Federal Injunctions and the Public Interest

Gene R. Shreve
Indiana University Maurer School of Law, shreve@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Jurisdiction Commons, Litigation Commons, and the Public Law and Legal Theory Commons

Recommended Citation
Federal Injunctions and the Public Interest

Gene R. Shreve*

In 1937, the Supreme Court observed, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."¹ The point has been restated so often by federal courts that it has become an aphorism.² Commentators and courts have attempted to ascribe various truths to the idea, asserting that it means equitable discretion is virtually limitless, and therefore the advancement of public policy is easily accommodated within courts’ power to grant injunctions;³ or that equity doctrine restricting the availability of injunctions should not be permitted to block realization of public-policy goals;⁴ or that a federal court can forebear from the issuance of an injunction warranted under equity doctrine on grounds of public policy.⁵ This Article asserts that these

Copyright © 1983 by Gene R. Shreve.


The author wishes to acknowledge the research suggestions of Wythe Holt and the assistance of Maurice J. Holland, Peter Raven-Hansen, Richard H. Seeburger, and Roger Trangsrud, who read and made helpful comments on the manuscript. Any aspects of the Article which trouble the reader are, of course, attributable solely to the author. The research assistance of Frank N. Olmstead, Vermont Law School Class of 1982, and Billie Grey, National Law Center Class of 1983, is also gratefully acknowledged.

3. See infra notes 27-33 and accompanying text.
4. See infra notes 97-159 and accompanying text.
5. See infra notes 160-76 and accompanying text.
attempts are misguided.

Part I of this Article undertakes a limited restatement, reformation, and defense of some of the ideas used to limit federal equitable discretion. From its English Chancery origins, injunction decision making has been based on ideas of equitable discretion, and the bulk of equity doctrine has been devoted to rules restraining the exercise of that discretion. Traditionally, core elements of equitable restraint have been gathered under the rubric: "equitable jurisdiction." This Article rejects the prevailing view that the restraints of equity should be discarded. Instead, the author offers a theory of equitable jurisdiction that, it will be argued, has potential for illuminating and, in appropriate cases, averting potential burdens on the principals in the injunction proceeding, and strains on the judicial process. Not only can each element of equitable jurisdiction be seen as having its own resonance and utility, in addition, the elements can be combined to form a decisional framework facilitating principled, closely reasoned decisions granting or denying injunctions. The author concludes that, thus viewed, equity doctrine can be brought into the developing mainstream of procedural jurisprudence: the contemporary shift from the formalistic to the instrumental, from rule to method.

Part II probes application of the author's theory of equitable jurisdiction to the sphere of federal litigation in which the resilience and growth of equity doctrine faces its strongest challenge: cases affecting the public interest. Discussion in this section provides opportunities both to elaborate and test the author's theory and to use the theory as an instrument for evaluating the soundness of equity decisions made in the face of public-interest arguments. To consider whether equity should go further than the limits of equitable jurisdiction would suggest in order to advance public policy, part II examines Hecht Co. v. Bowles\(^6\) and related cases, in which Congress may have attempted to abbreviate the federal courts' equitable jurisdiction inquiry. To consider whether equity should go further to withhold relief in the name of public policy, part II examines Younger v. Harris\(^7\) and similar cases, in which injunctions against state statutes challenged as unconstitutional were denied in the name of federalism. The Article concludes that, properly understood, doctrines of equitable jurisdiction are capable of accommodating many important public-policy concerns, and that the further, unstructured use of public policy to overturn the result of a properly conducted equitable-jurisdiction inquiry promotes injustice and distorts equity doctrine.

---

\(^6\) 321 U.S. 321 (1944).

\(^7\) 401 U.S. 37 (1971).
I. A Theory of Equitable Jurisdiction

A. Nature and Origins of Federal Equity Power

Article III of the United States Constitution extends the federal judicial power to cases "in Law and Equity." Federal trial courts have been empowered to grant equitable relief since the Judiciary Act of 1789. In exercising this power, federal courts have adopted doctrines of judicial restraint developed in the English Chancery Court. The sum of these doctrines, termed "equity jurisdiction" by Justice Story, is today exercised by state as well as federal courts.

8. U.S. Const. art. III, § 2. The provision was considered at the Constitutional Convention. After one objection to the "vesting of these powers in the same Court," it passed by a vote of six yes, two no, and three absent. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 428 (1937).


Section 16 of the Judiciary Act required that federal equity power not be exercised "where plain, adequate and complete remedy may be had at law." Scholars have suggested that Congress imposed this restriction in lieu of making federal equity suits subject, as federal law actions were, to the Rules of Decision Act, 28 U.S.C. § 1652 (1976). P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 728 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]. This view appears correct: when Congress repealed the restriction in 1948, it simultaneously made federal equity proceedings subject to the Rules of Decision Act.

10. See Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945); G. MCDOWELL, supra note 9, at 47; Morse, The Substantive Equity Historically Applied by the United States Courts, 54 Dick. L. Rev. 10 (1949); Developments in the Law — Injunctions, 78 HARV. L. Rev. 994, 997 (1965) [hereinafter cited as Developments — Injunctions].

Earliest equity decision making was diffused throughout the English legal system. By the fourteenth century, it had evolved into a separate system, which remained isolated from English law practice until the Judicature Acts of 1873 and 1875 abolished the Chancery and merged law and equity. These and other developments in English equity practice are discussed at length in Hazeltine, The Early History of English Equity, in ESSAYS IN LEGAL HISTORY 261-85 (P. Vinogradoff ed. 1913); 5 W. HOLDsworth, A HISTORY OF ENGLISH LAW 336-38 (1924); F. MAITLAND, EQUITY 1-16 (2d ed. 1938) and Adams, The Origin of English Equity, 16 COLUM. L. Rev. 87 (1916). English equity was shaped in substantial part by the intellects and imaginations of the strongest figures who attained the office of Chancellor. For profiles of the most important, see T. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 695-707 (1956).

11. 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 68 (1972).

12. Although state courts today have developed extensive equity jurisprudence, see, e.g., State ex. rel. Turner v. United-Buckingham Freight Lines, Inc., 211 N.W.2d 288, 290 (Iowa 1973), "in 1789 equity was either non-existent or undeveloped in the courts of many of the states." HART & WECHSLER, supra note 9, at 664; see also L FRIEDMAN, A HISTORY OF AMERICAN LAW 130-131 (1973) (states without a developed equity system often allowed litigants to make equitable claims in cases "at law"). This may explain why federal equity courts were not required by statute to conform their practice to state practice, as were the federal law courts. See C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 32-33 (1947). Instead, the product of the Supreme Court's first exercise of its rulemaking power, the Equity Rules of 1822, 20 U.S. (7 Wheat.) v. government equity practice in the federal courts. HART & WECHSLER, supra note 9, at 665. For a thorough discussion of the Rules as applied by the federal courts, see Lane, Federal Equity Rules, 35 HARV. L. Rev. 276 (1922). The federal equity rules lost effect in 1938, when Congress merged federal law and equity practice in enacting the Federal Rules of Civil Procedure. See F. JAMES & G. HAZARD, CIVIL PROCEDURE 21-22 (2d ed. 1977). These rules now govern all equity cases in federal courts. FED. R. Civ. P. 1. On the effect of the Federal Rules on prior equity practice, see Holtzoff, Equitable and Legal Rights and Remedies under the New Federal Procedure, 31 CALIF. L. Rev. 127 (1943) (observing that the new rules abolished only the procedural distinctions between law and equity, without affecting differences in rights, remedies, and substantive rules).
Historically, equitable jurisdiction required a party seeking equitable relief to meet a different and frequently more onerous burden of justification than that required to secure a legal remedy. Because courts used their discretion in granting equitable relief, the definition of equitable jurisdiction — that is, equitable power — quickly became a survey of the principal rules limiting that discretion.

These limiting rules have gradually become most significant as applied to the modern equitable remedy, the injunction. Three concerns of equitable restraint are central to every case in which an injunction is sought. Petitioner must demonstrate that, without the injunction, he would suffer harm that would be immediate, substantial, and irreparable. In addition, concerns of injunction managea-

13. Use of the term "equitable jurisdiction" with respect to federal courts risks creating confusion between equitable power and federal subject-matter jurisdiction. Justice Holmes took pains to distinguish the two in Massachusetts State Grange v. Benton, 272 U.S. 525 (1926). There the Court refused to authorize an injunction on the grounds that it lacked equitable jurisdiction. Justice Holmes explained: Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked. In a strict sense the Court in this case had jurisdiction. It had power to grant an injunction, and if it had granted one its decree, although wrong, would not have been void. Id. at 528. A similar distinction is attempted in D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 62 (1973).

In operation, of course, the two doctrines are different. In addition, federal equitable jurisdiction is derived from an older and broader tradition than is subject-matter jurisdiction, which is largely idiosyncratic to federal courts. Nonetheless, this Article suggests that the two do at times converge. See infra notes 123-28 and accompanying text.

The risk of confusion does not seem to have discouraged use of the term equitable jurisdiction. See, e.g., United Steelworkers of Am. v. United States, 361 U.S. 39, 40-41 (1959); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); Meredith v. City of Winter Haven, 320 U.S. 228, 236 (1943); Douglas v. City of Jeanette, 319 U.S. 157, 162 (1943).

14. In the sixteenth century, St. Germain wrote that it was the "intent [of] equytie . . . to temper and mitigate the rigour of the law." C. St. Germain, Dialogues between a Doctor of Divinity and a Student in the Laws of England 45 (W. Muchall 18th ed. 1782); see also 4 W. Holdsworth, supra note 10, at 281 (equity is necessary in order that the law can do complete justice); G. McDowell, supra note 9, at 15-18 (discussing Aristotle's theories on the need for equity to lessen the severity of positive law). Justice Story observed: "In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right . . . ."

1 J. Story, supra note 11, at 1.

These justifications for equity offer little help in suggesting limits upon the use of equitable power, and the prospect of abuse of equitable discretion has evoked hostility. Consider John Selden's famous remark that equity, "a roughish thing," depended upon the length of the Chancellor's foot. H. McClintock, Handbook of the Principles of Equity 50 n.8 (2d ed. 1948). Several scholars have asserted that equity decision making be confined by precedent. See F. Maitland, supra note 10, at 13; G. McDowell, supra note 9, at 30-31, 43. Others have argued that to circumscribe equitable discretion by proposing rules of general application would destroy equity's vitality and unique contribution to the law. See Emmerglick, A Century of the New Equity, 23 Tex. L. Rev. 244, 249-50 (1945); Pound, The Decadence of Equity, 5 Colum. L. Rev. 20, 24 (1905). 15. Professor Maitland described the injunction as one of three remedies to evolve from equity, the other two being specific performance and judicial administration of estates. F. Maitland, supra note 10, at 22. For early examples of possible uses of the injunctive remedy, see id. at 318-19, and 2 J. Story, supra note 11, at 163-64.

16. See infra notes 52-64 and accompanying text.

17. See infra notes 65-69 and accompanying text.

18. See infra notes 70-78 and accompanying text.
play a role; courts should deny the injunction or restrict its scope if serious difficulties in framing or enforcing the decree exist.\textsuperscript{20} Other snares have awaited parties seeking equitable relief. Until recently, equity's protections were confined to property as opposed to personal rights.\textsuperscript{21} Assorted maxims borrowed from English practice — for example, that petitioner must seek an equitable remedy with clean hands or must not be tardy in seeking an injunction\textsuperscript{22} — have found their way into federal\textsuperscript{23} and state\textsuperscript{24} equity jurisprudence, as has the invention of balancing the equities.\textsuperscript{25} All of these notions could be considered part of equity jurisdiction in the largest sense. But the first four criteria — imminence, substantiality, irreparability, and manageability — are most important and are perhaps the only concerns consistently capable of sustaining the burden of justification that refusal to issue an injunction carries. These four shall provide the list of elements in the theory of equitable jurisdiction developed in this Article.\textsuperscript{26}

B. Equitable Jurisdiction Under Attack

An increasing number of scholars have asserted that the constraints of equity jurisdiction have outlived whatever purposes they once served and should therefore play a reduced part in a court's decision to grant or deny an injunction.\textsuperscript{27} Professor Fiss has advanced what is perhaps the most formidable attack. He contends that the constraints

\begin{enumerate}
\item See infra notes 79-80 and accompanying text.
\item See Developments — Injunctions, supra note 10, at 1012-13; cf. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor . . . to mould each decree to the necessities of the particular case.").
\item Several scholars have severely criticized the attempt to draw a line short of the protection of personal rights. E.g. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 HARV. L. REV. 640, 681-82 (1916); Zammit, Developments in the Law of Equitable Remedies, 51 N.Y. ST. BAR J. 563, 564 (1979). The distinction has been rejected in most jurisdictions. E.g., Maxwell v. Sutton, 621 S.W.2d 239, 240 (Ark. App. 1981); Kenyon v. City of Chicopee, 320 Mass. 528, 534, 70 N.E.2d. 241, 244-45 (1946).
\item See generally H. McLINTOCK, supra note 14, at 59-60, 71-76 (discussing the development of the clean hands doctrine and the maxim that equity aids only the vigilant).
\item See Gorham v. Sayles, 23 R.I. 449, 453-54, 50 A. 848, 850 (1901) (denying equitable relief because of petitioner's delay in bringing suit).
\item For different attempts to assign an order of importance to elements of equitable discretion, see Winner, The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions, 9 ENVTL. L. REV. 477, 489 (1979) (advocating an expanded role for the balancing of equities in injunction decision making), and W. DEFUNIAR, HANDBOOK OF MODERN EQUITY 10 (1956) (observing that the requirements of no adequate remedy at law and substantial harm are the two main prerequisites to equitable jurisdiction).
\end{enumerate}
of equitable jurisdiction have placed the injunction in an inferior position within the hierarchy of remedies, as it is much easier for plaintiffs to obtain a legal remedy, such as damages, than it is to obtain an injunction.\(^{28}\) He argues that this subordination of the injunction to damages is unjustified; the decision as to which remedy is superior, he contends, is better left to individual plaintiffs to resolve according to the needs of their case.\(^{29}\) Professor Fiss focuses his attack on the element of equitable jurisdiction that brings the subordination of the injunction into sharpest perspective: the requirement that plaintiff establish the need for an injunction to avoid irreparable harm,\(^{30}\) or the similar requirement that plaintiff have no adequate remedy at law.\(^{31}\) Other critics have made similar attacks: some scholars question whether equity courts should retain the irreparable-injury requirement,\(^{32}\) and another may have come close to defining it out of existence.\(^{33}\)

The critics are partially correct. The injunction does occupy an inferior hierarchical position in the law of remedies. In an action for damages, plaintiff need not establish that the harm he suffers is substantial.\(^{34}\) To obtain an injunction, however, plaintiff must show that the equitable remedy is necessary to avert substantial harm.\(^{35}\) In addition, the irreparability-adequacy requirement permits courts to deny injunctive relief to some plaintiffs who face certain and substantial wrongs. In such cases, the courts will devalue plaintiff's rights by substituting for injunctive relief the prospect of compensation or consolation. In short, defendant is left free to infringe plaintiff's rights and, at most, either pay plaintiff damages later, or in some other way rescind the transgression in a non-equity proceeding.\(^{36}\)

28. O. Fiss, supra note 27, at 1.
29. Id. at 6. Professor Fiss advocates a nonhierarchical approach for all types of injunctions, not just the civil rights injunction. Id.
30. Id. at 38-39.
31. For a comparison of the irreparability and adequacy requirements and the conclusion that the two are not identical, see infra notes 70-78 and accompanying text.
32. See Hammond, supra note 27, at 276; Rendleman, supra note 27, at 347-48.
33. Quoting Terrence v. Thompson, 263 U.S. 197, 214 (1923), Professor Laycock suggests that "no legal remedy is adequate unless it is 'as complete, practical and efficient as that which equity could afford.' " Laycock, supra note 27, at 1071. This formulation of the adequacy requirement is well-known, see W. DEFUNIAK, supra note 26, at 9-10; H. McClintock, supra note 14, at 103; Simpson, Fifty Years of American Equity, 50 Harv. L. Rev. 171, 237 (1936), but it no longer reflects federal doctrine. On the resurgence of the adequacy requirement, see infra note 73.
35. See infra notes 65-69 and accompanying text.
36. For example, a federal court could refuse to enjoin state criminal proceedings
The critics accurately identify the effect of equitable jurisdiction in producing hierarchy of remedies; but in suggesting that elements of equitable jurisdiction should be forsaken because they no longer serve their purpose, they attack straw men. Critics typically identify two rationales for the irreparability-adequacy requirement: that it is a need generated by the maintenance of law and equity as separate systems, and that it is a means of assuring the right to a jury trial, which is available only in actions at law. They argue against retaining the requirement by suggesting that both justifications have weakened considerably over time. The trend toward merger of law and equity may indeed have undercut the first argument in favor of the irreparability-adequacy requirement. However, the case for the requirement has not weakened much because of the merger. Similarly, the desire to preserve jury trials may once have been a more persuasive argument for the irreparability-adequacy requirement than it is today. But the case for the irreparability-adequacy requirement does not depend on that argument either. The contemporary justifications for the irreparability-adequacy requirement and other elements of equitable jurisdiction that subordinate the injunction in the hierarchy of remedies have nothing to do with jury trials or the merger of law and equity.

C. The Function of Equitable Jurisdiction

The restrictions that appear as elements of equitable jurisdiction upon a sufficient expectation that the state criminal court will dismiss them. This appears to have happened in Douglas v. City of Jeanette, 319 U.S. 157 (1943), since the Supreme Court invalidated the local ordinance under attack in Douglas on the same day it decided that case. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). For further discussion of the relation between the two cases, see HART & WECHSLER, supra note 9, at 1012 n.1.

37. O. Fiss, supra note 27, at 44, 50-51; W. Walsh, A Treatise on Equity 134 (1930); Hammond, supra note 27, at 240-49; Laycock, supra note 27, at 1078-83.

38. O. Fiss, supra note 27, at 51; Laycock, supra note 27, at 1079-82. Interesting research and argument has recently surfaced for the position that the merger of law and equity should be cause for greater rather than less restraint in the exercise of equitable power. Professor McDowell takes this position in his book, Equity and the Constitution, and ascribes the same view to Francis Bacon, Joseph Story, and antifederalists who participated in the constitutional debates. G. McDowell, supra note 9, at 7-8, 27, 44, 80.


40. See D. Dobbs, supra note 13, at 61 (arguing that jury trials have simply become less significant in most cases). Now seems a particularly poor time to attribute much importance to the right to a jury trial, given that the right, especially in complex civil litigation, is in the process of redefinition. See generally Lempert, Civil Juries and Complex Cases: Let's Not Rush to Judgment, 80 Mich. L. Rev. 68 (1981) (discussing the difficulties of attempting to limit the right to jury trial in complex cases); Lunenburg & Nordenberg, Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Litigation, 67 Va. L. Rev. 887 (1981) (discussing possible alternatives to jury trials in complex civil litigation).

41. See H. McClintock, supra note 14, at 48-49. But see D. Dobbs, supra note 13, at 61 (asserting that the primary reason today for retaining the adequacy requirement is that the plaintiff who seeks equitable relief has precluded the possibility for defendant to obtain a jury trial).
serve to minimize the number of injunctions that courts issue. The particularly onerous burdens that the injunction places upon the defendant and the issuing court necessitate these constraints.

Remission of plaintiff to a damage proceeding may debase the value of his right, but the issuance of an injunction may exact an exaggerated cost from the defendant. The injunction’s purpose is to avert harm to the plaintiff by incapacitating the defendant. Incapacitation poses the threat of adjusting more aspects of the defendant’s behavior than those that would wrong the plaintiff if the injunction were not issued. It is difficult if not impossible to so finely adjust an order that it protects plaintiff without impairing defendant’s harmless activities or the rights of those who are not represented before the court.

A second burden that defendant must bear as the addressee of an injunction is the specter of civil and criminal contempt. It is not always easy to determine the meaning and scope of an injunction, and defendants who wish to protect themselves against contempt liability must sometimes choose between foregoing desired behavior and undergoing the cost of clarifying or modifying the injunction.

Injunction proceedings also place special burdens on courts. Unlike the trial of factual issues in damage actions, trial in injunction proceedings is future-directed. The judge must contend with a

42. See supra notes 28-33 and accompanying text.
43. Some object to allowing the defendant the option of wrongdoing plaintiff and then paying damages, see, e.g., Chayes, The Supreme Court, 1981 Term — Foreward: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4, 45-46 n.260 (1982) (hereinafter cited as Chayes, Public Law Litigation], but at least that serves to confine the remedy to plaintiff’s proper sphere of concern. In contrast, to require by injunction that the defendant close his business in order to cease the pollution of plaintiff’s property imposes a much cruder remedy. If plaintiff had sought an injunction to close the same business in order to ruin shareholders, render employees jobless, or erode the local tax base, the injunction would, of course, have been denied. Yet these effects may flow just as certainly from an injunction sought and granted on anti-pollution grounds.

Of course, it may be possible in some cases to so tailor or condition injunctive relief as to ameliorate the burden on defendant. See Spur Indus. v. Del E. Webb Dev. Co., 108 Ariz. 178, 186, 494 P.2d 700, 708 (1972) (en banc); Rabin, Nuisance Law: Rethinking Fundamental Assumptions, 63 VA. L. REV. 1299, 1301-09 (1977); cf. Yakus v. United States, 321 U.S. 414, 440 (1944) (describing the court’s discretion to “avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if plaintiff’s contentions are not sustained”).

44. Disobedience of an injunction gives rise to liability for civil contempt; moreover, willful disobedience may give rise to criminal liability. Developments — Injunctions, supra note 10, at 1086. See generally Dobbs, Contempt of Court: A Survey, 56 CORNELL L. REV. 183, 235-49 (1971) (discussing the procedural consequences of classifying a contempt proceeding as criminal or civil).
45. For an examination of contempt, clarification, and modification proceedings, see Developments — Injunctions, supra note 10, at 1078-91.
46. See United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). Attempts to further divide injunctions into mandatory and prohibitory injunctions, e.g., Kettenhofen v. Superior Court, 55 Cal. 2d 189, 191, 358 P.2d 684, 685, 10 Cal. Rptr. 356, 357 (1961), are unprofitable, because of the impossibility in certain cases of determining whether the
number of competing hypotheses — all to a greater or lesser degree speculative — about expected events and behavior. He must grapple with language for the decree that is sufficiently clear to govern the future, and preside over differences of opinion about what the language of the decree does or should mean. Finally, he must place the dignity of his judicial office on the line in demanding obedience to his order.

The implications of the injunction for the litigants and the court suggest the need for careful decision making. Despite the avowed intention of courts to use their considerable discretion to strike balances to fit the particular case, the censure that critics have directed against equitable restraint may derive in part from a not unjustified dissatisfaction with judges' failure to balance difficult considerations in a thoughtful, closely reasoned way. This failure is particularly evident in equity cases brought by government enforcement agencies. But it is as much the nature of equity doctrine to experience rebirth as ossification. If used properly, the elements that this Article asserts should compose equitable jurisdiction can today accommodate the variables to decide the difficult cases.

1. Immediate and Substantial Harm

Both English and American equity courts developed the requirements that harm necessary to justify an injunction be immediate and substantial. One of the best illustrations of their use appears in the English Chancery case, Fletcher v. Bealey. The plaintiff feared that the river water it used to produce high-quality paper products would be polluted so as to make plaintiff's continued operation impossible. It sought an injunction against defendant as the potential injunction's desired effect is to prohibit or to order an affirmative act, see Developments — Injunctions, supra note 10, at 1062-63. It is enough to say that all injunctions are future-directed in that they all seek to protect the plaintiff by removing a behavioral choice of the defendant.

47. Of course there are injunction cases in which, absent an apocalypse, the shape of the future is reasonably clear, just as there are damage cases that require guesswork about the future. See Leubsdorf, Remedies for Uncertainty, 61 B.U.L. Rev. 132, 137 (1981). Courts may sometimes find it more difficult to estimate damages than to frame an injunction. Id. at 142. However, most damage awards are in compensation for past wrongs. Courts awarding damages treat evidence as empirical data tending to prove historical incidents of interest to the litigants. Issues in such cases may be difficult, but at least the past has already happened — and it happened only one way.


49. See authorities cited supra note 27; L. Friedman, supra note 12, at 346-47; Emerglick, supra note 14, at 248-50; Pound, supra note 14, at 29.

50. See infra notes 98-159 and accompanying text.

51. Equity is capable of continual adjustment and growth. See Redden, Equity: A Visit to the Founding Fathers, 31 Va. L. Rev. 753, 753 (1945); Simpson, supra note 33, at 751. For an early illustration of how instrumental utility can be derived from ostensibly wooden equity dogma, see Professor McClintock's seminal article, Adequacy of Ineffective Remedy at Law, 16 Minn. L. Rev. 233 (1922) (asserting that a remedy available at law may not be adequate if the remedy is in practice ineffective).

52. 28 Ch. D. 688 (1885).

53. Id. at 690.
luter, alleging that defendant was negligently maintaining a chemical waste dump upstream.\textsuperscript{54} There was no proof that defendant had polluted the river in the past, therefore the court required plaintiff to show “proof of imminent danger” and “proof that the apprehended damage will, if it comes, be very substantial.”\textsuperscript{55}

Plaintiff offered three different hypotheses about the future. Plaintiff argued that a “pernicious” liquid would ooze from the chemical waste and flow into the river.\textsuperscript{56} Rejecting this argument, the court reasoned that if the liquid reached the river, it might do so only after a considerable length of time. By then it was probable that scientists working on pollution control would discover a way to render the liquid innocuous.\textsuperscript{57} Plaintiff also alleged that a landslide would cause defendant’s chemical waste to fall into the river.\textsuperscript{58} The court doubted that the landslide would occur, and, if it did, that it would carry the refuse into the river, or more than temporarily delay plaintiff’s business.\textsuperscript{59} Finally, plaintiff asserted that a canal wall would collapse and cause the waste to fall into the river.\textsuperscript{60} Though conceding that the wall had fallen several times,\textsuperscript{61} the court nevertheless denied plaintiff’s request for an injunction, as it was uncertain whether the wall would break again and unsure about the resulting damage if it did.\textsuperscript{62}

\textit{Fletcher} illustrates how equity courts can effectively use the requirements of imminence and substantiality in tandem. But the requirements should be understood to represent different concerns. The concept of prematurity implicit in the imminence requirement suggests that there exists a period of time during which neither of two possible outcomes can be considered as unlikely to occur. Eventually, the plaintiff will either be able to assure the court of impending harm and still retain the opportunity to avert harm by securing an injunction,\textsuperscript{63} or plaintiff’s fear of being harmed by the defendant will

\begin{itemize}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.} at 698.
\item \textsuperscript{56} \textit{Id.} at 690.
\item \textsuperscript{57} \textit{Id.} at 700. The court also hypothesized several devices that would prevent the liquid from flowing into the river. \textit{Id.}
\item \textsuperscript{58} \textit{Id.} at 690.
\item \textsuperscript{59} \textit{Id.} at 701-02.
\item \textsuperscript{60} \textit{Id.} at 690.
\item \textsuperscript{61} It fell, I think, in 1876, and it fell again curiously enough confirming the predictions of the Plaintiff’s witnesses, between the month of August, when the trial of this action was commenced, and the month of December, when the hearing was resumed. In August the Defendants’ witnesses magnified the beauty and excellence of this wall, and said that it had been built with the greatest possible care at an expense of 20,000 [pounds], and that it would stand as long as the world lasted. But, notwithstanding, in the month of October, another fall occurred. \textit{Id.} at 702.
\item \textsuperscript{62} \textit{Id.} at 703.
\item \textsuperscript{63} When the prospect of harm has come so near that there is no longer time for plaintiff to secure an injunction, the court has waited too long. Procedures for obtaining presumably rapid interlocutory injunctive relief in federal and many state
\end{itemize}
prove unwarranted. Time will tell which possibility materializes, and it seems fair for the court to refuse to enjoin defendant's activity during the interim. If the plaintiff obtains an injunction prematurely, the court will never know which possibility would have occurred. The defendant will then have lost the opportunity to demonstrate by his voluntary future conduct that plaintiff's fears were unjustified. Imposing the burdens of a possibly needless injunction on defendant and the court is unwarranted.

The requirement of substantial harm suggests a different concept. One might think that once plaintiff shows that a legal wrong underlies his request for an injunction, the court's inquiry into substantive law is at an end. The substantiality test indicates that such a supposition is impossible. Applying the test strictly, a court may deny a request for an injunction to a plaintiff in imminent danger of being wronged by a defendant because the wrong is not substantial. That this seems to discredit and perhaps redefine substantive law may explain the apparent reluctance of equity courts to characterize imminent wrongs as insubstantial.

The most significant use of the substantiality requirement is to bolster the imminence requirement. In *Fletcher v. Bealey*, the court questioned whether a landslide would occur, whether the landslide would carry pollutants into the water, and whether the pollution would cause plaintiff great harm. Note the court's scarcely perceptible shift from imminence questions one and two to substantiality question three. The court's rhetoric is: "no harm is imminent, at least no real harm."

2. *The Irreparability-Adequacy Requirement*

The requirement that, to obtain equitable relief, a plaintiff must have no adequate remedy at law, is derived from early English Chancery practice. Some scholars assert that the adequacy requirement and the requirement that the harm to be averted by the injunction be irreparable represent but one rule. Indeed, courts frequently collapse the two into one. Maintaining two formulations of a rule that em

courts should have the effect of extending the period of prematurity. On the nature and availability of interlocutory injunctive relief, see Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978).

64. Federal courts may perceive this issue as one of subject-matter jurisdiction, viewing the argued speculative nature of the harm as raising case or controversy problems under article III of the United States Constitution. See *Babbit v. United Farm Workers Nat'l Union*, 422 U.S. 289, 297-305 (1979); *O'Shea v. Littleton*, 414 U.S. 488, 493-99 (1974).


66. *Cf.* Rendleman, *supra* note 27, at 346 ("Remedial doctrine does not concern itself with defining substantive interests but, instead, concerns itself with the proper method of vindicating interests that wrongdoers have injured.").

67. In such cases, plaintiffs may eventually be able to obtain nominal damages.

68. 28 Ch. 688 (1885).

69. See *supra* notes 59-62 and accompanying text.

70. See F. *Maitland*, *supra* note 10, at 4-7; W. *Walsh*, *supra* note 37, at 132.

71. See O. *Fiss*, *supra* note 27, at 38; Laycock, *supra* note 27, at 1070.

ploy such dissimilar language invites mischief.\textsuperscript{73} If they both expressed the same idea, it might be desirable to discard one or the other. But, similar as the tests are, they do not express quite the same idea.

The adequate-remedy-at-law formulation poses the question: is it fair to permit plaintiff to seek an injunction when plaintiff could have selected a less onerous remedy — perhaps damages — that would, in a rough sense, protect the same interests? The irreparable-injury formulation poses the somewhat different question: are there other noninjunctive proceedings that are likely to repair, in a rough sense, the harm plaintiff seeks to avert by injunction?

Application of the Supreme Court's instruction in \textit{Douglas v. City of Jeannette},\textsuperscript{74} illustrates the difference between the irreparable-injury and adequate-remedy-at-law formulations. In \textit{Douglas}, plaintiff sought an injunction in federal district court against the threatened enforcement in state court of a municipal-tax and licensing ordinance alleged to be unconstitutional.\textsuperscript{75} The Supreme Court dismissed the case for lack of equity jurisdiction, reasoning that a federal court should be particularly careful to scrutinize cases for want of equity jurisdiction "where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court."\textsuperscript{76}

For a federal court to rule in a case like \textit{Douglas} that it will not enjoin a state criminal proceeding because the plaintiff's status as a criminal defendant gives him an adequate remedy at law\textsuperscript{77} is nonsensical. An individual in the pressed and involuntary straits of a crimi-
nal accused hardly enjoys a "remedy." In contrast, the irreparable-injury requirement can justify the denial of an injunction in such cases. It is not relevant whether the state criminal trial is not a remedy, or that the plaintiff could not reasonably be expected to invoke it, as long as the prospect of prosecution is certain. If the constitutional claim that plaintiff seeks to have resolved and enforced by injunction can also be resolved by the state criminal court and enforced through dismissal of criminal charges, the question becomes whether the value to the plaintiff in vindicating his right in federal court justifies the burden the equity proceeding places on the defendant and the federal court.\(^7\)

3. Manageability

Courts unable to decide the proper language and scope of a decree, or how and whether it can be enforced, should refuse to issue an injunction, on grounds that it would not be manageable.\(^7\) An injunction issued under such circumstances would likely be unclear or over-inclusive, and therefore would exacerbate many of the problems considered earlier.\(^8\) These injunctions will usually impair aspects of defendant's behavior that are not properly plaintiff's concern. They are also likely to create dangers of contempt liability for defendants or the expense of supplementary proceedings. In addition, unmanageable injunctions will almost certainly dissipate the court's energy and diminish its prestige.

4. Structure and Flexibility

The foregoing attempt to attribute contemporary functions to traditional elements of equitable jurisdiction suggests some outer limits on their legitimate use. But courts must be free to balance these elements in individual cases because they will necessarily vary.\(^8\) This Article urges a reformation of the present system of equitable jurisdiction, in which to announce the rule is to decide the case. What is needed is a framework of considerations that is sensitive to the way factors in the injunction dispute will register and combine differently.

\(^7\) See infranotes 178-91.

\(^7\) That problems in framing or enforcing the decree may justify denying the requested remedy is not, in itself, a new idea. Marble Co. v. Ripley, 77 U.S. 339, 358-59 (1870); Developments in the Law — Equity — 1933, 47 Harv. L. Rev. 1174, 1185 (1934) [hereinafter cited as Developments — Equity]. The term, "manageability," may, however, be new to this context. Its more familiar use is with reference to class action suits under Federal Rule of Civil Procedure 23(b) (3). See Developments in the Law — Class Actions, 89 Harv. L. Rev. 1318, 1498-1504 (1976).

\(^8\) Whether the harm to the plaintiff is imminent is a question of fact. See United States v. W.T. Grant Co., 345 U.S. 629, 635 (1953). Though it may be less obvious, so is the irreparability-adequacy question. Professor Fiss observes that "inadequacy is not a dichotomous quality, but rather permits of degree . . . ." O. Fiss, supra note 27, at 38; cf. D. Dobbs, supra note 13, at 61 ("Adequacy is open ended; it does not exist as a matter of rule, but as a matter of fact. Whether a legal remedy is adequate or not, and how it compares with equity remedies, is a matter for analysis in each case."). Each case also has its own dimensions of manageability. See Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 551-52 (1937).
in each case. Properly understood and applied, the elements comprising the author's theory of equitable jurisdiction have the instrumental capacity to meet that need.82

The requirements of imminence, substantiality, irreparability-adequacy, and manageability can serve as elements of a methodology leading to principled and well-reasoned decisions to deny or grant injunctions. The methodology movement in modern procedure derives from two related ideas: that certainties assumed by legal formalism are illusory and should be rejected in favor of a more instrumental view urging flexible, policy-centered understanding of each case's differing demands;83 and that although some types of procedural controversies can be easily resolved by the application of rules,84 others can not.85 Instead of assigning the controversy to a category of cases governed by a single decisional rule, the methodological approach evaluates it according to a series of guidelines designed to ascertain the presence and intensity of facts related to policies served by the decision. These guidelines may be regarded as rules — but to apply them is not to decide the case, but rather to describe the method by which the case will be evaluated. The movement has been influential in choice of law,86 res judicata,87 personal,88 and federal

---

82. This view rejects the conclusion suggested by contemporary attacks on equity, see supra text accompanying notes 27-33, that equity doctrine is incurably formalistic. 83. Distinctions between functional or instrumental jurisprudence and earlier, formalistic jurisprudence have been the subject of recent commentary. See generally Lyons, Legal Formalism and Instrumentalism — A Pathological Study, 66 CORNELL L. REV. 949 (1981) (discussing the doctrines of formalism and instrumentalism and rejecting the instrumentalists' criticisms of formalistic doctrine); Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought — A Synthesis and Critique of Our Dominant General Theory About Law and its Use, 66 CORNELL L. REV. 861 (1981) (attempting to advance the undiscovered potential for instrumentalism as a legal doctrine). Professor Summers suggests that formalism reflects a belief in law as "a static and closed legal system," one in which there is "always one 'true rule,' ascertainable by reason" and that "laws of governance are laws similar to universal laws of nature." Id. at 867 n.4. He contrasts the later, "nonformalistic" view as one in which "law is like a dynamic and open framework" and that there are a "plurality of plausible forms of law for the usual problem." Id. Professor Summers describes this general reaction to formalism, which he calls "pragmatic instrumentalism," as particularly active during the first half of this century. Id. at 865.

Closest to the shift in equity thinking advocated in this Article are trends in procedure that have developed in this century. Typically, these developments have not been categorized as functional or instrumental, but it may be helpful to regard them as such. 84. For example, whether suits brought under 42 U.S.C. § 1983 (Supp. V 1981), were exempt from the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), and whether the language of Federal Rule of Civil Procedure 23(c)(2) had to be followed in every class action brought under paragraph (b)(3) of the rule, were not fact-variable controversies. Once they were authoritatively settled, see Mitchum v. Foster, 407 U.S. 225, 243 (1972) (section 1983 suits exempted); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) ((c)(2) must be followed), courts could administer all cases under the same rule.

85. For example, to conclude that adjudication in the absence of an important party is intolerable in one case is not to conclude that it is always intolerable. See Shreve, Questioning Intervention of Right — Toward a New Methodology for Decision-making, 74 Nw. U.L. REV. 894, 908-10 (1980).

86. For a comparison between the formalistic vested rights approach of the First Restatement of Conflict of Laws with the Second Restatement's sensitivity to party

The movement's delay in reaching equity can be explained in part by the tendency among scholars to view equity doctrine as accreting around substantive areas rather than yielding to general theory, and in part because, ironically, equity anticipated some of a modern methodology's discretion and flexibility during the halcyon period of formalism. Limits drawn to defend and preserve equity in that hostile climate now cause its growth to lag in a more progressive era.

The utility of these elements of equitable jurisdiction in a decisional methodology is twofold. Each has its own resonance illuminating a different sector of concern about the injunction's appropriateness in the particular case. In addition, the elements can be combined to create a decisional framework that justifies issuing as well as denying an injunction. As the applicant successfully meets the requirements of equitable jurisdiction, his case should gather


89. On the test for pendent jurisdiction, compare the formalism of *Hurn v. Oursler, 289 U.S. 238, 246 (1933)* (“two distinct grounds in support of a single cause of action . . . .”), with the more pragmatic test under *UMW v. Gibbs, 383 U.S. 715, 725 (1966)* (“The state and federal claims must derive from a common nucleus of operative fact . . . such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding . . . .”).

Developments in federal subject-matter jurisdiction that would require reinterpretation of longstanding statutory provisions have moved more slowly. This is probably attributable, at least in part, to judicial reluctance to change even an antiquated view of a statute once courts have made a decisive interpretation of legislative intent. See *E. Levi, An Introduction to Legal Reasoning* 32 (1948).


Methodological self-sufficiency has been realized to varying degrees in the Federal Rules. See, e.g., Shreve, supra note 85, at 910-24 (discussing the success of Rule 19 and Rule 24's failure to achieve this self-sufficiency).


92. See supra notes 10, 14.

93. See supra note 14.

94. The criteria of a true decisional methodology must carry the potential for justifying opposite results when material differences in succeeding cases are great enough. There must be, in other words, advertent juxtaposition of opposing interests within one framework. For example, the factors set out in Federal Rule of Civil Procedure 19(b) to aid the court in deciding whether to continue or dismiss the plaintiff when an
force. If all elements are satisfied, perhaps the applicant should have a right to an injunction. At the very least, the court should carefully justify its decision to deny an injunction, because the applicant has shown that he will soon suffer a substantial wrong that damages could not repair, and that only an injunction, which could be framed and administered without serious difficulty, could avert.

II. Equitable Discretion and the Crucible of Public Interest

A. Equitable Discretion and the Mandatory Injunction

When public law-enforcement officers argue against either the grant or denial of an injunction on the grounds that the judgment could frustrate realization of the goals of laws they are appointed to enforce, equity faces a formidable challenge. One powerful invocation

absent party, whose joinder would be required "if feasible," cannot be joined, demonstrate this juxtaposition.

55. Present equity practice reflects this idea in one respect. In many federal courts, the applicant for a preliminary injunction is relieved of the burden of demonstrating a likelihood of prevailing on the merits, if the harm he will suffer absent the preliminary injunction is great enough. The plaintiff need only establish a substantial question on the merits of the case. See Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953); see also William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975) (requiring plaintiff to show that serious questions are raised by his case and that the balance of hardships tips sharply in his favor); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 453-55 (1973) (suggesting that if plaintiff makes a showing of substantial harm, he still needs to show some probability that he will succeed on the merits, but the standard to be met is lower).

56. Later I suggest that Supreme Court decisions overturning injunctions under the doctrine of Younger v. Harris, 401 U.S. 37 (1971), fall short of meeting this substantial burden of justification. See supra note 231. Of additional concern are recent cases like Weinberger v. Romero-Barcello, 456 U.S. 305 (1982), which, though in an unclear manner, seem to go beyond the essentials of equitable jurisdiction and refuse to issue an injunction through a kind of vague balancing of the equities.

57. Appeals to the public interest are not found solely in suits brought by public officers. The equity reports are sprinkled with decisions in which private parties seeking or opposing injunctions have been able to influence the outcome of litigation by affiliating their interest with that of the public. D. DOBBS, supra note 13, at 65; H. McCLENTOCK, supra note 14, at 193-94; Developments — Equity, supra note 79, at 1184, 1194. Private parties seeking injunctions are at times even regarded as surrogates for public law-enforcement authorities. See Chayes, The Role of the Judge in Public Law Litigation, 69 HARV. L. REV. 1281, 1292-95 (1976) (remarking on the increase in public-interest litigation and its effect of shifting the conception of litigation from that of a mechanism to settle private disputes to one of resolving questions of government program management; and suggesting that, in such cases, equitable remedies are no longer considered "extraordinary" relief) [hereinafter cited as Chayes, Role of Judges]; cf Chayes, Public Law Litigation, supra note 48, at 4 (suggesting that whether or not the private plaintiff successfully obtains requested relief is not determinative of whether a suit is "public law litigation", rather, the nature of the controversy, sources of governing law, and impact of a decision differentiate public from private litigation).

The problem whether or how to give public-interest weight to private-litigant arguments is one of dilemmatic proportions. See Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW 37 (D. Kairys ed. 1982) (suggesting that the interests of some private litigants are more public than others may be more of a political than a legal question); Chayes, Role of Judges, supra, at 1311 (exploring the prob-
of the public interest is the argument that Congress has statutorily limited the court's equitable jurisdiction. Several judges and commentators have suggested that Congress might have the power to withdraw the federal courts' discretionary power and require courts to issue injunctions automatically, upon proof of unlawful activity. *Hecht Co. v. Bowles*, the leading decision presenting the issue of Congress's power to limit equitable discretion, arose when the administrator of the Office of Price Administration brought suit under section 205(a) of the Emergency Price Control Act of 1942 against defendant, a department store. Section 205(a) provided in part that "upon a showing by the administrator that" defendant "has engaged . . . in" violations of the Act, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." Plaintiff-administrator sought an injunction against the defendant after demonstrating extensive previous violations of the Act. The district court dismissed the complaint, reasoning that defendant was trying hard to comply with the Act, that its record of compliance would improve, and that an injunction would not facilitate such improvement. The District of Columbia Circuit reversed, construing the statute to require the district court to issue the injunction upon proof of past violations of the Act.

The Supreme Court's grant of certiorari raised the possibility of a constitutional confrontation between Congress and the Court. If the Supreme Court refused to affirm the order of injunction, it might appear to be rejecting the statute altogether. For the nonelected federal judicial branch to so impede Congress's substantive law-enforcement

---


99. See *Plater*, supra note 65, at 527-33 (although Professor Plater proposes that equity courts retain some discretion in enjoining statutory violations); *Note, The Statutory Injunction as an Enforcement Weapon of Federal Agencies*, 57 YALE L.J. 1023, 1025-27 (1948) (observing that statutes materially change judicial discretion to deny injunctive relief; but that plaintiffs relying upon statutes must still show a possibility of future violation).

100. 321 U.S. 321 (1943).


policies, without assessing the constitutionality of these policies, would arguably violate the separation-of-powers doctrine. Yet if the Court granted the injunction, it might be admitting that Congress could usurp the federal courts’ power to decide when to issue injunctions. Such a ruling could erode the independence and integrity of the judicial process that article III of the Constitution presumably affords the federal courts.

The Supreme Court managed to escape the horns of this dilemma. Writing for the Court, Justice Douglas construed the phrase, “or other order,” as granting the trial court the discretion to refuse to issue an injunction, so long as it issued some other order in its place. As an example, the Court suggested that the trial court could order the case continued pending disclosure of defendants’ subsequent performance. Justice Douglas concluded that Congress could not have intended the language of section 205(a) to require something so unconventional as a mandatory injunction.

The Court rendered a narrow decision, and its interpretation of the statute was strained, to say the least. The language of the opinion gives little guidance as to the proper roles for Congress and the federal courts in cases similar to Hecht, and these roles have not yet been elaborated in a helpful manner. Two factors may explain this.

---

104. Two concerns underlie the issues of the appropriate sphere of federal authority raised in this Article: whether the integrity of a federal institution might be compromised, and whether a litigant might be forced to bear a result lacking in legitimacy. Regarding the latter point, consider Professor Tribe’s view of the development of the separation of powers doctrine: “The upshot is to require, in most instances, that at least two full branches of the federal government cooperate before governmental choices potentially hostile to individual rights or needs can be effected.” L. Tribe, *American Constitutional Law* 16 (1978) (emphasis added).

105. For development of article III concerns in this context, see infra notes 122-28 and accompanying text.


107. *Id.* at 328.

108. *Id.* at 329-30. For purposes of this Article, the term “mandatory injunction” refers to an injunction that appears to be statutorily mandated as a remedy, rather than one that requires the addressee to act affirmatively.

109. As one commentator observed, “The Court maneuvered the camel of discretion through the proverbial needle’s eye . . . .” Note, *supra* note 99, at 1027 n.17. For a more satisfactory definition of the “or other order” provision of § 205(a), see Porter v. Warner Holding Co., 328 U.S. 395, 399-400 (1946) (defining it to permit equitable restitution).

110. Justice Douglas characterized the result sought by the OPA Administrator as a “drastic,” “major,” and “abrupt” departure from federal equity tradition. 321 U.S. at 329-30. However, Congress rather clearly expressed its intent to authorize the injunction that the *Hecht* court refused. The case presented an appropriate occasion for the Court to reconcile the competing demands of the separation of powers doctrine and article III. But the holding’s artificiality and equivocations rendered *Hecht* more of a hinderance than a help.

Since *Hecht*, the prevailing practice has been for Congress to allow more room for judicial discretion in describing the process for obtaining law-enforcement injunctions than it did in the Emergency Price Control Act.\(^{112}\) But equally important, courts can accommodate a great deal of the public interest that supports the mandatory injunction when scrutinizing cases for the traditional elements of equitable jurisdiction. Consequently, the potential for conflict between congressional purpose and the federal courts' equitable discretion is considerably less than it might first appear. This can be understood by considering how public-interest issues are accommodated in the process of determining equitable-jurisdiction issues of imminence, substantiality, irreparability-adequacy, and manageability.

Congress has rarely attempted to displace the federal courts' fact-finding discretion to determine whether harm necessitating a statutorily based injunction is imminent.\(^{113}\) The courts' power to refuse requests for injunctions for lack of imminence is widely acknowledged.\(^{114}\)

The strongest challenge to federal judicial independence in making an imminence inquiry may have come in *United States v. W. T. Grant Co.*\(^{115}\) The government sought an injunction against interlocking corporate directorates alleged to be in violation of section 8 of the Clayton Act of 1914. Section 15 of the Act gives the district courts "jurisdiction to prevent and restrain violations" of the Act.\(^{116}\) Plaintiff was ready to prove that defendant had violated the Act.\(^{117}\) The district court, however, relied upon defendant's promise to cease violating the Act and dismissed the case.\(^{118}\) The Supreme Court affirmed, acknowledging that the dismissal left the defendant "free to return to

---


113. *Section 205(a) of the Emergency Price Control Act, examined in Hecht Co. v. Bowles, might be considered as such an attempt. Yet even that statute preserved the Court's ability to make findings of past or future violations. Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 23, 33 (terminated 1947).*


115. 345 U.S. 629 (1953).


118. 112 F. Supp. at 338.
his old ways,” and that there was “a public interest in having the legality of the practices settled . . . .” The Court nonetheless concluded that the government had failed to demonstrate that the district court’s finding of no threat of further violation constituted an abuse of discretion.

The significance of Grant lies in the Court’s treatment of the issue of imminent harm. The Court framed the issue in terms of mootness: whether “there exists some cognizable danger of recurrent violation, something more than the mere possibility” of wrongdoing. The Court thereby equated lack of imminent harm with the lack of a constituent element necessary to meet the “case or controversy” requirement of article III of the Constitution. This parallel between federal equitable jurisdiction and subject-matter jurisdiction suggests that the Court is hesitant to appear to be avoiding its obligation to exercise jurisdiction constitutionally granted to it by Congress. The Court began early in its history to identify characteristics of federal adjudication as indispensible, refusing to decide cases in which they were not present. The Court undoubtedly foresaw that such refusals to adjudicate would be construed by critics as attempts to subvert exercises of the popular will. Consequently, the Court was usually careful to frame these issues in constitutional terms, thus generating doctrine purporting to elaborate the meanings of “case” and “controversy” in article III. It seems appropriate to draw a parallel between the imminence requirement of equitable jurisdiction and the “case or controversy” requirement of article III. Issuing an injunction without establishing a sufficient prospect of imminent harm is an unsound use of equitable jurisdiction because it is wasteful, unfair, and potentially chaotic. For the same reasons, it is likely to offend one of the constellation of doctrines under article

119. 345 U.S. at 632.
120. Id.
121. Id. at 634. The government was unable to show that the district court had “no reasonable basis” for its decision. Id.
122. Id. at 633. Although the Court noted that it did not agree that the case was moot, id. at 635, compare the analysis of the requirement of imminent appearing in Part I of this Article with the Court’s analysis quoted in the text accompanying this note.
124. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (requirement of case or controversy); Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1793) (same); Correspondence of the Justices, reprinted in HART & WECHSLER, supra note 9, at 64-66 (the Supreme Court declines to serve an advisory function on foreign relations).
125. Discussing the constellation of doctrines under article III, Professor Bickel observed: “These are ideas central to the reasoning in Marbury v. Madison. They constitute not so much limitations of the power of judicial review as necessary supports for [Chief Justice] Marshall’s argument in establishing it.” A. BICKEL, THE LEAST DANGEROUS BRANCH 115 (1962); see also infra note 157.
126. See supra notes 63-64 and accompanying text.
Those elements of equitable jurisdiction that also advance policies underlying article III should be secure against congressional abridgement by the mandatory injunction.\textsuperscript{128}

At the same time, the federal judiciary's attempts to conserve its independence by seeking sanctuary in the Constitution are and should be limited. The maxim that constitutional statutes may not be nullified\textsuperscript{129} applies fully to federal courts.\textsuperscript{130} It is difficult, therefore, to make as strong a case for federal judicial independence if the inquiry shifts from imminence to substantiality.\textsuperscript{131} So long as public law-enforcement officers sought injunctions to avoid common-law wrongs, courts did not need to differentiate between their functions as law makers and law interpreters, feeling relatively free to question the substantiality of the wrong.\textsuperscript{132} When legislatures largely took over public law making, courts became confined to powers of statutory interpretation.\textsuperscript{133} In addition, federal court opinions reveal an awareness of Congress's intent to repossess considerable powers of substantive law elaboration in federal enforcement agencies.\textsuperscript{134} Consequently, courts' ability to question the substantiality of a legal wrong should be limited.\textsuperscript{135}

Federal courts seem reluctant to subject federal governmental plaintiffs to the burden of showing that no adequate remedy at law exists. When the court poses the requirement in other cases, it is to question the plaintiff's choice of an injunction to determine whether plaintiff could have chosen a less-burdensome remedy that would adequately protect the same rights.\textsuperscript{136} If an injunction is the only remedy the governmental plaintiff has standing to seek, the adequacy requirement is easily satisfied. The question is more difficult if the
governmental plaintiff may choose among several forms of relief.\(^{137}\) But even then, the injunction may often be the alternative least onerous to the defendant and to the court — particularly if the other option is criminal prosecution.\(^{138}\)

Judicial opinions do not evince a willingness to make these distinctions. Federal courts probably are reluctant to undertake the second-guessing inherent in an adequacy inquiry because they hesitate to question the judgment of another branch of the federal government.\(^{139}\) This may explain the lack of closely reasoned inquiry into the adequacy requirement in public-injunction cases.

Federal courts appear similarly reluctant to subject governmental plaintiffs to an irreparability standard.\(^{140}\) In neither case is this simply a matter of blind deference. The federal law-enforcement officer may be the best judge of when and where to employ the injunction as a law-enforcement tool. Most of the injunctions issued in such cases would withstand an irreparability-adequacy inquiry.\(^{141}\) At the same time, judicial deference does not excuse the frequent failure of federal courts to explain how the essential concerns of equity have been satisfied. This contributes to a larger trend toward doctrinal incoherence concerning the nature and limits of equitable restraint.\(^{142}\)

The manageability requirement poses special concerns in public-injunction cases, as United Steelworkers of America v. United States\(^{143}\) illustrates. The dispute in that case arose when President Eisenhower requested the Attorney General to sue under Section 208

---

137. These may include damage actions, condemnation, licensing suspension, or criminal prosecution. The scope of options will vary with the statutory setting. See Note, supra note 99, at 1034-36. For example, the Securities and Exchange Commission may respond to violations of federal securities laws by suspending security trading, revoking security registration, seeking a federal injunction, or referring cases to the Justice Department for criminal prosecution. See generally H. Bloomenthal, 1982 Securities Law Handbook §§ 10.04, 24.01-03 (discussing the remedies available to the SEC to enforce federal securities laws, and the utility of each remedy).

138. See Note, supra note 99, at 1049.


141. For example, in United Steelworkers of America v. United States, 361 U.S. 39 (1959), the Attorney General argued, and the Court appeared to agree, that unless the steelworkers' strike was enjoined, the national defense and space program would be irreparably harmed by further delay. Id. at 41-42. In addition, the steel products needed for these projects were not available from other sources. Id.


of the Labor Management Relations Act\textsuperscript{144} to secure an injunction ordering a striking labor union back to work. The district court's decision to grant the injunction\textsuperscript{145} was affirmed by the Third Circuit\textsuperscript{146} and the Supreme Court.\textsuperscript{147} In their concurring opinion, Justice Frankfurter and Justice Harlan observed that although a district court sitting in equity must usually shape the details of a decree,\textsuperscript{148} it was "not qualified to devise schemes for the conduct of an industry so as to assure the securing of necessary defense materials."\textsuperscript{149} The Justices stated that the injunction problem contained factors that the trial court was not competent to judge,\textsuperscript{150} and involved forces that the court would be unable "to readjust or adequately to reweigh."\textsuperscript{151} Therefore, the trial court was justified in issuing the injunction as drafted by the Attorney General.\textsuperscript{152}

Justices Frankfurter and Harlan's opinion suggests that a federal trial court need not understand the decree it issues, as long as the injunction is supported by officials of the Executive Branch.\textsuperscript{153} A federal judge who considers issuing an injunction under such circumstances faces one of two undesirable prospects. Either he relies on the executive to tell him what to include in the injunction, what it means, and when it has been violated, or he tries to discern for himself what the injunction means after he issues it. The first outcome is an abdication of the federal judicial function.\textsuperscript{154} The same considerations that prompt federal courts to rely on article III to deny themselves the power to adjudicate controversies in order to conserve that power,\textsuperscript{155} should lead the court to deny the injunction. The second outcome is chaos. Adversaries will turn the Court one way and another as it grapples for answers in modification, clarification, or enforcement proceedings. So grave a manageability problem also raises article III concerns.\textsuperscript{156}

Fortunately, the threat to the courts' discretion in shaping the public injunction suggested in the Justices' concurring opinion has not materialized.\textsuperscript{157} Nevertheless, every injunction, including those

\begin{itemize}
\item \textsuperscript{146} 271 F.2d 676 (3d Cir.), aff'd, 361 U.S. 39 (1959).
\item \textsuperscript{147} 361 U.S. at 44.
\item \textsuperscript{148} \textit{Id.} at 50.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} at 51.
\item \textsuperscript{152} \textit{Id.} at 55-58.
\item \textsuperscript{153} \textit{Id.} at 50-51, 56-58.
\item \textsuperscript{154} \textit{See supra} text accompanying note 126.
\item \textsuperscript{155} \textit{See supra} notes 124-25 and accompanying text.
\item \textsuperscript{156} Functionally, article III "case" and "controversy" doctrines may be regarded as a series of quality controls on the federal judicial product. Assuring quality is impossible unless federal courts have stable, judicially manageable working materials for decision.
\item \textsuperscript{157} Instead, the cases establish that a trial court has considerable discretion in handling questions of practicality in considering whether or how a decree should be framed, as courts of equity would accomplish nothing by trying to order the impossible. \textit{See, e.g.}, TVA v. Tennesse Elec. Power Co., 90 F.2d 885, 894 (6th Cir.), \textit{cert. denied}, 301 U.S. 710 (1937); Moffitt v. City of Rock Island, 77 Ill. App. 3d. 850, 854, 397 N.E.2d 457, 460 (1979).
\end{itemize}
sought by law-enforcement agencies, has the potential to drain a court's time and damage its stature. If an injunction is disobeyed, these dangers are realized. In all cases, the courts must understand the prospective decree well enough to conclude that there is a reasonable possibility for compliance. Circumstances that support this conclusion will vary from case to case, and courts must be permitted to retain the discretion to respond to each new situation.

Federal courts have lapsed into careless, sweeping language to state the importance of statutorily based injunctions to the public interest. Some have gone so far as to suggest that the court's equitable discretion is preempted. Few cases, however, have been resolved under such an approach. Closer examination reveals that the essentials of equitable restraint are rarely sacrificed in the face of the so-called mandatory injunction. Judicial reservations concerning substantiality, adequacy, and irreparability give way, as they should, in the face of the special law-enforcement authority and needs of the governmental plaintiff. Judicial reservations concerning imminence and manageability, in contrast, do not. They must be addressed in each case. There is a need for clearer, more closely reasoned opinions, but the results reached in the cases are on the whole satisfactory.

B. Equitable Jurisdiction Validly Exercised and Overturned: The Doctrine of Younger v. Harris

In Younger v. Harris, the Supreme Court reviewed a three-judge federal court's decision to enjoin the ongoing state criminal prosecution of federal plaintiff, Harris, under California's Criminal Syndicalism Act. The district court held that the Act violated plaintiff's

---

158. See supra note 79 and accompanying text; see D. Dobbs, supra note 13, at 62-63.
159. Decisions based on a preemption idea were reversed in Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975), and Hecht Co. v. Bowles, 321 U.S. 321 (1944).

The statutorily mandated injunction has gained far greater acceptance in state practice. See, e.g., State ex. rel. Edmisten v. Challenge Inc., 54 N.C. App. 513, 522, 284 S.E.2d 333, 339 (1981); Rhode Island Turnpike Auth. v. Cohen, 433 A.2d 179, 182 n.5 (R.I. 1981). But see Hudson v. School Dist. of Kansas City, 578 S.W.2d 301, 311-14 (Mo. App. 1979) (courts should not issue "mandatory" injunction that would violate public-interest concerns). State courts are not, of course, subject to article III constraints and are free to take a different, more self-effacing view of their judicial independence. However, because it is my view that the reasons for equitable restraint inhere in the judicial process, state court acceptance of mandatory injunctions is also undesirable.

161. Other plaintiffs intervened and sought an injunction against Harris's prosecution, alleging that they felt "inhibited" by it. Id. at 39-40. The Court, citing Golden v. Zwickler, 394 U.S. 103 (1969), responded that persons with only speculative fears of prosecution could not invoke federal equitable power to enjoin a pending state proceeding. 401 U.S. at 42. The Court thereby equated a requirement of equitable jurisdiction with what, in Golden, was the requirement of a "controversy" under article III of the Constitution. Golden v. Zwickler, 394 U.S. at 108-10. For further discussion of this parallel, see supra notes 123-28 and accompanying text.

162. CAL. PENAL CODE §§ 11400-02 (Deering 1980).
first amendment rights. The Supreme Court, apparently agreeing with this conclusion, nonetheless reversed. Writing for the Court, Justice Black justified withdrawal of the injunction on equity doctrine, with added references to comity and federalism.

Younger has since evolved into a broader doctrine barring plaintiffs who use section 1983 from seeking injunctions or declaratory judgments against pending state proceedings brought to enforce statutes or local ordinances, at least when the pending state

---

165. The Court invoked what it called the "basic doctrine of equity jurisprudence that courts of equity should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43-44.
166. Justice Black loosely juxtaposed these concepts with equity doctrine on a page of the opinion curiously devoid of citations. Id. at 44.
168. Declaratory judgments require an exercise of judicial discretion characteristically different from that required in injunction decision making. For an excellent discussion of the availability and applications of declaratory relief, see Developments in the Law — Declaratory Judgments — 1941-49, 62 Harv. L. Rev. 786 (1949). There is widespread confusion over whether requests for declaratory judgments should be tested by the same standards as injunctions, Samuels v. Mackell, 401 U.S. 66, 69-74 (1971), or more freely granted, Steffel v. Thompson, 415 U.S. 452, 462-73 (1974), or less freely granted, Public Serv. Comm. v. Wycoff Co., 344 U.S. 237, 241-49 (1952). This subject is beyond the scope of this Article.
169. The doctrine has also been employed to support the refusal to enjoin "patterns and practice of conduct in the administration of the criminal justice system" in an Illinois County that allegedly violated plaintiffs' constitutional rights. O'Shea v. Littleton, 414 U.S. 488, 490 (1974).

Injunctions of the kind sought in O'Shea have been described as "structural." See O. Fiss, supra note 27, at 92-93. See generally Developments — 1983, supra note 167, at 1173-74, 1187-90 (discussing the structural injunction's implications for federal-state relations). Structural injunctions are sought to avert constitutional wrongs that are in substantial part behavioral. The injunction granted may monitor or even reorder the operation of state or local governments. In such cases, the inquiry does not tend to focus on the validity of a state or local ordinance, nor is it likely that a state proceeding will be pending. O'Shea, therefore, does not fit the paradigm outlined in the text accompanying this note.

Because the Younger doctrine addresses issues of equitable jurisdiction quite different from those presented by structural injunctions, the invocation of Younger by the Court in O'Shea was inappropriate. The issue of irreparable harm is capable of posing serious problems in some cases like Younger. See infra notes 181-87 and accompanying text. In contrast, it is unclear whether any other judicial proceedings could repair the harm the structural injunction would purportedly avert. Although recent studies offer some hope, immunity doctrines may foreclose the availability of an alternative damage action in federal or state court. See generally Hart & Wechsler, supra note 9, at 241-43 (1981 Supp.); Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations, 69 Calif. L. Rev. 189 (1981) (suggesting that the supremacy clause obligates state courts to ignore sovereign immunity in suits alleging violations of federal-constitutional rights); Note, Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism, 53 Cal. L. Rev. 945 (1965); Note, Official Immu-
Federal Injunctions

THE GEORGE WASHINGTON LAW REVIEW

proceeding is judicial in character. The Supreme Court has applied the Younger doctrine to deny injunctions sought against pending state criminal proceedings, and to overturn federal injunctions rendered against state civil proceedings, even those commenced in state court by private parties.

Whether Justice Black intended to stray beyond the base of support provided by equity doctrine in withdrawing the injunction in Younger is unclear. The cases he relied upon did not. And, late in the opinion, he observed that "our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention ...." Nonetheless, Justice Black's opinion may be interpreted as a suggestion that policy arguments of comity and official immunity in Federal Court: Supreme Court of Virginia v. Consumers Union of the United States, Inc., 67 CORNELL L. REV. 188 (1981) (advocating a narrow reading of official immunity because of constitutional limits to judicial deference). The picture is much the same concerning the availability of a civil rights injunction in state court. Cf. Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1124-27 (1977) (suggesting that state court judges enforce constitutional rights less vigorously than federal court judges). In addition, although concerns of manageability in shaping and administering a decree in a suit to enjoin state proceedings are minimal, see infra notes 179-80 and accompanying text, they can be of major concern when a structural injunction is sought, see Altman, Implementing a Civil Rights Injunction: A Case Study of NAACP v. Brennan, 78 COLUM. L. REV. 738, 740 (1978); Robbins & Buser, Punitive Condition of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 STAN. L. REV. 893, 909-14 (1977); Developments — 1983, supra note 167, at 1231-50. For further discussion of manageability problems raised by structural injunctions, see infra note 180.

There have been few efforts like O'Shea to apply Younger in cases beyond the paradigm presented in the text surrounding this note. Even Professor Bator, in cases where he approves of the results reached under the doctrine, is reluctant to extend the approach of Younger to structural injunction cases. Bator, The State Courts and Federal Constitutional Litigation, 22 WM. & MARY L. REV. 605, 621, 635 (1981).


In an interesting recent case, the Supreme Court appeared to suggest that Younger abstention is more appropriate when pending state proceedings are judicial. Middlesex County Ethics Comm. v. Garden St. Bar Ass'n, 457 U.S. 423, 432 (1982). Of course, the line between judicial and nonjudicial proceedings is not a clear one. The Middlesex County Court described disciplinary proceedings before a state bar association, under the supervision of the New Jersey Supreme Court, as "judicial in nature." Id. at 433-34.


175. 401 U.S. at 54.
Federalism can be allied with equity doctrine to build a stronger case against injunctions. The Supreme Court soon acted upon that suggestion, characterizing the Younger doctrine as a tripartite inquiry probing semi-independent concerns of “equity, comity and federalism.”

The administration of the Younger doctrine is incompatible with the goals of function and method advanced earlier in this Article as part of the author’s theory of equitable jurisdiction. Within the scope of the Younger doctrine, proper administration of the requirements of equitable jurisdiction should result in the issuance of injunctions in some cases and their denial in others. Instead, the Supreme Court negated federal equitable power in all cases within the ambit of the doctrine. The post-Younger Supreme Court opinions suggest an inclination to void injunctions, not because the Court has satisfied itself that the trial court’s discretionary exercise of equitable jurisdiction is unsound, but rather to advance public policy notions of comity and federalism. The Supreme Court has thereby obscured and denigrated the meaning of federal equity doctrine and overstepped its authority to refuse injunctions.

The traditional equitable-jurisdiction inquiry should be the sole basis for evaluating requests to enjoin state proceedings. In cases similar to Younger, federal courts must be free to conduct an imminence inquiry. The concerns reflected in this element of equitable jurisdiction are no less present in this setting. In contrast, concerns over manageability are insignificant in the Younger context. The decree sought is simply one to invalidate the state statute or local ordinance. The process of comprehension of and compliance with such an injunction has an analog familiar in the experience of law-enforcement defendants: repeal of public laws by state or local legislative bodies.

The element of equitable jurisdiction, however, that has attracted the most controversy in cases brought to enjoin state proceedings is the irreparability-adequacy inquiry. Suggestions that these re-

---

178. See supra notes 63-64 and accompanying text. Concerns of imminence and substantiality are joined in Younger v. Harris, 401 U.S. 37, 46 (1971), an analytic approach characteristic of federal equitable jurisdiction. See supra text accompanying notes 65-69.
179. See supra text accompanying notes 79-80.
180. For surveys of federal decisions invalidating state statutes and local ordinances and enjoining their enforcement, see Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials, 40 Harv. L. Rev. 969 (1927), and Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345 (1930).
181. See O. Fiss, supra note 27, at 42. The greatest criticism of contemporary rules of equitable jurisdiction is generally reserved for the irreparability-adequacy requirement. See supra notes 30-33 and accompanying text.
quirements be suspended in cases like *Younger* are unjustified.182

The irreparability inquiry is a necessary one in a suit brought to enjoin a state law-enforcement proceeding, which represents the allocation of presumably scarce public law-enforcement resources. Although interrupting the state proceeding does not present a separation-of-powers issue,183 the separation-of-powers dimension of the federal courts' relationship to federal law-enforcement officers184 should increase the courts' sensitivity to planning and resource-allocation problems in law enforcement facing state and local officials as well.185 The federal suit duplicates186 and casts aspersions upon the official's work, subjecting him to the strain of being a defendant and potential addressee of the court's injunction.187 Although injunctions in such cases may be easy to frame, the federal court will frequently

182. The hierarchical subordination of the injunction is most evident in the irreparability-adequacy inquiry. See supra notes 28-33 and accompanying text. Critics find this subordination particularly distasteful when it leads to the denial of a civil rights injunction. Professor Fiss writes: "My conceptual world has been shaped in large part by the civil rights experience, and at the core of that experience is a conception of rights that denies their reducibility to a series of propositions assuring the payment of money to the victims." O. Fiss, *supra* note 27, at 76; see also Rendleman, *supra* note 27, at 352 (criticizing the notion that constitutional violations may be redressed adequately by monetary payments).

In the *Younger* setting, however, it is neither appropriate nor necessary to regard the civil rights plaintiff as having another remedy — for damages or otherwise — in order to refuse the injunction. Plaintiff's involuntary status as a state criminal or civil defendant may offer a means of raising the same constitutional issue, but hardly suggests a remedy. See supra notes 74-78 and surrounding text. But, insofar as the state court is required to entertain the constitutional issue as a defense, the irreparability requirement makes the need to visualize an alternative remedy unnecessary. *Id.* In addition, although it may be especially painful to do so, courts must apply principles of equitable restraint in constitutional cases as in all others. See Developments — Injunctions, *supra* note 10, at 1007; cf. Henkin, *Is There a Political Question Doctrine?*, 85 Yale L.J. 597, 621-22 (1976) (suggesting that ordinary principles of equitable restraint would better explain the Supreme Court's reluctance to decide certain questions than the "political question" doctrine). My reason for reaching this conclusion follows from this Article's theory of equitable jurisdiction, see supra notes 52-80, which asserts that the limits of equitable restraint inhere in the judicial process.


184. See supra notes 131-35.

185. For a discussion of some of the problems created by federal court interference, see ALI Study, *supra* note 73, at 282; Warren, *supra* note 180, at 373-76; Simpson, *supra* note 33, at 242-46.

186. In the *Younger* setting, the state suit is usually pending when the federal suit is filed. But see Hicks v. Miranda, 422 U.S. 332, 349-50 (1975) (federal plaintiff filed federal complaint before state criminal proceedings were begun, but Court applied *Younger* because the state criminal proceedings began before any proceedings on the merits of the federal claim). So long as the civil rights claimant can raise the same issue as a defense in a state proceeding, he is assured of a forum for the claim. The supremacy clause guarantees that the state court cannot impose liability without considering a constitutional defense. See M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 124 (1980). The federal proceeding in this sense duplicates a prospective function of the state proceeding and may involve some waste of the prosecutor's time.

187. It seems more awkward to subject state and local law-enforcement officials, rather than private defendants, to these strains.
appear to be questioning state or local officials’ good faith and legal competence.

Whether these costs should be borne depends in part on a determination of the situation that the federal plaintiff will confront if the injunction is withheld. The harm plaintiff seeks to avert is the alleged encroachment of the statute or ordinance on his constitutional rights. If plaintiff could avert this harm through another procedure, the court should refuse to issue the injunction. In addition, the federal court should analyze the relative importance of the defendant’s law-enforcement interests. State criminal proceedings probably are entitled to greater deference than state civil proceedings. But if the

188. The inquiry should be twofold. First, the promptness and certainty of a state decision should be ascertained by examining the posture of the state case and the nature of governing state-procedural law. For example, the state-procedural frustrations facing the federal plaintiffs that were revealed in dissenting opinions in several of the cases should have been addressed by the majority. Moore v. Sims, 442 U.S. 415, 437-42 (1979) (Stevens, J., dissenting) (federal plaintiffs lost custody of their children for over one month because of inadequate notice and hearing provisions of state statutory scheme); Trainor v. Hernandez, 431 U.S. 434, 434, 451-52 (1977) (Brennan, J., dissenting) (state court granted a continuance on the validity of the attachment of federal plaintiffs’ property, depriving them of their savings for additional two weeks; state court also never acted on plaintiff’s motion to temporarily enjoin execution of attachment); Younger v. Harris, 401 U.S. 37, 60, 65 (1971) (Douglas, J., dissenting) (state trial and appellate courts denied federal plaintiff’s requests to prohibit prosecution under an unconstitutional statute). Second, results of the inquiry should vary according to the constitutional rights claimed. The first amendment appears to retain its special importance. Cf. Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (even a brief loss of first amendment freedoms constitutes irreparable injury). Yet Younger appears to renounce the implication of Dombrowski v. Pfister, 380 U.S. 479 (1965), that a state prosecution may destroy permissible first amendment rights prior to the adjudication of the constitutional issue, even in the absence of bad faith prosecution. The idea of valuing some civil rights above others may be disquieting, but rough justice is better than no justice at all. Consider Judge Friendly’s view: “I would be considerably more willing to abstain in a case . . . where the issue was the permissible length of hair of high school students than when it concerned the rights of black citizens to equal education, housing or employment opportunity.” H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 95 (1973) (footnote omitted).

One step removed are those cases in which no state proceeding is pending when the federal case is filed. Plaintiffs in such cases may fail prey to imminence or article III problems, see supra note 161, but are safe from the Younger doctrine, see Wooley v. Maynard, 430 U.S. 705, 711 (1977); Steffel v. Thompson, 415 U.S. 482, 481-62 (1974). But see M. REDISH, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 691 (1983). Some commentators have suggested that too much depends on whether the state proceeding is actually begun first. H. FRIENDLY, supra, at 97; Bator, supra note 169, at 616-17 n.35. If, however, the distinction should be “between cases in which the plaintiff seeks an anticipatory ruling that future conduct is constitutionally immune from state punishment (or other regulation), and cases in which the plaintiff is claiming that past conduct is so immune,” id. at 617 n.35, then the present rule appears to work pretty well. In the only case in which the federal plaintiff managed to file first but sought to insulate past conduct from state criminal prosecution, the Court applied the Younger doctrine anyway. Hicks v. Miranda, 422 U.S. 332, 348-50 (1975).

189. The Supreme Court did not apply the Younger doctrine to dismiss a plaintiff seeking an injunction against pending state civil proceedings until Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In its subsequent decisions, the Court has failed to find a pending state civil proceeding so consequential as not to be entitled to the protection of the Younger doctrine. The Court is usually careful to analogize the state regulatory interest at stake in the state civil case to some aspect of the state’s criminal law. See, e.g., Judice v. Vail, 430 U.S. 327, 335-36 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975). However, because state interests in regulating behavior through enforcement of civil and criminal laws are naturally akin, it is hard to escape the conclusion that the Younger doctrine now bars injunctions against all criminal and civil state judicial proceedings.

It is regrettable that the Supreme Court has taken this position. As the Court’s approach by analogy seems to concede, the need to preserve civil aspects of state and
federal plaintiff extensively used the state civil court system prior to filing his federal case, he may be more vulnerable to the adequacy requirement in seeking the injunction. Finally, Younger should be applied less willingly if the plaintiff in the state proceeding is a private individual rather than a public law-enforcement officer.

The Supreme Court has selected as vehicles for elaborating the Younger doctrine primarily those cases in which federal trial courts have granted injunctions sought against state judicial proceedings as within the sound exercise of their equitable jurisdiction. Before considering whether these decisions give proper regard to the dynamics of equitable jurisdiction, it is important to consider a more fundamental question. Given the fact-centered and historically discretionary nature of equity decision making, how much justification is there for reviewing these decisions at all? Although federal law on the reviewability of exercises of equitable discretion is not settled, the answer should be that review may be justified so long as the precedential effect of appellate redecision is limited.

The results of federal appellate review of exercises of equitable jurisdiction are inherently confined. Of the two functions of appellate review — administration of a rule of law and securing justice in the given case — only the latter is advanced. This is because the fact-local law enforcement from federal interference is not as immediate. The Court's refusal to apply this distinction robs the Younger doctrine of any sensitivity.

Ordinarily, it would be unfair to regard the federal plaintiff as having acquired, through the added jural identity of a state defendant, an adequate remedy at law. See supra notes 77-78 and accompanying text. The more extensively he partakes in the state proceeding, however, the less coerced the idea of a state remedy seems. The extreme case would be one in which the state defendant litigated the constitutional issue, lost, then filed in federal court to enjoin the proceeding before the state judgment became final.

The doctrine was extended to such a case in Juidice v. Vail, 430 U.S. 327 (1977). Juidice is one of the most disturbing of the Younger line of cases. If the doctrine is to be applied at all in civil proceedings, the status of the state plaintiff as a private individual should make it far harder to refuse the federal injunction. Under such circumstances the burden of justification created by disruption of a regime of public law enforcement, see supra text accompanying notes 183-87, would not seem, absent a special showing, to be present. For a case in which the Supreme Court appears more perceptive to the differences between public and private law enforcement, see Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).


Compare the assertions that the trial court's exercise of equitable discretion is or should be insulated to a substantial extent from appellate review in Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); Brown v. Chote, 411 U.S. 452, 457 (1973); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975); and Note, supra note 99, at 1033-34 n.44, with arguments to the contrary in Developments — Injunctions, supra note 10, at 1070, and ALI Study, supra note 73, at 206.

I have discussed the foundations of these two functions in Shreve, supra note 85, at 921-23. Professor Cover has perhaps made a similar distinction with the terms
tors relevant to an equitable-jurisdiction inquiry are so variable\textsuperscript{197} that decisions posed for courts are rule-resistant.\textsuperscript{198}

Appellate redecision of an injunction question should influence the trial court's consideration of the next case only by example. Supreme Court decisions elaborating rules of equitable jurisdiction can design and, if necessary, enforce a methodology to guide equitable discretion.\textsuperscript{199} The Court can order federal trial judges to consider the potentially strong public interest in the attempts to enforce state and local laws, and whether plaintiff's request to interrupt that enforcement is justified. But whether a court should issue an injunction depends on how elements of equitable jurisdiction register and combine in each case.

Because they should be entitled to so little precedential value and because federal circuit\textsuperscript{200} and Supreme Court\textsuperscript{201} resources are exceedingly scarce, appellate redecisions of incidents of judicial discretion are generally difficult to justify. It is hard to argue, however, that decisions of equitable jurisdiction in cases like Younger should not be open to review.\textsuperscript{202} Public interests likely to repose in the federal court defendants in such cases\textsuperscript{203} might justly reenacting the equitable-jurisdiction inquiry simply to assure that justice is done\textsuperscript{204} in the case.\textsuperscript{205} The problem is that appellate judges usually speak in terms of rules, just as those who read their opinions usually search for the ratio decidendi.\textsuperscript{206} Courts have expressed concern over the devitaliz-

\textsuperscript{197} See supra note 81 and accompanying text.

\textsuperscript{198} See supra notes 83-96 and accompanying text. Designation of the trial court's decision about equitable jurisdiction as discretionary should be understood, in part, as a product of this realization. See supra notes 14, 48, 121, and accompanying text.

\textsuperscript{199} See supra notes 52-80 and accompanying text.


\textsuperscript{201} In contrast to the federal circuit courts, the Supreme Court has managed to keep its workload current. R. Stern & E. Gressman, Supreme Court Practice 43 (5th ed. 1978). The Court, however, does not necessarily have the time to work through its docket without truncating the process of decision in some cases and evading decision in others. See generally Griswold, Rationing Justice — The Supreme Court's Caseload and What the Court Does Not Do, 60 Cornell L. Rev. 335 (1975); Harper & Eetherington, What the Supreme Court Did Not Do During the 1950 Term, 100 U. Pa. L. Rev. 354 (1951); Harper & Rosenthal, What the Supreme Court Did Not Do in the 1949 Term — An Appraisal of Certiorari, 99 U. Pa. L. Rev. 293 (1950); Hart, The Supreme Court, 1958 Term — Foreward: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959).

\textsuperscript{202} For example, as I have undertaken to explain elsewhere, all federal court decisions denying intervention should be regarded as discretionary and rarely subject to appellate redecision. Shreve, supra note 85, at 924.

\textsuperscript{203} See supra text accompanying note 185.

\textsuperscript{204} Assuming, of course, that no rule of law can be administered.

\textsuperscript{205} Cf. McClintock, supra note 14, at 51 n.16 ("Equitable discretion is subject to review on appeal, since it is the duty of the reviewing court to render the decree which the trial court ought to have rendered.").

\textsuperscript{206} See R. Pound, An Introduction to the Philosophy of Law 55-57 (rev. ed. 1954); Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 643 (1971).
Federal Injunctions

THE GEORGE WASHINGTON LAW REVIEW

ing effect of precedent on the chancellor's discretion throughout equ-

ity's history.\textsuperscript{207}

The Supreme Court's willingness to serve as ultimate chancellor
may explain the brittleness of the Younger doctrine. It cannot, how-
ever, explain the breadth of that decision's subsequent construction.
The Younger doctrine nearly imposes an absolute rule barring fed-
eral injunctions against pending state enforcement proceedings if the
federal plaintiff alleges that the law to be enforced is unconstitu-
tional.\textsuperscript{208} If it were possible to conclude that issuing injunctions in
such cases could never be supportable as a sound exercise of the trial
court's equitable discretion, the rule could be defended in the name
of efficiency. Because this is not true,\textsuperscript{209} however, the rule is insup-
portable on equity grounds alone. The Supreme Court, however, has
made Younger more than a rule of equity. In its broad sweep and
inflexible form, the Younger doctrine operates much more akin to a
federal subject-matter jurisdiction statute.\textsuperscript{210}

The functional resemblance of the Younger doctrine to a jurisdic-
tional rule becomes especially clear given the example provided by
the Anti-Injunction Act,\textsuperscript{211} a jurisdictional statute\textsuperscript{212} presently in

\textsuperscript{207} See supra note 14.

\textsuperscript{208} See supra notes 167-73 and accompanying text. The Younger Court itself iden-
tified two exceptions to the rule it established. If the district court finds that the state
prosecution is being conducted in bad faith, or is motivated by a desire to harass the
defendant, the court may enjoin the proceeding. 401 U.S. 37, 47-49 (1971). In addition, if
the challenged statute is patently and flagrantly unconstitutional, an injunction would
be warranted. Id. at 53-54.

The number of exceptions has not grown and the two described above have largely
proven to be illusory. The only clear illustration of the first exception is the retrospec-
tive example made of Dombrowski v. Pfister, 380 U.S. 479 (1965), in Younger v. Harris,
401 U.S. 37, 47-61 (1971). The passage making up the second exception is language
quoted in Younger, 401 U.S. at 53-64, from Watson v. Buck, 313 U.S. 387, 402 (1941). The
tortured language of this exception is not clarified by reading Watson, and the
Supreme Court has yet to invoke it in lieu of applying the Younger doctrine.

\textsuperscript{209} See supra note 192 and accompanying text.

\textsuperscript{210} Regulating subject-matter jurisdiction by reference to the remedy sought is a
well-established draftsman's technique. See statutes discussed infra note 212. The
device works reasonably well, at least when compared to the complexities of determining
subject-matter jurisdiction in federal question cases utilizing the "arising under" lan-
guage of 28 U.S.C. § 1331 (1976). See ALI STUDY, supra note 73, at 189; Note, The Ex-
panded Federal Question: On the Independent Viability of Declaratory Claims, 57
NOTRE DAME LAW. 806, 811-813 (1982). See generally Mishkin, The Federal "Question" in
the District Courts, 53 COLUM. L. REV. 157 (1953) (arguing for a broad construction of
the "arising under" language if Congress has articulated a federal policy in a substan-
tive area). Because federal plaintiffs must identify remedies sought in their complaint,
remedy-based regulating factor permits federal trial judges to screen cases early,
either on defendant's motion to dismiss, or sua sponte.

\textsuperscript{211} Originally enacted in 1793, it now appears in revised form at 28 U.S.C. § 2283
(1976): "A court of the United States may not grant an injunction to stay proceedings in
a State court except as expressly authorized by Act of Congress, or where necessary in
aid of its jurisdiction, or to protect or effectuate its judgment." On the history of the
Anti-Injunction Act and developments in § 2283 litigation, see M. REDISH, supra note
186, at 259-90, and Mayton, Ersatz Federalism Under the Anti-Injunction Statute, 78

\textsuperscript{212} It may seem more natural to describe affirmative grants of federal judicial
power as jurisdiction statutes. In light of article III's language and history, see infra
force. The statute appears to traverse the same ground as the Younger doctrine in much the same way.213 Indeed, the Younger doctrine would have been rendered all but unnecessary214 had the Court not declared the Act inapplicable to section 1983 actions.215

The Supreme Court justifies its ersatz rule of federal subject-matter jurisdiction on public-interest concerns of comity and federalism. A closer examination of the two concerns, however, reveals that neither adds to the courts' authority to deny injunctions.

Comity216 concerns supporting a federal forum's refusal to entertain a case should have already been fully considered under a properly conducted equitable-jurisdiction inquiry. Recent decisions invoking comity appear to proceed from the supposition that concurrent federal and state proceedings are largely duplicative.217 If the

note 224, to suggest the Congress was empowered only to add to the jurisdictional power of lower federal courts is unthinkable. The valid exercise of Congressional power to remove cases from the authority of United States district courts is also a regulation of jurisdiction. For example, the Tax-Injunction Act, 28 U.S.C. § 1341 (1976), which restricts federal injunctions against state tax collection, and the Johnson Act, 28 U.S.C. § 1342 (1976), which restricts federal injunctions against state and local utility regulation, have been analogized to jurisdictional statutes. HART & WECHSLER, supra note 9, at 976, 978; cf. Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 CORNELL L.Q. 499, 507-11 (1928) (describing statutory developments in the history of federal-question jurisdiction that both expanded and restricted federal judicial authority). The Anti-Injunction Act is also, in effect, jurisdictional. Cf. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 294 (1970) ("A federal court does not have inherent power to ignore the limitations of § 2263 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear.").


213. Compare the language of the statute, supra note 211, with the text accompanying notes 167-70.

214. Of the post-Younger cases, only Hicks v. Miranda, 422 U.S. 322 (1975), would have escaped the same result under the Anti-Injunction Act. For a discussion of Hicks, see supra note 186.

215. In Mitchum v. Foster, 407 U.S. 225 (1972), the Court held that § 1983 suits operated as exceptions to the Anti-Injunction Act since they were, in the language of the Act, "expressly authorized by Act of Congress." Id. at 242. Because the statute appears neither expressly nor implicitly to exempt litigation brought under it from the Anti-Injunction Act, the result in Mitchum was curious. Professor Redish, who liked the result, nonetheless described the opinion as "questionable in its legal reasoning." M. Redish, supra note 186, at 271. Judge Friendly, who did not, called it "devastating to proper federal-state relations." H. FRIENDLY, supra note 188, at 99.

216. The term is of uncertain meaning at best. It particularly suffers from the lack of a satisfactory definition in the Younger line of cases. Federal courts have construed comity as a reason to decline jurisdiction to avoid duplicating state proceedings. But federal courts have usually been able to exercise their jurisdiction notwithstanding duplicative state proceedings, so long as the rival state action was not in rem. E.g., Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922). Although comity connotes deferral "[w]hen the degree of deference is relatively weak," Neuborne, Toward Procedural Parity in Constitutional Litigation, 22 WM. & MARY L. REV. 725, 767 (1981), the present trend appears to be toward an increased use of comity dismissals; see infra note 217.

defendant in a suit to enjoin a state prosecution demonstrates a sufficient parallel between the federal case and the pending state proceedings to justify a comity-based dismissal, he has demonstrated, a fortiori, that the federal plaintiff has failed what should be the irreparability-adequacy requirement of federal equitable jurisdiction.\(^{218}\) However viable the comity issue may be in other settings,\(^{219}\) it is redundant in cases addressed by the Younger doctrine.

In one respect, the appeal to federalism is also an inconsequential argument. Federal defendants can argue that not only are their attempts at law enforcement disrupted, but the competence and integrity of state judges will be impugned by a federal injunction. But, in comparison to arguments of defendants' own interests, appeals to the latter are likely to be diffuse and attenuated. They suffer from problems of obscurity characteristic of the arguments of injunction litigants who attempt to affiliate themselves with the interests of third parties,\(^{220}\) and thus should not be afforded much weight.\(^{221}\) Thus, federalism, like comity, adds little to the federal defendants' arguments concerning equitable jurisdiction.

On the other hand, federalism as a supplementary reason for injunction deferral frees the Younger doctrine from the constraints of a properly conducted equitable-jurisdiction inquiry. Much of the justification given by the Court\(^{222}\) and sympathetic commentators\(^{223}\) for the doctrine is that it regulates traffic between state and federal courts in a way that best advances the interests of federalism.

This argument, however, proves too much. Issues of federalism are of such transcendent importance that the Constitution mandates that inquiry over proportionate allocation of power between state and fed-

---

\(^{218}\) My suggestions for the form of the irreparability-adequacy requirement are discussed supra notes 70-78, 136-42, and accompanying text.

\(^{219}\) As a more basic matter, Younger-type cases simply do not pose the prospect of a parallel state proceeding because the federal plaintiff is cast in the role of a state defendant. This distinction is potentially very important. See the factors reviewed supra notes 188-91 and accompanying text.


\(^{221}\) As Professor Fiss correctly observes: "the primary concern must be with the sensibilities of state prosecutors; they would be the addressees of the...injunction. It is truly difficult, though not impossible, to imagine a state judge noticing — much less taking offense — when a case ceases to appear on his ever-crowded calendar." O. Fiss, supra note 27, at 64.


\(^{223}\) See Aldisert, On Being Civil to Younger, 11 Conn. L. Rev. 181, 195 (1979); cf. Bator, supra note 169, at 621-25 (declining to endorse the precise lines of Younger, but approving of the case generally because of the role it will preserve for state judges in constitutional adjudication).
eral courts be perennial. But the power to conduct the inquiry and the processes suitable to its undertaking belong to Congress, not the federal judiciary. Whether the Supreme Court could have achieved the Younger doctrine’s effect more legitimately through statutory interpretation is an interesting, but academic question.

224. The prospect of rivalry between lower federal courts and state courts was a concern raised at the Constitutional Convention. The framers agreed upon the need for a national judiciary, but many feared that federal trial courts would encroach upon the individual states’ rights. State courts were considered perfectly competent to hear all cases, assuming a right of appeal to a federal supreme court. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79-80 (1913).

At the convention, creation of a lower federal judiciary along with a supreme court was approved as the ninth resolution of the Virginia Plan. 1 M. FARRAND, supra note 8, at 21-22. Later, the Convention voted to strike the language creating “inferior tribunals” in the ninth resolution. Id. at 118. In the next vote to be taken, the Convention added to the ninth resolution: “That the national legislature be empowered to appoint inferior Tribunals.” Id. Delegates Madison and Wilson had argued unsuccessfully against the vote to strike “inferior tribunals.” After that vote, they argued in favor of the substitute language of the passage that the Convention had just stricken, observing the distinction between establishing such tribunals in the Constitution and giving the legislature the discretion to establish them. Id. at 125. The history, then, as well as the language of article III indicates that concerns of federalism in the allocation of judicial power were committed to Congress.


225. Questions about the extent of lower federal court jurisdiction are essentially political and are best addressed by the institution most comfortable with the political side of law making: Congress. Consider the following classic observations on the legal process of jurisdictional law-making.

Not inherent reasons . . . but practical justifications explain the past judicial acts and must vindicate existing jurisdiction. The force and dangers of parochial attachments, the effectiveness and limitations of a centralized judiciary administering law over a continent, the dependability of state courts, the convenience of suitors, shifting economic and political sentiments — such influences, with varying incidence, have shaped the accommodations of authority distributed between the national judiciary and the state courts. The present jurisdiction cannot rely on tradition.

Frankfurter, supra note 212, at 514. Then Professor Frankfurter correctly concluded that questions of federal jurisdictional limits are issues of the very stuff of American politics, to be settled or evaded by the compromises of one generation, only to reappear in the next. They are not technical issues, nor within the special province of lawyers. The formulation of the compromises demand legal skill, and of a high order. But the bases of adjustment must be evolved by statesmen, and ought both to enlist and to satisfy public understanding.

Id. at 500-01.

226. The Supreme Court declined an opportunity presented in Mitchum v. Foster, 407 U.S. 225 (1972), to interpret the Anti-Injunction Act so as to obviate the need to resort to the Younger doctrine in most cases, by construing § 1983 to be an “expressly authorized” exception to the Anti-Injunction Act.

The result in Mitchum is open to question. There is much to the view that “the expressly authorized condition of the statute cannot simply be ignored.” Mayton, supra note 211, at 355. Critics of the Mitchum decision appear to be correct in arguing that the condition was ignored in that case. It may not be altogether fair to criticize the Mitchum Court’s failure to choose correctly between the avenues presented by the Anti-Injunction Act and the Younger doctrine, as the latter choice may have not then been available. The pending state proceeding was civil in character and perhaps the Court

[416]
By instead setting up what is in effect a rival scheme of federal subject-matter jurisdiction, the Court has caused several problems.

First, statutory jurisdiction confers an entitlement to sue in federal court. Whether the federal plaintiff is damaged when a court utilizes Younger to withdraw that entitlement depends on whether a state court adjudication would be in all respects as satisfactory as one by a federal trial judge. It is doubtful that in all respects it would. Second, it is wrong to deprive a federal plaintiff of an in-

was not ready to apply Younger to civil proceedings. Still, if the Supreme Court was determined to strike jurisdictional balances in the name of federalism, it is regrettable that it did not choose the Anti-Injunction Act as a vehicle, since the invocation of federalism would not have been out of place there. The implications of the choice made by the Court are more than academic. See infra notes 227-32.

There is general agreement that the Anti-Injunction Act's original purpose has become obscure. The conventional view as to its purpose is reflected in Justice Black's opinion for the Court in Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 358 U.S. 281 (1970): "While all the reasons that led Congress to adopt this restriction on federal courts are not wholly clear, it is certainly likely that one reason stemmed from the essentially federal nature of our national government." Id. at 285 (footnote omitted); see also Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511, 518-19 (1955) (section 2283 reflects Congress's confidence in the state courts' ability to vindicate federal rights, and a desire to avoid conflicts between federal and state courts). Justice Black's view, supported in the past, see Warren, supra note 180, at 347-48, has come under recent criticism. See Mayton, supra note 211, at 331-346 (Congress intended only to prohibit individual Supreme Court Justices from enjoining a state proceeding); Note, Federal Court Stay of State Court Proceedings: A Re-examination of Original Congressional Intent, 38 U. Chi. L. Rev. 612, 613-14, 618 (1971) (asserting that historical evidence shows that Congress intended that the federal courts be permitted to use other methods of interfering in state proceedings). Yet, in light of the Anti-Injunction Act's language, and Congress's attempts to implement policies of federalism through jurisdictional enactments, it seems clear that judicial interpretation of the Anti-Injunction Act would have provided stronger support for a door-closing rule than equity doctrine larded with public-interest concerns of comity and federalism. The concerns of comity and federalism have, in fact, been invoked as factors in the interpretation of a jurisdictional statute. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 503-05 (1975) (Rehnquist, J., dissenting). Justice Rehnquist's use of comity and federalism was far more appropriate to the issue there, the scope of the Supreme Court's appellate jurisdiction over state decisions under 28 U.S.C. § 1257 (1976), than was his use of the same formulation when writing for the Court in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and Moore v. Sims, 442 U.S. 415 (1979).

227. It is in the national interest for certain federal-question jurisdiction to exist in United States district courts: suits brought by the federal government and those in which the United States or one of its officers is a party. ALI STUDY, supra note 73, at 477. The remainder of federal-question jurisdiction appears intended "to provide a federal forum to those litigants who prefer it in federal question cases." Id.

On occasion the Supreme Court has recognized the status of federal jurisdiction as a party entitlement. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); see also Patsy v. Board of Regents, 457 U.S. 496, 501-02 (1982) (federal courts should not defer the exercise of jurisdiction under federal statutes unless deferral is consistent with congressional intent). The Younger doctrine, of course, does not recognize the party-entitlement idea of federal jurisdiction, nor do other recent Supreme Court cases declining jurisdiction in the name of comity. See supra note 217.

228. Compare Neuborne, supra note 169 (institutional differences between state and federal courts make the federal courts the preferred forum) with Fischer, Institutional Competency: Some Reflections on Judicial Activism In The Realm of Forum Allocation Between State and Federal Courts, 34 U. MIAMI L. REV. 175 (1980) (criticizing Professor Neuborne's belief that institutional differences between state and federal courts are in fact clearly measurable).

229. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), Justice Rehnquist tried to
junction awarded after a thorough inquiry under doctrines of equitable jurisdiction, for no better reason than that it is in the public interests of comity and federalism to do so. The Younger doctrine does considerable violence to the idea suggested earlier in this Article 230 that, properly understood and applied, equitable jurisdiction is capable of justifying as well as refusing injunctions.231 If the Supreme Court uses Younger to overturn an injunction issued within the lower court’s equitable jurisdiction, it denies the injunction to one imminently threatened with the substantial loss of constitutional rights, who is without the prospect of an adequate noninjunctive remedy or any practical hope that injury to those rights will otherwise be averted. A properly understood equitable-jurisdiction inquiry does not under such circumstances leave plaintiff’s case untested. It validates plaintiff’s request for an injunction and creates a strong presumption that it should issue. Appeals to comity and federalism should be ineffective in the face of this presumption.

A final problem created by the Younger doctrine is that it contributes to an already confused and unattractive image of equity.232 The only way for courts to administer federal equitable jurisdiction in Younger or other settings is through an appreciation of the fact-sensitive and exceedingly variable inquiry from case to case. This

---

230. See supra notes 94-96 and accompanying text.

231. The Supreme Court’s principal mode of elaborating the Younger doctrine has been to overturn injunctions on review. See cases cited supra note 192. It is not clear that, as a matter of federal equitable jurisdiction, all of those injunctions should have been granted originally. What can be said is that those injunctions should have been overturned only in cases in which the Court demonstrated in thoughtful, closely reasoned opinions that the restraints of equitable jurisdiction were exceeded.

232. Younger and related cases are “Exhibit A” in Professor Fiss’s case against the hierarchical subordination of injunctions. O. Fiss, supra note 27, at 42, 62-65. An indication of the confusion Younger has generated can be found in Professor Laycock’s opposing view that the Younger cases have little to do with equity. Laycock, supra note 27, at 1068.
does not pose an easy alternative to Younger. But it may be easier to live with, for it does not ask the impossible: to create wooden rules out of the protean material of equity.

**Conclusion**

Although the attack on equitable jurisdiction's creation of a hierarchy of remedies has intensified in recent years, the long-standing rules restricting the exercise of equitable discretion should not be ignored. As described in the author's theory of equitable jurisdiction, the requirements of imminent, substantial, and irreparable harm, no adequate remedy at law, and manageability are capable of serving important functions in limiting the issuance of injunctions, which, in turn, reduces the strains on courts and defendants that are often created by these injunctions.

Those who assert that federal courts should ignore some of the traditional restraints of equity jurisdiction in issuing injunctions sought by governmental plaintiffs do not appreciate the utility of each restraint. For a court to issue an injunction without finding the probability of imminent harm is wasteful of scarce judicial resources. Similarly, concerns of manageability are particularly important in public-injunction cases, as it is the issuing court that must ultimately determine whether the injunction has been violated. Public-interest concerns can be accommodated through the traditional inquiries of equitable jurisdiction. Although it does not appear that the federal courts have abandoned their judicial function in public injunction cases, courts should more clearly address these factors in each case.

More troubling, however, is the federal courts' decision to forego the equitable-jurisdiction inquiry when faced with comity and federalism arguments by state governmental plaintiffs. As a result of the Younger doctrine, considerations of comity and federalism now operate to prevent absolutely the federal courts' exercise of equitable jurisdiction in certain situations, thereby replacing the sensitivity that could be displayed by courts analyzing these cases under the instrumental view of equity principles suggested by the author's theory of equitable jurisdiction. Moreover, it is Congress's responsibility, not the federal courts', to regulate the flow of cases between federal and state courts according to the dictates of federalism.