sense.<sup>313</sup> Whatever its cause, the presumption against extending the writ to extrajudicial action was so strong that it led the Kentucky courts to reject prohibition despite the express provision of the relevant city charter “that the validity of ordinances” was to “be tried by writ of prohibition.”<sup>314</sup> Importantly, though, the Kentucky court did not deny all relief; instead, it viewed the absence of power to prohibit as a justification for interposition by way of injunction.<sup>315</sup> The failure of prohibition was thus less a basis on which to deny all relief than the prelude for equitable intervention.<sup>316</sup>

### C. Equity’s Absorption of Common Law

Having detailed the trajectory of the administrative writs in federal and state courts, this Subpart recounts the steps by which injunctions became the preferred tool of judicial control in the second half of the nineteenth century. In both sets of courts, the turn to equitable remedies reflected a growing perception that the common law remedies had become inadequate.<sup>317</sup> Federal

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Maxwell, 26 Va. (5 Rand.) 636, 638 (1826); *Fleming v. Comm’rs*, 8 S.E. 267, 270-73 (W. Va. 1888); *State ex rel. Kellogg v. Gary*, 33 Wis. 93, 97-98 (1873).

311. *See supra* notes 269-79 and accompanying text.

312. *See, e.g., West*, 41 Mo. at 49-50.

313. *See* 3 BLACKSTONE, *supra* note 113, at \*112-14; *see also* 6 DANE, *supra* note 262, at 336, 340, 347-48 (1823).

314. *Patton v. Stephens*, 77 Ky. (14 Bush) 324, 329 (1878).

315. *See id.* at 329 (refusing to allow prohibition but then authorizing a bill in equity after concluding there was no adequate remedy at law).

316. To be sure, in a handful of instances state courts did deploy the writ of prohibition to restrain exercises of unlawful administrative action. For a particularly noteworthy case, see *Zylstra v. Corporation of Charleston*, 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl. 1794). Finding that one of its bylaws or ordinances exceeded the city council’s “legislative” authority under both the city charter and the state constitution, the court likewise found the council’s threatened enforcement of the bylaw to exceed its “executive” power, and declared “the whole proceedings” to be “void,” *id.* at 387 (opinion of Burke, J.), because “*coram non iudice*,” *see id.* at 384 (statement of the case). *See also id.* at 388-89 (opinion of Grimke, J.); *id.* at 389-90 (opinion of Waties, J.) (“I have no difficulty in saying that the law . . . is void, as being contrary to the constitution of the state.” (emphasis omitted)); *id.* at 398 (opinion of Bay, J.).

317. *See* BISPAM, *supra* note 7, § 37; 1 POMEROY, *supra* note 38, §§ 130-133.

courts confronted jurisdictional restrictions that hamstrung the administrative writs, whereas state courts turned to equity after concluding that the common law writs could no longer keep pace with the modernizing administrative state. We begin at the state level, and then trace the federal courts' embrace of equity in public law.

1. State courts

At the dawn of the nineteenth century, courts of equity were universally reluctant to entertain public law claims. That reticence is exemplified in *Attorney-General v. Utica Insurance Co.* by the refusal of James Kent, the New York Chancellor, to interpose on behalf of a public right.<sup>318</sup> Chancellor Kent viewed the right in question as one properly protected through the writ of quo warranto, a common law proceeding with criminal antecedents.<sup>319</sup> His flat refusal to allow equitable intervention as to matters governed by common law remedies viewed as both established and adequate seems to have typified the position of state courts of equity during the first half of the nineteenth century. The Circuit Court for the District of Massachusetts echoed Chancellor Kent's view in refusing to interpose in equity when legal remedies were adequate.<sup>320</sup> In dismissing an application for equitable relief against a board of local county commissioners, Circuit Justice Story explained that the proper remedy was a mandamus directed to the commissioners on the theory that the matter in question had not been left in their "discretion."<sup>321</sup> Courts of equity, on the other hand, had "no revisory power over the acts of the state tribunals in the exercise of their jurisdiction" and "no authority to compel them to do their duty, or to abstain from the exercise of their functions."<sup>322</sup>

But the jurisdictional boundaries of law and equity began to blur with the introduction of the "Reformed Procedure" of the Field Code, which blended law and equity into one unitary proceeding in New York in 1848 and spread to

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318. 1 N.Y. Ch. Ann. 412, 421 (1817).

319. *See id.* at 416, 421 (explaining that matters of public right, such as whether a statutory insurance company exceeded its lawful powers, fell within the "uniform and undisputed cognizance" of "the courts of law," and not those "of equity"); *see also supra* note 36.

320. *See Tobey v. County of Bristol*, 23 F. Cas. 1313, 1317 (C.C.D. Mass. 1845) (No. 14,065) (statement of the case) ("[I]f . . . it is fit and proper that the said board should be compelled to proceed to the selection of referees, . . . the only proper means so to compel them is by a writ of mandamus, which affords a plain, adequate and complete remedy, according to the course of the common law.").

321. *Id.* at 1322 (majority opinion).

322. *Id.*

roughly half of state courts by 1880.<sup>323</sup> Once state judges had access to both common law and equitable remedies in the same action, they exhibited a much greater willingness to utilize those of equity, which by their very nature were more “readily adaptable to [the] practical needs of [the] modern system of judicial review.”<sup>324</sup> Equity thus contrasted with the aging administrative writs, which displayed a procedural rigidity typical of common law remedies that made them less adaptive to modern needs.<sup>325</sup> While, to be sure, the administrative writs remained potent and sometimes even predominant in state courts well into the twentieth century,<sup>326</sup> equity had broken their monopoly on judicial control of government activity before the Civil War.

The injunction’s rise as a tool of government control in state courts can be understood with reference to the specific gaps in the remedies made available by each common law writ. First and foremost was the near-total failure of the writ of prohibition to reach “executive” or “administrative” activity.<sup>327</sup> This formidable limitation on common law’s preventive authority explains why the equitable version’s “most important potential use” in state courts concerned the textbook action that prohibition did not reach: the prevention of the collection of unlawful taxes.<sup>328</sup> Among the earliest cases to permit equitable relief in this (or any) context was *Adriance v. Mayor of New York*, in which the state supreme court, freshly invested with the reformed procedure, restrained the city

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323. See 1 POMEROY, *supra* note 38, at vi. For an overview of the New York Field Code, see generally Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure*, *New York 1846-76*, 36 J. LEGAL HIST. 152 (2015); and Kellen Funk, *The Union of Law and Equity: The United States, 1800-1938*, in EQUITY AND LAW: FUSION AND FISSION 46 (John C.P. Goldberg et al. eds., 2019).

324. See Kenneth Culp Davis, *Mandatory Relief from Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585, 608 (1955) (discussing the rise of the injunction as a tool of administrative oversight from the vantage of the mid-twentieth century); cf. Simpson, *supra* note 16, at 247 (“The processes of equity have . . . proved themselves to be a practically indispensable aid to effective government under modern conditions . . .”).

325. See DE SMITH, *supra* note 36, at 800-01 (characterizing the administrative writs as “beset[]” with “abstruse technicalities and hair-splitting distinctions,” while viewing equity as “flexible and adaptable”).

326. See 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24.05 (1958) (citing cases into the 1950s in which state courts refused to permit injunctive or declaratory relief where “some other remedy . . . such as certiorari, mandamus, or statutory review,” however much less adequate, was available).

327. See *supra* Part III.B.3.

328. Simpson, *supra* note 16, at 231-32; see also 1 POMEROY, *supra* note 38, §§ 258-260, 334; 3 *id.* § 1345, at 376-77, 377 n.1 (cataloging injunctions in the municipal tax context). As the Supreme Court of Florida observed in *Sherlock v. Mayor of Jacksonville*, in which it refused to issue a prohibition against the mayor and city council of Jacksonville, there were only “two or three cases” in the reports “in which a prohibition ha[d] gone to restrain a tax collector from enforcing an illegal tax,” decisions that it claimed were “promptly and strongly condemned.” 17 Fla. 93, 99-100 (1879).

council from appropriating taxpayer funds to pay for the city's legal fees in violation of the organic act.<sup>329</sup> Although the court had "doubts" about its capacity "to interfere in such a case," it resolved not "to deny the relief asked for," especially since the council had implicitly "conceded" its jurisdiction by answering the return.<sup>330</sup> Despite this ambivalent start, equity was around to stay. When the court enjoined the city council again in *Christopher v. Mayor of New York*, just five years later, it was settled that wherever "executive act[ion]" which was "clearly illegal" tended "to injure . . . the property of any [taxpayer]," there was "enough . . . to warrant the interference" of equity.<sup>331</sup>

Gaps in mandamus relief also helped provide equitable remedies a toehold in state courts. Limited to the enforcement of "ministerial" duties, mandamus served only to *compel* government action, not to *forbid* it. This limited approach, which favored Blackstone's view over Lord Chief Justice Mansfield's,<sup>332</sup> necessitated equitable intervention where the circumstances called for a preventive (or negative) rather than a mandatory (or affirmative) injunction.<sup>333</sup> As the Supreme Court of Wisconsin stated in upholding equity jurisdiction to enjoin the enforcement of unlawful railroad tolls, mandamus served only to "command[]" action, "compel[] duty," and "supply defect," whereas injunctions were necessary to "forbid[]" or "restrain[] wrong" or "excess."<sup>334</sup> Although this distinction often proved inscrutable in practice,<sup>335</sup> the rough division of labor allowed the "taxpayer's suit for an injunction" to develop alongside the "citizen's mandamus" in state courts as the other "most significant prototype[]" of the public action," working in tandem to provide

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329. See 1 Barb. 19, 19 (N.Y. Special Term 1847) (statement of the case); *id.* at 19-20 (opinion).

330. *Id.* at 19-20 (opinion).

331. See 13 Barb. 567, 568, 570-71 (N.Y. Gen. Term 1852).

332. Compare 3 BLACKSTONE, *supra* note 113, at \*110 (describing mandamus in strictly mandatory terms, as compelling the performance of specific acts), with *R v. Barker* (1762) 97 Eng. Rep. 823, 824-25; 3 Burr. 1265, 1267 (asserting that mandamus "ought to be used upon all occasions where the law has established no specific remedy").

333. See 3 POMEROY, *supra* note 38, § 1338, at 367 n.2 (critiquing the tendency of state courts to "dwell[] too much on the negative side" of the injunctive principle and to "almost" totally "ignore[] its affirmative aspect," which was largely left to mandamus); *cf.* BISPHAM, *supra* note 7, § 400 ("An injunction may . . . be said to be either mandatory or prohibitory. . . . The jurisdiction of the court to issue [a mandatory injunction] has been [sic] questioned, but it is now established beyond doubt." (footnote omitted)).

334. *Attorney Gen. v. Chi. & Nw. Ry. Co.*, 35 Wis. 425, 520 (1874).

335. See *id.* ("[S]o near are the objects of the two writs, that there is sometimes doubt which is the proper one; *injunction* is frequently mandatory, and *mandamus* sometimes operates restraint."); *cf.* Davis, *supra* note 324, at 590 (discussing "the impracticability of trying to draw a line between a prohibitory and a mandatory decree"). The decree in *Hall* nicely illustrates the difficulty, as it necessarily used both mandatory and prohibitory language in commanding the railroad company to *stop* enforcing its unlawful policies and to *start* implementing lawful ones. See *supra* note 31.

preventive and mandatory relief against public wrongs.<sup>336</sup> And as with mandamus, the taxpayer's injunction could be sought on behalf of the whole community, by any party with a share in the general grievance, and could operate to block an unlawful tax (typically in the municipal context) for the benefit of nonparties.<sup>337</sup>

That left the writ of certiorari, alongside suits for damages in cases based in tort and contract,<sup>338</sup> as the common law remedies for unlawful executive action. Both common law forms were often available in the tax context, which made the dispositive question whether they were adequate to displace equitable relief.<sup>339</sup> In many states, and for many years, state courts maintained that the common law forms were adequate,<sup>340</sup> including the Supreme Court of Connecticut in *Dodd v. City of Hartford*,<sup>341</sup> the Supreme Court of Michigan in *Youngblood v. Sexton*,<sup>342</sup> and the Delaware Court of Chancery in *Equitable Guarantee & Trust Co. v. Donahoe*.<sup>343</sup> Exemplified by Justice Cooley's opinion in *Youngblood*, which denied "standing in . . . equity" to seek an injunction against the collection of an unlawful tax, these states effectively took the position that equity did not gain a jurisdiction unsupported by its history simply because it

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336. JAFFE, *supra* note 116, at 462, 470; *see also id.* at 468 ("The public action . . . evolved principally through mandamus and injunction.").

337. *See, e.g.,* Carlton v. Newman, 1 A. 194, 199 (Me. 1885) (issuing a universal injunction against the collection of municipal taxes assessed without lawful authority); *see also* 1 POMEROY, *supra* note 38, §§ 258-260 (collecting other such municipal tax cases).

338. A growing literature discusses the role of the common law suit for damages in systems of government accountability and constitutional remediation. *See generally* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933 (2019) (evaluating the role of both legal and equitable remedies in constitutional tort litigation); Pfander, *supra* note 47 (arguing that the shift away from hard-edged common law rules to open-ended constitutional balancing in the military context has diminished the efficacy of damage remedies); Woolhandler, *supra* note 232 (exploring the nineteenth-century history of both legal and equitable remedies).

339. *See* 1 POMEROY, *supra* note 38, § 260.

340. *See* Simpson, *supra* note 16, at 231-32 (discussing the reluctance of many state courts to deploy equitable remedies against unlawful taxes where common law remedies were available).

341. *See* 25 Conn. 232, 238 (1856) ("In respect to each one of these petitioners, taking his case separately, it is difficult to see why he has not adequate remedy at law. . . . No irreparable injury can arise from the levy."). The New York Court of Common Pleas reached the same conclusion in *Wilson v. Mayor of New-York*, where it found, after thorough examination of the common law remedies available to a taxpayer in that state in the mid-nineteenth century, that their adequacy foreclosed equitable interposition. *See* 1 Abb. Pr. 4, 32 (N.Y. Ct. Com. Pl. 1854).

342. *See* 32 Mich. 406, 409 (1875), *superseded on other grounds by constitutional amendment*, MICH. CONST. art. IX, § 29.

343. *See* 45 A. 583, 584, 589 (Del. Ch. 1900).

could provide a better remedy than common law.<sup>344</sup> Asserting that the injunction was “peculiarly liable to abuse,” Justice Cooley urged against “resorting to it in cases” where it was not expressly “allowed by law” and “relying upon the opposite party to overlook” the illegal “enlarge[ment]” of equity jurisdiction.<sup>345</sup>

Arguing against the remedial adequacy of common law, John Norton Pomeroy rejected Justice Cooley’s approach in *Youngblood* and made the case for equitable interposition. Pomeroy’s 1881 *Treatise on Equity Jurisprudence* took care to document the “numerous” cases “in which suits in equity brought” by a taxpayer “suing on behalf of himself and all the others similarly situated, to procure the enforcement and collection of [an] assessment to be enjoined, and the assessment itself to be set aside and annulled on account of its illegality, ha[d] been sustained.”<sup>346</sup> As Pomeroy noted, these courts uniformly asserted equity jurisdiction on the view that injunctions, which were uniquely capable of granting universal preventive relief “in a single proceeding,” were “both proper and necessary in order to prevent a multiplicity of suits” at common law.<sup>347</sup> A traditional head of equity jurisdiction, the multiplicity-of-suits reasoning reflected the principle that, at least in the taxpayer context, both damages and in some states certiorari could provide relief only to an individual taxpayer,<sup>348</sup> a limitation that rendered these remedies categorically inadequate and triggered the concurrent jurisdiction of equity.<sup>349</sup> A staunch proponent of this view, Pomeroy urged that common law remedies against unlawful taxes were plainly inadequate “when compared with the comprehensive and complete relief” that a “single decree in equity” could furnish.<sup>350</sup> State courts were increasingly inclined to agree. As the Supreme Court of West Virginia observed in *Williams v. County Court* in an opinion citing Pomeroy’s treatise, by 1885, the “views of Judge Cooley” had been “repudiated by the decided weight of authority,” which held that equity could “stay the collection of illegal taxes

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344. See 32 Mich. at 409-12.

345. *Id.* at 409.

346. 1 POMEROY, *supra* note 38, § 260.

347. *Id.*; see also *id.* § 270.

348. See JAFFE, *supra* note 116, at 462 (noting that certiorari, despite being a “public proceeding[]” in England, “figure[d] primarily as the prototype of the private action” in state courts); *id.* at 467 & nn.38-39 (discussing *Justices of Middlesex County* as an exception to this rule). New Jersey was not the only state that went the other way, and some states even permitted universal relief *only* on writ of certiorari, but not in equity—which, to Pomeroy’s thinking, was nothing less than “a farce or travesty upon the administration of justice.” 1 POMEROY, *supra* note 38, § 270, at 296 n.1 (emphasis omitted).

349. 1 POMEROY, *supra* note 38, § 243.

350. *Id.* § 260.

levied by counties, cities . . . and even states” where necessary to prevent a multiplicity of suits.<sup>351</sup>

## 2. Federal courts

Much like their state court counterparts, federal courts came to rely on the suit for injunctive relief as a tool of administrative oversight. While such forms of equitable review were rather limited in antebellum practice, postbellum federal courts turned to the bill in equity in a variety of situations.

### a. Antebellum beginnings

Two forms of equitable interposition took hold in the antebellum federal courts, each of which helps to illustrate the factors that would later inform the widespread use of equity to oversee the actions of state officials later in the nineteenth century.<sup>352</sup> In the first such form, the well-known suit to restrain Ohio from collecting unconstitutional state taxes from the Bank of the United States, Chief Justice Marshall viewed Congress’s provision that the Bank “shall . . . ‘sue and be sued, plead and be impleaded, . . . defend and be defended’” in all courts of competent jurisdiction as an ample foundation for the issuance of injunctive relief in the Bank’s favor.<sup>353</sup> What’s more, Chief Justice Marshall found that sovereign immunity and the Eleventh Amendment posed no barrier to equitable relief against the Ohio officers.<sup>354</sup> While Justice Johnson, in dissent, rejected the Court’s jurisdictional conclusions, he did not contest the power of a federal court, when clothed with proper jurisdiction, to enjoin state officials’ violations of law.<sup>355</sup> The Court thus viewed federal equity power

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351. See 26 W. Va. 488, 500-01 (1885) (citing *Newmeyer v. Mo. & Miss. R.R. Co.*, 52 Mo. 81, 84-89 (1873); *Rice v. Smith*, 9 Iowa 570, 576 (1859); *Bd. of Comm’rs v. Brown*, 28 Ind. 161 (1867); *Worth v. Comm’rs of Fayetteville*, 60 N.C. (Win.) 617 (1864); *Vanover v. Davis*, 27 Ga. 354, 358 (1859); *Mott v. Pa. R.R. Co.*, 30 Pa. 9 (1858); *Mayor of Balt. v. Gill*, 31 Md. 375, 392, 395 (1869); *Barr v. Deniston*, 19 N.H. 170 (1848); *City of New London v. Brainard*, 22 Conn. 552, 556-57 (1853); *Colton v. Hanchett*, 13 Ill. 615, 618 (1852); *Allison v. Louisville, Harrod’s Creek & Westport Ry. Co.*, 72 Ky. (9 Bush) 247, 252 (1872); and *Noesen v. Town of Port Washington*, 37 Wis. 168 (1875)).

352. On equity’s capacity for change in the antebellum period, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 222-23 (1977) (identifying “an independent equity power” in the federal courts); and Kristin A. Collins, “A Considerable Surgical Operation”: *Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 *DUKE L.J.* 249, 251-52 (2010). On the role and forms of administrative law in antebellum America, see generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 53-143 (2012).

353. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 817, 870-71 (1824) (quoting Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 266, 269).

354. See *id.* at 836-59; *supra* note 54 (discussing the party-of-record rule).

355. See *Osborn*, 22 U.S. (9 Wheat.) at 871-903 (Johnson, J., dissenting).

(coupled with a jurisdictional grant) as a sufficient basis for fashioning relief against a threatened trespass on the property of the Bank by officers of the state, anticipating the expanded equitable authority that accompanied the grant of general federal question jurisdiction in 1875.

A second form of antebellum equitable interposition developed in connection with the judicial oversight of federal patents. The federal government issued patents as evidence of two forms of property: inventions and land grants.<sup>356</sup> Patents took their name from English law, which used the term “letters patent” to describe the formal legal documents that the Crown issued when granting ownership interests in inventions, monopolies, chartered colonies, and offices.<sup>357</sup> Letters patent, so called because they bore an official seal, were usually regarded as complete evidence of the ownership interest they described.<sup>358</sup> But they were subject to judicial control through the writ of *scire facias*, a proceeding to test the legality of the patent that, if successful, would lead to its cancellation.<sup>359</sup> The writ of *scire facias* thus initiated a form of public action: A well-founded action to cancel the patent abrogated the property interest both for the benefit of the individual petitioner and for all the world.<sup>360</sup> A federal finding of patent invalidity has a similarly broad impact today.<sup>361</sup>

Following English law, Congress incorporated proceedings to cancel into the nation’s first invention patent statutes.<sup>362</sup> In both the 1790 and 1793 legislations, Congress provided for the initiation of an action to cancel in the federal district court of the patent holder’s residence.<sup>363</sup> An account of the

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356. See Beauchamp, *supra* note 195, at 662 (discussing inventions); Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1700-01, 1700 n.139 (2013) (discussing land grants).

One might argue that the provision for injunctive relief against warrants of distress, issued by the federal government to collect debts from federal officials, represents a third important example of the use of equity to oversee the legality of government action. See Act of May 15, 1820, ch. 107, § 4, 3 Stat. 592, 595 (providing for notice to a government debtor of an impending distress warrant and authorizing the federal court to entertain a suit for injunctive relief to test the legality of the debt and the warrant). On the operation of this provision for injunctive relief to test an alleged indebtedness to the government, see *United States v. Nourse*, 34 U.S. (9 Pet.) 8 (1835).

357. Beauchamp, *supra* note 195, at 654; see also *supra* note 193 and accompanying text.

358. See *United States v. Stone*, 69 U.S. (2 Wall.) 525, 535-36 (1865).

359. See Beauchamp, *supra* note 195, at 648, 654-55.

360. See *id.* at 657 (noting that “a suit for *scire facias* repealed the grant outright,” not just as to “the parties to the case”).

361. See *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349-50 (1971) (accord nonmutual issue-preclusive effect to a finding of patent invalidity).

362. See Beauchamp, *supra* note 195, at 648, 662-63.

363. See *id.* at 663.

history of these provisions treats them as analogous to the English scire facias proceeding, with some changes to reflect differing circumstances.<sup>364</sup> Federal law thus seemingly authorized a popular action to cancel a patent that would, as in England, operate for the benefit of the public. Justice Story's influential account of proceedings to cancel drew heavily on English law of scire facias in defining the nature of the American proceeding and the respective roles of judge and jury.<sup>365</sup>

In time, the analogy to scire facias gave way. Federal courts came to understand the action to cancel as an equitable proceeding to quash an improper patent.<sup>366</sup> Equity thus substituted the injunction for the writ of scire facias, and suits for injunctive relief against invalid patents came to dominate the litigation landscape with respect to both land and invention patents. Scholars agree that the rise of equity to oversee the legality of land grants, culminating in such cases as *Johnson v. Towsley*,<sup>367</sup> provides an important key to understanding the growth of administrative law in the federal courts.<sup>368</sup> A similar switch to equity took place in connection with litigation over invention patents. The history of patent litigation thus anticipates the broader pattern sketched in this Article, in which an equitable form arose to perform a function that was once the province of the common law writs. We can thus link the judicial power to cancel an invention patent, which today offers a species of nonparty specific relief, to proceedings that began life at common law.<sup>369</sup>

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364. See Lemley, *supra* note 356, at 1691-97.

365. See *id.* at 1696-97.

366. See *United States v. Stone*, 69 U.S. (2 Wall.) 525, 535 (1865) (finding the suit in equity to be "a more convenient remedy" to cancel a wrongly issued patent than the writ of scire facias). Chief Justice Marshall suggested in an early opinion that courts of equity were better adapted to the cancellation of land patent rights than were the courts of common law. See *Polk's Lessee v. Wendal*, 13 U.S. (9 Cranch) 87, 98-99 (1815).

367. See 80 U.S. (13 Wall.) 72, 85-87 (1871) (embracing the bill for injunction as the best tool of oversight).

368. See MASHAW, *supra* note 352, at 246-50.

369. One also finds a turn to equity in an early Michigan federal circuit court case in which the plaintiff sought to compel the commissioners of St. Clair County to commit certain county assets to the payment of two judgments he had obtained against the county. See *Lyell v. St. Clair County*, 15 F. Cas. 1137, 1137 (C.C.D. Mich. 1845) (No. 8,621) (*per curiam*). While mandamus would lie to compel the commissioners to levy and collect a tax to pay the judgments, mandamus was unavailable under the controlling statute to authorize the court to direct use of the assets in question to pay the judgments. *Id.* Not to worry. Rather than view the gap as debarring a judicial role, the court took the view that equity was available to fill the gap and provide the plaintiff with a remedy unavailable under the statute. See *id.* at 1138. As the court explained, no one could seriously object to the enforcement of the plaintiff's rights through the "ordinary exercise of chancery powers, independently of statutory provisions" given the county's having been "made subject to a suit." *Id.* The court thus used equity to build upon and  
*footnote continued on next page*

b. Postbellum developments and the influence of state law

This Subpart describes the postbellum federal trend toward greater equitable substitution, beginning with a line of diversity cases decided shortly after the Civil War. It then sketches how, as the heir to the common law tradition, the injunction to restrain unlawful government action became a regular feature of the Court’s remedial toolkit in the final decades of the nineteenth century, paving the way for the decision in *Ex parte Young*. It shows that federal courts did not recognize the “full implications” of equitable remedies for public law until state courts began to make the transition.<sup>370</sup> Once federal courts joined the trend, however, they deployed the injunction as a “catchall” tool for nonstatutory review of administrative action with greater exuberance than their state counterparts, especially after Congress granted general federal question jurisdiction in 1875.<sup>371</sup>

In a revealing early decision that provides a comparative baseline for later developments, the Supreme Court in *Ewing v. City of St. Louis* declined to use the injunction as a tool of administrative oversight.<sup>372</sup> Confronting allegations that orders by the mayor of St. Louis violated due process, the Court ruled that the relief could only “be obtained by the writ of *certiorari*.”<sup>373</sup> To support supposedly “well-established doctrine,” the Court selectively cited cases from New York<sup>374</sup>—where state courts had long used *certiorari* to control administrative action and had nonetheless permitted equitable intervention since the 1850s.<sup>375</sup> Discussing neither the variety of state court remedies nor the lower federal court’s inability to issue a writ of *certiorari*, the Court ruled that the petitioner could “ask [for] no greater relief in the courts of the United States than he could obtain . . . [in] the State courts.”<sup>376</sup> In a decision that might

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extend the remedies ordinarily available through mandamus to prevent a failure of justice.

370. See Simpson, *supra* note 16, at 236.

371. See JAFFE, *supra* note 116, at 193; see also Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2018)) (granting general federal question jurisdiction).

372. 72 U.S. (5 Wall.) 413 (1867).

373. *Id.* at 418.

374. See *id.* at 418-19.

375. See *supra* note 270 and accompanying text (discussing *certiorari*); *supra* text accompanying notes 329-31 (discussing injunctions). Consider also *Bouton v. City of Brooklyn*, in which the New York Appellate Division characterized several of the same cases cited by the Supreme Court in *Ewing* as recognizing an “exception[] to the general rule” that equity has no power to “inquir[e] into the proceedings of subordinate tribunals of special and local jurisdiction” or “the acts of public officers” where “the interposition of the court was necessary to prevent a multiplicity of suits.” *Bouton v. City of Brooklyn*, 15 Barb. 375, 398 (N.Y. App. Div. 1853).

376. *Ewing*, 72 U.S. (5 Wall.) at 419.

strike the modern reader as informed both by a nascent form of the *Erie* doctrine and by ideas about abstention in diversity proceedings, the Court declined to offer an equitable remedy that the state courts would reject.<sup>377</sup> The Court thus required the petitioner to “resort to the ordinary remedies afforded by the law” in state courts.<sup>378</sup>

*Ewing’s* resistance to equitable substitution, however, quickly yielded to the perceived need for federal judicial oversight of official action. Consider *Gaines v. Thompson*,<sup>379</sup> which marked “a major advancement toward explicit unification” of legal and equitable remedies against unlawful administrative activity.<sup>380</sup> In *Gaines*, petitioners claiming equitable interests in certain Arkansas lands sought an injunction to restrain the Secretary of the Interior and the Commissioner of the Land Office from carrying out an order to cancel their entries.<sup>381</sup> Taking a page out of *Decatur*, the government argued that an injunction was unavailable because “no functions within the range of the executive authority [were] less ministerial . . . than those which devolved upon the officers of the land department in the administration of matters relating to the disposal of the public domain.”<sup>382</sup> The Supreme Court agreed—including, notably, with the underlying premise that, “whether . . . by writ of mandamus or injunction,” there was “no difference in the principle” by which federal courts were empowered to interfere with official action.<sup>383</sup>

The Court’s conclusion as to the interchangeability of legal and equitable remedies did not, of course, guarantee access to a remedy for the alleged misconduct of “the officers of the executive departments of the government.”<sup>384</sup> *Decatur*, as confirmed by a long line of mandamus cases, held that federal courts could exercise mandamus power only where the duty was “precise,” “definite,” and “purely ministerial,” admitting of “no discretion whatever.”<sup>385</sup> The *Gaines* Court declined to intervene on the ground that the land officers’ responsibility to determine the “validity” of the petitioners’ entries required the land officers to exercise “judgment and discretion” by carefully construing “more than one act of Congress,” which precluded all routes to judicial review.<sup>386</sup> As to the interchangeability of legal and equitable

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377. *See id.*

378. *Id.*

379. 74 U.S. (7 Wall.) 347 (1869).

380. Young, *supra* note 229, at 804.

381. *See* 74 U.S. (7 Wall.) at 347 (statement of the case).

382. *See id.* at 348 (argument for the appellee).

383. *Id.* at 353 (majority opinion) (emphasis added).

384. *See id.* at 348-49.

385. *See id.* at 350-52 (citing *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840)).

386. *See id.* at 353.

remedies in the proper case, however, the Court reiterated the message in *Litchfield v. Register & Receiver*, which characterized the principle that the judiciary could interfere equally “either by mandamus or injunction with executive officers . . . in the discharge of their official duties,” provided those duties involved “no exercise of judgment or discretion,” as having been “so repeatedly decided in this court” that it was “useless to repeat.”<sup>387</sup>

The Court had occasion to affirm injunctive decrees shortly after *Gaines* and *Litchfield*, in two state-officer diversity cases that would be cited in *Ex parte Young*.<sup>388</sup> First came *Davis v. Gray*, in which the Court upheld an injunction restraining the Governor and Land Commissioner of Texas from appropriating the petitioners’ land.<sup>389</sup> Finding “no reason why a court of equity” could not interpose to stop the officers “from doing illegal acts,”<sup>390</sup> the Court supported its assertion of jurisdiction exclusively by reference to state court mandamus<sup>391</sup> and injunction<sup>392</sup> cases. The Court likewise relied on a state mandamus decision for the rule that, regarding the “principle” of judicial control, governors stood “upon a footing of equality” with “officers of . . . lower grades.”<sup>393</sup> Next came *Board of Liquidation v. McComb*, where the Court affirmed an injunction to block a state agency from using bonds for a purpose unwarranted by the organic statute and therefore beyond the agency’s legal authority.<sup>394</sup> As in *Gaines* and *Litchfield*, the Court supported its exercise of equity jurisdiction by equating its capacity “to interpose by injunction or *mandamus*” wherever state executive officers failed to conform their conduct to law, going as far as to characterize the two remedies as “somewhat correlative to each other.”<sup>395</sup>

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387. 76 U.S. (9 Wall.) 575, 577 (1870).

388. *See supra* note 62 and accompanying text. In a third case, *Tomlinson v. Branch*, the Supreme Court reversed the Circuit Court for the District of South Carolina’s denial on the merits of a bill in equity seeking to enjoin state tax collectors from collecting an unlawful tax against a railroad company in which the petitioner was a shareholder. 82 U.S. (15 Wall.) 460, 460 (1873) (statement of the case); *id.* at 470 (majority opinion).

389. 83 U.S. (16 Wall.) 203, 204-15 (1873) (statement of the case).

390. *See id.* at 219-20 (majority opinion).

391. *See id.* at 221 (citing *Woodruff v. Trapnall*, 51 U.S. (10 How.) 190 (1851) (on writ of error from the Supreme Court of Arkansas); *Ward v. Townsend*, 2 Tex. 581 (1847); *Comm’r of the Gen. Land Office v. Smith*, 5 Tex. 471 (1849); and *McLelland v. Shaw*, 15 Tex. 319 (1855)).

392. *See id.* (citing *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853) (on writ of error from the Supreme Court of Arkansas); and *Stewart v. Crosby*, 15 Tex. 546 (1855)).

393. *Id.* (citing *State ex rel. Whiteman v. Chase*, 5 Ohio St. 528 (1856)).

394. 92 U.S. 531, 532-33, 540-41 (1876).

395. *See id.* at 536, 541.

By the time Congress granted general federal question jurisdiction in 1875,<sup>396</sup> then, the Supreme Court had laid the groundwork for the use of injunctions to perform the judicial review function of the administrative writs in cases supported by federal jurisdiction.<sup>397</sup> As scholars have pointed out, shortly after this expansion in their jurisdiction, the lower federal courts “began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action” based “on the theory that [they] needed only a grant of jurisdiction . . . in order to exercise the powers of a court of equity.”<sup>398</sup> In doing so, the lower federal courts took their lead from recent Supreme Court decisions that likened equitable powers to those that formerly allowed courts of common law to control such action. From that moment forward, federal courts at all levels routinely recognized the availability of equitable relief against unlawful government action.<sup>399</sup>

For an illustration of the way federal courts fashioned injunctive remedies as a substitute for certiorari after the jurisdictional expansion in 1875, consider *Crampton v. Zabriskie*.<sup>400</sup> Recalling *Justices of Middlesex County*, *Crampton* arose from a decision by a county board in New Jersey to purchase land on which to erect a county courthouse and other governmental buildings.<sup>401</sup> Assailing the decision as a violation of the board’s organic statute, “[s]ome of the resident tax-payers” obtained a writ of certiorari in the Supreme Court of New Jersey, which “adjudged the proceedings invalid, and set [them] aside.”<sup>402</sup> When the board ignored the judgment and moved ahead, “other tax-payers” successfully sought an injunction in federal court.<sup>403</sup> On appeal, the Supreme Court found “no question as to the invalidity of the [board’s] proceedings” on the merits,<sup>404</sup> and justified its equity jurisdiction in equally confident terms, asserting that “the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition” of county money was not subject to “serious question” because “numerous” state court decisions had already resolved it.<sup>405</sup>

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396. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2018)).

397. See JAFFE, *supra* note 116, at 328.

398. Merrill, *supra* note 227, at 949; see also Monaghan, *supra* note 80, at 1825 n.122; Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 890 (1970).

399. See JAFFE, *supra* note 116, at 193-94.

400. 101 U.S. 601 (1880).

401. *Id.* at 607; see also *supra* note 256 and accompanying text (discussing *Justices of Middlesex County*).

402. *Crampton*, 101 U.S. at 608.

403. *Id.*

404. *Id.*

405. *Id.* at 609.

Unlike *Ewing*, then, where the (perceived) refusal of state courts to allow injunctive relief rendered such relief unavailable in federal court, *Crampton* relied on the (genuine) willingness of state courts to grant injunctive relief in justifying similar remedies in federal court. In so doing, *Crampton* also invoked the certiorari tradition underlying this trend by insisting that it was “eminently proper for courts of equity to interfere,” upon the application of any taxpayer, and “on behalf of” all taxpayers, to prevent officers from acting “in excess of their powers.”<sup>406</sup>

Equitable substitution continued in the last two decades of the nineteenth century, generating a series of precedents on which the Court would rely in asserting equity jurisdiction in *Ex parte Young*.<sup>407</sup> In case after case challenging unlawful state action, the Supreme Court continued to invoke the common law tradition in support of the interposition of equity, doing so in *Allen v. Baltimore & Ohio Railroad Co.*,<sup>408</sup> *Poindexter v. Greenhow*,<sup>409</sup> and again in *Pennoyer v. McConaughy*.<sup>410</sup> That pattern continued in *Reagan v. Farmers' Loan & Trust Co.*, an influential precursor to *Ex parte Young* in which the Court unanimously affirmed an injunction issued to restrain the Texas state attorney general from

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406. *See id.*

407. *See* Simpson, *supra* note 16, at 242-43 (noting that around 1890, “numerous suits to enjoin the enforcement of state legislation began to be brought in the federal courts, and were sanctioned by the Supreme Court,” although it was not until *Ex parte Young* “that the Supreme Court . . . definitely established the jurisdiction of the lower federal courts to intervene by injunction for the purpose of restraining unconstitutional state action” (footnote omitted)).

408. *See* *Allen v. Balt. & Ohio R.R. Co. (The Virginia Coupon Cases)*, 114 U.S. 311, 315 (1885) (“[I]t has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. . . . In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ.” (emphasis omitted) (quoting *Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1876))).

409. *See* *Poindexter v. Greenhow (The Virginia Coupon Cases)*, 114 U.S. 270, 293 (1885) (“Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the State. The State is not named as a party in the record; the action is not directly upon the contract; it is not for the purpose of controlling the discretion of executive officers . . .”).

410. *See* 140 U.S. 1, 12-17 (1891) (citing *Davis*, *McComb*, *Poindexter*, and *Allen* for the principle that “actions at law or suits in equity” could be equally “maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void” (quoting *Hagood v. Southern*, 117 U.S. 52, 70 (1886))).

enforcing unreasonably low railroad rates in violation of due process under the Fourteenth Amendment.<sup>411</sup>

In *Reagan*, the Court justified injunctive relief against state enforcement by reasoning, in an echo of mandamus, that the officers' authority to prescribe and enforce rates "was not a matter within the[ir] absolute discretion," but rather one "subject to legislative control," especially by means of the "constitutional limitations" of due process under the Fourteenth Amendment.<sup>412</sup> Viewing (economic substantive) due process as setting an outer boundary to the state's zone of discretionary regulation, the Court invoked the certiorari tradition in asserting judicial power to restrain the officers' "excessive and illegal acts."<sup>413</sup> Moreover, the Court once again drew upon the common law tradition in rejecting the Eleventh Amendment argument by stating that sovereign immunity did not bar suits *either* "for an injunction" ("to prevent [a] wrong") or "for a mandamus" ("to enforce" a "duty").<sup>414</sup> Recalling the certiorari formulations in *Justices of Middlesex County* and *Lawton*,<sup>415</sup> the Court declined to block suits brought "against defendants who, claiming to act as officers of the State," yet "under the color of an unconstitutional statute," cause injury to the "rights and property" of individuals.<sup>416</sup>

No wonder, then, that *Ex parte Young* could cite a line of cases that had already gone a long way toward resolving the question of federal courts' equity power to control the enforcement of an unconstitutional (state) statute.<sup>417</sup> Viewed in the context of equity's steady absorption of the common law's administrative writs, *Ex parte Young* represents a link in a venerable chain of judicial control of administrative activity. Less an unprecedented assertion of judicial power or an ordinary antisuit injunction, *Ex parte Young* illustrates equity's capacity to absorb common law forms. If Stephen Subrin's important work traces equity's conquest as a matter of procedural form,<sup>418</sup> *Ex parte Young* illustrates the way equity similarly embraced and then replaced the common law writs, becoming the primary mode by which federal courts in the

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411. See *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362, 400-13 (1894).

412. See *id.* at 397-99.

413. See *id.* at 390-91, 399.

414. *Id.* at 389 (quoting *Pennoyer*, 140 U.S. at 10).

415. See *supra* notes 257-58 and accompanying text (discussing *Justices of Middlesex County*); *supra* note 270 and accompanying text (discussing *Lawton*).

416. See *Reagan*, 154 U.S. at 388-89 (quoting *Pennoyer*, 140 U.S. at 9-10 (citing *Davis*, *Tomlinson*, *Allen*, *McComb*, and *Poindexter*)).

417. See *supra* notes 61-62 and accompanying text.

418. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

twentieth century enforced constitutional (and statutory) limits on government action.<sup>419</sup>

If *Ex parte Young* established the injunction as the tool of choice for oversight of the constitutionality of state action, contemporary decisions similarly relied on this tool for judicial oversight of the federal administrative state. Indeed, by 1913, as reflected in *Degge v. Hitchcock*,<sup>420</sup> the Court's switch from common law to equitable forms of interposition was effectively complete at the federal level. *Degge* involved a suit challenging a quasi-judicial order of the Postmaster General as "arbitrary" and in "excess of the jurisdiction conferred."<sup>421</sup> Turning the historical relationship between law and equity "on its head,"<sup>422</sup> the Court held that "the extraordinary writ of certiorari" was unavailable because the petitioner "had the right to apply for and obtain appropriate relief in a court of equity."<sup>423</sup> As one observer has noted, the *Degge* Court thus inverted the English remedial calculus and "tossed [certiorari] out of the system" for good.<sup>424</sup> Yet in asserting that "administrative" action taken under a federal statute "passed primarily for the benefit of the public at large" was henceforth to be controlled by equitable rather than legal remedies,<sup>425</sup> *Degge* effectively cemented the transition upon which Justice Brandeis would later remark in his *Crowell v. Benson* dissent.<sup>426</sup>

#### IV. The Implications of *Ex parte Young's* Common Law Origins

If one can best understand *Ex parte Young's* assertion of equity power as the outgrowth of a centuries-old common law tradition of judicial control of administrative action, then perhaps those origins shed light on the decision's enduring puzzles. We do not, of course, argue that other factors played no part in the evolving remedial framework that gave rise to *Ex parte Young*. As we

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419. Notably, the Supreme Court also made equitable remedies available to the states when they brought suit in lower federal courts to challenge federal official action. See Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 864-67 (2016) (discussing *Missouri v. Holland*, 252 U.S. 416 (1920), and *Colorado v. Toll*, 268 U.S. 228 (1925)).

420. 229 U.S. 162 (1913).

421. *Id.* at 171.

422. JAFFE, *supra* note 116, at 167.

423. *Degge*, 229 U.S. at 170-71. In many ways, the decline of certiorari as a means to control administrative action can be traced to *Decatur*, which characterized such action not only as typically discretionary, but also as "truly a thing apart from the judicial," and thus equally beyond the reach of certiorari as mandamus. See Young, *supra* note 229, at 802 & n.186.

424. JAFFE, *supra* note 116, at 328.

425. *Degge*, 229 U.S. at 171.

426. See *supra* note 2 and accompanying text.

have explained, the transition to equitable forms of administrative oversight was aided by the procedural joinder of law and equity,<sup>427</sup> the equitable concern to avoid multiplicity of suits,<sup>428</sup> and equity's willingness to interpose in matters of nuisance.<sup>429</sup> These factors, coupled with the shared reliance on contempt as a tool of enforcement, helped smooth the way. But larger factors were in play as well, including the Court's newly asserted willingness to use the Constitution as a check on state and federal regulatory activity.<sup>430</sup> To this end, the common law had long enabled the judiciary to play a boundary-setting role in defining the limits of government activity.

In this Part, we consider the implications of the common law origin story for modern debates over the *Ex parte Young* doctrine and nonparty protective orders. We find that the history of the common law provides a more persuasive account of the emergence of federal public law equity than the practices of the High Court of Chancery in the late eighteenth century. If the administrative writs do not "rule us from their graves," as Maitland observed,<sup>431</sup> then perhaps their ghosts have shaped the forms of equity that *Ex parte Young* both built upon and helped to set in motion.

#### A. Revisiting the Elements of *Ex parte Young* Actions

This Subpart tests the common law account of *Ex parte Young* by comparing its explanatory power to that of Harrison's antisuit injunction story. We thus evaluate each of the decision's enduringly puzzling features—its rejection of the attorney general of Minnesota's sovereign immunity defense, its use of equity to restrain an enforcement proceeding, and its willingness to decree in the absence of any express right of action or any threatened tortious invasion of property. In each respect, we find the common law account more persuasive.

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427. See *supra* notes 39, 323-26 and accompanying text.

428. See *supra* notes 347-51, 375 and accompanying text.

429. See *supra* note 36 and accompanying text; *infra* notes 447, 488 and accompanying text.

430. Of course, this willingness also reflected the rise of substantive due process under the Fourteenth Amendment. See *supra* note 50 and accompanying text. For an account of the way *Ex parte Young* outlived the substantive due process era and evolved into the jurisdictional doctrine of the civil rights movement, see Friedman, *supra* note 13, at 272 (quoting Judge Henry Friendly for the proposition that *Ex parte Young*, once the "bête noir of liberals," has "become 'the fountainhead' of federal power to enforce the Civil Rights Act").

431. See MAITLAND, *supra* note 20, at vi (asserting that the forms of action, though buried, "still rule us from their graves").

1. Officer suits without sovereign immunity

Ever since Justice Harlan gave voice in dissent to an expansive conception of state sovereign immunity, *Ex parte Young* has been best and most controversially known as resting on a “fiction.”<sup>432</sup> As often depicted, *Ex parte Young* proceeds on the assumption that state officers may be enjoined as state actors from violating the Fourteenth Amendment but cannot claim the protections from suit embedded in the Eleventh Amendment.<sup>433</sup> Harrison’s account proposes to ease this paradox, but his reliance on equity’s antisuit tradition strikes us as less historically accurate than the common law account.

a. The common law perspective

As we have seen, common law courts granted specific relief against Crown officials from the early seventeenth century onward, both to prevent and to compel official action, without worrying about the English tradition of sovereign immunity.<sup>434</sup> Simply put, English administrative law “never regarded officers as possessing any particular immunities resulting from their position as officers.”<sup>435</sup> To the contrary, early on it established that “every official” beneath the Crown, “from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.”<sup>436</sup> As developed in King’s Bench, this doctrine “had become firmly established by the beginning of the eighteenth century,” by which point officers were regularly suable for specific relief by writ of mandamus, certiorari, or prohibition (and other remedies yet).<sup>437</sup> By means primarily of these writs, the courts of common law “constantly hampered the action of the executive” and “exert[ed] a strict supervision over the proceedings of the Crown and its servants” for centuries without any jurisdictional impediment.<sup>438</sup>

The absence of sovereign immunity in officer suits in England reflects the imperatives of the rule of law,<sup>439</sup> as embodied in the unique procedural posture

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432. See *supra* notes 65-73 and accompanying text.

433. See *supra* text accompanying note 72.

434. See 3 DAVIS, *supra* note 326, § 27.01.

435. GOODNOW, *supra* note 36, at 396.

436. DICEY, *supra* note 47, at 189.

437. Jaffe, *supra* note 250, at 433; accord DICKINSON, *supra* note 26, at 39-40.

438. See DICEY, *supra* note 47, at 341-42.

439. Scholars have often remarked on the importance of *Ex parte Young* to notions of the rule of law. See, e.g., Fallon, *supra* note 338, at 944 (“The rule of law requires that governments and their officials be accountable to law.”). In the days before *Ex parte Young*, the administrative writs served as one important way of doing so. As the King’s serjeant-at-law argued in *The King v. St. John’s College*, the administrative writs were  
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of the writs. In a public action, the plaintiff named an officer of the Crown who had “committed an act not justified by the law” in the course of discharging his “public functions.”<sup>440</sup> Such an officer was regarded as having acted “*coram non iudice*,” or “without jurisdiction,” and thus was, like any other private person, subject to legal consequences for his misconduct “before the ordinary courts.”<sup>441</sup> The plaintiff proceeded in name of the Crown itself, calling upon a malfeasant official “to account for [his] conduct.”<sup>442</sup> Because the proceeding was the means by which the Crown commanded rogue officers to do “right and justice,”<sup>443</sup> it made sense that defendant officers could not plead the Crown’s own immunity to evade its superintendency.

Understood in England as proceedings brought in the name of the Crown, administrative writs evolved in the American republic into suits brought (much like criminal proceedings) in the name of the people. Both state and federal courts continued to caption proceedings in mandamus, certiorari, and prohibition as if prosecuted by the public as a whole, with federal courts naming the plaintiff as “*United States ex rel. [relator]*” or even just “*United States*,” and state courts doing the same with the words “*state*,” “*commonwealth*,” or “*people*.”<sup>444</sup> Such a convention coheres with the principle that, even when the writs were sought by individual citizens, they were viewed as brought *on behalf of* the public as a whole. American courts explicitly recognized that these principles defeated the argument for sovereign immunity. As the high court of Massachusetts observed in *Connecticut River Railroad Co. v. County Commissioners*, in which it used the writ of prohibition much like an *Ex parte Young* injunction, the “fact that an agent of the Commonwealth [was] the adverse party in the proceedings . . . afford[ed] no reason” for asserting sovereign immunity because the prerogative writs, even in the American tradition, were “properly sued out in the name of the . . . State.”<sup>445</sup> The same concept transferred over to the injunction once it came to substitute for the administrative writs.

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“the usual way for this Court [of King’s Bench] . . . to put the law in execution.” (1694) 90 Eng. Rep. 245, 245; Skinner 546, 546.

440. GOODNOW, *supra* note 36, at 397.

441. *Id.* at 396-97.

442. Jaffe, *supra* note 250, at 433.

443. See TAPPING, *supra* note 31, at 5.

444. See *supra* Parts III.A-B; cf. *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 536 (1844) (reply for the plaintiffs in error) (“In England the public property, and other public rights, are vested in the king, and suits concerning them are brought in his name, but in these states the public property and rights are vested in the commonwealth, and not in any individual, and suits concerning them are brought in the name of the commonwealth . . .”).

445. 127 Mass. 50, 50-52, 59-60 (1879) (prohibiting the defendant commissioners from enforcing a state statute purporting to authorize the “Governor and Council” to direct unconstitutional takings of private property).

Just as *Ex parte Young* absorbed the traditional willingness of common law courts to control unlawful administrative action through officer suits, so too did it regard sovereign immunity as irrelevant to that tradition. Thus, in the cases leading up to *Ex parte Young*, the Court explained that in suits against government officers under the “mandamus” tradition, courts had long seen fit “to enforce upon the defendant the performance of a . . . legal duty.”<sup>446</sup> One can read these cases as treating the injunction as having borrowed both the traditional administrative writs and their role in maintaining official accountability.<sup>447</sup> So understood, one finds the writ tradition lurking just beneath the surface of the Court’s opinion. As Justice Peckham explained:

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official . . . [T]he officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.<sup>448</sup>

This reasoning echoes the common law tradition of the administrative writs. To describe an officer as proceeding “without authority” recalls the *coram non judge* formulation, which holds that courts can invalidate actions that exceed an officer’s jurisdiction. Such rule-of-law logic required that officers acting “without legal justification,” as Dicey put it, were “subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”<sup>449</sup> Similarly, the conclusion that the state “has no power to impart” its immunity to shield an officer from accountability for a violation of supreme law mirrors the procedural logic of proceedings brought “in the name of the Crown” against officers who had to account for their transgressions of the law of the land.

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446. See *Pennoyer v. McConnaughy*, 140 U.S. 1, 10 (1891). Before Justice Harlan’s change of heart in *Ex parte Young*, he too had invoked the mandamus tradition as the justification for rejecting government immunity claims in officer suits. See *supra* note 65.

447. An assist may have come from the traditional willingness of courts of equity to ignore any claim of sovereign right when enjoining public officers from committing a nuisance on behalf of the government. Courts of equity had “a concurrent jurisdiction” that was “well established” over such matters, along with courts of common law. *Gardner v. Trs. of the Vill. of Newburgh*, 1 N.Y. Ch. Ann. 332, 334 (1816).

448. *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

449. See DICEY, *supra* note 47, at 189.

b. The antisuit alternative

Harrison's account of the inapplicability of sovereign immunity draws instead on the tradition of the antisuit injunction. For Harrison, the railroad company's claim in *Ex parte Young* was best seen as a defense to an enforcement action, to which the doctrine of sovereign immunity was inapplicable.<sup>450</sup> Just as a defendant could raise the Constitution as a defense to criminal liability without having to overcome a sovereign immunity claim, so too would Harrison's model allow the prospective criminal defendant to raise such a defense by bringing an affirmative suit in equity to block an enforcement proceeding. So long as the relief sought was the same in both proceedings—a judicial order blocking or annulling the government's action—the form was of little moment.

Harrison's account draws strength from the way in which modern constitutional litigation developed after *Ex parte Young* came down: In many of the leading cases concerning the power of the federal courts to enjoin state action on constitutional grounds, the federal proceeding proposes, in effect, to preempt or block a state court enforcement action. Such well-known cases as *Younger v. Harris*<sup>451</sup> and *Mitchum v. Foster*<sup>452</sup> arose as actions to enjoin state court enforcement proceedings. Even *Ex parte Young* itself was careful to avoid the tradition of deference to criminal prosecution and the venerable federal Anti-Injunction Act on the ground that no proceeding was pending in state court when the railroad sought its stay.<sup>453</sup> Today, *Mitchum* allows (if more in theory than in practice) the stay of pending criminal proceedings, so long as the plaintiff seeks relief under § 1983 and comes within an exception to the federalism limits imposed by the judge-made doctrine of equitable restraint.<sup>454</sup>

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450. See *supra* notes 84-89 and accompanying text.

451. 401 U.S. 37 (1971) (addressing a suit to enjoin a state criminal prosecution said to have been brought in violation of the First Amendment).

452. 407 U.S. 225 (1972) (addressing a suit to enjoin a nuisance proceeding brought by a state to close down the plaintiff's lewd bookstore).

453. See *Ex parte Young*, 209 U.S. at 161-62 (acknowledging the argument that equity lacks power to interpose in criminal matters and that federal courts lack power to enjoin pending proceedings in state court, but noting that no such state criminal proceeding had yet begun when the suit to enjoin enforcement of the rates was brought against the State's Attorney General). On the assumptions underlying the Anti-Injunction Act, both as originally drafted and applied and as later codified in 1948, see generally Pfander & Nazemi, *supra* note 155, at 10-59.

454. See 407 U.S. at 242-43 (viewing § 1983 as an exception to the Anti-Injunction Act and thereby authorizing the issuance of injunctions that pass muster under the doctrine of equitable restraint articulated in *Younger v. Harris*). While one could thus in theory thread the needle and secure a stay of pending proceedings by showing bad faith or patent unconstitutionality, scholars have concluded that these exceptions to *Younger* restraint often prove more illusory than real. See Brian Stagner, *Avoiding Abstention: The Younger Exceptions*, 29 TEX. TECH L. REV. 137, 157-63 (1998) (surveying the absence  
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While some features of modern constitutional litigation map onto Harrison's model (at least in part), one struggles to identify support for Harrison's account in equitable tradition, either in *Ex parte Young* itself or in the cases and history on which it drew. In the days of the divided bench, the High Court of Chancery routinely issued antisuit injunctions to stay civil proceedings at common law. But these "common injunctions," as they were known, applied only to civil litigation where the Chancellor might interpose to ensure the recognition of such equitable defenses as fraud, mistake, accident, and duress—defenses that the common law courts refused to recognize in an action on a contract or bond.<sup>455</sup> The antisuit injunction was thus not generally available. Suitors either had to bring their claim within the freestanding antisuit tradition of the common injunction or had to invoke equity jurisdiction on some other basis and seek an ancillary stay that would prevent another court from taking up an issue that was already properly before the Chancery.<sup>456</sup>

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of federal authority on the patent unconstitutionality exception and finding that it exists "in theory only"). By contrast, Stagner finds that courts are "occasionally receptive" to arguments for application of *Younger's* bad-faith exception. *Id.* at 157.

455. See BISPHAM, *supra* note 7, §§ 407, 409-413. For accounts of the common injunction, see ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 3-14 (Albany, William Gould & Co. 1822) (sketching the practice on the common injunction in cases of accident, mistake, and fraud); 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 668-76 (Philadelphia, Lea & Blanchard 1846) (discussing the distinction between common injunctions—that is, injunctions to restrain proceedings at common law—and special injunctions); and David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 568-70 (1986) (discussing the origins of the common injunction). See also Pfander & Nazemi, *supra* note 155, at 11-17 (describing the distinction between original suits for the writ of injunction, the very purpose of which was to block a common law suit to enforce a property right, and ancillary relief in the nature of an injunction that sought to preserve the power of a court of equity, already vested with jurisdiction over a matter, to enjoin duplicative or disruptive proceedings elsewhere).
456. One such form of ancillary relief (the precursor to interpleader and bankruptcy) was a decree to protect a fund brought before a court of equity by staying other proceedings that would interfere with equity's ability to provide complete relief. See EDEN, *supra* note 455, at 30-31 (describing injunctive relief to stay creditors' suits at law as requiring only a motion ancillary to a decree for the administration of assets); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 890 (Boston, Hilliard, Gray & Co. 1836) (confirming that, following a decree upon a creditor's bill for the administration of assets, equity can issue an injunction "after notice given to the creditor"). Justice Story generalizes, explaining that the distinction between the freestanding writs of injunction and ancillary relief in the nature of an injunction had sometimes been disregarded in practice and been indiscriminately given "the name of injunctions." *Id.* § 861, at 154 n.1 (quoting EDEN, *supra* note 455, at 209).

Chancery did not issue the common injunction to stay criminal law proceedings,<sup>457</sup> as the Supreme Court itself had confirmed as recently as 1888 in its elaborate opinion in *In re Sawyer*.<sup>458</sup> To be sure, stays of criminal proceedings might be available in rare cases on an ancillary or auxiliary basis, but only where equity had first properly exercised jurisdiction over the matter.<sup>459</sup> The Court in *Sawyer* explained the exception as follows: “The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.”<sup>460</sup> The threat of criminal enforcement thus did not ground equity jurisdiction in the same way that a threatened or pending common law suit to enforce an inequitable contract gave rise to a common injunction. Courts hearing criminal law enforcement actions, after all, *would* recognize defenses of unconstitutionality and illegality—the very recognition missing from the equitable defenses of mistake, accident, and fraud that was seen as grounding equitable interposition in civil proceedings on the common injunction. To block criminal enforcement proceedings, equity had to identify grounds for interposition independent of threatened enforcement.<sup>461</sup>

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457. EDEN, *supra* note 455, at 32; 2 STORY, *supra* note 456, § 893; *see also supra* note 16. We owe thanks to Henry Monaghan for suggesting that one might summarize the limited scope of the antisuit injunction by observing that equity focused on private property rights, leaving issues of liberty to the courts of common law.

458. 124 U.S. 200 (1888). As the Court explained:

The office and jurisdiction of a court of equity . . . are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors . . . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences . . . is to invade the domain of the courts of common law . . . . From long before the Declaration of Independence, it has been settled in England, that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process.

*Id.* at 210.

459. Thus, Justice Story explained that equity will generally refrain from issuing an injunction to stay any criminal matters or “cases not strictly of a civil nature,” including a mandamus, indictment, information, or prohibition. *See* 2 STORY, *supra* note 456, § 893. But if the plaintiff in equity is also the party seeking the other remedy, equity can restrain them; in “such cases [the injunction] is merely incidental to the ordinary power of the Court to impose terms upon parties, who seek its aid in furtherance of their rights.” *Id.* This ancillary or incidental invocation of equity depended on the court’s having first secured equitable jurisdiction.

460. *In re Sawyer*, 124 U.S. at 211; *see also* EDEN, *supra* note 455, at 33 (discussing *Mayor of York v. Pilkington* (1742) 26 Eng. Rep. 584; 2 Atk. 302, as a case in which a bill and cross bill were already pending in Chancery to settle a dispute over fishing rights, and equity granted a stay to restrain the plaintiffs in equity from also pursuing indictments against the defendants for a breach of the peace in fishing).

461. *See Pilkington*, 26 Eng. Rep. at 585, 2 Atk. at 302 (explaining that the Court of Chancery “has not originally . . . any restraining power over criminal prosecutions,” but concluding that while the court “cannot grant an injunction,” it may “certainly make an order

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It was this ancillary, rather than original, antisuit jurisdiction to which *Ex parte Young* pointed in justifying the district court's interposition. As the Court explained,

[*Sawyer*] holds that in general a court of equity has no jurisdiction of a bill to stay criminal proceedings, but it expressly states an exception [for claims already pending in equity]. Various authorities are cited to sustain the exception. The criminal proceedings here that could be commenced by the state authorities would be under the statutes relating to passenger or freight rates, and their validity is the very question involved in the suit in the United States Circuit Court.<sup>462</sup>

For the Court, then, equitable jurisdiction was predicated not on the threat of an enforcement proceeding but on a challenge to the constitutional "validity" of the passenger and freight rates.<sup>463</sup> The Court thus found that the original bill conferred *both* equity jurisdiction to review the constitutionality of the ratemaking legislation at issue *and* ancillary authority to restrain a subsequently filed proceeding that would present the same question. Even this represented an extension of the modest exception to which the Court gestured.<sup>464</sup> No wonder, then, that contemporary commentary did not liken *Ex parte Young* to a common antisuit injunction, but viewed it simply as judicial oversight of state regulatory action.<sup>465</sup>

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upon the prosecutors to prevent the proceeding on the indictment"). Here, the court acknowledged its lack of original antisuit jurisdiction to issue a common injunction and relied instead on its ancillary power to prevent the prosecution from raising the same issues as the pending proceeding in equity.

462. *Ex parte Young*, 209 U.S. 123, 162 (1908). As the Court further explained in treating the injunction as ancillary, once the question of unconstitutionality has been properly raised in a federal court, "that court . . . has the right to decide it to the exclusion of all other courts." *Id.* at 160.

463. *Cf. Miss. R.R. Comm'n v. Ill. Cent. R.R. Co.*, 203 U.S. 335, 341, 343, 347 (1906) (upholding an injunction to block a state commission's order requiring interstate trains to make local stops).

464. The exception, as described in the authoritative discussions from the antebellum period, applied to situations in which the plaintiff pursued relief both in criminal enforcement proceedings and in equity. Equity's willingness to restrain the criminal proceeding thus represented an application of the doctrine that equity would enforce an election of remedies and foreclose a plaintiff from seeking relief both at common law and in equity. On that doctrine, see *Jones v. Earl of Strafford* (1730) 24 Eng. Rep. 977, 980-81; 3 P. Wms. 79, 90 (confirming that the plaintiff must elect between pursuing a claim in law or equity and, if he chooses equity, "then the proceedings at law are by that order to be stayed by injunction"). In *Ex parte Young*, the Attorney General did not invoke the federal court's equity jurisdiction.

465. In an earlier examination of commentary on the *Ex parte Young* decision, one of us found little evidence that contemporaries viewed the decision as an outgrowth of the antisuit tradition in equity. See Pfander & Dwinell, *supra* note 16, at 212 n.236. One contemporary, however, proposed to understand the decision, at least in part, by emphasizing state courts' repurposing of equity (as discussed in Part III.C.1 above) to

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For these reasons, one cannot readily defend the *Ex parte Young* injunction as the product of a traditional practice of issuing antisuit injunctions against criminal enforcement proceedings that stretches in an unbroken line to the practice of the High Court of Chancery in 1789. Instead, it appears that in granting injunctions like that in *Ex parte Young*, federal courts of equity were working out the implications of a transition from an old world in which equity steered clear of public law proceedings, to a new world where equity had largely replaced the forms of public law oversight once supplied by mandamus and certiorari. Caleb Nelson identifies some lower court decrees from the ten years or so immediately preceding *Ex parte Young*, characterizing them as anticipating the sort of restraints on enforcement that *Ex parte Young* was later to announce and questioning how much new ground was broken in *Ex parte Young*.<sup>466</sup> The groundbreaking feature of *Ex parte Young*—its willingness to approve an injunction against a state enforcement proceeding—consists of its sharp departure from the practice of the High Court of Chancery. As we have seen, one can best explain that injunction by reference less to Chancery’s antisuit tradition than to the rise of equitable oversight of administrative action. Having confirmed equity’s power effectively to quash administrative action, *Ex parte Young* upheld equity’s authority to issue ancillary injunctions to restrain government actions inconsistent with the declaration of invalidity. We would thus characterize *Ex parte Young* as confirming the transition to a new antisuit tradition in equity, rather than drawing on the established antisuit tradition of the common injunction.

The common law origins of judicial control may have eased the transition to the equitable oversight of criminal enforcement matters. King’s Bench was not only the forum in which parties brought suit for the issuance of

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replace the common law writs as the preferred mode of administrative oversight. See Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 AM. POL. SCI. REV. 347, 349-54 (1909) (characterizing the line of cases leading up to *Ex parte Young* as premised on “the common law rule that an officer . . . is liable for every act in excess of jurisdiction”). In explaining the power of the federal courts to hear suits against state officers, Scott invoked the tradition of control by English common law courts through writs “like prohibition, mandamus, habeas corpus and quo warranto.” *Id.* at 352. After noting that state courts had long issued injunctions to restrain enforcement of unconstitutional state laws, and blocked government interference in property rights, he wondered why federal courts “should not . . . have the same power within the sphere of their jurisdiction.” *Id.* at 353. Scott also observed that the cases of interposition included both “purely negative control” as well as the “grant of positive remedies.” *Id.* at 348. And while he acknowledged, borrowing from the mandamus tradition, that the court could not “control the exercise of the discretion of an officer,” he observed that officers have “no discretionary power to enforce an [unconstitutional] act.” *Id.* at 360.

466. See Caleb Nelson, “Standing” and Remedial Rights in Administrative Law, 105 VA. L. REV. 703, 714 n.42 (2019).

administrative writs, but it was also England's superior court of criminal law.<sup>467</sup> Indeed, King's Bench often issued the writ of certiorari to remove criminal proceedings from an inferior court for further proceedings in a superior court.<sup>468</sup> Common law tradition thus comfortably included the issuance of administrative writs to interpose in criminal proceedings. Such a foundation may (relative to the antisuit alternative) better help explain how the Supreme Court came, in *Ex parte Young* and its predecessors, to view judicial control of prospective state court enforcement proceedings as a proper object of an equitable public action.

In sum, then, we think the story of *Ex parte Young* offered here better explains the various puzzling elements of that decision than does the antisuit account put forward by Harrison. Across a range of issues, the common law origin story better fits the evidence and explains the Court's embrace of public law proceedings to enjoin unlawful government action. While *Ex parte Young* may have since evolved into an all-purpose bill to enjoin threatened enforcement proceedings, we do not believe that the Court understood or tried to solve the problem in those terms, or that it embraced the implicit limitations that such an antisuit model would seemingly entail.

c. The court's remedial authority

One final feature of Harrison's model deserves separate consideration. In viewing *Ex parte Young's* provision for immunity-free litigation with the state as the creature of the antisuit tradition in equity, Harrison would empower the federal judiciary to issue only a decree in which "nothing is being demanded" of the state.<sup>469</sup> Such an approach would allow federal courts to invoke *Ex parte Young* to nullify state action. But it would not authorize relief that directs the state to take any affirmative action to bring its activities into compliance with the law's demands. Such a restriction on federal judicial power would, perhaps needless to say, impose a substantial limit on constitutional remedies. Much of the remedial work undertaken to end Jim Crow segregation in the South would fail a strict test of negation. Busing and other affirmative remedies, though well established in decisions from the post-*Brown* era, would seemingly go well beyond the limited form of negation that Harrison envisions.

The common law origin story expands the potential scope of federal remediation well beyond the negation remedy contemplated in Harrison's antisuit model. The administrative writs, as we have seen, offered a range of remedies against government action. Courts might issue the writ of mandamus

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467. See *supra* text accompanying notes 127-28.

468. See *supra* note 139 and accompanying text.

469. See Harrison, *supra* note 7, at 1005-06; see *supra* notes 90-99 and accompanying text.

to compel officers to take action compelled by law, the writ of certiorari to review and quash allegedly illegal administrative action, and the writ of prohibition to block a contested assertion of government authority. As we have seen, common law courts deployed administrative writs to offer this relatively expansive collection of remedies without viewing the directives as inconsistent with the sovereign immunity of the Crown (or of the state governments that arose after independence). Indeed, the *Ex parte Young* Court defined the scope of its remedial authority by drawing on precedents from the common law writs. Thus, while the Court disclaimed any power to control the “discretion” of government officials, it followed mandamus tradition in reaffirming its authority to “direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action.”<sup>470</sup>

Of course, tracing the *Ex parte Young* proceeding to common law suits brought in the name of the state or the people might substitute one fiction for another. As discussed above, the conception of the administrative writs as “public proceedings brought in the King’s name” was built upon the fiction that the Crown was ever present on the bench.<sup>471</sup> Yet to the extent the action remains fictional, its common law origins counsel the suspension of disbelief in two ways. First, they demonstrate that the so-called “*Ex parte Young* fiction” was no invention of the Supreme Court in 1908, but was instead firmly embedded in the traditional balance between judicial oversight and sovereign immunity that American courts borrowed from English administrative law as it had developed from the seventeenth century. Second, they reveal that the fiction was born out of the need to maintain “the rule of law” in the early administrative era,<sup>472</sup> a need at least as relevant to our law-drenched republic today. As Jaffe notes, “[t]he availability of suit against an officer . . . was the result of a deliberate effort” on the part of common law “to protect the citizen from governmental misuse of authority.”<sup>473</sup>

## 2. Injunctions without tortious injury

*Ex parte Young*’s common law origins may also help to explain the Court’s approval of specific relief against government action that did not constitute a trespass or other common law tort. Unlike the power of a court of equity to prevent tortious injury, as reflected in *Osborn*, the common law’s administrative

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470. *Ex parte Young*, 209 U.S. 123, 158 (1908).

471. JAFFE, *supra* note 116, at 462; *see supra* notes 127, 184-86, 198-200 and accompanying text.

472. *See* Jaffe, *supra* note 250, at 433.

473. JAFFE, *supra* note 116, at 237.

writs reached unlawful government action that would not necessarily give rise to tort-based liability. These writs enabled courts to restrain executive officers from acting outside the bounds of law or to compel them to act as required by law. By invoking judicial power to restrain officers from committing any “acts of wrong . . . to the rights” of citizens,<sup>474</sup> the line of cases culminating in *Ex parte Young* restated the tradition of the administrative writ, in which the “wrong” to be remedied was simply an officer’s violation of the rights of the petitioner, and often of the public.

More specifically, the basis on which the Court in *Ex parte Young* enjoined the Attorney General of Minnesota from proceeding “without the authority” of law mirrored the rationale that animated the writs of certiorari and prohibition.<sup>475</sup> That rationale enabled courts to prohibit officers from taking action in excess of their jurisdiction, that is, their legal authority, regardless of whether such action would qualify as a common law tort. American courts had regularly controlled administrative action on the sole ground that it was coram non iudice, or in excess of jurisdiction, as the Supreme Court itself may be said to have done in *McComb*,<sup>476</sup> *Crampton*,<sup>477</sup> and *Reagan*<sup>478</sup> (in circumstances almost identical to *Ex parte Young*). Such courts had equated the enforcement of legislation that violated state or federal constitutions, seen as the paramount “limit[]” on the “lawful powers” of government,<sup>479</sup> with administrative activity in excess of jurisdiction, as did the Supreme Court as early as *Weston v. City Council of Charleston*<sup>480</sup> and again in *Reagan*.<sup>481</sup> *Ex parte Young* thus did not break new ground in concluding that the Constitution

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474. *Pennoyer v. McConnaughy*, 140 U.S. 1, 10 (1891).

475. *See* 209 U.S. at 159.

476. *See supra* text accompanying note 394.

477. *See supra* text accompanying notes 400-06.

478. *See supra* text accompanying notes 411-16.

479. *See* DICKINSON, *supra* note 26, at 95-97 (“[I]n the United States Coke’s doctrine has been what we have built upon. A written constitution is in itself the most effective possible application of the idea of a law sovereign over all laws which emanate merely from government. It carries with it by an almost inexorable logic the power of courts to overthrow governmental acts, and it limits in practice the power of governmental agencies to determine for themselves the scope of their lawful powers.” (footnotes omitted)).

480. 27 U.S. (2 Pet.) 449, 469 (1829) (reversing the constitutional court of South Carolina’s denial of prohibition to enjoin the City Council of Charleston from levying taxes on stock of the United States Bank on the ground that the ordinance imposing the taxes was unconstitutional under *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)); *see also supra* note 316 (discussing *Zylstra v. Corporation of Charleston*, 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl. 1794), in which the South Carolina court characterized the state constitution as similarly circumscribing the lawful powers of government).

481. *See supra* notes 411-16 and accompanying text.

imposed judicially enforceable limits on contemplated state executive action that would not, in itself, amount to tortious conduct. The key seems to have been the Court's desire to protect rights of private property from wrongful government conduct, with the idea of wrongfulness broadly understood to encompass government activity that was tortious or was otherwise violative of constitutional limits on state action.

Unlike Harrison's more limited antisuit model, the common law tradition of the administrative writs also provides a basis for federal courts to issue mandatory decrees without regard to the presence of a common law tort, which refusals to take action rarely entail. Indeed, judicial power to compel the performance of executive action has long been supplied by the mandamus tradition, which provides direct precedent for the issuance of specific decrees to compel government officers to take affirmative action. Dating back to *Bagg's Case* in 1615, mandamus has regularly empowered courts of common law to compel public officers to take nondiscretionary action required by law, whether restoring someone to his citizenship or office, or desegregating schools.<sup>482</sup> No common law tort was required to justify such judicial involvement; courts were empowered to compel performance of some wrongfully withheld action and to command execution of the law where required.<sup>483</sup> Contrary to Harrison's account, then, judicial review of government action has not contented itself with merely passive recognition of limitations on government. The judicial power to decree affirmative action in conformity with law finds equal support in our tradition.

### 3. Injunctions without express rights of action

Its common law origins may also shed light on the most recent "fiction" ascribed to the *Ex parte Young* action: its implied right of action to seek injunctive relief. As discussed above, concerns with the source of the right to sue in *Ex parte Young* arise as a result of the Supreme Court's distinctly modern

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482. See Fallon, *supra* note 338, at 966 ("To take just the plainest example, the school segregation involved in *Brown v. Board of Education* would not have registered as tortious at common law, nor would many infringements on free speech and religious liberty." (footnote omitted)); *id.* at 936 (same, with respect to the threatened enforcement action in *Ex parte Young*).

483. The focus on the existence of a tort-based theory of liability arises from the Court's need to distinguish its earlier refusal in *In re Ayers* to deploy equitable or other tools to enforce state government contracts. By placing a narrow category of contract enforcement off limits, the Court sought to accommodate traditions of legislative control over money payment that had remained largely immune from judicial control in America. For accounts of the Eleventh Amendment, the sovereign immunity debate, and the role that control of the fisc played in the doctrine's longevity, see generally Pfander & Dwinell, *supra* note 16; Pfander, *supra* note 52.

preference for express statutory rights of action.<sup>484</sup> In the old days, before *Erie* and our preoccupation with what body of law creates the right of action for jurisdictional purposes,<sup>485</sup> a grant of jurisdiction was viewed as enough to set in motion an independent body of federal equity.<sup>486</sup> As a result, federal courts began regularly “entertaining bills of equity that sought to enjoin allegedly unlawful administrative action” once Congress conferred federal question jurisdiction in 1875, proceeding “on the theory that [they] needed only a grant of jurisdiction,” but “not a statutory cause of action, in order to exercise the powers of a court of equity.”<sup>487</sup> In doing so, the federal courts were building on equitable principles that date from well before 1875.<sup>488</sup>

Many scholars have addressed these nineteenth-century developments, albeit with different projects in mind. Kristin Collins told a story of change, highlighting the willingness of antebellum federal courts to fashion a uniform

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484. See *supra* notes 77-83 and accompanying text.

485. *Erie* of course treats state law rules of decision as controlling in federal court in cases where they apply and thus demands much closer scrutiny of federal judicial lawmaking power. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). A familiar line of subsequent decisions now calls into question the power of federal courts to fashion rights of action, even in circumstances where federal law provides the rule of decision. While many of these cases involve federal statutory rights, the Court has also deployed this skepticism in curtailing suits against federal officers for constitutional torts. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858-63 (2017).

The source of the right to sue has well-known implications for jurisdiction. See generally Monaghan, *supra* note 80 (discussing *Exceptional Child*'s impact on the *Ex parte Young* action). Most scholars treat *Ex parte Young*'s federal judge-made right to sue as deriving either from federal equity or from the Fourteenth Amendment. See *id.* at 1829 (asserting that the action “fits very comfortably within the officer suit tradition, that is, a creation of the court of equity”). Hart and Wechsler long subscribed to the Fourteenth Amendment view. See HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 818-19 (1953). For an account that treats the right of action in *Ex parte Young* as the product of a subtle shift from trespass to equity-based litigation, see Woolhandler, *supra* note 232, at 127-30. Woolhandler explains that in cases leading up to *Ex parte Young*, the reasonableness of state rates came to be seen as an element of the due process claim for injunctive relief, thereby placing the issue on the face of the well-pleaded complaint, rather than as a reply to a defensive assertion of official authority. *Id.* at 131.

486. The doctrine of equitable remedial rights, illustrated by *Guffey v. Smith*, a diversity proceeding, enabled the federal courts to grant relief in equity that state courts of equity would have denied. See 237 U.S. 101, 113-14 (1915). The animating idea, that federal equity was best understood as a uniform system of remedial law and was immune from state control, stands in some tension with the *Erie* doctrine, as the Court later suggested in *Guaranty Trust Co. v. York*, 326 U.S. 99, 103-06 (1945).

487. Merrill, *supra* note 227, at 949; see *supra* text accompanying note 398.

488. See *supra* notes 372-93 and accompanying text. Many other such cases could be cited, including, for example, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, a case heard by the Court under its original jurisdiction in which an injunction was sought to abate a public nuisance, 50 U.S. (9 How.) 647, 649 (1850) (statement of the case).

body of federal equity that often ignored state court remedial limits and thus differed dramatically from the Supreme Court's post-*Erie* approach to such questions of vertical legal consistency.<sup>489</sup> John Duffy examined the rise of federal equity in the nineteenth century as a source of nonstatutory review of administrative action.<sup>490</sup> Evaluating that body of judge-made administrative law, Duffy found it was legitimately predicated on federal enactments, in particular the statutory provisions that confer equity jurisdiction on the federal courts.<sup>491</sup> Ann Woolhandler evaluated the evolving right to bring implied equitable rights of action and found a well-pleaded federal question on the face of suits to enjoin unconstitutional state regulations that apparently helped to explain the assertion of federal question jurisdiction in *Ex parte Young*.<sup>492</sup> Together, this work explains how the *Lochner* Court might have resolved the right-to-sue problem in *Ex parte Young* without insisting on express rights of action.<sup>493</sup>

The Court's modern emphasis on express statutory rights of action in an area of law that developed without the same jurisprudential commitments may unsettle a range of remedial doctrines.<sup>494</sup> So far, the destabilizing influence of

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489. See generally Collins, *supra* note 352. Collins "retell[s] the story of judge-made law in the federal courts through the lens of equity" to "shed[] light on the radical transformations that have occurred in our understanding of the judicial power as set forth in Article III." *Id.* at 255.

490. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121-30 (1998).

491. *Id.* at 121-22.

492. See Woolhandler, *supra* note 232, at 130-32.

493. On the lost world of pursuing equitable claims before equity's fusion with law, see P.G. Turner, *Fusion and Theories of Equity in Common Law Systems*, in EQUITY AND LAW: FUSION AND FISSION, *supra* note 323, at 1, 17-21 (explaining that pre-fusion equity was understood less as a formulary right of action in common law's terms than as the application of equitable principles to a fluid set of facts).

494. The absence of explicit "right-of-action" language in the relevant jurisdictional grants does not necessarily mean that nineteenth-century federal jurists understood themselves as empowered to issue mandamus without an appropriate grant of statutory authority. Notably, as it did in both *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 601-03 (1821), and *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 505-06 (1813), the Supreme Court found that an underlying grant of federal jurisdiction alone did not suffice to make mandamus available; something more specific was required. Perhaps that something more was present in *Hall*, where the Supreme Court premised the availability of the writ on statutory language conferring "upon the proper Circuit Court . . . jurisdiction" specifically "to hear and determine all cases of mandamus." See *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 343 (1876) (citing Act of Mar. 3, 1873, ch. 226, § 4, 17 Stat. 485, 509); *supra* note 240. Yet one should note that the inability of the lower federal courts to issue mandamus to federal officers did not foreclose those courts from drawing on mandamus principles to craft effective remedies. In 1868, the Court upheld the power of a federal circuit court to issue mandamus to compel Iowa county officials to levy a tax to pay amounts due on county bonds. See *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 197-200 (1868).

*footnote continued on next page*

the Court's insistence on statutory rights of action poses its sharpest threat to the enforcement of federal statutory rights and to constitutional tort claims. Both *Seminole Tribe* and *Exceptional Child* concluded that the judge-made right to sue for injunctive relief against state action had been impliedly displaced by the existence of a set of alternative remedies supplied by Congress.<sup>495</sup> As for the enforcement of federal constitutional rights, the Court has narrowed the right to sue for damages on a constitutional tort theory.<sup>496</sup> And while it has so far resisted proposals to rethink the continued viability of *Ex parte Young*,<sup>497</sup> doubts about federal equity could subject the *Ex parte Young* doctrine to forms of legislative displacement.<sup>498</sup>

### B. Nonparty-Protective Decrees

The administrative writs may shed light on the power of federal courts to issue judgments and decrees that confer protections on nonparties. In a word (or two), while courts of equity declined to grant broad relief except where claims were recognized as appropriate for classwide relief, the common law tradition embraced the use of specific relief and orders to quash directed against government actors. Recall that, "conceived as public proceedings brought in the King's name,"<sup>499</sup> the administrative writs regularly sought to control

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Acknowledging that the interplay of sections 13 and 14 of the Judiciary Act had curtailed lower court power to issue original mandamus to federal officials, *cf.* Pfander, *supra* note 27, at 1592-96 (exploring the interpretation of sections 13 and 14), the Court nonetheless found in section 14's all-writs language power to use ancillary mandamus to effectuate a circuit court judgment, *Riggs*, 73 U.S. (6 Wall.) at 188-89, 198. In 1873, Congress amended section 13 to eliminate the Court's mandamus authority over federal officials in keeping with the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Compare Act of Dec. 1, 1873, § 687, Rev. Stat. 1, 127 (describing the Supreme Court's original jurisdiction), with *id.* § 688, Rev. Stat. at 127 (extending the Court's "power" to issue writs of mandamus "to persons holding office under the authority of the United States" but only in ambassador and state-party cases otherwise within the Court's original jurisdiction). By eliminating the statutory predicate for implied foreclosure of original mandamus to federal officers, the 1873 repeal may have encouraged lower federal courts to draw more freely on the mandamus tradition as they shaped their use of federal equity to review administrative action.

495. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 (2015); *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996).

496. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017) (limiting the *Bivens* right of action to established contexts and emphasizing the primacy of Congress's role in any expansion).

497. Thus, a proposal to create a case-by-case *Ex parte Young* doctrine has yet to take hold. See *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 269-71 (2011) (Roberts, C.J., dissenting) (contending that the doctrine should apply as a matter of judicial discretion, as suggested in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) (opinion of Kennedy, J.), but failing to attract more than one other vote).

498. See Fallon, *supra* note 338, at 960-61, 987 & n.245.

499. JAFFE, *supra* note 116, at 462; see also *supra* text accompanying notes 184-86.

unlawful government action as a general matter, with reference to those aggrieved and without regard to party status. Once equity took over the public rights space, the resulting landscape resembled a blend of the public action's inclination toward universality with equity's inclination toward plaintiff-specificity.

One can see nonparty protection reflected in the English origins and American applications of the writ of certiorari. In discussing the origins of judicial review of administrative action in England, one noted scholar explains that an order “would be quashed [on certiorari] if the justices had no jurisdiction to make it.”<sup>500</sup> While nominally limited to jurisdictional errors or matters beyond the authority of the agency or commission, the remedy of “certiorari to quash” was “in fact available for every issue of law.”<sup>501</sup> Such quashing orders nullified the administrative action under review as a general matter and threatened officials with contempt for noncompliance.<sup>502</sup> That has been the practice in England both during the twentieth century and today.<sup>503</sup> When quashed, as the Supreme Court of the United Kingdom explained in its 2019 decision invalidating the Prime Minister's order proroguing Parliament, the action is treated as “null and of no effect” from the outset.<sup>504</sup> From a legal perspective, it was “as if the Commissioners had walked into Parliament with a blank piece of paper.”<sup>505</sup>

Orders to quash took hold in the judicial practice of the United States in the early Republic. Nathan Dane described certiorari as a freestanding writ to review the proceedings of any inferior tribunal that did not follow the course

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500. HENDERSON, *supra* note 114, at 144.

501. *Id.* at 158.

502. English abridgments in the eighteenth and nineteenth centuries spoke with one voice on the remedial effect of certiorari. *See* 1 BACON, *supra* note 268, at 359 (“After the *Certiorari* delivered, if the inferior Court proceeds, where by Law it ought not, it is a Contempt, for which the Court will grant an Attachment.”); 2 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 23 (London, H. Woodfall & W. Strahan 1764) (“If a *Certiorari* be delivered to a Justice of Peace, or other Justice to whom it is directed, it shall be a *Supersedeas*, and every Proceeding afterwards is a Contempt.”); 4 VINER, *supra* note 268, at 359 (“All *Proceedings after a Certiorari allowed* are erroneous . . .”). Such sweeping decrees of invalidity sometimes conferred protection on nonparties. *See* 2 COMYNS, *supra*, at 23 (“So, if several are indicted, and one of them only brings a *Certiorari*, it shall be a *Supersedeas* to all of them.”).

503. *See* BERNARD SCHWARTZ, LAW AND THE EXECUTIVE IN BRITAIN: A COMPARATIVE STUDY 157-58 (1949) (“[C]ertiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed.” (quoting *R v. Elec. Comm'rs* (1924) 1 KB 171 at 204-05 (Atkin, LJ) (Eng.))).

504. *See R (Miller) v. Prime Minister & Cherry v. Advocate Gen. for Scotland* [2019] UKSC 41 [69].

505. *Id.*

of the common law.<sup>506</sup> Massachusetts courts followed English practice in treating the proceeding as one brought on behalf of the Commonwealth and as providing for issuance of an order to quash in appropriate circumstances.<sup>507</sup> As Dane explained, following the issuance and return of the writ, the superior court “then proceeds to act, and quash or affirm on this *certiorari*.”<sup>508</sup> By quashing, or declaring an administrative order null and void, the superior court practically ended the order’s legal effect. Thus, in *Morewood v. Hollister*, the New York Court of Appeals assessed the proper use of the writ of certiorari to review the legality of a state commissioner’s summary proceedings to discharge a debtor in bankruptcy.<sup>509</sup> Having concluded that the discharge was erroneous, the court declared the proceedings of the commissioner “null and void,”<sup>510</sup> thereby curtailing the legal effectiveness of the debtor’s discharge as a general matter.

To be sure, much of the government action quashed, compelled, or prohibited by means of the administrative writs was indivisible, meaning that courts had no choice but to relieve the whole public at once, as in the instance of orders to build or not to build a road or courthouse.<sup>511</sup> But even when the challenged action was divisible, courts of common law would occasionally deploy the administrative writs to provide more comprehensive relief. We saw this in the 1794 New Jersey certiorari case of *Justices of Middlesex County*, in which both the (indivisible) election fraud and the (divisible) assessments were equally quashed in one decree.<sup>512</sup> The justices of the Supreme Court of New Jersey explicitly premised such comprehensive relief on the tradition of judicial control reflected in the opinions of Lord Chief Justices Coke and Mansfield. In this tradition, relief “in *toto* at once” for the whole community was seen as preferable to the inconvenience, for both citizen-plaintiffs and government-defendants alike, of making “every” individual aggrieved by the unlawful

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506. See 5 DANE, *supra* note 262, at 85.

507. See *id.* at 92.

508. *Id.* at 85; see also 2 W.F. BAILEY, THE LAW OF JURISDICTION 658 (Chicago, T.H. Flood & Co. 1899) (explaining that on certiorari a court “must either quash the proceeding [below] or quash the *certiorari* which brings it here” (quoting *Basnet v. City of Jacksonville*, 18 Fla. 523, 524 (1882))); 5 DANE, *supra* note 262, at 93 (“When a *certiorari* is delivered to a justice, . . . it is a *supersedeas*, and any after proceeding is a contempt . . .”).

509. See 6 N.Y. 309, 309 (1852) (statement of the case).

510. *Id.* at 324 (majority opinion).

511. Cf. *Morley*, *supra* note 19, at 654 (arguing that district courts should certify nationwide class actions where the plaintiff “asserts an ‘indivisible’ right, meaning that it would be impossible to grant him or her relief without effectively extending such relief to other right holders”).

512. *State v. Justices of Middlesex Cty.*, 1 N.J.L. 244, 255 (1794); see *supra* text accompanying notes 259-61.

action “work[] out his own redress by a separate suit.”<sup>513</sup> Such community-wide developments on the common law side anticipate equity’s later reliance on preventing a multiplicity of suits as the justification for its interposition.

One finds the same broad relief in the mandamus decree affirmed by the Supreme Court in *Hall*, an instance in which the action compelled or restrained was (at least partially) divisible. Recall that in *Hall*, the Supreme Court approved a decree mandating that a federal railroad company “operate its road” “as one continuous line for all purposes,” thereby putting an end to *all* unlawful policies concerning the Missouri River bridge, with respect to *all* freight and commuters.<sup>514</sup> Had the Court been so inclined, it could have tailored this relief to the individual plaintiffs, without extending incidental benefits to any nonparties.<sup>515</sup> Yet such a narrow scope of relief, although likely feasible, did not occur to anyone in the case. Rather, in directing the railroad to operate its line as one continuous line with respect to, and for the benefit of, every consumer, the Court recognized that such nonparty relief flowed from the purpose of mandamus to correct a “public wrong” and enforce a “public duty.”<sup>516</sup> The *Hall* Court’s approval of a broad decree to address unlawful public action may deserve a role in contemporary debates over the history of nonparty protection before the twentieth century.<sup>517</sup>

Early nonparty-protective decrees issued out of courts of equity as well, as state courts turned, in the mid-nineteenth century, to the injunction as a substitute for the administrative writs of prohibition, certiorari, and mandamus.<sup>518</sup> Notably, such “taxpayer’s suit[s] for an injunction” were routinely

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513. *Justices of Middlesex Cty.*, 1 N.J.L. at 252, 255.

514. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 343 (1876); *see supra* notes 233-45 and accompanying text.

515. To be sure, it might not have been *practical* to limit at least some of the relief granted to the petitioners and no others. But *Hall* wasn’t a case of *strictly* indivisible relief, as were many public mandamus actions. The divisibility of the relief was especially true of the freight and passenger tariffs that were likewise enjoined universally in the initial writ, despite the ease of letting the railroad company enforce them against nonparties. Other policies could likely have been enjoined more narrowly as well. *See supra* notes 235-44 and accompanying text.

516. *See Hall*, 91 U.S. at 355.

517. Although the writ in *Hall* controlled the low-level officers of a publicly chartered railroad, the Supreme Court has consistently recognized that the common law tradition of judicial control embraced any and all government officers below (or perhaps even including) the chief executive. *See supra* text accompanying note 218; *see also* *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-99 (1867) (implying that even the President would be subject to judicial control in the proper case). Similarly, the fact that the writ concerned a geographically limited area of the railroad’s line does not undermine *Hall*’s significance; “[g]eographical lines are simply not the [relevant] stopping point” for in personam decrees. *Bray, Multiple Chancellors, supra* note 9, at 422 n.19.

518. *See supra* Part III.C.1.

deployed by state courts to provide relief against the collection of unlawful taxes by cities, counties, and even states in order to protect every aggrieved taxpayer in the relevant community, regardless of their party status.<sup>519</sup> Of course, these early, community-wide injunctions differ from today's national decrees in terms of geographic breadth. But the willingness of early courts to provide "office-wide" relief at the community level may inform the scope of relief for the improper exercise of official responsibility at the national level. Because the common law writ of certiorari was available to quash government action as a general matter, rendering it null and void, the judgment would protect all citizens within the regulatory ambit of the order. Mandamus could also operate on an office-wide basis, obliging official defendants to take specified action that would redound to the benefit of all interested citizens. Courts of equity might offer similar relief, drawing on the traditional power to grant equitable remedies where necessary to prevent a multiplicity of suits at common law.<sup>520</sup> The traditional availability of the common law public action, a proceeding for broad relief that did not depend on the rules of equity that governed class-wide relief,<sup>521</sup> thus lent support to office- or community-wide definition of the proper scope of equitable interposition.<sup>522</sup>

Viewed as combining two traditions, the *Ex parte Young* action provides tools for controlling unlawful state action on a statewide basis. As Sohoni recently documented, the Supreme Court expressed approval of nonparty-protective injunctions as early as the 1890s and approval of statewide injunctions in a handful of cases between 1916 and 1934.<sup>523</sup> Looking back upon

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519. JAFFE, *supra* note 116, at 470; *see supra* notes 259-61, 329-51 and accompanying text.

520. *See supra* notes 347-51, 375 and accompanying text; *see also* Sohoni, *Lost History*, *supra* note 10, at 935-36, 940-41, 949, 972-73.

521. As we have seen, the administrative writs were often pursued with community-wide relief in mind. Brought in the name of the Crown (in England) or of the state or people (in the United States), on the relation of one or more aggrieved individuals, the writs allowed a suitor to stand for the public in seeking relief on behalf of the whole community, thus providing a common law antecedent for community-based relief that did not depend on equity's willingness to recognize the availability of a class action. That said, the recognition of what were in effect public law class actions outside the confines of equity may not alone resolve the debate over nonparty-protective orders. In many instances, the discretionary decision to allow such public actions to proceed may well have turned on considerations similar to those that inform class-wide litigation in equity. Thus would the Scottish Court of Session temper its willingness to allow public actions with some consideration of the representative adequacy of the relator and the binding effect of the decree on nonparties. *See Pfander, supra* note 191, at 1547-54.

522. One could conceive of the Court's remedy in *Hall* as office-wide, ordering the defendants as it did "to operate the whole" railroad "as one continuous line for all purposes." *See Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 343 (1876).

523. *See Sohoni, Lost History, supra* note 10, at 929, 941-42, 958-73.

this era, many at the time hoped (and feared) that *Ex parte Young* actions would serve to authorize statewide relief.<sup>524</sup> Congress passed the first three-judge court statute in 1910 to ensure that no state policy could be enjoined by a single federal judge.<sup>525</sup> Perhaps not coincidentally, Sohoni documents the first statewide, and potentially national, injunctions issuing out of such three-judge courts soon thereafter, as early as 1916.<sup>526</sup> Reflecting upon the three-judge court in 1941, Justice Frankfurter, writing for the Court, went as far as to presume that the very “crux of the business” was to provide “procedural protection against an improvident state-wide doom by a federal court of a state’s legislative policy.”<sup>527</sup>

We do not contend that the history we recount provides a definitive answer to the questions of when or how broadly federal district courts should enjoin the federal government. Much has been written on that subject by scholars who have identified a host of factors that should inform the analysis.<sup>528</sup> We suspect the Court, when it addresses the subject more fully, will send cautionary signals. Our history shows only that the common law tradition recognized that the oversight of administrative actors will sometimes necessitate the issuance of orders to quash that operate to control an agency’s actions throughout its assigned jurisdiction.<sup>529</sup> While the early equity tradition did not deploy such orders in public law proceedings, the administrative writs help to explain the origin of such orders to quash, orders that remain a part of the judicial authority conferred on the federal judiciary in the Administrative Procedure Act (APA).<sup>530</sup> As a consequence, we have difficulty embracing the

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524. See Friedman, *supra* note 13, at 270 (quoting Senator Lee Overman for the proposition that, by 1910, there were 150 cases in which federal judges “had tied the hands of the state officers, the governor, and the attorney-general”).

525. See Solimine, *supra* note 13, at 111-18.

526. See Sohoni, *Lost History*, *supra* note 10, at 924-25, 971-73 (discussing *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916), and *Tanner v. Little*, 240 U.S. 369 (1916)). Additionally, Sohoni asserts that the Supreme Court itself issued a nonparty-protective injunction in 1913, outside of the three-judge district-court setting. See *id.* at 943 (discussing *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913)).

527. See *Phillips v. United States*, 312 U.S. 246, 251 (1941).

528. See *supra* note 19.

529. To be sure, when the power to quash through certiorari was exercised by a state supreme court, that court would typically speak for the state as a whole. Its decision as to the legality of administrative action would thus enjoy stare decisis effect and might govern nonparties as a matter of precedent. In such situations, the power to quash would not present the same multiple-chancellors problem that Bray explores in evaluating the issuance of nonparty-protective orders by lower federal courts. See generally Bray, *Multiple Chancellors*, *supra* note 9.

530. See 5 U.S.C. § 706(2) (2018) (providing the reviewing court with authority to “hold unlawful and set aside” agency action found to be, among other things, “not in accordance with law,” “contrary to constitutional right,” or “in excess of statutory  
*footnote continued on next page*

view, expressed by Justice Thomas and others,<sup>531</sup> that all broad-gauged relief lies beyond the power of the Article III judiciary as historically conceived.

### C. Equitable Originalism

In questioning the scope of federal judicial power, originalists have echoed the equitable traditionalists in urging that, in the words of Bray, “equitable doctrines and remedies of the federal courts must find some warrant in the traditional practice of equity, especially as it existed in the Court of Chancery in 1789.”<sup>532</sup> *Ex parte Young* injunctions would appear to fail that test. As of that critical date, aside from nuisance law, the High Court of Chancery played no role in the adjudication of public rights and had no power to issue injunctions against the unlawful actions of the government or its officers.<sup>533</sup> Those tasks fell, instead, to the courts of common law, deploying the administrative writs in public actions that were understood to operate in proper cases for the benefit of the public as a whole.<sup>534</sup> Equitable originalists might therefore question the legitimacy of *Ex parte Young*; they might encourage the Court to cut back on the availability of equitable remedies in public actions on the ground that the Article III judicial power does not extend to equitable suits to oversee the administrative state.<sup>535</sup>

We believe that historically minded scholars and jurists should consult both the equitable and common law traditions when assessing the scope of Article III judicial power. In defining judicial power, it makes little sense to examine the power of a court of equity or common law in isolation; after all, Article III confers the judicial power in law, equity, and admiralty, suggesting that all of the established forms of adjudication (with the possible exception of some ecclesiastical matters) were proper grist for the federal courts.<sup>536</sup> When

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jurisdiction, authority, or limitations, or short of statutory right”). For an excellent and timely defense of “the conventional understanding” that the APA’s “set aside” language empowers the reviewing court to vacate an agency’s unlawful action “for everyone”—or in toto, as the Supreme Court of New Jersey might say in issuing an old-fashioned writ of certiorari—see generally Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. (forthcoming 2020).

531. See *supra* notes 9-11 and accompanying text.

532. Bray, *Multiple Chancellors*, *supra* note 9, at 423-25.

533. See *supra* note 36 and accompanying text.

534. See *supra* Part II.C.

535. Neither Bray nor Harrison would go quite so far. Bray focuses on national orders issued at the district court level, see generally Bray, *Multiple Chancellors*, *supra* note 9, while Harrison would retain *Ex parte Young* in its narrowed form as a vehicle for the negation of wrongful government conduct, see *supra* notes 90-101 and accompanying text.

536. See U.S. CONST. art. III, § 2, cl. 1. For an assessment of the breadth of judicial power and its application to matters once characterized as proper for adjudication in the  
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the Court has considered the validity of new models of adjudication, it has looked to history for support but has not confined its search to any particular remedial form. Thus, in approving the exercise of federal judicial power in declaratory judgment matters, the Court explained that

the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.<sup>537</sup>

After identifying a host of historical analogues—some legal, some equitable—the Court had little difficulty in concluding that declaratory-style relief found ample support in the history of federal judicial practice.<sup>538</sup>

Applying such an approach, the identification of common law traditions of administrative oversight would seemingly help allay any concerns with the modern use of equitable forms to hear challenges to the legality of government action. That indeed was the conclusion apparently reached by Justice Scalia (without dissent on this point) in accounting for the origins of federal equitable relief in *Exceptional Child*.<sup>539</sup> At issue was the use of an *Ex parte Young* action to enforce a federal statute against state officials.<sup>540</sup> In the course of his opinion for the Court, Justice Scalia explained that the “ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.”<sup>541</sup> In supporting that proposition, Justice Scalia cited work by Louis Jaffe and Edith Henderson that traces the seventeenth-century

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ecclesiastical courts, see James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1541-50 (2014) (concluding that federal courts lack power to decree in church matters, as by issuing an order of excommunication, but have ample power to hear issues that were once part of ecclesiastical jurisdiction, including claims for defamation and usury).

537. *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933).

538. *See id.* at 263 (identifying boundary disputes, naturalization proceedings, interpleader actions, and quiet title actions as examples of judicial power that produce a declaration of rights rather than a judgment or decree in a form suitable for execution).

539. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015).

540. While the Court reaffirmed the availability of such relief as a general matter, it found that remedial choices made by Congress in the particular statutory scheme had impliedly displaced the *Ex parte Young* action. *See id.* at 1385.

541. *Id.* at 1384 (citing Jaffe & Henderson, *supra* note 76). On the importance of the reaffirmation in *Exceptional Child* of a “long-standing, judge-made right to sue to enjoin violations of federal law,” see DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 571 (5th ed. 2019).

English history of the common law writs of mandamus and certiorari,<sup>542</sup> the very writs that underlie our account of the origins of *Ex parte Young*. Justice Scalia's view here sees equity not in isolation from but in relation to the broader Anglo-American remedial tradition.

In contrast to equitable originalism, we would follow Justice Brandeis (and Justice Scalia in *Exceptional Child*) in explaining the rise of federal equity power in common law terms, and would embrace the gradual emergence and subsequent refinement of the equitable tradition that we now associate with the decision in *Ex parte Young*. Just as we would reject a conception of equity frozen in 1789, we do not believe that the modern contours of equitable relief were fixed by *Ex parte Young* in 1908. By adopting an evolutionary conception of federal equity, we would take account of changes in the organization of government, in the nature of constitutionalism, and in the availability of alternative remedies over time. As Richard Fallon recently explained, *Ex parte Young* "epitomize[s] two gradual transitions":

One involves a movement from the common law of torts to constitutional norms to define the standards to which the rule of law most urgently requires official adherence. The second is from damages to equitable remedies as the more indispensable safeguard of constitutional rights. Since the emergence of the modern regulatory state, the greatest threat to constitutional rights comes from statutes and regulations that are enforceable through criminal and civil penalties, not isolated acts of traditionally tortious lawlessness by individual officials.<sup>543</sup>

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542. See Jaffe & Henderson, *supra* note 76, at 350-61 (tracing the origins of certiorari and mandamus to seventeenth-century litigation over the sewer commissions and justices of the peace in King's Bench, as discussed in Part II above).

543. Fallon, *supra* note 338, at 972. One might argue that this Article's recognition of non-tort-based interposition in public law, informed by constitutional norms, stands in some tension with an earlier article's comparative assessment of remedial effectiveness in the nineteenth and twenty-first centuries. See Pfander, *supra* note 47, at 754-56 (emphasizing the centrality of tort-based damage remedies as one key to the nineteenth-century system of government accountability). But that earlier article sought to highlight the importance of a sharp-edged, routinely available, retrospective claim for damages as one element in a system of remedies and to explore the assumptions about constitutional meaning, judicial role, and political branch responsibility that underlie such a conception of remedies in the nineteenth century. The switch to a constitutionally inflected form of damages litigation, under the aegis of the *Bivens* doctrine, makes the tort-based theories of liability of the nineteenth century less immediately central to modern constitutional litigation. See Fallon, *supra* note 338, at 941-51. The nineteenth-century baseline provides an important touchstone in assessing the effectiveness of remedial schemes today and in ensuring judicial oversight of the legality of policies (like torture) and forms of policing (like that in prisons) that evade ordinary administrative, habeas, and equitable review. Cf. JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 94-98 (2017) (explaining why the Bush Administration's war-on-terror policy of extraordinary rendition and harsh interrogation evaded judicial review through the usual processes of law). One might draw on a common law baseline to help define the meaning of due process and the adequacy of *Bivens* without calling for a wholesale return to tort-based remedies for

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We acknowledge both transitions and would add a third: the nineteenth-century transition from administrative writs to equitable interposition in public law litigation. So understood, a common law conception of *Ex parte Young* helps to account for many of its puzzling features and to ground the decision and the doctrine that has grown up around it in a familiar common law process of case-by-case evolution.

While perhaps objectionable to equitable originalists, our approach may appeal to originalists of a more positivist stripe. In a series of important papers, William Baude and Stephen Sachs have advanced a theory of originalism that privileges the Founders' law except to the extent lawfully changed.<sup>544</sup> As applied to issues of equitable power, such a view of originalism might well begin with equity circa 1789 as a point of departure. But by acknowledging the possibility of lawful change, originalists of the Baude and Sachs persuasion might well embrace the legitimacy of the many decisions, recounted in Part III of this Article, that led American public law away from the common law administrative writs and toward the forms of equity. Equity, after all, can legitimately change in response to the shifting contours of the rest of the remedial system without the need for a constitutional amendment. Applying the legal rules in place at the time the relevant changes were made opens up new justificatory possibilities.<sup>545</sup> Better, one supposes, to measure the changes we recount by reference to the standards of their day, when federal equity

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government wrongs or calling for compensatory damages as the remedy of preference for all constitutional wrongs.

544. See generally William Baude & Stephen E. Sachs, Essay, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019); William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015) ("Our law is still the Founders' law, as it's been lawfully changed.").

545. See Sachs, *supra* note 544, at 845 (specifying that a change in the law, in order to be lawful, must be "made under a rule of change that was valid at the time" of the law's enactment). For an account of legal legitimacy, see RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 35-36 (2018) (defining the legal legitimacy of the Court's decisions in terms of several Justices' consistent use of interpretive methods that are generally accepted in the legal culture). Notably, in this view, decisions might be wrong but still legitimate. For a helpful elaboration of legitimacy, see Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2244, 2246-48, 2247 n.27 (2019) (reviewing FALLON, *supra*) (developing ideas of legal and moral legitimacy in an extended review of Fallon's work).

Others have traced the nineteenth-century rise of equitable forms of judicial review in evolutionary terms that appear to accept the legality of the transition. See *supra* notes 490-93 and accompanying text (describing the work of Duffy and Woolhandler). We understand that the fact of change does not, in itself, answer questions of legitimacy. We would observe, however, that nineteenth-century judges viewed the authority conveyed by the standing federal legislative grant of equity power in capacious terms. *Erie* does not negate the legality of all that was done during the era of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), despite later overruling it.

made statutory rights of action less essential, than to evaluate them either by reference to the practice of the English Court of Chancery in 1789 or by reference to today's text-centric perspective on rights to sue. If originalism, leavened by legitimate change, is "our law,"<sup>546</sup> then perhaps *Ex parte Young* and its progeny can fairly claim a place in it.

Finally, by articulating an origin story that sees law and equity as part of a system of remedies, each in some sense linked to the adequacy of the other, our account brings *Ex parte Young* within a venerable tradition in the scholarship and jurisprudence of federal courts law.<sup>547</sup> That tradition holds that remedies serve to some extent as substitutes for one another, filling gaps in the law that might arise either from misadventures or misguided legislative interventions.<sup>548</sup> Equitable originalism threatens to deprive the system of this gap-filling quality by rooting doctrines in a historical moment when equity had precious little role to play in matters of public law. By seeing *Ex parte Young* as the product of a systemic response to perceptions of remedial inadequacy, the account here explains both the doctrine's appearance and its capacity for adaptation to the needs of today.

### Conclusion

Modern equity-based judicial review in public law cases owes much to the common law writs of mandamus, certiorari, and prohibition. That indeed was the lesson of Justice Brandeis's opinion in *Crowell v. Benson*, with which this Article began. The same writs that gave rise to what has come to be known as nonstatutory or common law review of administrative action also underlie the use of injunctive relief to test the constitutionality of state action. *Ex parte Young* arose from the writ tradition, drawing on the common law's boundary-setting and duty-enforcing principles to police state compliance with constitutional limits.

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546. See Baude, *supra* note 544, at 2352.

547. See Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2556 (1998) (defending *Ex parte Young* as "entirely consistent with the original presupposition that the Constitution would be implemented through an evolving remedial system"); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787 (1991) (quoting Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953), famously called "Hart's Dialogue," for the propositions that "[h]istory has a lot to do with" the scope of constitutional remedies and that wide substitutability of remedies, one for another, has been upheld).

548. See Fallon & Meltzer, *supra* note 547, at 1789 (linking the Hartian concept of substitutability to the systemic importance of ensuring reasonable governmental compliance with the rule of law).

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When looking for the origins of the judicial power exerted in *Ex parte Young*, then, the key lies not in the equitable tradition of the antisuit injunction but in the promise of *Marbury*. Such a focus on the common law writs explains the Court's decisions, in *Ex Parte Young* and its progeny, to reject the state's claims of sovereign immunity, to interpose in a criminal enforcement matter, to do so in the absence of any threat of tortious conduct on the part of state officials and without any express cause of action, and to offer forms of affirmative relief—as well as its recognition that courts can, on appropriate occasions, fashion remedies that ramify beyond the parties to the suit. A jurisprudence of equitable originalism may struggle to take these developments on board, blinding jurists to the role that an evolving public action can play in the preservation of government under law.