Washington and Lee Law Review

Volume 78
Issue 5 *Black Scholars Book 2022*

Article 6

2021

Civil Rights Equity: An Introduction to a Theory of What Civil Rights Has Become

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Abstract

This Article argues that civil rights law is better understood as civil rights equity. It contends that the four-decade-long project of restricting civil rights litigation has shaped civil rights jurisprudence into a contemporary version of traditional equity. For years commentators have noted the low success rates of civil rights suits and debated the propriety of increasingly restrictive procedural and substantive doctrines. Activists have lost faith in civil rights litigation as an effective tool for social change, instead seeking change in administrative forums, or by asserting political pressure through social media and activism to compel policy change. As for civil rights litigation, activists have, most damningly, ignored it. This Article makes a preliminary case for understanding civil rights jurisprudence as a contemporary version of traditional equity, available in limited circumstances to address extraordinary violations of rights. Civil rights litigation has become a limited tool: inappropriate for driving social change, unreliable for litigants involved in everyday disputes, and mostly incapable of articulating and developing rights through precedent. Judges are the powerful, central figures in this litigation. And the rights landscape is structured by the capabilities and demands of the kind of equity regime civil

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rights litigation has become. What emerges is a vision of the courts as protectors of the status quo in social and political relationships.

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INTRODUCTION

Civil rights "law" has become civil rights "equity." Specifically, civil rights jurisprudence has taken on the attributes of traditional equity, and civil rights litigation has come to fill the role traditional equity once occupied. Civil rights equity contrasts sharply with current usage of the term "equity" as a synonym for equality, or even justice. Civil rights equity represents not the achievement of an equanimous status in law or society, so much as it is the reduction of the role of civil rights litigation to the supplemental role of traditional equity, characterized by and limited to addressing outrages for deserving individuals.

In the days after George Floyd's death, protests erupted across the country.[1] These protests sought to change police use-of-force practices that have led to the killing of Black people, often in response to suspicion of minor crimes, as was the case with Mr. Floyd.[2] These protests reanimated the #Blacklivesmatter movement of 2015, which accompanied campus protests for racial justice and the #MeToo movement.[3] Collectively, these might be viewed as a New Civil Rights Movement—the power of which was reflected in the widespread, multiethnic nature of the antiracist protests of the summer of

1. *See* Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Oct. 2, 2021), https://perma.cc/JQF9-75P3.

2. *See* Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), https://perma.cc/324H-AJU7.

3. *See* Linda S. Greene et al., *Talking About Black Lives Matter and #MeToo*, 34 WIS. J.L., GENDER & SOC'Y 109, 110–14 (2019).

2020, as well as the central place those protests occupied in the political imagination at that time.[4]

As civil rights movements, the summer 2020 protests, like those in 2015, have a strange (even strained) relationship with civil rights law; civil rights litigation is ever-present but decidedly peripheral to this New Civil Rights Movement and its pronounced goals. Since 2015, the families of prominent victims of police violence have been represented by attorneys pursuing compensation for civil rights violations. Indeed, in many of the cases they have been represented by the same lawyer, Ben Crump, who secured settlements in several of the prominent cases.[5] Similarly, many of the women accusing Harvey Weinstein of sexual assault and rape are suing him and the companies he led.[6] But in neither instance is civil rights law central; the litigation is seen as attaining needed compensation for the victims, but few view the lawsuits as effective deterrents.[7] Mr. Crump voiced this concern following the

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4. *See* Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://perma.cc/4LAY-67LM.

5. *See* Tyler Foggatt, *Who Is the Floyd Family's Lawyer?*, NEW YORKER (June 15, 2020), https://perma.cc/8UDV-ETN3

> In 2012, after Trayvon Martin was killed by George Zimmerman, in a suburb of Orlando, Martin's family hired Crump, who is based in Tallahassee, to represent them. He made the rounds on cable news to talk about the case; shortly afterward, protests erupted in Florida. (Zimmerman was eventually acquitted.) Two years later, Crump took on another high-profile case, after Michael Brown was shot dead by Darren Wilson, a police officer, in Ferguson, Missouri. (More protests; Wilson was never charged.) Now Crump is representing the family of George Floyd, who was killed, three weeks ago, by Derek Chauvin, a cop in Minneapolis, who knelt on Floyd's neck for nearly nine minutes.

Minneapolis settled with Mr. Floyd's family in March 2021. Rachel Treisman, *Minneapolis Reaches $27 Million Settlement with Family of George Floyd*, NPR (Mar. 12, 2021, 2:21 PM), https://perma.cc/HYQ8-3ADW.

6. *See, e.g.*, Complaint at 55–74, Geiss v. Weinstein Co. Holdings, No. 17-cv-09554 (S.D.N.Y Dec. 6, 2017); Complaint at 42–56, Doe 1 v. Weinstein Co. Holdings, No. 17-cv-08323 (C.D. Cal. Nov. 15, 2017); *see also* Jan Ransom & Danielle Ivory, *'Heartbroken': Weinstein Accusers Say $44 Million Settlement Lets Him off the Hook*, N.Y. TIMES (May 24, 2019), https://perma.cc/K6GA-9UAY ("Zoe Brock, a former model who has accused Harvey Weinstein of sexually inappropriate behavior, said she once viewed a lawsuit against him as her best opportunity to hold him to account.").

7. *See* Treisman, *supra* note 5.

announcement of a settlement in the killing of Mr. Floyd.[8] He is reported to harbor

> mixed feelings about whether civil settlements actually serve to deter police violence, noting that while they may motivate city governments to make changes, they have not necessarily been proved to do so. . . . Crump said that to him, progress would mean justice—which is not the same as accountability. "The only thing George Floyd could get is accountability, Breonna can only get accountability, you know, Ahmaud Arbery can only get accountability," he said. "Because the reality is, justice would be them still here with us living."[9]

Indeed, some commentators have come to question the propriety of taxpayers paying judgments for police practices the taxpayers might not support.[10] In any case, change is expected to come from political and administrative avenues in response to protests.[11] If any judicial process is crucial for many activists, it is the criminal prosecution of the perpetrators, whether the perpetrators are police utilizing excessive force or workplace rapists, that activists consistently and persistently call for.[12] It does not seem too much to say that activists do not believe civil rights litigation is a useful tool for social change. Notably, when the summer 2020 protests triggered talk of legislation aimed at modifying qualified immunity, and thereby facilitating civil

8. *See id.* (explaining that Mr. Crump does not believe the suits serve as actual deterrents to police violence).

9. *Id.*

10. *See, e.g.*, Andrew Cockburn, *Blood Money: Taxpayers Pick Up the Tab for Police Brutality*, HARPER'S MAG., Nov. 2018, at 61, https://perma.cc/82L4-2U9S (PDF).

11. The Movement for Black Lives (M4BL) policy platform does not list civil litigation among their policy proposals. *See Vision for Black Lives*, M4BL, https://perma.cc/3PFE-6KUY. A news story on Ben Crump highlights hostility on social media at the intervention of "ambulance chasers" as a distraction from the movement. *See* Foggatt, *supra* note 5.

12. *See, e.g.*, Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), https://perma.cc/QJ6X-PNPL (last updated Apr. 12, 2021) (noting the public outcry to charge police officers connected to the deaths of Breonna Taylor, Michael Brown, and Carlos Ingram Lopez).

rights suits against abusive officers,[13] activists were unmoved,[14] dismissing such calls in favor of proposals to "defund the police."[15] Law seemed beside the point, an inappropriate distraction from efforts for true reform.

Ambivalence to civil rights law derives in part from an increasingly conservative federal judiciary that has been inhospitable to civil rights claims.[16] This ambivalence is also consistent with a view of social change that emphasizes political processes, organization, and activism.[17] But the litigation tools of the Civil Rights Movement seem available, and conservative activists are energized about using the courts to counteract policy with which they disagree (and which they feel certain violates the Constitution).[18] Civil rights litigation lives and yet it seems that the statutes and constitutional rights that were hard-won in the original Civil Rights Movement have been made superfluous to the challenges of today. Litigation has become an inefficient and ineffective tool for change that, though ephemeral, always requires maximum social and political capital, mobilized and deployed in the streets.[19] Social justice, it seems, is not to be had through law, and victories are not effectively memorialized there.

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13. *See* Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (June 23, 2020), https://perma.cc/VKN2-339K (last updated Mar. 8, 2021).

14. "For a growing consortium of progressive groups focused on young voters, justice for Mr. Floyd requires dismantling police power and investing in programs related to mental health, housing and education—which activists believe would reduce crime and violence." Astead W. Herndon, *For George Floyd's Mourners, What Does 'Justice' Mean?*, N.Y. TIMES (June 12, 2020), https://perma.cc/J7X2-ZTZC.

15. *See* Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://perma.cc/3PQQ-9UXX.

16. *See* Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), https://perma.cc/8U9V-SDUC (last updated Mar. 16, 2020).

17. *See* Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 400–05 (2018) (discussing the pragmatic approach that favors other forms of activism and organization over litigation for creating change).

18. *See* Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 L. & SOC. INQUIRY 1698, 1709–14 (2018) (explaing how the conservative movement used originalism as a tool to restrict rights).

19. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 958 (2011).

This Article offers a view as to why. Its focus is on the nature of civil rights litigation, which has been built around judicial equity powers from its inception and occupies a role akin to equity's traditional role over the years: a means for courts to provide remedies to individuals in unusual circumstances in order to achieve justice. Ultimately, civil rights jurisprudence has become "civil rights *equity*."

In the Anglo-American jurisprudential tradition, law and equity were separate, complementary systems.[20] Common law courts and equity courts successively emerged in England after the Norman conquest, with common law becoming an independent, formalized system of jurisprudence, and equity emerging as a system for interposing just results in cases where the common law was inadequate.[21] Equity possessed its own, complex system of writs, rules, and precedent,[22] but in the United States federal courts, the Federal Rules of Civil Procedure (FRCP) and their rejection of formal pleading merged equity with law.[23] Since then, a single system of pleading and procedure for law and equity has governed, diminishing the distinction between law and equity in a combined system focused on attaining justice. This fluid, less formal nature aided in the emergence of civil rights law and, arguably, eventually undermined civil rights law's social change capacity.

Emerging from the ferment of the Civil Rights Movement and the post-World War II optimism in rights-based legalism, civil rights threatened to reshape American law. Instead, the revolutionary potential of civil rights has been refashioned in recent years along the lines of traditional equity in both formal and informal ways. Formally, civil rights equity reflects the central role of equitable remedies in civil rights jurisprudence and the central importance of sharp limitations on those

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20. *See* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 329 (2005) [hereinafter Main, *New Equity*].

21. *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 430, 437 n.50 (2003) [hereinafter Main, *Traditional Equity*].

22. *See generally* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (13th ed. 1886).

23. *See* Main, *Traditional Equity*, *supra* note 21, at 431.

remedies.[24] Informally, it reflects the subtle influence of equitable constraints on shaping how courts approach damages actions, making those actions characteristically procedural with vaguely defined, fact-intensive rights that operate to give judges in civil rights cases a role similar to the role of traditional equity courts.[25] The resulting "civil rights equity" limits the force of rights, confines rights to exceptional circumstances, and subordinates them to private rights. Civil rights equity runs counter to *Marbury*'s dicta that public rights are like private rights, to be enforced when established.[26] Civil rights equity is a judicial style that has made civil rights exceptional and limited. It explains the resilience of civil rights, their ever-presence, as well as their uselessness for activists in this new civil rights era.

The claim that civil rights law has *become* civil rights equity is peculiar in at least three ways, the response to which structures this Article's delineation of a theory of civil rights equity. First, civil rights statutes and jurisprudence were initially created expressly to empower courts to use their equity powers to dismantle the system of segregation known as Jim Crow that had emerged after slavery and Reconstruction.[27] Congress and the courts seemed to agree that, to take on dismantling a system as complex and far-reaching as Jim Crow, required empowering the courts generally, and individual judges specifically, to utilize their equity powers.[28] Though these efforts were discussed in the language of rights, and though, importantly, a parallel system of damages actions emerged

24. *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1212 (2005) (discussing how the courts have eroded remedial measures over the past twenty-five years).

25. *See id.* at 1211, 1235–41.

26. Chief Justice Marshall quoted Blackstone: "'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" Marbury v. Madison, 5 U.S. 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

27. *See* Robert E. Easton, Note, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983, 1983 (1990).

28. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, pmbl., 78 Stat. 241, 241 (stating that the Act would "confer jurisdiction upon district courts of the United States to provide injunctive relief against discrimination in public accommodations").

alongside this equity-focused system,[29] the origin and structure of civil rights jurisprudence during the Civil Rights Movement was rooted in equity.[30] "Civil rights equity" is only a strange construction in the sense that we presume that "civil rights law" invokes legal rights, or to the degree we think of rights in light of the related analogy to common law rights enforcement that "law" implies. Part I argues that civil rights are equity because it was rooted in equity, and in its formative years, equitable powers came to be closely associated with the civil rights project (emerging damages actions notwithstanding).

Second, the distinction between law and equity is not supposed to be especially meaningful in modern American law,[31] making a distinction between civil rights law and civil rights equity unclear. One should be able to speak coherently of *legal* rights even if the primary remedies invoked are *equitable*. Indeed, the merger of law and equity facilitated courts' effective confrontation of Jim Crow in the face of resistance to the Civil Rights Movement and resistance to court-centered efforts to eradicate Jim Crow.[32] Creative utilization of equitable remedies would evolve into the structural injunction and make public law litigation characteristically structural reform litigation.[33] Though the Supreme Court and Congress would in time curtail these broad powers, the merger of law and equity permitted significant judicial confrontation with Jim Crow, which made it difficult to curtail courts' equitable powers while confining changes to the "equitable" aspects of civil rights litigation.[34]

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29. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 392–96 (1971) (permitting damages actions against federal officers for violations of Fourth Amendment rights).

30. *See* Civil Rights Act of 1964, pmbl., 78 Stat. at 241.

31. *See* Samuel Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1008 (2015) [hereinafter Bray, *The Supreme Court and the New Equity*].

32. *See, e.g.*, OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 4 (1978).

33. *See* Kamina Aliya Pinder, *Reconciling Race-Neutral Strategies and Race-Conscious Objectives*, 9 STAN. J. C.R. & C.L. 247, 250 (2013) (describing public law litigation as lawsuits based in equity that "extends beyond the bilateral structure to broadly impact public policy resulting in a remedy that requires judicial activism and ongoing oversight and administration of remedial compliance").

34. *See, e.g.*, Rudovsky, *supra* note 24, at 1213 (indicating that civil rights litigants seeking monetary relief face court-imposed barriers to recovery).

Civil rights equity thus represents the influence of traditional equitable restrictions in limiting civil rights jurisprudence more generally. Part II argues that civil rights are equity because it has operated and continues to operate under limitations on litigation drawn, often indirectly, from traditional equity restrictions. The effect of these restrictions is the creation of a hierarchy of rights that defines when to apply civil rights equity and is defined by assumptions about what constitutes an appropriate civil rights case, as informed by traditional equity-based limitations on appropriate use of judicial power.

Third, the claim that civil rights are equity is peculiar because merging law and equity created a simplified system of attaining justice, empowering courts to pursue justice in an efficient, consolidated process. Thus, to speak of civil rights becoming equity defies the assumptions of the post-FRCP approach by implying that a separate kind of equity persists. But the radical anti-formalism of modern law has obscured the emergence of a civil rights jurisprudence that administers legal rights by duplicating the form and role of traditional equity. Civil rights equity means that civil rights jurisprudence has been fashioned to permit courts to intervene principally in circumstances reminiscent of traditional equity courts—to address outrages, where legal remedies are inadequate, and for deserving litigants.[35] Civil rights are made a supplement to law with an approach that supplants legalistic constructions of rights with a largely unbounded search for injustice as understood by individual jurists. The unbounded nature of this jurisprudence is also obscured because, like the jurisprudence of traditional equity, civil rights jurisprudence is characteristically procedural—focused on limiting litigants' access to courts' tremendous power to provide remedies. Yet civil rights jurisprudence is substantively fact intensive—focusing jurists on the specific claim of the particular individual, under their precise circumstances.[36] The efficient, consolidated pursuit of justice in modern law has come to empower jurists to provide

35. *See* Main, *New Equity*, *supra* note 20, at 400 ("[T]he jurisdiction of Equity consisted entirely of cases where the legal remedies were inadequate.").

36. *See* Rudovsky, *supra* note 24, at 1200 ("[T]he Supreme Court . . . has restricted civil rights remedies through a series of complex and controversial measures, including . . . narrower standards for standing and for private enforcement of civil rights legislation . . . .").

remedies where they perceive an injustice, tested by procedural limits, and structure cases for judicial management, checked by the necessity of accord from appellate courts.[37] Civil rights equity is thus a search for outrages.

Accordingly, Part III argues that civil rights are equity because it fulfills the role of traditional equity in the way traditional equity operated. Fulfilling equity's role in this way is not confined to cases involving equitable remedies. Indeed, civil rights equity is epitomized by damages actions being restricted to the kinds of circumstances that equity practice occupied in traditional equity systems. This is less an application of equity restrictions to civil rights than it is an application of popular views of equity in the legal profession to civil rights litigation as a means of redefining the role of civil rights. Part IV details how civil rights equity operates, and the Conclusion summarizes some implications.

I. EQUITY AND CIVIL RIGHTS IN THE CIVIL RIGHTS ERA

Civil rights are equity because the original conception of civil rights litigation was thoroughgoingly equitable.[38] The reliance on equity in civil rights made civil rights and equitable remedies synonymous and modeled civil rights intervention on equity's traditional role.[39] Though a complete version of civil rights equity would only emerge as a product of efforts since the late 1970s to restrict civil rights actions, this original conception of civil rights had a lasting effect on courts' approach to rights cases.

This Part begins with a description of equity. It then depicts the centrality of equity to *Brown v. Board of Education*[40] and to the formative 1960s civil rights legislation. Equity was more than a choice of remedy, more, even, than a necessity dictated by the enormity of a nation confronting an aspect of its identity

37. *See, e.g.*, FISS, *supra* note 32, at 6 ("The civil rights injunction . . . invites us to imagine that the substantive claim could be just, and to ask then whether the classical position of the injunction in the remedial hierarchy—one of subordination—can be justified.").

38. *See* FISS, *supra* note 32, at 4.

39. *See* Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 946–48 (2010).

40. (*Brown I*), 347 U.S. 483 (1954).

as defining as Jim Crow. Equity framed and defined the judiciary's role in this project as an exceptional intervention to address an extraordinary problem. This framework would influence future treatment of rights as the country and the courts largely abandoned their brief confrontation with Jim Crow's myriad effects.[41]

A. *Traditional Equity, Equity as Justice, and Popular Equity*

Civil rights equity is not traditional equity. It draws from, but is independent of, equity as it used to be and as it is today. Civil rights equity is an imitation of traditional equity and is an expansion of those aspects of equity that remain significant after the merger of law and equity. But equity is a slippery term, used alternatively to refer to the legacy judicial system that operated in parallel to common law courts in the Anglo-American legal tradition (traditional equity) and more broadly to reference the mission of such courts in ensuring justice (equity as justice).[42] This formal system and broad mission animate the ways equity is used in legal discourse, producing a third aspect of equity: informal juridical equity (popular equity). Traditional equity, equity as justice, and popular equity all inform civil rights equity, which is largely a species of popular equity.

Traditional equity emerged alongside and in supplement to the common law.[43] It possessed its own, ultimately complex system of writs, rules and precedent.[44] Traditional equity was a parallel system of Anglo-American jurisprudence, originally administered by independent courts of equity.[45] The system of

41. *See* FISS, *supra* note 32, at 4 (discussing the impact of the injunction as its use extended to civil rights cases generally).

42. *See* Main, *Traditional Equity*, supra note 21, at 495 ("The moderating force of equity ensures just results in each application of the strict law and also fulfills an essential role in the dialectic evolution of the law.").

43. Main, *Traditional Equity*, *supra* note 21, at 502.

44. *See generally* STORY, *supra* note 22.

45. "England has not had separate courts of law and equity since the 1870s." Bray, *The Supreme Court and the New Equity*, *supra* note 31, at 1017 (citing Patrick Polden, *Part III: The Courts of Law*, *in* 11 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 523, 757–73 (John Baker ed., 2010)). In Australia, Canada, and the United Kingdom the term "fusion" refers to the merger of law and equity. Samuel L. Bray, *Form and Substance in the Fusion of Law and*

equity was unevenly adopted by the colonies and early American states due to distrust of the unbounded power it vested in judges,[46] but states widely adopted equity courts or recognized equity in courts with dual or merged jurisdiction.[47] American courts drew on the writs, rules, and precedent of the English Chancery Court and later on homegrown equity precedent to adjudicate equity cases.[48] Federal courts always had both legal and equitable jurisdiction but, until the adoption of the FRCP, administered law and equity separately, typically borrowing state precedent and procedure under various process and conformity acts.[49]

In Anglo-American law, common law and equity were systems that successively emerged from the royal prerogative to supplant the legal process of communal courts after the Norman conquest.[50] As common law became an independent, formalized system of jurisprudence, equity emerged as a system for interposing just results in cases where the common law courts were inadequate.[51] Over time, the Court of Chancery developed into a distinct court that was a supplement and competitor to the common law courts and whose power expanded as the complexity of growing mercantilism exposed limitations in the common law procedure, forms of action, and substantive rules.[52]

Equity, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk et al. eds., 2020) [hereinafter Bray, *Fusion of Law and Equity*].

46. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 926 (1987).

47. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 95–98 (3d ed. 2005).

48. *See* Main, *Traditional Equity*, *supra* note 21, at 463.

49. *See* Subrin, *supra* note 46, at 930.

50. For an examination of the history of equity jurisdiction, see Main, *Traditional Equity*, *supra* note 21, at 437.

51. *See id.* at 440–42. Main's review underscores the supplemental role of equity in providing flexibility to the "universalizing" tendency of law. *See* Main, *New Equity*, *supra* note 20, at 351. That flexibility is lost in a continuous process that Main believes equity operated to counteract. *Id.* at 400. Civil rights equity serves a similar purpose but rather than provide flexibility to ensure justice, civil rights equity ensures flexibility to suppress the development of a strict civil rights jurisprudence that would disrupt notions about federalism and the proper role of courts.

52. *See* Main, *Traditional Equity*, *supra* note 21, at 442–43.

Equity courts also transformed over time,[53] eventually operating as a complex, parallel legal system,[54] even in the United States, where equity jurisdiction was sometimes, for example, in the federal courts, exercised by the same judges possessing common law jurisdiction.[55]

Since the merger of law and equity[56] in the FRCP and the rejection of the formal pleading it included, a single system of pleading and procedure for law and equity has governed, obscuring the distinction between law and equity, the latter of which is most identifiable today in specific equitable remedies.[57] The jurisprudence of traditional equity was thus permitted to inform the equitable powers deployed after *Brown* to administer civil rights remedies in what would become the civil rights or structural injunction. Some conservative commentators regard *Brown* as disrupting traditional equity by interposing a "sociological" perspective in place of an individual focus,[58] but

53. Until the seventeenth century, courts of equity focused on right and wrong with little regard for precedent in the name of conscience. *Id.* at 445. Starting with Lord Chancellor Bacon, who issued one hundred rules of equity, and continuing under subsequent Lord Chancellors, equity was "bound and confined by the channels of its own precedents and the technicalities of its own procedure." *Id.* at 447–48.

54. *See* Subrin, *supra* note 46, at 918–21 ("An expansive equity practice developed as a necessary companion to common law.").

55. *See* Bray, *The Supreme Court and the New Equity*, *supra* note 31; FRIEDMAN, *supra* note 47, at 97–98 (noting that many states "handed over the powers and tools of equity to ordinary courts of common law").

56. The "merger" was preceded by the merger in the influential Field Code of New York. FRIEDMAN, *supra* note 47, at 293–94. Subrin argues that the Field Code was more common-law rooted than it appeared and much more so than the FRCP. *See* Subrin, *supra* note 46, at 925, 931–39.

57. Though equity has disappeared, save in remedies according to Bray, *Fusion of Law and Equity*, *supra* note 45, at 2 n.5, equity arguably won out in the FRCP, influencing the courts' distinctly anti-formalist approach under the FRCP. *See* Subrin, *supra* note 46, at 943–74 (explaining how equity and common law influenced the FRCPs); FRIEDMAN, *supra* note 47, at 298 (noting that, insofar as law and equity were joined in the FRCPs, equity "came out on top").

58. *See* GARY MCDOWELL, EQUITY AND THE CONSTITUTION 8–11 (1982) (explaining that, because of the *Brown* decisions, "[e]quity, originally and historically a power addressed toward individuals, has been stretched to cover entire social classes"); HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 371–72 (1990) (noting that the balancing test under *Brown II* might mean "Linda Brown's right to

these objections seem really to be to the definition of the right to equality under the Constitution. As one objector conceded, *Brown II*'s[59] use of equity was a conservative outcome, notwithstanding how the structural injunction would be utilized in years to come.[60] *Brown* (*I* and *II*) initiated a civil rights jurisprudence characterized by equity's flexible, forward-looking focus on achieving just outcomes.[61] For one commentator, "*Brown* and its legacy . . . are very good constitutional equity."[62]

However administered, traditional equity had distinctive characteristics. Traditional Equity was *supplemental to law*; it intervened only where the common law provided no "plain, adequate, and complete remedy."[63] Traditional equity was in personam, acting only on the individual and enforced only through contempt power.[64] In this way, equity courts avoided conflict with common law courts that may have simultaneously possessed jurisdiction over a dispute.[65] And traditional equity *pursued justice*, understood as the "moral sense of the community."[66]

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prompt relief must yield to some larger but vaguely defined public interest in balancing the claims of her protected class against the need for public order").

59. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

60. *See* GRAHAM, *supra* note 58, at 371 ("*Brown II*, then, *was* a conservative decision, as the relieved white South and the disappointed civil rights community immediately perceived." (emphasis in original)).

61. *See* FISS, *supra* note 32, at 6 (explaining that the civil rights injunction as applied in *Brown* permits the courts to "look at the injunction through a different substantive lens—a belief that the underlying claim—to achieve equality for the racial minority—is just").

62. PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA xii (1990).

63. Main, *New Equity*, *supra* note 20, at 350; *see* Main, *Traditional Equity*, *supra* note 21, at 451; STORY, *supra* note 22, at 16.

64. Main, *New Equity*, *supra* note 20, at 350.

65. *See* Main, *Traditional Equity*, *supra* note 21, at 451 ("Whenever a court of law was competent to take cognizance of a right and had the power to proceed to a judgment that afforded . . . relief, the plaintiff had to proceed at law because . . . the defendant had a right . . . available only in the law courts.").

66. "Intervention was premised on the notion that justice incorporated the moral sense of the community, existing as a function not only of a community's technical rules but also of 'magisterial good sense, unhampered by rule . . . .'" Main, *New Equity*, *supra* note 20, at 351 (citing Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 701–02 (1913)). Traditional

Significantly, these attributes of traditional equity operated in concert with law and were interdependent with law.[67] Equity's role in doing justice *derives from* the inadequacies of law.[68] Equity intervened when legal outcomes were inconsistent with the community's conscience reflected through the Chancellor.[69] As Justice Story noted, the guiding principle of equity was the justice of the common law, making equity "sometimes concurrent," "sometimes exclusive," and "sometimes auxiliary" to the common law.[70] Equity responded to inadequacies in law:

> The remedy must have been plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. . . . It must have been adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must have been complete; that is, it must attain the full end and justice of the case. It must have reached the whole mischief and secure the whole right of the party in a perfect manner at the present time and in future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity was, therefore, sometimes concurrent with the jurisdiction of a court of law, it was sometimes exclusive of it, and it was sometimes auxiliary to it.[71]

Where equity did intervene: equity's in personam nature suppressed the formation of precedent; its search for a plain, adequate, and complete remedy at law avoided interference with common law; and its emphasis on justice counseled hesitation where the outcome of a decision in equity was less than clearly in service of community notions of right.[72] Equity thus counseled

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equity served as a check on the universalizing tendency of law, focusing on the specific case to convey the conscience of the community. *See id.*; Subrin, *supra* note 46, at 918.

67. For a review of the debate over whether and to what extent equity interfered with the Common Law or abated its rigors, see Main, *New Equity*, *supra* note 20, at 370 n.196.

68. *See id.* at 351.

69. *See id.* at 370 ("[T]he very purpose of a separate system was to correct or to mitigate injustices caused by the rigor of the common law.").

70. STORY, *supra* note 22, at 20.

71. *Id.* at 19–20 (internal citations omitted).

72. Main, *New Equity*, *supra* note 20, at 371.

public interest balancing to obtain a just result.[73] Traditional equity's intervention power is consequently more limited than it might have seemed.[74] Traditional equity was dynamic, operating in a dialectical relationship with law and dependent on it.[75]

However, in the United States, the merger of law and equity has largely limited our discussion of equity to remedies and, because equity is no longer working as a supplement to the common law, rendered equity static, rigid, and mostly overlooked.[76] But the merger also had liberating effects. It permitted courts to tailor unique remedies that fit the right violated without worrying about procedural, substantive, or

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73. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1780 (1991) ("Frequently the availability of equitable remedies depended, at least in part, on a balancing calculus structured to reconcile public and private needs.").

74. As Main elaborates:

> Equity did not claim to override the law. By acting *in personam*, Equity could compel a person to perform a duty without directly challenging or altering the defendant's property rights and without regard to any contrary judgment rendered in the Law courts.
>
> > "Equity" does not intend to set aside what is right and just, nor does it try to pass judgment on a "strict Common Law rule" by claiming that the latter is not well made. It merely states that, in the interest of a truly effective and fair administration of Justice, the "strict Common Law" is not to be observed in some particular instance.
>
> Moreover, Equity's decision had no precedential effect even in Equity, much less in Law. [Nor did] Equity [seek to] correct all injustices. In fact, Equity left untouched, in full force and operation, a great number of legal rules that were certainly harsh, unjust, and unconscientious as any of those that it did confront.

Main, *New Equity*, *supra* note 20, at 371–72 (quoting Anton Hermann Chroust, *The "Common Good" and the Problem of "Equity" in the Philosophy of Law of St. Thomas Aquinas*, 18 NOTRE DAME L. REV. 114, 117 (1942)).

75. *See* Main, *New Equity*, *supra* note 20, at 375 ("As complements and as rivals, separate systems of Law and Equity combined to administer the laws for centuries with both certainty and discretion.").

76. *See id.* at 387 ("For in denying Equity any structural autonomy, there remains no relief from the procedures of the merged system itself when the modes of proceeding in that system are inadequate. Thus when the unanticipated situation arises, courts have no choice but to follow the procedural rules drafted . . . .").

remedial limitations on that substantive right.[77] This element of the merger facilitated the Supreme Court's *Brown* outcome, even if worries remained about the lack of a remedy for the individual plaintiffs in the case.[78] Though the power invoked by courts during the civil rights period was an awesome and broad power, it was limited: it was an exceptional intervention, justified by exceptional circumstances, and acting on deserving individuals.[79]

This exceptional role for courts in extraordinary circumstances was justified by another aspect of equity: its pursuit of justice. Equity is more than the jurisprudential legacy of traditional equity.[80] Equity has long meant justice, independent of the elaborate systems of traditional equity and equitable remedies.[81] This broad sense of equity is rooted in the humanities and traces at least to Aristotle in the Western tradition.[82] Geared toward counterbalancing the rigidity of legal

77. According to Subrin, "Pound contended that substantive and procedural common law concentrated too heavily on the individual and private rights, thus neglecting the importance of the community and the need for government protection of the individual." Subrin, *supra* note 46, at 945 (citing Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 403–04 (1906)). This dissatisfaction underlay the efforts to reform procedure and led to the FRCP, which Subrin sees as particularly equity influenced. Subrin argues that the desire to permit judges to do justice was a defining feature of the emergence of the FRCP (and a departure from the Field Code), thus characterizing those rules. Subrin, *supra* note 46, at 943–74.

78. *See* Reinert, *supra* note 39, at 933 ("Civil rights cases challenging segregation were never about compensatory damages . . . . On this account, the Court . . . has accepted a vision of public interest law in which damages litigation is seen as less productive, less virtuous, and less admirable than equitable cases.").

79. *See, e.g.*, Subrin, *supra* note 46, at 926 (classifying *Brown* as a "structural case[] that attempt[s] to re-interpret constitutional rights in light of experience and evolving norms of what is humanitarian").

80. *See* GARY WATT, EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW 36 (2009) (outlining the various contextual uses of equity, including social justice, equality of opportunity and resources, and fair wealth distribution).

81. *See generally id.*

82. *See id*. at 36–41. The typical cite is to ARISTOTLE, RHETORIC 143 (J. H. Freese trans., 1926) ("For that which is equitable seems to be just, and equity is justice that goes beyond the written law."). *Accord* ARISTOTLE, NICHOMACHEAN ETHICS 313 (H. Rackham trans., 1926) ("We have next to speak of Equity and the equitable, and of their relation to Justice and to what is just respectively.").

rules with a focus on the situation of the individual, equity pursues just results characterized by flexibility (over uniformity), specificity (over abstraction), and particularity (over generality).[83] This focus on the justice of outcomes has unsurprisingly informed traditional equity and the jurisprudence developed in its service.[84] *Equity as justice* also contributes to understandings of the good life, recognition, liberty, and other ideas associated with justice in political and social theory.[85] This broad sense of equity as justice animates the key substantive role of civil rights—remedying injustice.

The pursuit of justice gave weight to the Court's Civil-Rights-Movement-era jurisprudential developments, charging courts to get the outcome right and justifying the creative use of equitable remedies that became the structural injunction. That civil rights jurisprudence today might be seen as failing to address the social and political issues traditionally associated with the Civil Rights Movement ought not be taken as an abandonment of a justice-seeking mission. Quite the contrary, civil rights jurisprudence has been *reduced* to almost exclusively pursuing this kind of broad justice *but* does so in the exceptional, supplemental way associated with the mission of traditional equity.[86] In routine cases, where injustice does not strongly resonate with jurists, the civil rights equity that has emerged points courts *away* from intervening; nonetheless, civil rights's mission remains the pursuit of justice.

Equity today also operates in the popular legal imagination. *Popular equity* is an informal view of equity invoked by jurists who draw on concepts established by traditional equity and use it in professional legal discourse. It is "popular" in that it is independent of the details of traditional equity jurisprudence,

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83. *See* Subrin, *supra* note 46, at 918 ("Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law.").

84. *See* Main, *New Equity*, *supra* note 20, at 386 ("One virtue of . . . Equity was its authority to act in opposition to the strict law when the unique circumstances of a particular case demanded intervention.").

85. *See id.* at 344–45.

86. *See* MCDOWELL, *supra* note 58, at 97–98 ("By ignoring the particularity of each case, the Court could confine its attention to what it saw as the unifying 'legal question' all of the [*Brown*] cases shared: the meaning of equal protection of the laws and, accordingly, the meaning of equality under the Constitution.").

reflecting foundational concepts from equity but disconnected from and unconstrained by its details.[87] This popular equity envisions equity as a supplement to law, available only where legal remedies are inadequate to achieve justice, and only for deserving claimants. These concepts are embedded in prerequisites to invoking equitable remedies[88] and have something of a phantom presence in contemporary legal discourse.[89] After the merger of law and equity, these prerequisites are seldom taught separately from remedies and,

87. Main identifies three usages of the term equity that roughly correspond with those I have set out here. First, is the use of equity as that which is "ethical rather than jural" and focuses on what is "moral, right, just and good." Main, *New Equity*, *supra* note 20, at 344. This is like the equity-as-justice construction put forth here. Second, Main notes that equity is associated with "natural justice," conveying "the soul and spirit of all law—the moral standard to which all law should conform." *Id.* at 344–45 (internal quotation omitted). And third, Main speaks of the "technical definition of Equity (a meaning typically signified by use of the capital letter 'E') [which] refers to that system of jurisprudence that was originally administered by the High Court of Chancery in England," and whose emergence Main details in two works. *Id.* at 345–46; *see id.* at 346–53 (comparing Equity to the emergence and goals of ADR); Main, *Traditional Equity*, *supra* note 21, at 437–52 (detailing Equity's emergence and juxtaposing it with the Common Law. Main's third version of equity (Equity) corresponds to the traditional equity referenced in this Article; however, his second sense of equity does not have a close corollate with those used in this Article. While Main's second version of equity is not dissimilar from the popular juridical equity discussed here, Main's construction seems more like a normative check on the operation of law that is substantively like his first equity and, generally perhaps, operates through his third, more formal, version of equity. I believe there is an intermediary version of equity operating (juridical or popular equity) that combines both notions of justice and aspects of the traditional system of equity but in an informal way, despite being done by lawyers, judges, and commentators. It is less a normative claim about how law ought to operate than a reference to a jurisprudential system that is said to be extant and which is sometimes controlling in disputes.

88. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 103, 105, 109, 111–13 (1983) (treating equitable requirements as stricter than the general case-or-controversy requirement); O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (same).

89. *See* MCDOWELL, *supra* note 58, at 100 ("[T]hough [Warren] spoke of the 'traditional attributes' and guiding 'principles' of equity as being controlling, he ignored most of the more substantial equitable principles in writing his decree [in *Brown II*].").

outside of remedies, are generally no longer systematically examined in jurisprudence and scholarship.[90]

Civil rights equity is a kind of popular equity, drawing on equitable concepts, especially constraints on the invocation of equity jurisdiction, to limit civil rights litigation. Focused on judicial restraint, civil rights equity preserves the possibility of judicial intervention in the interest of justice while working to achieve the restraining goals associated with equity. Yet, unmoored from the strictures of traditional equity, these goals are immanent and go unexamined.

B. *The Defining Role of Equity in the Creation of Modern Civil Rights*

Civil rights are typically styled "civil rights law" because civil rights are generally thought to be legal rights, recognized by courts and conceived as comparable to private rights such as property rights, rights created by contract, or rights to recover for injuries caused by the fault of others. The suggestion that civil rights are equity implies that "civil rights law" assumes too much about how civil rights have been treated in American courts. An examination of the emergence of civil rights during the Civil Rights Movement highlights that the promise of a property-like rights regime was never unequivocal and possibly never predominant.[91] Rights recognition and enforcement, especially as related to efforts to dismantle Jim Crow, were always heavily rooted in the federal judiciary's equitable powers, and private rights of action for monetary (legal) relief, though widely recognized by courts, were not clearly spelled out in the signature civil rights statutes and never independent of

90. *Cf.* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 530 (2016) [hereinafter Bray, *Systems of Equitable Remedies*] (explaining that there is a popular academic contention "that every distinctive feature that is claimed for equity, such as a high degree of discretion or an emphasis on fairness, can be found to the same degree in law").

91. *See, e.g.*, *Brown II*, 349 U.S. 294, 300 (1955) ("These cases call for the exercise of these traditional attributes of equity power."); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971) ("If school authorities fail in their affirmative obligations under [*Brown I* and *II*], judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad . . . .").

the possibility of equity relief.[92] That civil rights enforcement was always so flexible and conditioned likely obscured the emergence of civil rights equity, as the approaches that characterize civil rights equity were always prominent in civil rights jurisprudence.

Civil rights have promised to provide protection to the core values of American citizenship by treating constitutional and statutory rights as the equivalent of private rights,[93] the infringement of which suggests the need for remedies to make the holder of the right whole.[94] Despite a proliferation of Reconstruction Era Amendments and legislation, the Reconstruction Era courts suppressed emergence of a rights regime by holding that the Reconstruction constitutional amendments established few relevant rights.[95] This is especially true of the Supreme Court's insistence that the privileges and immunities of American citizenship referenced by the Fourteenth Amendment meant little.[96] Similarly, the Court read the statutory rights created under the authority of these amendments as either beyond the authority the amendments

92. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, § 206, 78 Stat. 241, 245 (codified at 42 U.S.C. § 2000a-5) (empowering the Attorney General to bring civil actions "requesting such preventative relief . . . necessary to insure the full enjoyment of the rights herein described").

93. Courts have occasionally emphasized the "rights" character of civil rights. Recently in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court rejected "interest-balancing" as an appropriate approach to interpreting the Second Amendment, referencing the First Amendment for support. *Id.* at 634–35. At least for those two constitutional rights, the Court speaks of commands limiting the government's authority to act. *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010). "The Bill of Rights enshrines negative liberties. It directs what government may not do to its citizens, rather than what it must do for them." Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 645 (7th Cir. 2013); *see* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) (stating that the First Amendment operates as a negative restraint on governmental regulation of speech).

94. This view dates back to *Marbury v. Madison*, 5 U.S. 137, 163 (1803). *See* Fallon & Meltzer, *supra* note 73, at 1778 ("Few principles of the American constitutional tradition resonate more strongly than one stated in *Marbury v. Madison*: for every violation of a right, there must be a remedy.").

95. *See* Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

96. *See* Slaughter-House Cases, 83 U.S. 36, 76–77 (1872).

granted or as lacking in substantive force.[97] This is Eugene Gressman's "unhappy history" of civil rights law.[98]

Modern courts confronted these questions anew in the 1950s and 1960s. Though the courts and Congress embraced a vision of rights as enforceable attributes of citizenship and as necessary attributes of the equality that civil rights advocates were seeking, their approach, at least in actions supporting the Civil Rights Movement, relied on the judiciary's equitable powers. *Brown* and congressional enactments alike emphasized courts' equitable powers.[99] *Brown* expressly rejected the then-contemporary construction, "personal and present right," that the Court had underscored in *Sweatt v. Painter*[100] and which would have triggered access to money damages.[101] Instead, *Brown* turns on the judiciary's equity powers.[102] Similarly, private rights of action were not clearly emphasized and actions for damages are almost entirely absent in the 1960s civil rights statutes.[103] And though Supreme Court decisions recognized private rights of action to enforce constitutional rights as legal rights after *Brown*,[104] the judicial and legislative legacy related to the Civil Rights Movement evidences a

97. *See* The Civil Rights Cases, 109 U.S. 3, 25 (1883) (striking down several provisions of the Civil Rights Act of 1875).

98. *See generally* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

99. *See Brown II*, 349 U.S. at 300 ("These cases call for the exercise of these traditional attributes of equity power."); Civil Rights Act of 1964, Pub. L. No. 88-352, § 206, 78 Stat. 241, 245 (codified at 42 U.S.C. § 2000a-5) (empowering the Attorney General to seek equitable relief to prevent violations of the Act).

100. 339 U.S. 629 (1950); *id.* at 635.

101. *See* ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 161 (1957).

102. *See Brown II*, 349 U.S. 294, 300 (1955).

103. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 206, 78 Stat. 241, 245 (codified at 42 U.S.C. § 2000a-5) (contemplating equitable relief).

104. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961) (permitting damages suits against state officers under 42 U.S.C. § 1983); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971) (permitting implied damages actions against federal officers); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (recognizing implied damages actions to enforce federal statutory rights in some circumstances).

reticence to foster a private law-like-entitlement view of civil rights.

1. *Brown* and 1960s Civil Rights Statutes' Focus on Empowering Courts and the Attorney General

In *Brown v. Board of Education* (*Brown I*),[105] the Supreme Court famously overruled *Plessy v. Ferguson*,[106] declaring that separate but equal public education programs violate the Fourteenth Amendment's equal protection clause.[107] Notably, the decision avoided announcing a remedy. The Court reheard the question of remedies and declared in *Brown II* that desegregation should proceed "with all deliberate speed."[108] *Brown II* expressly relied on equity:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision.[109]

Under *Brown II*, school desegregation proceeded slowly in the face of "massive resistance" in the South,[110] not to mention the nagging implication by many that *Brown I* was wrongly

105. 347 U.S. 483 (1954).

106. 163 U.S. 537 (1896).

107. *Brown I*, 347 U.S. at 495.

108. *Brown II*, 349 U.S. at 301.

109. *Id.* at 300 (footnotes omitted); *see* BLAUSTEIN & FERGUSON, *supra* note 101, at 158–79. Hoffer details the Court's complex and "ambitious" efforts to "fuse a very technical conception of equitable discretion based on the Balance of Equity doctrine with Warren's highly personal vision of equitable discretion." HOFFER, *supra* note 62, 180–90.

110. *See generally* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004).

decided,[111] and despite the agreement among the Court and all litigants that the "all deliberate speed" injunction was within the Court's powers.[112]

Looking back at this complicated, politically charged context, it is perhaps easy to see *Brown* as establishing legal rights[113] and miss its overt reliance on federal courts' equitable powers, which, at the time at least, vested courts with tremendous authority to order demounting of our segregated system.[114] Perhaps as importantly, the Court's approach also seemed to set out a framework that would define civil rights going forward: the Court was departing from "law" to achieve a just outcome by responding to an outrage (Jim Crow segregation), where normal legal remedies were inadequate[115] (the recurrent argument that *Plessy* was correctly decided but morally wrong), in a way that was extraordinary (education policy being generally left to states), and for deserving complainants (innocent schoolchildren).[116]

Contemporaneous commentators saw *Brown* this way. After a long discussion of the need for neutral principles, Herbert Wechsler's article, *Toward Neutral Principles of Constitutional Law*, criticized the *Brown* opinion for being

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111. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959); Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955).

112. *See* BLAUSTEIN & FERGUSON, *supra* note 101, at 162–67. The NAACP requested the plaintiffs' immediate admission to segregated schools. *Id*. at 165–66.

113. *See* Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 425–26 (1954) (exploring potential damages, such as monetary and criminal penalties against perpetrators of segregation, as remedies for school segregation). This view of *Brown* is summarized in Reinert, *supra* note 39, at 946–48.

114. *See* Reinert, *supra* note 39, at 946 ("[T]he Court is consolidating its power. And moving civil rights litigation into the equitable camp is one way of doing so, because equity is controlled by judges.")

115. *See* BLAUSTEIN & FERGUSON, *supra* note 101, at 162 ("[Brown] had to invoke equity or chancery power of the courts to obtain the desired relief.").

116. *See id.* at 162–63 ("In making its decree, the court of equity *fashions* its remedy. It gives direct orders to litigating parties. It may also impose conditions on their duty to obey.").

unprincipled.[117] Wechsler supported the outcome of the decision,[118] and dismissed the significance of most criticisms of the *Brown* opinion,[119] giving his charge more weight. Similarly, Alexander Bickel took up the legislative history question that *Brown* avoided, concluding that the history of the Fourteenth Amendment did not support *Brown*'s position.[120] Together, the opinions of influential scholars who nonetheless supported the outcome of the decision cemented a view of *Brown* as a morally necessary departure from normal constitutionalism—that is, an equity-like departure from constraining legal doctrine in the interest of justice.[121] Beyond *Brown II*'s reliance on equitable powers, the two *Brown* decisions duplicated the structure of traditional equity in this way, a structure that would become civil rights equity when federal courts' equitable powers were curtailed.

Congressional enactments continued down this path. In a series of major enactments, Congress sought to respond to the demands of the Civil Rights Movement activists as the movement simultaneously gained steam and splintered.[122] In those enactments, Congress identified new rights but was at best unclear on structuring those rights as enforceable, property-like entitlements. In fact,

> Congress's first response to the imperative of racial equality entailed in *Brown* was not to enunciate substantive rights, but rather to authorize the Attorney General to bring injunctive suits to implement the Fifteenth Amendment. This occurred in the Civil Rights Act of 1957. The very next congressional initiative, the Civil Rights Act of 1960, was in

117. *See* Wechsler, *supra* note 111, at 32–33 (stating that *Brown*'s outcome required looking into the legislature's motivations, which courts typically cannot consider).

118. *See id.* at 27.

119. *Id.* at 31–34.

120. *See* Bickel, *supra* note 111, at 58–59, 64–65.

121. *See* BLAUSTEIN & FERGUSON, *supra* note 101, at 162 (explaining that financial remuneration was "obviously" not an adequate remedy for *Brown*'s plaintiffs).

122. *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 58 (1985) (describing how violent responses to Martin Luther King Jr.'s peaceful protests led John F. Kennedy to send a civil rights bill to Congress).

> large part intended to perfect the Attorney General's injunctive weaponry on behalf of voting rights.[123]

Describing the situation prior to the passage of the Civil Rights Act of 1957 and the debates that led to it, Judge John Minor Wisdom emphasized the central role of equitable remedies in Congress's efforts to overcome widely acknowledged impediments to protecting civil rights activists.

> In the field of civil rights the problem of enforcement is more difficult than the problem of legislative definition. The choice of remedy determines whether an act of Congress simply declares a right or carries machinery for meaningful performance of the statutory promise. In the past, an obvious hiatus has been the lack of effective sanctions against private persons interfering with a citizen's exercise of a civil right. This lack may be explained by a number of reasons. (a) Congress has been reluctant to assert affirmatively by legislation its responsibility to protect the privileges and immunities of citizens of the United States, for fear of imperiling the balanced relationship between the states and the Nation. (b) Courts have narrowly construed criminal sanctions available in Sections 241 and 242 of Title 18. (c) Congress and the courts have been severely limited by the doctrine of state action, in spite of the trend toward an expansive view of what is state action. (d) Congress has been wary of using an equitable remedy in civil rights legislation. The Constitution guarantees an accused in a criminal case the right to indictment by a grand jury and trial by a jury of the vicinage. Enforcement of civil rights through the use of an injunction and the contempt power of the courts would by-pass the jury system. However, in communities hostile to civil rights and resentful against 'outside', that is, federal interference, injunctive relief may be the most effective method of enforcing civil rights.
>
> Congress considered the pros and cons of these and many other issues when the Administration submitted an omnibus civil rights bill in 1956. The focal issues—the contempt power, the jury system, and the relationship of the States with the Nation—produced one of the great debates in American parliamentary history. By the time the bill was cut

123. FISS, *supra* note 32, at 21 (citing Civil Rights Act of 1957, Pub. L. No. 85-315, § 131(c), 71 Stat. 634, 637; Civil Rights Act of 1960, Pub. L. No. 86-449, § 601, 74 Stat. 86, 90–91.

> down to a voting rights law, as the Civil Rights Act of 1957, 71 Stat. 634, Congress and the country thoroughly understood the significance of the legislation. Congress had opened the door, then nearly shut, to national responsibility for protecting civil rights—created or guaranteed by the Nation—*by injunction proceedings against private persons*.[124]

Wisdom's recitation tellingly never considers civil actions for damages (legal actions) as a means to address the civil rights challenge.[125] In the Civil Rights Act of 1957, he saw the beginning of an effective legislative assault on Jim Crow through expansion of equity power.[126]

In the Civil Rights Act of 1964,[127] Congress broadly banned discrimination in public accommodations[128] and public facilities,[129] by recipients of federal funds,[130] and in employment.[131] Beginning with that Act, Congress either did not set out an enforcement mechanism or created systems that combined administrative review and judicial actions for

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124. United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 344–46 (E.D. La. 1965) (footnotes omitted) (emphasis added).

125. *See id.* at 345 ("[I]n communities hostile to civil rights and resentful against . . . federal interference, injunctive relief may be the most effective method of enforcing civil rights.").

126. *See id.* at 349.

127. Pub. L. No. 88-352, 78 Stat. 241.

128. *Id.* § 201, 78 Stat. at 243–245.

129. *Id.* § 301, 78 Stat. at 246.

130. *Id.* § 601, 78 Stat. at 252.

131. *Id.* § 701, 78 Stat. at 253–255. The Act also protected voting rights, amending the Civil Rights Act of 1957 to prevent persons acting under color of state law from using ad hoc standards to determine a person's qualification to vote, denying the right to vote because of immaterial errors in the voter's registration record, or employing literacy tests as a qualification for voting in designated circumstances. *Id.* § 101, 78 Stat. at 241–242. It addressed desegregation of public education in Title IV, *id.* § 401, 78 Stat. at 246–249; created the Commission on Civil Rights in Title V, *id.* § 501, 78 Stat. at 249–252; provided for the collection of data on voter registration in Title VIII, *id.* § 801, 78 Stat. at 266; provided a procedure for appeal after remand of civil rights cases that had been removed to federal court and for the intervention of the Attorney General in civil rights cases in Title IX, *id.* § 901, 78 Stat. at 266–67; and created a Community Relations Service in Title X, *id.* § 1001, 78 Stat. at 267. The bulk of the Act (thirteen of the Act's twenty-eight pages) was devoted to Title VII, *id.* § 701, 78 Stat. at 253–266, but most of the attention in the debates was directed to Title II, *id.* § 201, 78 Stat. at 243–246.

equitable relief.[132] For Title VI, where Congress did not provide a judicial remedy, one could reasonably have anticipated that the various agencies distributing federal funds might provide enforcement.[133] But for Title II, the provision banning discrimination in public accommodations about which most of the debate on the Act focused, such enforcement would make no sense, as there were no agencies with authority over the wide range of public accommodations implicated by the Act.[134] To address this, the Title anticipated an *equitable* action by the aggrieved party and was titled, "Injunctive Relief Against Discrimination in Places of Public Accommodation."[135] In fact,

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132. *See id.* §§ 301–308, 78 Stat. at 246 (failing to provide a remedy).

133. In fact, that is what the Title calls for: federal departments and agencies are directed to issue "rules, regulations, or orders of general applicability" to achieve the objectives of the Act—elimination of discrimination on the basis of race color or national origin—and compliance with such requirements "may be effected (1) by the termination of" funding so long as "there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement" and after voluntary efforts to achieve compliance have failed. *Id.* § 602, 78 Stat. at 252–293; *see* Caulfield v. Bd. of Educ., 632 F.2d 999, 1005 (2d Cir. 1980) ("Title VI enforcement procedures apply to the Board's teacher hiring and assignment practices and . . . HEW therefore had jurisdiction to investigate and seek compliance."). The Supreme Court assumed that Congress intended a private right of action for damages to be available under Title VI, see Cannon v. University of Chicago, 441 U.S. 667, 696 (1979) (stating that Title IX was modeled after Title VI, and that Title VI had "been construed as creating a private remedy"), a view confirmed by Guardians Ass'n v. Civil Service Commission, 463 U.S. 582, 597 (1983) (explaining that the private cause of action from Title VI was not expressly created by Congress but implied by the courts).

134. *See* Civil Rights Act of 1964, § 201(b)(1)–(4), 78 Stat. at 243 (explaining that inns, hotels, motels, restaurants, lunchrooms, movie theaters, and sports stadiums, among others, fall under the Act).

135. *Id.* § 204, 78 Stat. at 243–44. The enforcement anticipated was "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order" by the "person aggrieved," *id.* § 204(a), 78 Stat. at 244, and "a reasonable attorney's fee as part of the costs" for the prevailing party, *id.* § 204(b), 78 Stat. at 244. Tellingly, the constitutionality of the Act, was tested not by efforts to enforce the Act but by declaratory judgment and injunctive actions brought by supporters of segregation in public accommodations seeking to have the Act declared unconstitutional. *See* Katzenbach v. McClung, 379 U.S. 294, 305 (1964) ("We find it in no violation of any express limitations of the Constitution and we therefore declare it valid."); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) ("The appellant contends that Congress in passing this Act exceeded its power to regulate commerce . . . .").

Title II excluded other presumably legal remedies like damages.[136] Congress's actions in Title VII, the employment discrimination provision, raised even more questions. Right before the bill passed out of the House Judiciary Committee, a NLRB-like EEOC with adjudicatory powers was replaced with the current version.[137] Senators then added the private right of action, replacing a remedial structure that was primarily administrative with a hybrid one that required administrative "conciliation" efforts but permitted lawsuits by individuals.[138] While this version gives preference to private litigation over administrative enforcement, the private suits authorized by Title VII provided only "equitable" relief.[139]

If rights create a form of property, the enforcement of such rights in various parts of Congress's signature civil rights enactment were administrative (Title VI), unclear (Title III),[140]

136. Civil Rights Act of 1964, § 205, 78 Stat. at 244–45. While it is arguably hard to anticipate the consequential damages one might encounter from being excluded from, say, an ice cream shop, even on a hot day, segregation extended to essential services like hospitals, where the damages caused by exclusion were already extant. *See* Cara A. Fauci, *Racism and Health Care in America: Legal Responses to Racial Disparities in the Allocation of Kidneys*, 21 B.C. THIRD WORLD L.J. 35, 39–40 (2001) (explaining how segregation of medical services harmed Black people during the Jim Crow Era).

137. *See* Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. MIA. RACE & SOC. JUS. L. REV. 41, 72–74 (2012) ("The Judiciary Committee stripped out the judicial function entirely. All that remained was the Commission's ability to seek judicial relief for discrimination when conciliation failed."); WHALEN & WHALEN, *supra* note 122, at 58 ("Title VII (Equal Employment) was retained, but the commission's powers were limited to investigation and conciliation.").

138. *See* Henson, *supra* note 137, at 83.

139. Section 706 sets out the administrative process precedent to a suit, permitting "a civil action . . . brought against the respondent named in the charge" filed with the EEOC or state agency by the aggrieved party. Civil Rights Act of 1964, § 706(e), 78 Stat. at 260. If a court finds an unlawful employment practice, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate," including "reinstatement or hiring of employees, with or without back pay," *id.* § 706(g), 78 Stat. at 261, along with a reasonable attorney's fee, *id.* § 706(k), 78 Stat. at 261.

140. Title III empowered the Attorney General to bring an action when individuals were denied access to public facilities (other than schools and public colleges) on the basis of race, color, religion, or national origin, for "such relief as may be appropriate." *Id.* § 301(a), 78 Stat. at 246. Title III is unclear because in Section 303 it reserves the prospect of suit by "any person" for such exclusion. *Id.* § 303, 78 Stat. at 246.

complex (Titles II and VII), and in all cases, "equitable" rather than "legal."[141] Courts would quickly recognize private rights of action to enforce Titles II and IV, but even for those causes, equitable remedies seemed to be the primary focus. Indeed, soon after the passage of the Act, the Supreme Court embraced private litigation as an important aspect of successful enforcement of the Civil Rights Act of 1964, while casting doubt on damages actions as an appropriate way to be a "private attorney general."[142]

The Voting Rights Act of 1965[143] concerned issues of grave importance to the activists of the Civil Rights Movement, which they believed would grant them significant political power in the many jurisdictions in the South where activism was most focused.[144] One might have expected it to create clear, enforceable individual rights. At the same time, the Act involved voting systems that are varied, complex, and typically controlled by state and local governments, suggesting the Act would create a regulatory regime. Unsurprisingly, the Act's structure contains a mixture of individual rights combined with

141. *See* Reinert, *supra* note 39, at 932 (stating that the Court has crafted equitable or injunctive relief in civil rights litigation rather than legal or monetary relief).

142. "When a plaintiff brings an action under that Title [II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968).

143. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. § 1973) (current version at 52 U.S.C. § 10301). References to the Voting Rights Act here are to the earlier designation. The Voting Rights Act's operation was limited to five years, necessitating reauthorization. Extensions in 1970, Pub. L. No. 91-285, 84 Stat. 315 (1970); 1975, Pub. L. No. 94-73, 89 Stat. 402 (1975); 1982, Pub. L. No. 97-205, 96 Stat. 134 (1982); and 2006, Pub. L. No. 109-246, 120 Stat. 580 (2006), imported significant substantive changes to the Act, often to reverse narrow judicial interpretations. The last two reauthorizations were for twenty-five years each.

144. Consequently, voting rights were the subject of the Civil Rights Acts of 1957, 42 U.S.C. § 1971(b), and the Civil Rights Act of 1960, 42 U.S.C. § 1971(e), and were protected in the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A)–(C). Together, these Acts prohibited intimidation intended to interfere with the right to vote. *See, e.g.*, United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 347–49 (E.D. La. 1965). Remedies under these statutes are specifically equitable. *See* United States v. Ramsey, 331 F.2d 824, 829 (5th Cir. 1964).

regulations on jurisdictions setting voting rules and qualifications.[145] Along with the Twenty-Fourth Amendment that, in 1964, prohibited the poll tax, the Voting Rights Act's Section 2 constructed the right to vote as a valuable right to be protected:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .[146]

The Voting Rights Act—like the Civil Rights Act of 1964—was perhaps surprisingly equivocal on how this right was to be enforced. The statute provided criminal penalties for violating the Act and a supervisory structure with Federal Examiners in certain jurisdictions as well as poll watchers.[147] But the Act refers again and again to the Attorney General bringing injunctive or declaratory judgment actions to enforce various provisions of the Act.[148] The language of the Act focuses on actors engaged in prohibited behavior and actions by the Attorney General to stop the illegal behavior without referencing individual beneficiaries of the Act.[149] The Act's "right" seems to stop short of providing individually enforceable property-like entitlements to vote.

Section 3, the general enforcement provision of the Act, is a broad grant of authority to the Attorney General to proceed "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment."[150] Changes in voting rules

145. *See* Voting Rights Act of 1965, § 7(b), 79 Stat. at 440 (describing eligible voters); *id.* § 4, 79 Stat. at 438 (explaining types of banned tests in determining eligible voters).

146. 42 U.S.C. § 1973 (transferred to 52 U.S.C. § 10301).

147. *See* 52 U.S.C. § 10302.

148. *Id.*

149. *See id.* § 10302(b).

150. 42 U.S.C. § 1973(a) (transferred to 52 U.S.C. § 10302(a)). Section 4 similarly provided enforcement authority to the Attorney General to enforce the Section's prohibition on voting tests. *Id.* § 1973(b) (transferred to 52 U.S.C. § 10303). Subsection (b) of this Section has been held unconstitutional. *See* Shelby County v. Holder, 570 U.S. 529, 544 (2013) (stating that the Section violates the fundamental constitutional principle of equal sovereignty among states).

required preclearance under the Act's Section 5,[151] and the Court would soon acknowledge that private individuals could seek equitable and declaratory relief to block new voting requirements in violation of Section 5.[152] This right of action extended to Section 2 enforcement, but the text of that Section both creates an individual right (no voting rules can deny or abridge "the right of any citizen . . . to vote on account of race or color"[153]) and anticipates that the Attorney General will enforce

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151. 42 U.S.C. § 1973(c) (transferred to 52 § 10304(a)). The power of Section 5 has been rendered inoperative by the holding that Section 4 was unconstitutional. *See Shelby County*, 570 U.S. at 557 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

152. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (concluding it is consistent with the purpose of the Act to allow private citizens to seek judicial enforcement of Section 5). The court in Allen described the confusion around the issue:

> Section 12(f) of the Act . . . provides: 'The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether *a person* asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.
>
> Appellants have argued this section necessarily implies that private parties may bring suit under the Act, relying on the language "a person." While this argument has some force, the question is not free from doubt, since the specific references throughout the other subsections of § 12 are to the Attorney General. *E.g.*, §§ 12(d) and 12(e). However, we find merit in the argument that the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as "private" rights.
>
> In any event, there is certainly no specific exclusion of private actions. Section 12(f) is at least compatible with 28 U.S.C. § 1343 and might be viewed as authorizing private actions.

Id. at 555 n.18 (emphasis added) (citations omitted). In any event, the continued viability of such an implied right is called into doubt by the Court's recent, more restrictive view of implied rights of action. *Cf.* Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (raising doubts about the continuing viability of implying rights of action in *Bivens* suits).

153. 52 U.S.C. § 10301(a). The Supreme Court casts doubt on the private right for Section 2, stating that it was "[a]ssuming, for present purposes, that there exists a private right of action to enforce this statutory provision." City of Mobile v. Bolden, 446 U.S. 55, 60 (1980). But the Court mooted the question by holding that Section 2 was coextensive with the Fifteenth Amendment. *Id.*

that right through equitable remedies (injunction and declaratory judgment).[154] Like the 1964 Act, the Voting Rights Act seems to create rights but provides a complex enforcement structure that is as much equitable as legal and centers on protecting voting rights as much as it lends voting rights property-like character. The private right of action recognized by courts was as much an avenue to invoking the Court's considerable equitable powers as a recognition of any property-like rights.

Congress's other major legislative effort in response to the Civil Rights Movement, the Fair Housing Act of 1968,[155] is even more complex. The Act, which prohibits discrimination in various aspects of the sale and rental of housing,[156] echoes the 1964 Civil Rights Act. First, like Title VI of the 1964 Act, its definition of substantive scope extends the Act, upon passage, to entities receiving federal funds.[157] Second, it roughly duplicates the enforcement structure of Title VII of the 1964 Civil Rights Act: the Act charges the Secretary of Housing and Urban Development to receive complaints (Section 810(a)) and to conduct investigations and lead conciliation efforts, subject to an

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at 61. *Bolden* was legislatively overruled, eliminating the intent requirement imposed on Section 2 by this reading and permitting suits premised on discriminatory effect of voting regulations. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 131. The Court has subjected these suits to a "totality of the circumstances" test. *See* Thornburg v. Gingles, 478 U.S. 30, 43 (1986). One commentator has noted, "Interestingly, § 2 does not expressly confer a right of action, though the Supreme Court has routinely allowed private enforcement of this provision." Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 138 n.198 (2010) (citing Johnson v. De Grandy, 512 U.S. 997 (1994); Chisom v. Roemer, 501 U.S. 380 (1991)).

154. Though a declaratory judgment is not strictly an equitable remedy, it operates much like the injunction to which it is tied here. Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1143 (2014).

155. Pub. L. No. 90-284, 82 Stat. 73, 81.

156. *Id.* §§ 804–806, 82 Stat. at 83–84. The prohibitions on discrimination are subject to exemptions for religious organizations and private clubs, *id.* § 807, 82 Stat. at 84; for bona fide private sales of private dwellings, *id.* § 803(b)(1), 82 Stat. at 82; and for sales and rentals of units in small, multifamily housing facilities occupied by the owner, *id.* § 803(b)(2), 82 Stat. at 83.

157. *Id.* § 803(a)(1)(A)–(D), 82 Stat. at 82. The Act went into effect for other housing on December 31, 1968. *Id.* § 803(a)(2), 82 Stat. at 82.

obligation to defer to existing state or local procedures;[158] it charges the Secretary to use "informal methods of conference, conciliation, and persuasion;"[159] and, if the Secretary's efforts do not resolve the dispute, it permits "persons aggrieved" to file a civil action in federal district court "to enforce the rights granted or protected" by the Act.[160]

In enacting of the Fair Housing Act, Congress created a mixed remedial system with both legal and equitable attributes. Section 810(d) emphasizes that in a private suit under the Act[161] a "court may . . . enjoin the respondent from engaging in such [discriminatory] practice or order such affirmative action as may be appropriate."[162] But Section 812(c), which sets out the remedies available in such an action, authorizes both equitable and legal remedies, along with costs and fees for prevailing plaintiffs.[163]

The Fair Housing Act seems to reflect the merger of law and equity in a context in which Congress expects private litigation to drive enforcement of the Act, subject to administrative efforts to head off litigation that are designed to permit the Secretary to obtain necessary information to educate the public (Sections 808 and 809).[164] The Attorney General is authorized to bring pattern and practice suits in a companion Section[165] but the Act's enforcement is built around private litigation with both equitable and legal remedies available.[166] The Fair Housing Act

158. *Id.* § 810(c), 82 Stat. at 86.

159. *Id.* § 810(a), 82 Stat. at 85.

160. *Id.* § 810(d), 82 Stat. at 86.

161. Private civil actions are authorized by *id.* § 812, 82 Stat. 73, 88.

162. *Id.* § 810(d), 82 Stat. at 86.

163. Courts are authorized to issue permanent or temporary injunctions, temporary restraining orders, and other orders, but can also award actual damages and punitive damages up to $1,000. *Id.* § 812(c), 82 Stat. at 88.

164. *See id.* §§ 808–809, 82 Stat. at 84–85 (laying out the Secretary's responsibilities).

165. Title IX of the Act prohibits intimidation in fair housing, *id.* § 901, 82 Stat. at 89–90, supplementing the Attorney General's right, granted in Section 813, 82 Stat. at 88, to enforce the Act.

166. The Act was substantially amended in 1988 with a specific focus on improving the remedial process by providing for an administrative enforcement system before administrative law judges, private civil actions in courts, and the "pattern or practice" cases brought by the Justice Department. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 814, 102 Stat. 1619, 1634. The 1988 amendments replaced Sections 810–813 with new

shows the rapid evolution of civil rights enforcement thinking from the contested, hedged, and primarily equitable structure of the Civil Rights Act of 1964. In part, this reflects the legal rights approach that was developing in the courts throughout the decade.

2. Emergence of a Parallel "Rights" Regime

Throughout the 1960s, the private-right-of-action strain of rights enforcement would gain momentum. As the Court upheld the constitutionality of and clarified the availability of individual causes of action to enforce rights under the three seminal civil rights statutes, it identified additional causes of action against racial discrimination under remains of the Reconstruction-era civil rights statues. In *Jones v. Alfred Mayer*,[167] the Court recognized a cause of action to enforce a prohibition on discrimination in housing under 42 U.S.C. § 1982.[168] It later upheld a cause of action to enforce a prohibition on racial discrimination in contracts under 42 U.S.C. § 1981.[169] Notwithstanding the focus on equitable remedies in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and the complex structure of the Fair Housing Act of 1968, actions at law for damages became available in housing and employment discrimination cases. Implied rights of action had been recognized to challenge discrimination in federally-funded programs and voting rights,[170] providing damages as a remedy in the former.[171] This background of private rights of action informed Congress's subsequent legislation prohibiting

language. *Id.* The new enforcement structure preserves the remedial blend of damages, equitable relief, and attorney's fees. *Id.* § 813(c), 102 Stat. at 1633.

167. 392 U.S. 409 (1968).

168. *See id.* at 413.

169. *See* Runyon v. McCrary, 427 U.S. 160, 168 (1976) ("It is now well established that . . . 42 U.S.C. § 1981, prohibits racial discrimination in the making and enforcement of private contracts."); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975) ("[Section] 1981 affords a federal remedy against discrimination in private employment on the basis of race.").

170. *See, e.g.*, Tokaji, *supra* note 153, at 126–33 (summarizing the rise and fall of implied rights of action).

171. *See id.* at 126 ("[W]here [violation of a federal statute] results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied." (quoting Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916))).

discrimination on the basis of sex among recipients of federal educational funds (Title IX)[172] and discrimination on the basis of age in the Age Discrimination in Employment Act (ADEA) of 1975.[173] And though Title IX was silent on a private right of action and the ADEA relied on a complex Fair Labor Standards Act administrative structure, the private right of action was widely assumed to exist and to provide access to legal remedies—that is, money damages.[174]

This enforceable-legal-rights strain of civil rights jurisprudence emerged in 1961 with the Supreme Court's decision in *Monroe v. Pape*.[175] *Monroe* facilitated suits in law or equity under § 1983 of the 1871 Civil Rights Act by reading "under color of state law" to include behavior that was not specifically authorized by the state but undertaken by a person clothed in state authority.[176] In doing so, *Monroe* gave practical meaning to the selective incorporation of the Bill of Rights against the states through the Fourteenth Amendment.[177] But the true effect was the creation of an avenue for enforcement of constitutional rights through actions for damages—actions at law.[178]

The promise that *Monroe* would make civil rights into property-like entitlements enforceable on par with private rights was not to be realized. Beginning in the 1970s, the Court aggressively limited suits for recovery of money damages,[179]

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172. 20 U.S.C. §§ 1681–1686.

173. 29 U.S.C. §§ 621–634.

174. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (holding that an implied private right of action exists under Title IX); Franklin v. Gwinnett Cnty Pub. Schs., 503 U.S. 60, 76 (1992) (holding that a "damages remedy is available for an action brought to enforce Title IX").

175. 365 U.S. 167 (1961).

176. *Id.* at 184.

177. *See id.* at 171.

178. *See id.* at 172.

179. *See, e.g.*, Alexander v. Sandoval, 531 U.S. 275, 293 (2001) (holding that a private right of action under Title VI does not permit disparate impact proof); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015) (stating that the Supremacy Clause does not create a cause of action to seek injunctive relief against the enforcement or implementation of state legislation).

even as it created hurdles to and limits on equitable relief.[180] However much the Court's efforts were aimed at limiting the kinds of rights suits that could be litigated, its efforts have not led to a repudiation of those rights.[181] Rather, this Article's core argument is that the Court has recast these enforceable legal claims in the shape of equity to cabin their effect while preserving their application in certain cases. Efforts to reduce the role of equitable remedies in the complex social-change cases that Abram Chayes famously called "structural reform"[182] led courts to similarly limit damages actions.[183]

Monroe's damages-based approach departed from the "eradicating Jim Crow" approach of *Brown* and presaged the post-structural reform, legal remedies-focused character of civil rights actions to come.[184] With a parallel system of rights operating to compliment the *Brown*-based approach, damages and equitable actions would ebb and flow as primary means of enforcing rights.[185] Even as damages actions gained acceptance and were incorporated into civil rights statutes like the Fair

180. *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1235 (2005) ("Over the past twenty-five years, the Supreme Court has limited the scope and reach of these injunctions . . . based on federalism, comity, and separation of powers principles.").

181. *See id.* at 1235–41 (describing the adverse impact on civil rights injunctions during the second half of the 20th century as "substantial, but not fatal").

182. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

183. *See id.* at 1292 ("It is perhaps too soon to reverse the traditional maxim to read that money damages will be awarded only when no suitable form of specific relief can be devised. But surely, the old sense of equitable remedies as 'extraordinary' has faded.").

184. *Compare Monroe*, 365 U.S. at 170–75 (focusing on Congress's intention to give "to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer"), *with Brown I*, 347 U.S. 483, 487–93 (1954) (focusing on the "circumstances surrounding the adoption of the Fourteenth Amendment" and "the effect of segregation itself on public education").

185. *See* Reinert, *supra* note 39, at 947–48 (explaining how the Court's equitable remedy in *Brown* created a preference of providing equitable, instead of monetary damages, in civil rights cases); John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 872–73 (2013) (discussing the prevalence of injunctions to remedy civil rights issues in the decades after *Brown*).

Housing Act of 1968 or allowed as judicially recognized means of enforcing aspects of the 1964 Civil Rights Act and 1965 Voting Rights Act, the emerging structural injunction—which arguably became synonymous with civil rights for a time—was the main mechanism for confronting Jim Crow.[186]

The choice of a primarily equitable approach to the Court's initial confrontation with Jim Crow in *Brown* set the terms for civil rights equity. Civil rights during this period was predominantly equitable. But perhaps more significantly, civil rights came to echo the role and shape of traditional equity—it was an exceptional tool for an extraordinary problem, wielded in the pursuit of justice for innocent children. The dramatic social consequences of the *Brown* decision and the momentous legislative victories that the 1960s Civil Rights Acts represented may have obscured that the choice of equity was a compromise and relatively conservative.[187] When the Court's focus shifted away from confrontation with Jim Crow, these choices would continue to frame civil rights suits as exceptional interventions, for extraordinary situations, and for deserving complainants.

II. CIVIL RIGHTS EQUITY: STRUCTURING RIGHTS LITIGATION IN THE POST-CIVIL-RIGHTS ERA

Civil rights are equity because it came to operate under limitations on litigation drawn directly and indirectly from traditional equity restraints.[188] The effect of these limitations is the creation of a hierarchy of rights that both defines civil rights equity and is defined by the assumptions of what cases are appropriate according to traditional equity restraints.[189] Civil rights remains a quest for justice undertaken by judges sitting in equity and exercising broad discretion in the review of claimants' lawsuits.[190] However, the 1970s saw a shift in perspective from eradicating Jim Crow to addressing discrimination and similar, discrete, individual-focused

186. *See* Reinert, *supra* note 39, at 936.

187. *See* GRAHAM, *supra* note 58, at 371 (arguing that *Brown II* was a conservative decision because it only required a "prompt and reasonable start toward full compliance," at a "deliberate speed").

188. *See* Rudovsky, *supra* note 180, at 1235.

189. *See id.* at 1212.

190. *See id.* at 1235–38.

claims.[191] Without the goal of eradicating Jim Crow root and branch, broad remedies like the structural injunction increasingly appeared unjustified, even unjust, as third-party interests and other externalities were recognized as being implicated by judicial intervention.[192] But individual suits for damages raised other concerns.[193] This shift in perspective inaugurated a retrenchment period during which concerns about judicial activism extended beyond equity powers to courts' role in individual damages actions.[194] Civil rights equity results from distinguishing between good and bad cases during this period, a distinction informed by traditional equity restraints applied to law and equity alike.

A. *From Retrenchment to Civil Rights Equity: A Definition of Civil Rights Equity*

Civil rights law has been retreating for over forty years, the target of multiple forces combining to restrict the substantive, procedural, and remedial scope of civil rights actions.[195]

> [T]he Supreme Court (and in recent years, the Congress) has restricted civil rights remedies though a series of complex and controversial measures, including expanded immunities from suit, narrower standards for standing and for private enforcement of civil rights legislation, exceptions to the exclusionary rule, limitations on remedies in criminal cases and federal habeas corpus, and direct federal court door-closing legislation.[196]

As one commentator put it, "[A]s opponents of the rights revolution mobilized, they . . . focused their attention on these very same institutional components" that had driven the rights revolution, "a vastly broadened and empowered institutional

191. Phillip Bobbit sees this shift as fundamental to the "Age of Consent" he identifies. Phillip Bobbit, *The Age of Consent*, *in* 2 GRANT GILMORE, THE AGES OF AMERICAN LAW 100, 125–26 (2014).

192. *See* Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 993 (1993).

193. *See, e.g.*, PETER SCHUCK, SUING GOVERNMENT 15 (1983).

194. *See* Rudovsky, *supra* note 180.

195. *See id.* at 1210–11.

196. *Id.* at 1200.

judiciary."[197] Retrenchment was rooted in an attack on "judicial activism" and broader efforts to turn the judiciary in a conservative direction.[198] Substantively, this retreat is rooted in a cycle of revival and limitation on approaches to civil rights statutes and constitutional provisions.[199] More broadly, retrenchment has been associated with concerns about judicial activism disrupting the federal balance, concerns about a "flood" of litigation burdening courts, and hostility to both civil rights plaintiffs and litigants more generally as benefiting from a litigation system that is viewed as unjust.[200] Retrenchment is a process rooted in objections to *Brown* and its progeny, that gained strength in the 1970s, and that has arguably become a defining feature of the federal judiciary's approach to civil rights law since at least 2000. Civil rights equity is what courts' approach to civil rights looks like in the aftermath of a wide range of restrictions on civil rights actions imposed in the last forty years.[201] Civil rights equity describes the nature of civil rights litigation as a consequence of this retrenchment period.

Civil rights equity is a narrow, goal-focused jurisprudence projecting the aims of *equity as justice* but limited by a revival of *traditional equity*-based restrictions in the form of constitutional doctrine, procedural prerequisites, and substantive proof requirements. The ability of traditional equity to do justice—to override the complex, detailed, and universal elements of law—was a tremendous power that was limited to those circumstances where law was deemed inadequate. Equity buttressed law and underscored its legitimacy, even as equity

197. SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 5–6 (2015).

198. *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE OF CONTROL OF THE LAW 56–57, 88–89 (2008).

199. *See* John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right*, 69 TEMP. L. REV. 145, 148–51 (1996) (characterizing the jurisprudence of Reconstruction Era legislation as competing between a "revival" and a "limiting period").

200. *See* Lynda G. Dodd, *Introduction* to THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE UNITED STATES 3, 18–21 (Lynda Dodd ed., 2018).

201. Civil rights equity reflects an additional irony in that it is arguably the equitable character of the FRCP that both facilitated the civil rights legal revolution while also underlying the criticisms of federal litigation as too proliferate. *See* Subrin, *supra* note 46, at 986–87.

overruled law in the exception. Imitating traditional equity, civil rights equity reinforces the constitutional structure that civil rights threatened to upend and formalizes the primacy of private (state) law that federal civil rights threatened to broadly override. Between civil rights as a living, expansive legal jurisprudence and civil rights as a basis for exceptional intervention in the interest of justice, civil rights equity imposes the latter. Like traditional equity, civil rights equity is dynamic and ever evolving but ultimately narrow, as it limits civil rights to extraordinary circumstances.[202]

Civil rights equity originates in resurgent understandings of the appropriate use of equity jurisprudence in civil rights cases. Accordingly, judicial intervention ought to be limited to circumstances in which the "law" is inadequate, on behalf of individuals who are harmed, and in the interest of justice understood from the community's perspective. Though one might object to the lack of individual focus in the Court's intervention in *Brown* and post-*Brown* school desegregation cases,[203] it is easy to see that the then-evolving idea that segregation was unjust demanded extraordinary intervention because of the complete lack of effective legal remedies.[204] As the *Brown* moment was lost, the sense that equitable intervention was necessary or appropriate was undermined. In the absence of de jure segregation, the "inadequacy of the law" assumption encouraging broad judicial intervention was weakened. Extraordinary intervention seemed less compelling, as did the assumption that such interventions were doing justice, particularly in complex multidimensional cases affecting third-party non-litigants.[205]

Traditional equity bequeaths to civil rights jurisprudence a legacy of tools aimed at limiting access to the tremendous power of equity. Those tools, mimicked in constitutional doctrine, in procedural decisions, or used as federal common law, treat civil

202. *See* White, *supra* note 199, at 151 ("This period of upheaval in American law has produced a civil rights jurisprudence characterized by broad but significantly limited rights of action.").

203. This is the objection of Gary McDowell, though one might suggest that McDowell also diminishes the harm of Jim Crow and the challenge for courts forced to confront it. *See* MCDOWELL, *supra* note 58, at 97.

204. *See* FISS, *supra* note 32, at 8.

205. *See* Chayes, *supra* note 182, at 1284.

rights cases like traditional equity while facilitating application of those limitations by demanding that cases be narrow, episodic, and individually focused.[206] Roughly, this is the construction of civil rights, which retrenchment courts substituted for the mission of eradicating Jim Crow.

Civil rights equity is a product of the shift from efforts to excise Jim Crow from American life and economy to the pursuit of justice in individual civil rights cases, resulting in a deemphasis on structural change (integration) and repudiation of broad policy solutions (busing, affirmative action). But by focusing on individual claims, courts risked being drawn into ruling on the details of day-to-day operations of institutions, being dragged into relatively small disputes, and being compelled to review the adequacy of processes and procedures, often governing small stakes controversies. Civil rights equity reflects solutions to these problems that echo restraints on traditional equity jurisdiction. For example, *Paul v. Davis*[207] locates some disputes as state law disputes;[208] the reasonable officer standard in qualified immunity cases makes intervention turn on significant departures from expected behavior;[209] and courts' reluctance to pursue the implications of their procedural and substantive due process jurisprudence insulates the judiciary from second guessing on-the-ground judgment calls by the state and its officers.[210] "Justice" has a particular shape in these cases, requiring substantial departures from widely accepted practice—outrages—to support judicial intervention. Underlying it all is a fundamentally fact-intensive focus that empowers jurists to weigh the justice of a case in a relatively

206. *See* Rudovsky, *supra* note 180, at 1235–36 ("[W]hile the Court has not heeded calls to eliminate the structural injunction, it has imposed procedural hurdles that substantially erode the availability of the equitable remedy.").

207. 424 U.S. 693 (1976).

208. *See id.* at 711 (holding that "the interest of reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law").

209. *See, e.g.*, Hope v. Peltzer, 536 U.S. 730, 746 (2002).

210. *See*, *e.g.*, Graham v. Connor, 490 U.S. 386, 388 (1989) (applying "the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard" to a use of force case); County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998) (stating that a Fourteenth Amendment substantive due process claim for deprivation of life required a showing of deliberate or reckless indifference).

unbounded way. Projecting these developments forward would produce civil rights equity.

B. *Restricting Structural Injunctions with Equity*

The revolutionary character of the Civil Rights Movement and the consequent enthusiastic talk about rights obscured the fact that civil rights were ambiguously defined.[211] This provided broad power to courts to do equity but offered little in the way of articulating the character of the rights to be protected, much less how an individual might claim a protected right as a personal entitlement.[212] This was doubtlessly intentional, permitting flexibility to address the challenge of dismantling Jim Crow while ensuring that courts could, per *Brown II*, balance the many interests implicated. When courts' broad equitable powers were restricted, however, the lack of precise definitions meant that courts continued to have tremendous power to judge which cases demanded judicial intervention without much direction or restraint. Civil rights equity emerged from efforts to restrain this broad judicial power first in equity then in damages cases.

One might maintain that the civil right movement's legal legacy was as much the creative use of equity as it was the development of substantive rights. The rights of the period were largely defined during the Reconstruction Era,[213] only to be rendered impotent though narrow interpretation.[214] The invocation of equity powers in *Brown II* and the subsequent use of injunctions became characteristic of the judicial and congressional response to the Civil Rights Movement before and

211. *See, e.g.*, Henson, *supra* note 137, at 84–87 (arguing that "discriminate" in Title VII is not well defined).

212. *See* MCDOWELL, *supra* note 58, at 97–99 (arguing that *Brown* "broadened [the] concept of equity . . . [as a] major source of an assumed judicial power to formulate—rather than merely negate—public policies," without giving clear guidance on what rights should be granted equitable relief).

213. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that discriminatory application of a neutral law, a law that is "fair on its face," violates the Constitution).

214. *See* Gressman, *supra* note 98, at 1338–43.

after the passage of the key civil rights acts of the 1960s.[215] Writing in 1978, Professor Owen Fiss noted:

> *Brown* gave the injunction a special prominence. School desegregation became one of the prime litigative chores of the courts in the period 1954–74, and in these cases the typical remedy was the injunction. . . .
>
> The impact of *Brown* on our remedial jurisprudence . . . was not confined to school desegregation. It also extended to civil rights cases in general, and beyond civil rights to litigation involving electoral reapportionment, mental hospitals, prisons, trade practices and the environment.[216]

Use of the injunction expanded throughout the Civil Rights Movement.[217] In addition to being a key tool for dismantling Jim Crow in public schooling, enforcing those decrees saw the use of anti-obstruction injunctions, initially against governors leading "massive resistance" to desegregation, then eventually directed against the faceless mob though ex parte orders effective against all with notice of the order.[218] As noted above, civil rights statutes emphasized equitable remedies by creating or heightening the Attorney General's power to enjoin discriminatory activity and by creating individual suits that permitted equitable remedies (or in some cases permitted only equitable remedies, such as in Title VII).[219] In 1966, the new

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215. *See* FISS, *supra* note 32, at 4.

216. *Id.*

217. *See id.* at 21–23.

218. *See id.* at 16–17.

219. Fiss argues that "[t]he injunction became the primary remedy in civil rights litigation for a very special set of reasons." *Id.* at 86. Those reasons were "technocratic—civil rights litigation presented the courts with technical tasks that could not be performed by remedies other than the injunction, or that could not be performed as well." *Id.* at 87. They included the fact that the injunction was "well suited for the preventive needs of civil rights litigation" as it was aimed largely at government officials who might not have been "as sensitive to the prospect of damage judgments." *Id.* But he also notes that the superiority of the injunction related to the peculiar nature of the systematic oppression of Black Americans:

> [W]hen the demand was to compensate for the systematic and thorough wrongs of slavery, the Jim Crow era, or the more subtle, and recent, forms of discrimination, cash payments seemed peculiarly inadequate. The inadequacy stemmed from considerations much deeper than difficulties of measurement . . . [but instead] from the group nature of the

Rule 23(b)(2) was added to the FRCP to permit class actions for similarly situated plaintiffs,[220] allowing anti-discrimination litigants to proceed as a class if characteristically equitable remedies were sought.[221]

The judiciary's aggressive use of equitable powers was linked to the unique difficulties of dismantling Jim Crow—a system of official and unofficial racial subordination (or better yet, white supremacy) that operated throughout the country, though concentrated and most extreme in the South.[222] The grinding oppression and racial terror in the South triggered two great migrations of Black Americans out of the South.[223] Between 1915 and 1970 "some six million black southerners left the land of their forefathers," changing the direction of American and Black history.[224] Not only were conditions in the South oppressive, the segregation there was virtually complete with few contexts where Black Americans were not completely excluded from civic life; they were always relegated to a subordinate position.[225]

Conditions were definitively better in the rest of the country, but Black Americans were still excluded from prime

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> underlying claim and a belief that only in-kind benefits would effect a change in the *status* of the group.

Id. at 87. From a normative perspective, Fiss believes the injunction was superior because it gave agency to individual claimants and the courts. *See id.* at 88. In the first decade of the civil rights period the control over initiating actions and the independence of judges in issuing injunctions was crucial to the process because the other branches were unlikely to act. *See id.* at 88–89. In the second decade it supplemented the power of the Attorney General to address civil rights issues. *Id.* at 89.

220. FED. R. CIV. P. 23(b)(2).

221. *See* FISS, *supra* note 32, at 15.

222. *See* FRIEDMAN, *supra* note 47, at 381–89 (explaining the history of racial segregation and biases in the United States from 1850–1900); *id.* at 384 ("White supremacy in the deep South was total."); *id.* at 523–37 (summarizing constitutional rights, civil liberties, and race relations in the twentieth century); *id.* at 524 ("In the South, where most African Americans lived, the early part of the [twentieth] century was the high noon of white supremacy. Blacks had no political power. They had no vote.").

223. *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 9–11 (2010).

224. *Id.* at 9; *see id.* at 556.

225. *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944); LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW (1998).

opportunities everywhere they moved.[226] While the second great migration, which ran from World War II to 1970, took place during the period of greatest prosperity in American history, and though Black Americans showed their willingness to move great distances to take advantage of those opportunities, they found themselves in California, Michigan, and New York relegated to secondary status with limited access to the industrial employment that characterized that period of American prosperity.[227] At the end of the extended post-war boom, after perhaps a quarter of Black Americans pursued access to prosperity by moving across the country,[228] one-third of Black Americans lived in poverty (twice the rate of poverty of the nation as a whole).[229] At the root of this disconnect was the widespread insistence that "good" jobs and homes were not for Black Americans.[230] Redlining and restrictive covenants

226. FREIDMAN, *supra* note 47, at 529 ("The North had its own brand of apartheid, more subtle than the southern form, but also quite real.").

227. *See* William P. Jones, *Building of America: The Making of the Black Working Class*, NATION (Oct. 21, 2019), https://perma.cc/7JHU-CT77 (reviewing JOE WILLIAM TROTTER, JR., WORKERS ON ARRIVAL: BLACK LABOR IN THE MAKING OF AMERICA (2010)).

228. Wilkerson's estimate of 6 million great migration migrants constitutes 26.5 percent of the 22,580,289-Black population in 1970 when the migration ended. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* tbl. A-1 (U.S. Census Bureau, Working Paper No. 76, 2005), https://perma.cc/5CNR-UJTM (PDF).

229. COMPLEX LITIGATION: CASES AND MATERIALS ON LITIGATING FOR SOCIAL CHANGE 105 (Kevin R. Johnson et al., eds., 2009).

> By 1959 when the census employed its current measure of poverty rates 55.1 percent of black Americans lived in poverty, more than double the 22.4 percent of the population in general. Black poverty decreased steadily through the civil rights period, due largely to the migration of black farmers to cities. . . . Consequently, by 1967 the rate of poverty for black Americans was 39.7 percent and 33.5 percent in 1970. . . . [M]ajor reductions in black poverty rates mostly ceased in 1970, with poverty rates for African Americans holding steady for twenty-five years at about one third of the Black population.

Id. The overall poverty was 15.1 percent in 1970, half the rate for Black Americans, a ratio that has been stubbornly consistent. UNITED STATES CENSUS BUREAU, HISTORICAL POVERTY TABLES: PEOPLE AND FAMILIES 1959-2020 tbl. 3, https://perma.cc/9U2B-AJPL (PDF).

230. *See* Jones, *supra* note 227.

deprived Black residents of access to housing, and thereby schools, segregating access to social capital outside the South.[231] Crowded into ghettos, Black residents in the North, Midwest, and West became subject to increasingly hostile encounters with police forces that included few Black officers.[232]

Though *Brown* had initially been skeptically received,[233] the decision and the extraordinary judicial powers associated with it were eventually embraced in recognition that dismantling Jim Crow was a difficult task.[234] *Brown* transformed into a beacon of justice.[235] But not every aspect of life under Jim Crow was viewed as entangled with Jim Crow.[236] Nor were aspects of life that could be linked to Jim Crow universally viewed as problematic. Rapidly, distinctions emerged between official (de jure) and informal (de facto) segregation, and prohibited and permissible discrimination.[237] Aspects of life (private clubs) were cordoned off from the remedial effort.[238] Importantly, nearly all

231. While dramatic and widespread in the case of Black Americans, the system of segregation built around Jim Crow extended to other groups as well, turning on the degree to which they were not accepted as white.

232. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2069 (2017).

233. *See* Wechsler, *supra* note 111, at 31–35; Bickel, *supra* note 111, at 1–4.

234. *See* Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L. J. 1002, 1033 (2019) (emphasizing that victories in court "chipped away" at the ability to exclude African Americans, yet true equality was not a reality).

235. *See* Paul Finkelman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, 118 HARV. L. REV. 973, 978 (2005) (noting that *Brown* served as a "moral force" by setting the stage for dismantling formal racial segregation).

236. This is the power and political importance of William Julius Wilson's *The Declining Significance of Race: Blacks and Changing American Institutions*, which argued that a substantial explanation of Black poverty was the deindustrialization of American cities and a culture of poverty. In distinguishing Black poverty from segregation, Wilson's work was invoked to support reining in extraordinary civil rights remedies and focusing instead on individual acts of discrimination. *See generally* WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE (1st ed. 1978).

237. *See* Ulysses Jacks, *De Facto Segregation and* Brown*—A Constitutional Duty or Continued Despair?*, 15 HOW. L.J. 319, 319 (1969) (articulating the difference between de facto and de jure segregation).

238. *See When Is a Private Club Not a 'Private Club'?*, ACLU PA. (Aug. 21, 2009), https://perma.cc/WSJ4-SDMC (noting that after the Civil Rights Act was passed, many businesses argued that they were "private clubs" so they could remain segregated).

vested rights (employment, segregated housing) and many existing means of distributing social goods were insulated from efforts to dismantle Jim Crow.[239] These exclusions significantly circumscribed efforts to address the then-present effects of Jim Crow and extended those effects into the future.[240]

Two decades after *Brown,* civil rights jurisprudence was characterized by tremendous powers vested in courts to address Jim Crow but with significant limitations on what those powers could be deployed to do.[241] The exclusion of vested interests (however linked to Jim Crow) informed views about the nature of rights by implying that some conditions were not related to Jim Crow and not rightfully subject to judicial action.[242] Beginning early on, many saw inequality as independent of Jim Crow, inequality existing in the urban North.[243] In this increasingly contested policy space, there was growing impatience with the seemingly protracted length and broad extent of the anti-Jim Crow effort, particularly as other issues captivated the public's attention and civil rights remedies affected more people outside the South.[244] In the school

239. For a discussion of exclusions from Title VII, see Henson, *supra* note 137, at 74–77.

240. *See* Palma Joy Strand, *The Invisible Hands of Structural Racism in Housing: Our Hands, Our Responsibility*, 96 U. DET. MERCY L. REV. 155, 157 (2019) (explaining that, although discriminatory initiatives such as redlining have now been illegal for fifty years, the pattern created by redlining is still strikingly clear).

241. *See* Gerald N. Rosenberg, *African-American Rights After* Brown, 24 J. SUP. CT. HIST. 201, 204 (1999) (noting that courts and judicial decisions have legitimacy and can produce social reform but that political pressure did not follow until a decade after *Brown* was decided).

242. *See* WILSON, *supra* note 236, at 63 (discussing public office elections, where the probability of a white constituency electing a Black man was nearly zero, as an example of such conditions).

243. This is the major import of the Moynihan Report on the Negro Family along with scholarship explaining urban inequality on conditions and culture in urban ghettos. *See* STEPHEN STERNBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 119 (1995) (citing LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1967)); ADOLPH REED, JR., STIRRINGS IN THE JUG 193 (1999) (describing recent attempts to sanitize the "nefariously racist and sexist Moynihan Report" as "truly sinister and pernicious").

244. *See* Eyer, *supra* note 234, at 1018 (discussing the impact desegregation advocacy had on the North).

desegregation field, the Court narrowed the project systematically:

> By very close margins, the Court ruled that de facto segregation could not be remedied, that interdistrict transfers of students were not permissible absent a showing of past discriminatory practices, that there was no duty for a state to provide a funding system that would ensure equality in funding of local education, and that lower courts could not continue to enforce desegregation programs that were not believed to be narrowly tailored to meet the original segregation patterns.[245]

By 1978 "[t]he momentum [had] been lost," with the axiomatic status of *Brown* being questioned and a focus on rolling back school desegregation efforts that were widespread in Congress and the courts.[246] However, Professor Fiss's effort to reconceptualize the injunction, and in doing so justify "structural" and "reparative" injunctions[247] captured the dynamic, anti-formalism that still prevailed among jurists on the bench and in the academy alike. The energy of the civil rights period may have dissipated by the late 1970s, but the legacy of equitable remedies persisted.[248] Restraining court power became an increasing focus, tied up with limiting which aspects of Jim Crow were appropriate subjects for change.[249]

Many vested rights and practices having been excluded from being addressed as products of Jim Crow, the focus of judicial intervention was increasingly pointed at de jure segregation and intentional discrimination.[250] Resistance to efforts to address ongoing effects of discrimination (e.g., busing) merged with opposition to policies developed to address those

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245. Rudovsky, *supra* note 180, at 1204–05.

246. FISS, *supra* note 32, at 5.

247. *See id*. at 9–10 (defining the two types of "retrospective" injunctions).

248. *See* George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733, 738 (2015) (noting that Civil Rights advocates took the opportunity to sue for relief such as equitable remedies in the Title VII context).

249. *See* John Valery White, Brown v. Board of Education *and the Origins of the Activist Insecurity in Civil Rights Law*, 28 OHIO N.U. L. REV. 303, 312 (2002).

250. *See* Michael L. Wells, *Race-Conscious Student Assignment Plans After* Parents Involved*: Bringing State Action Principles to Bear on the De Jure/De Facto Distinction*, 112 PENN ST. L. REV. 1023, 1032 (2008).

effects independently (especially affirmative action in education, government contracting, and employment).[251] Thus, where courts' use of equitable powers seemed to point in the direction of redistributive policies, those policies were increasingly attacked as illegitimate.[252] Importantly, however, the rollback of civil rights era achievements continued to reflect an equity-rooted mission of doing justice, albeit redefined. As courts focused less on Jim Crow and more on individual claimants, they were pushed increasingly to take the interests of third parties into account and, as such, courts' intervention to dismantle Jim Crow came to seem less unequivocally "just." Tellingly, debates focused on "innocent" third parties and unjust beneficiaries of doctrines that focused more on groups than individuals.[253]

Restricting equity powers was the vehicle for this transformation of civil rights. Fiss emphasizes how relaxing traditional equity rules that had subordinated injunctions to other (presumably common law) remedies were crucial to the success of *Brown*[254] and how the revival of those doctrines has been key to the rollback of civil rights law, which was beginning as Fiss was writing.[255] In 1974, in *O'Shea v. Littleton*,[256] the Court seemed "bent on reversing the practice of resorting to the injunction as a primary remedy and [was] narrowly circumscribing, if not cutting back on, the injunction even in the civil rights domain."[257]

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251. *See id.* at 1030 (identifying Supreme Court precedent which held that the scope of a district court's power is broad when remedying past harms, and thus this power encompasses race-conscious remedies such as busing students).

252. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2104 (2002) (reasoning that redistributive policies were open to objections because the resources were being taken away from white people and given to people of color).

253. This debate culminates in *Martin v. Wilks*, 490 U.S. 755 (1989).

254. *See* FISS, *supra* note 32, at 38–42.

255. *See id*. at 42–44 (referencing *Younger v. Harris* and *O'Shea v. Littleton* as examples of civil rights cases limited by reinvigorated traditional equitable rules that subordinate the injunction).

256. 414 U.S. 488 (1974).

257. FISS, *supra* note 32, at 43–44.

The role of "traditional equity doctrine" in service of constitutional structure has been critical to this rollback. Fiss examines the Supreme Court's decision in *Douglas v. City of Jeannette*[258] for its revival of the irreparable injury rule in service of protecting what *Younger v. Harris*[259] would later call "Our Federalism."[260] In addition to viewing this theory of federalism as "unsound," Fiss faults "the use of the irreparable injury doctrine to demarcate the bounds of the state and federal courts."[261] Equity, or the revival thereof, has been a key component of the Court's efforts to cabin civil rights and their effects on the Constitution:

> The Court would have us believe that it is only making a point about remedies, when it is in fact making a point about the structure of the federal system . . . . The irreparable injury formula invokes the traditions of equity, and thereby enables the Court to forward its view of federalism without having to justify fully its value preference . . . .[262]

Fiss emphasized that the irreparable injury rule is not only a smokescreen, but also too narrow for the Court's purposes.[263] He suggests that "comity" might be a better framework for explaining the Court's concern in *Jeannette*; however, it is in its focus on remedies that the Court established the jurisdictional hierarchy it believes the Constitution requires.[264] The invocation of equity as a tool in the rollback of civil rights not only turned equity rules into tools for restricting remedies, but also gave the Court an instrument for interpreting the Constitution in light of "tradition." It also gave the Court access to a system that was especially focused on cabining extraordinary judicial powers, just when reining in an "activist" judiciary was becoming a more accepted rallying cry of civil rights critics.[265]

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258. 319 U.S. 157 (1943).

259. 401 U.S. 37 (1971).

260. FISS, *supra* note 32, at 61–68.

261. *Id.* at 67.

262. *Id.*

263. *Id.* at 68.

264. *Id.*

265. *See* LINO GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS—A SHARPLY CRITICAL VIEW OF THE

As Fiss anticipated, courts would work over the next two decades to circumscribe use of the structural injunction, with Congress ultimately prohibiting its use in the context of prisons.[266] The use of broad equitable remedies to effectuate school desegregation saw a similar fate, beginning the same year Fiss's book was published.[267] And, as Fiss noted, the Court had already created substantial limitations on broad equitable remedies to criminal justice systems said to be discriminatory.[268] The restrictions of *Rizzo v. Goode*[269] and *O'Shea* would be solidified in *Los Angeles v. Lyons*,[270] while attacks on disparities in criminal prosecutions would be dismissed by the Court in death penalty cases.[271] By the mid-1990s, the civil rights injunction had been mostly repudiated.[272]

The rollback of civil rights was not limited to extraordinary equitable remedies, however. The Court and Congress limited use of injunctions more generally.[273] "Whether imposed by Congress or by the courts, these restrictions on injunctive relief broadly reflect common law conceptions about the role of equity. They depend on background principles about the scope and effectiveness of alternative remedies and about the kinds of cases that can properly be brought."[274] By 1978, courts had also already placed significant limitations on the damages-based

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RULINGS THAT LED TO FORCED BUSING 258–59 (1976) (discussing the Supreme Court's power to invalidate unconstitutional policies).

266. Prison Litigation Reform Act, 42 U.S.C. § 1997e (2004).

267. *See* Milliken v. Bradley, 418 U.S. 717, 738 (1974).

268. *See* FISS, *supra* note 32, at 40 (noting that there is a preference for the criminal remedy and thus the court will not issue an injunction "unless the plaintiff demonstrates the inadequacy of the criminal remedy").

269. 423 U.S. 362 (1976).

270. 461 U.S. 95 (1983).

271. *See* McCleskey v. Kemp, 481 U.S. 279, 294 (1987) (arguing that the petitioner's data on racial disparities was inadequate and thus there was no constitutional violation).

272. *See* Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIA. L. REV. 143, 163 (2003) (arguing that barriers to structural reform are really barriers to liberal structural reform).

273. *See* John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1395–1400 (2007) (explaining how federal courts could "develop their own conceptions of equity jurisprudence" while Congress could "enact restrictive statutes" against federal injunctions).

274. *Id.* at 1398.

recovery in Section 1983 cases, reading into that statute immunities for government officers[275] and interpreting the Eleventh Amendment to bar damages recovery from states.[276] These limitations would be further developed in the ensuing decades, significantly circumscribing damages actions under Section 1983 with the consequence that "money damages are currently not available for routine constitutional violations."[277] As the civil rights revolution was built on the creative use of equity remedies, a rollback built around revival of traditional equity tests and limitations is unsurprising.[278] The surprise is that the Court would give preference to equity over damages actions when confronted with the damages actions created under Section 1983 and in parallel to *Brown*'s injunction-based regime.[279] Civil rights equity explains this preference by surfacing the Courts' application of an equity-based approach to rights claims for equity and damages claims alike.

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275. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (finding that qualified immunity extends to officers of the executive branch, with variations dependent upon the discretion and scope of responsibilities of the office).

276. *See, e.g.*, Will v. Mich. Dept. of State Police, 491 U.S. 58, 66 (1989) (concluding that suits seeking remedies against a state for deprivations of civil liberties are barred by the Eleventh Amendment unless the state waives its immunity).

277. Jeffries & Rutherglen, *supra* note 273, at 1403.

278. *See id.* at 1410.

279. In 1978, Fiss had already recognized the preference of injunctions over damages actions:

> Indeed, in several recent cases, somewhat removed from civil rights, classically defined in terms of protecting the racial minority, doctrine has been created that seems to give a primacy to the injunction. In *Pierson v. Ray* the court created an immunity for judicial officers that might be applicable only to damage remedies; in *Edelman v. Jordan* involving the invalidity of a state practice denying welfare payments, the Court case an Eleventh Amendment immunity around damages actions that is not applicable to injunctive remedies; and when the court finally—after the long post-*Bell v. Hood* interlude—held that constitutional prohibitions of their own force gave rise to action so for damages if they were violated, it also imposed on such damage actions restrictions—such as a good faith defense—not applicable to injunctions.

FISS, *supra* note 32, at 90; *see* Reinert, *supra* note 39, at 936–43. Jeffries and Rutherglen resolve this puzzle by emphasizing the importance of adequate remedies at law as the basis for injunctions. *See* Jeffries & Rutherglen, *supra* note 277, at 1399.

The shift in focus in civil rights cases from eradicating Jim Crow to responding to individual rights claims changed the underlying vision of injustice that the courts are deployed to eradicate without changing the predominantly equitable framework for thinking about civil rights litigation.[280] Individual damages actions perhaps require case-by-case rights articulation, akin to that of the common law to frame injustice, as traditional equity does not define injustice.[281] As Stephen N. Subrin has observed,

> The defense of equity power in constitutional cases designed to restructure public institutions tends to undervalue the problem of how to translate rights . . . into daily realities for the bulk of citizens. Aspects of common law procedure and thought, not equity, may be required to help deliver or vindicate rights, now that equity has opened a new rights frontier.[282]

Such an approach demands that courts identify injustice for individual claimants from the facts of particular disputes which would form binding precedent in similar cases. That is, with the effective repudiation of the anti-Jim Crow project, civil rights become potentially unbounded and in need of precise definitions of discrimination, abuse of government power, due process, and similar concepts that had become the core of civil rights litigation.[283] Rather than developing such definitions (and a common law of civil rights), courts defined justice in civil rights cases as it was under traditional equity: a fact-intensive examination in particular cases, accessible only where plaintiffs overcome a raft of procedural limitations on the court's ability to intervene.

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280. *See* Reinert, *supra* note 39, at 933 (noting that important and strategic consequences flow from the Supreme Court's approach to equitable remedies).

281. *See* Subrin, *supra* note 46at 974 (noting that federal legislation required courts to resolve complex cases).

282. *Id.* at 913

283. *See* Judith Olans Brown et al., *Treating Blacks as if They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1, 4 (1975) (explaining how civil rights legislation such as Section 1982 fail to define precisely the content of the rights protected by it).

C. *Emergence of Civil Rights Equity*

Civil rights equity emerges from judicial resistance to structural injunctions. That resistance was characterized by the revitalization of limits on equitable remedies in civil rights cases. However, the imposition of equitable constraints would not be limited to cases utilizing broad equitable remedies. Courts limited causes of action for damages in civil rights cases through use of traditional immunities and increasingly strict proof requirements. On their face, the limits in these "law" cases bear scant resemblance to equitable restrictions A closer look reveals that the structure of equitable limitations, designed to check the awesome powers of courts sitting in equity, frame and inspire courts' retrenchment efforts more generally, providing substance to an otherwise generalized and vague notion of judicial restraint.

Equitable power is awesome. Even as only a supplement to law, unrestrained equity would be daunting. Samuel Bray offers a compelling anatomy of how these tremendous powers made equity courts vulnerable and how restraints on equity power emerged.[284] Bray contends that equitable remedies survived the merger of law and equity because courts require a way to compel action or inaction.[285] The challenge of ensuring compliance with equitable orders[286] necessitates powerful tools like contempt[287] wielded solely by the judge,[288] which Bray calls "*equitable management devices*."[289] Given the tremendous authority these remedies and equitable management devices vest in courts,[290] "*equitable constraints*" exist to limit courts' power, mitigate the possibility of abuse by parties, and determine plaintiffs' reasonable expectations.[291] The equitable constraints Bray describes include those commonly associated with equity, like

284. *See* Bray, *Systems of Equitable Remedies*, *supra* note 90, at 582.
285. *Id*. at 553.
286. *See id*. at 563–64.
287. *See id*. at 564–68.
288. *Id*. at 571–72.
289. *Id*. at 563–72.
290. *See id*. at 572.
291. *Id*.

the requirement that there be no adequate remedy at law,[292] or equitable defenses, like laches and clean hands.[293] Others, like the requirement of equitable ripeness, resemble similar constitutional doctrines.[294] The focus of equitable defenses, like the other restraints, is "equity's refusal to allow the power of these remedies to be used on behalf of a plaintiff who acts unjustly."[295]

Equitable constraints have a direct role in civil rights cases as those cases often seek equitable remedies, sometimes along with damages.[296] Equitable constraints, like equitable standing, are recast as constitutional doctrine, with the effect that courts must ask if the plaintiff's case is an appropriate one as a matter of subject matter jurisdiction.[297] But in damages actions, these equitable constraints exert an influence beyond their direct application because civil rights damages actions, like equity actions, vest broad powers in the judge. The fact-intensive nature of most civil rights cases gives potentially expansive scope to rights claims that judges feel they need to constrain. Diverse civil rights claims are fact intensive: discrimination cases are framed around intentional use of a protected category to cause an adverse result;[298] due process cases ask whether the plaintiff received the process due;[299] and excessive force cases

292. *Id*. at 580–81. No adequate remedy at law is a constraint, but one that Bray notes is not difficult to meet in that there are no definitive rules governing this finding. Its importance lies in the determination that the remedy is equitable, that it maintains the "'conceptual exceptionalism' of equitable remedies." *Id*.; *see* DOUG LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 22 (1991) (finding that a remedy is adequate only when it is as complete, practical, and efficient as the equitable remedy—the legal remedy almost never meets this standard).

293. *See* Bray, *Systems of Equitable Remedies*, *supra* note 90, at 581–82.

294. *Id*. at 578–79. *Equitable ripeness* demands significant factual development in support of equitable remedies overlapping with "constitutional doctrines of ripeness and standing, as well as abstention doctrines." *Id.*

295. *Id*. at 581.

296. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 98 (1983).

297. *See* Reinert, *supra* note 39, at 943 (emphasizing that there are barriers to obtaining injunctive relief, with the standing doctrine being the most prominent).

298. *See, e.g.*, Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (maintaining that discrimination in Title VII claims is a question of fact).

299. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 536–43 (1981) (comparing the facts of that case to the facts of prior precedents).

ask, for both qualified immunity and the constitutional right, whether the officer exercised reasonable force under the circumstances.[300] These are "how high is high" questions, turning on assessment of the facts under the circumstances by the fact finder.

This open-ended, fact-intensive approach promises judicial openness to a broad range of cases, but procedural, structural, and proof limitations in civil rights damages suits mean that "[m]oney damages are most likely to prove effective against extreme or egregious constitutional violations and least likely to work well against borderline misconduct that might reasonably have been committed in good faith."[301] And where explanations of behavior, like discrimination, are skeptically received, civil rights litigation proves ineffective.[302] Bray's observations about equity constraints apply to damages actions. They are constrained in an effort to "guide the responsible exercise of judicial power . . . by focusing a judge's attention on certain situations where equitable remedies and enforcement mechanisms are most likely to be misused."[303]

The emergence of equity constraint-like limits is perhaps obscured by the recognition and expansion of damages actions from *Monroe* through the Court's rejection of the structural injunction.[304] The shift to individual suits for damages implied a move from equity's pursuit of justice in unusual situations to law's vindication of individual rights in everyday circumstances.[305] From the start the Court's damages jurisprudence emphasized process and procedure, while

300. *See, e.g.*, County of Los Angeles v. Mendes, 137 S. Ct. 1539, 1546 (2017) (stating that the reasonableness analysis carefully considers the facts and circumstances of each case).

301. Jeffries & Rutherglen, *supra* note 273, at 1405.

302. *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1300 (2012) (finding that people are reluctant to make findings of discrimination in cases such as disparate treatment in the employment context).

303. Bray, *Systems of Equitable Remedies*, *supra* note 90, at 584.

304. *See* Jeffries & Rutherglen, *supra* note 273, at 1401 (noting that money damages played a small role in vindicating constitutional rights prior to *Monroe*).

305. *See id.* at 1392 (arguing that until the staple of modern civil rights litigation—individual rights protected by the Fourteenth Amendment—assertions of constitutional rights were obscure).

eschewing the development of substantive elements for rights claims. Even as courts recognized rights—rights to be free from discrimination and excessive force, and rights to due process of law—plaintiffs were tasked with proving the ultimate fact of those rights violations without much guidance from substantive precedent.[306]

It is now apparent that rights actions for damages, characterized by this fact intensiveness and increasingly predominant procedural nature of the litigation, extended the fundamental shape of the Court's prior equity approach to its damages jurisprudence.[307] Fact intensiveness duplicated the unbounded structure of equity and gave courts broad authority to provide (now damages) remedies. A case like *McDonnell Douglas*,[308] which structured Title VII's nominally equitable employment discrimination litigation but left the question of discrimination unanswered, might have seemed to advance the promise of rigorous rights enforcement. But what it did was extend the possibility of continuing the Court's relatively unbounded power as the burden shifting of *McDonnell Douglas* was read to be only a burden of production which fell away when met, leaving plaintiffs to prove "discrimination vel non."[309] The ultimate focus on discrimination vel non[310] vests courts with the task of determining what constitutes discrimination and introduces the related prospect of litigants abusing the power of the courts (through invasive discovery or abusive litigation). It left open the need for equitable restraint even as the focus on discrimination vel non was extended to discrimination suits for damages under Sections 1981 and 1983.[311]

306. *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1777 (2016) (discussing the Supreme Court's curtailment of the right against excessive force, which has made it difficult for victims to overcome defendants' motions to dismiss and motions for summary judgment).

307. *See* Bray, *The Supreme Court and the New Equity*, *supra* note 31, at 1003 (stating that before the new equity cases, the Supreme Court was unsure of the amount of weight to give to historical distinctions between legal and equitable remedies).

308. 411 U.S. 792 (1973).

309. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–10 (1993).

310. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983).

311. Comcast Corp. v. Nat'l Ass'n of Afr.-Am.-Owned Media, 140 S. Ct. 1009, 1019 (2020).

An equity "style" is also projected by the characteristic balancing of interests this fact intensiveness facilitates. "The modern Supreme Court frequently requires the withholding of substitutionary constitutional relief [including damages] under doctrines . . . developed to protect the perceived public interest."[312] Though one would be surprised to see a court routinely apply equitable defenses like laches or unclean hands in a civil rights damages case, civil rights doctrine is broadly characterized by its balancing approach that sub silentio imports the undue hardship defense into the dispute. And the fact-intensive nature of most civil rights doctrines permits courts (and then juries) to diminish assertions of rights violations by those with unclean hands, even if that doctrine is nowhere cited and the question is a "legal" one. Moreover, what Abram Chayes said of juries—"one of the virtues of the jury was thought to be its exercise of a roughhewn equity, deviating from the dictates of law where justice or changing community mores required"[313]—applies to judge and jury in the system of civil rights that leaves so much to a fact-based judgment.

Courts facing difficult disputes have perhaps unsurprisingly found refuge in the structure and tools of equitable constraints. If courts are generally suspicious of civil rights claims, if they simply worry that the cases might push the court into conflict with other branches, or if courts just wish to limit access to the judiciary, it should not be surprising that these legacy tools for limiting judicial power, albeit in equity, influence efforts to limit the courts' power.[314] Chayes said in 1976:

> [T]he Burger Court may be seen to be embarked on some such program for the restitution of the traditional forms of adjudication. Its decision on standing, class actions, and public interest attorney's fees, among others, achieves a certain coherence in this light . . . . One suspects that at bottom its procedural stance betokens a lack of sympathy

312. Greabe, *supra* note 185, at 858; *see id.* at 881–96 (noting that the Supreme Court has deemed itself to be free to advance the perceived public interest).

313. Chayes, *supra* note 182, at 1287.

314. *See* Bray, *Systems of Equitable Remedies*, *supra* note 90, at 534.

> with substantive rights and with the idea of District Courts as a vehicle of social and economic reform.[315]

Equitable remedies (injunction, subrogation, etc.) are powerful tools that put courts in direct conflict with defendants and prompt potential noncompliance with judicial orders.

Simultaneously, civil rights cases involving contested rights, like antidiscrimination, privacy, and freedom from excessive force, put courts at odds with defendants who have incentives to resist the court's judgment. This is because the accusation suggests moral reprehensibility in discrimination cases, abuse of power in privacy cases, or a lack of professionalism (with horrendous consequences) in police abuse cases. A loss in such cases also deprives the defendant of full authority over property or control over policymaking. Courts may be able to force payment of damages, but their ability to generate compliance with the underlying values is compromised where defendants: deeply disagree with the values (e.g., antidiscrimination on the basis of sexual identity); object that they were in violation of the values (whether an employment decision was "based" on the protected category in discrimination cases); believe these values conflict with moral or political beliefs (anti-abortion legislation); or maintain that actions underlying the cases were necessitated by the circumstances (police abuse cases), putting the court's legitimacy in question. Cities might be "accountable" to Ben Crump's clients by paying a settlement while never confronting the values underlying the civil rights litigation the settlement resolves.[316]

If the difficulty of ensuring compliance defines equitable remedies,[317] the difficulty of inducing compliance with constitutional and statutory values defines civil rights cases for damages, particularly when the underlying value questions implicate the interests of networks of parties and nonparties in

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315. Chayes, *supra* note 182, at 1304–05.

316. *See* Treisman, *supra* note 5 (explaining that although civil settlements can compensate victims in police violence proceedings, they have not been shown to make a positive change in the belief systems of police officers and other city government officials).

317. *See* Bray, *Systems of Equitable Remedies*, *supra* note 90, at 563–64 (detailing that, although legal remedies rarely show any issues with compliance, there is a higher degree of difficulty in forcing compliance with equitable remedies).

multidimensional ways akin to structural injunction cases. In such contexts, courts struggle to be on the "right" side of civil rights disputes. This complexity is often cast as the case being "political," and it is suggested that courts should avoid political cases.[318] But every case has political implications, so the charge is too broad, and "political" is too narrow a characterization for what defines these cases. Rather, it is their multidimensionality that makes them complex and difficult.[319] And just avoiding them gives preference to the status quo ante, legitimizing the actions of the defendant potentially at the cost of constitutional values. Equitable constraints limit access to equitable remedies[320] and structural injunctions[321] in multidimensional cases. Civil rights equity emerged as a way of ameliorating the problems presented by such cases, whatever the remedy raised.[322] By constructing a predominately procedural jurisprudence with generally defined rights, civil rights damages actions mirror traditional equity, with a broad focus on justice by balancing interests, access to which is limited by the procedural stricture of equity constraints.

In recent years courts have demanded that cases be more conventionally and narrowly structured through a characteristic focus on process and procedure in federal

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318. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1224–26 (1978) (examining the relationship between constitutional norms and the political question doctrine).

319. *See* Chayes, *supra* note 182, at 1284 (examining the shift in federal litigation from disputes between private parties pertaining to "private rights" to disputes of constitutional and statutory policies).

320. *See, e.g.*, Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010) (outlining a four-factor test where a plaintiff seeking a permanent injunctive relief must show that, among other factors, remedies available at law are inadequate to compensate for an injury); eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392–93 (2006) (enforcing the Court's decision rejecting the replacement of traditional equitable considerations with a rule that injunctions might automatically follow an injury).

321. Chayes describes six ways in which "the judiciary may have some important institutional advantages for [managing structural reform litigation]." Chayes, *supra* note 182, at 1307–09.

322. *See* Subrin, *supra* note 46, at 913 (explaining that using historic equity powers has allowed judges to "breathe life into sacred constitutional rights and to permit such rights to evolve and expand as society attempts to become more humane").

litigation generally and civil rights litigation in particular.[323] The trend revives efforts to restrict the "equity" aspects of the FRCP. These restrictions were rejected during the drafting of the rules and are aimed at constraining litigation.[324] The rejected push to require pleadings to be more specific[325] is reborn in the *Iqbal*[326]/*Twombly*[327] requirements.[328] Rejected efforts to limit discovery[329] are accomplished through *Iqbal*/*Twombly* and through the court's emphasis on dismissing suits at the earliest possible moment in qualified immunity civil rights suits against officers.[330] The rejected proposal to permit judges to issue an "order formulating issues to be tried"[331] has been accomplished through aggressive use of summary judgment.[332] Though civil rights jurisprudence severely limits equitable claims while simultaneously pointing litigants to equitable relief over damages,[333] the jurisprudence in damages actions grants judges powerful tools to restrict access to the courts and narrow claims while resisting defining substantive rights.

Perhaps ironically, these efforts to restrict the equity aspects of the FRCP place judges in the position of equity judges, magnifying their power to restrict judicial access in complex cases. While the rejection of notice pleading in *Iqbal*/*Twombly* and the operation of qualified immunity frees public employee defendants from the inconvenience of litigation, the doctrines also reflect the belief that public employees ought to be freed of

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323. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569–70 (2007) (discussing the pleading standards for claims in federal courts).

324. *See* Subrin, *supra* note 46, at 985–86.

325. *See id.* at 977–79 (discussing a proposal for "lawyer verification").

326. 556 U.S. 662 (2009).

327. 550 U.S. 544 (2007).

328. *See Iqbal*, 556 U.S. at 678 (establishing that a complaint must contain sufficient facts to state a claim to relief that is plausible on its face to survive a motion to dismiss); *Twombly*, 550 U.S. at 547 (requiring a lower standard of specificity for which a pleading only needs to have enough facts to state a claim for relief that is plausible on its face).

329. *See* Subrin, *supra* note 46, at 977–78 (providing examples of efforts to limit discovery that courts rejected).

330. *See* Harlow v. Fitzgerald, 457 U.S. 800, 801 (1982).

331. Subrin, *supra* note 46, at 978.

332. *See id.* at 982.

333. *See* Reinert, *supra* note 39, at 936–43 (discussing the doctrinal and rhetorical preference of injunctions over damages in civil rights litigation).

the tremendous oversight power of the courts absent a specific, clear case of wrongdoing.[334] These doctrines permit courts to determine more easily whether they are facing a complex, multidimensional civil rights dispute implicating multiple interests, and therefore requiring the judge to limit access to a substantive application of the characteristically fact intensive rights, which would be applied through equity-like balancing in any event.[335] Instructively, *Iqbal* involved national security policy where, behind the simple structure of claimant versus government, there lay the interests of the untold masses presumably protected though national security.[336]

The demand for specificity is an outgrowth of the fact intensiveness of civil rights claims, which gives judges a central role in managing civil rights disputes not unlike the role that judges occupy in structural injunction cases.[337] Just as the party and issue complexity magnify the judge's role in structural reform cases, fact intensiveness in damages cases demands judicial management to restrict potentially broad rights.[338] As in equitable suits, judges are the principle figures in civil rights damages cases, weighing the public interests while deciding numerous procedural questions focused on whether a claim is appropriate for judicial resolution.[339] Throughout, balancing typifies the contemporary approach to damages actions,[340]

334. *See* Jeffrey J. Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN ST. L. REV. 1247, 1252 (2010) (exploring issues that might arise if plaintiffs are given great latitude in pursuing investigations of wrongdoing by defendants, like high costs of litigation and the presence of nuisance suits).

335. *See Twombly*, 550 U.S. at 558 (discussing the Court's ability to insist on specificity in pleadings before permitting an enlarged factual controversy to ensue).

336. *See* Ashcroft v. Iqbal, 556 U.S. 662, 670 (2009) (discussing the implications of subjecting high-ranked government officials to the "burdens of discovery" based on a complaint that is nonspecific in its nature).

337. *See* Greabe, *supra* note 185, at 882 (explaining that the Supreme Court has insisted that courts "define rights at a very high level of specificity" when determining whether those rights are "clearly established").

338. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (establishing that a right must be clearly established so that a reasonable person can understand the "contours" of the right).

339. *See* Greabe, *supra* note 185, at 889 (detailing the various federalism doctrines that Court has developed that can "deflect from federal court jurisdiction justiciable claims for specific relief" for constitutional wrongs).

340. *See id.* at 881–88.

whether through individual immunity in suits against individual officers[341] or the emphasis on the plaintiff's burdens of poof in employment discrimination cases.[342] Surviving the gauntlet of procedural hurdles, plaintiffs must establish a quantum of outrage sufficient to convince the judge (then the factfinder) that justice demands judicial intervention, however loosely the parameters of justice under the right concerned are defined.

A damages jurisprudence with unbounded, fact-intensive rights vests great power in courts to enforce civil rights but duplicates many problems of equity jurisprudence and thus begs for limits on invocation of judicial power. The high barriers that developed to limit access to the courts—from *Iqbal*/*Twombly*'s specificity requirements, to summary judgment practice, to immunities—empower judges to manage disputes.[343] This equity-like structure is particularly valuable in multidimensional cases where many interests are implicated and where the legitimacy risks of judicial intervention are greatest. Surviving the procedural gauntlet of judicial management and constraint, plaintiffs' rights are further subject to the balancing of interests and de facto deservedness judgment by fact finders loosely bound by fact intensive rights. This is civil rights equity.

D. *The Structure of Justice: Civil Rights Equity and a Hierarchy of Rights*

Civil rights equity generates different approaches to different kinds of rights claims. Just as the requirements of equity traditionally created a hierarchy of remedies with legal remedies superior to equitable ones, civil rights equity defines a hierarchy with some claims superior to others. This hierarchy also delimits the cases to which civil rights equity's management and constraints are applied. At the top of this hierarchy are cases involving the recognition of rights and identities, followed by "civil liberties" claims—cases of government abuse of an individual that are simple in structure

341. *See id.* at 881–84.

342. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993).

343. *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 360–61 (2010).

and effect—then "civil rights" claims. Positive rights, which are generally not recognized and are unprotected, are at the bottom of this hierarchy.[344]

Courts can decide recognition and civil liberties claims without resorting to civil rights equity techniques. Civil rights cases, defined as complex, multidimensional rights cases implicating multiple interests, are subject to civil rights equity management and constraints. The line between civil liberties and civil rights cases is fluid, turning on the perceived complexity of the dispute. Similarly, recognition cases typically emerge from efforts to enforce civil rights.[345] Consequently, the distinctions between the types of claims in the hierarchy usually emerge during litigation, diminishing the value of the hierarchy for describing cases before they are litigated. But the categories matter in terms of how courts are likely to approach cases.

Categorization is ad hoc and controlled by the judge.[346] The typically fact-intensive inquiries in rights cases not only put the judge at the center of the litigation, but they also grant the judge a perspective to determine whether the dispute is a multidimensional one in need of management or a simple one with a straight-forward question. Simpler cases, with a simple party structure that reflects the parties truly in interest, and with adverse positions, have a reduced need for the management devices and constraints of civil rights equity. Such cases can be resolved on narrow questions reminiscent of common law claims: Is the plaintiff's claim recognized by law? Has the plaintiff's right been violated by the defendant? Can the plaintiff be made whole without implicating third parties? Thus, courts can resolve recognition and civil liberties cases by determining if the plaintiff has a protected right that has been violated. As cases become more multidimensional, implicating additional interests or where remedies would do so, the

344. Positive rights such as the right to health care are typically beyond the scope of rights enforcement, though a court could recognize such a right in the federal or a state constitution or legislation, transforming it into a civil rights recognition case.

345. *See generally Brown I*, 347 U.S. 483 (1954) (enforcing the right to equal protection of the law).

346. *See* Spencer, *supra* note 343, at 360–66 (detailing the judges' power to manage litigation).

management devices and constraints of equity become vital.[347] Civil rights equity allows judges in complex, multidimensional cases to manage the interests involved and, importantly, restrict the courts' intervention to social outrages.[348]

The different approaches to relatively simple versus complex and multidimensional cases are exemplified by courts' approach to "new property."[349] Even as courts were expanding the *Brown*-based injunction—determining how to enforce the rights created by civil rights statutes, and providing damages actions for constitutional violations—courts started to contend with the right-privilege distinction that had informed judicial approaches to the distribution of government largess.[350] Courts were informed by Charles Reich's influential *The New Property*, which documented the scope and significance of governmental largess as well as the consequences of treating a variety of government gratuities as "privileges" to which individual recipients had no enforceable claim.[351] Reich defined his goal at one point as explaining "the weakening of civil liberties in the public interest state."[352] Among his many examples are cases where the government denied or withdrew funding, contracts, or licenses because of recipients' political affiliation, speech, or refusal to reveal past political associations.[353] Reich diagnosed the problem as "the public interest" being utilized to undercut individual claims to government largess.[354] This was possible because public interest had been read too singularly,[355]

347. *See* Chayes, *supra* note 182, at 1297–98 (exploring changes to litigation processes by courts resulting from extending impacts of judicial decisions).

348. *See, e.g.*, Spencer, *supra* note 343, at 369–70 (offering a theory known as "ordered dominance" in which restrictive doctrines, like heightened pleading, can be utilized by courts to restrict cases).

349. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

350. *See id.* at 740 (explaining that early legal protection of rights was greater than protection of privileges, where a privilege had the potential of being revoked by a judiciary without notice or hearing).

351. *Id.*

352. *Id.* at 774.

353. *Id.* at 762–69.

354. *Id.* at 774–77.

355. *Id.* at 774–75.

one-sidedly,[356] or trivially and vindictively,[357] and in all cases the effect of public interest denials on parties similarly situated to the claimant were ignored.[358] This parade of horribles fueled development of constitutional law around speech and association rights, as well as due process protections that treated government largess as entitlements that recipients could defend in court under certain circumstances.[359]

Constitutional law since 1964 has been mostly responsive to the horribles underlying Reich's case for new property. One might call this the civil liberties revolution because the property interests his article highlighted were most often compromised through retaliation against free speech or association.[360] The success in this area has not been complete, however. The glaring exception is welfare entitlements: courts' early protection of such rights through procedural due process was quickly undercut.[361] With similar results, courts have been deferential to state supreme courts' authority in administering admissions to the Bar[362] and have increasingly treated national security as a basis for only limited restraints on discretion in the government's response to national security threats since 9/11.[363]

The influence of public interest on civil liberties continues, with the degree to which courts recognize public interest behind government decisions diminishing their willingness to see civil liberties at stake. With the individual pitted against the state, courts have been amenable to tough review of government restrictions on liberty. However, the current Court has been

356. *Id.* at 775.

357. *Id.*

358. *Id.* at 776–77.

359. *Id.* at 774–83.

360. *Id.* at 763–64.

361. *See* Matthews v. Eldridge, 424 U.S. 319, 349 (1975) (limiting *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

362. *See, e.g.*, Hoover v. Ronwin, 466 U.S. 558, 581–82 (1984) (holding that admission is an act of the judiciary not subject to anti-trust action); Law Sch. C.R. Rsch. Council, Inc. v. Wadmond, 401 U.S. 154, 155 (1971) (establishing that a belief in the form of government and loyalty to the United States are permissible requirements for admission to the New York Bar).

363. *See* Madeleine Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, TIME (Sept. 11, 2021, 7:00 AM), https://perma.cc/M6FN-EYVZ (examining the effects of 9/11 on the U.S. government regarding national security).

particularly protective of speech as liberty and suspicious of even well-reasoned restrictions on speech.[364] While courts have continued to defer to the Bar on admissions, they have brushed aside the Bar's worries about lawyer advertising.[365] Where government actions more readily reflect the collective interests of the citizenry (national security, traditional consumer protection underlying restrictions on admission to the Bar), the court has given the government more leeway.[366] This distinction between structurally simple and complex cases define the difference between civil liberties and civil rights cases, with the former avoiding civil rights equity's equity-like approach.

Of course, to assert rights against the government or anyone else, the right must be recognized, and the identity because of which the right is denied must be recognized by the courts as a prohibited basis for denying rights.[367] Recognition cases are generally simple plaintiff-versus-defendant disputes, even if recognition of some rights or identities implicates complex interests for future application of those rights or protection of those identities—complex interests that are apparent when the recognition question arises.[368] But recognition disputes rarely appear fully formed. They generally arise from assertions of rights in ordinary civil liberties or civil rights disputes.[369] Ultimately, the resolution of recognition cases turns on the narrow question of whether the Constitution, a

364. *See John Roberts and Free Speech: A Report on the Roberts Court's First Amendment Jurisprudence*, CATO INSTITUTE (2020) [hereinafter *Roberts Court*], https://perma.cc/R8KN-H5EW (discussing how Chief Justice Roberts emphasizes protection of free speech).

365. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 361 (1977) (enforcing that the State Bar acts as an agent of a court); *cf.* Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 288 (1985) (striking down the residency requirement to sit for the bar).

366. For welfare this is perhaps the defining feature, leading to a permissive regime because the fiscal interests of taxpayers are ascribed to the government and balanced against the individual's interests in process.

367. *See* Obergefell v. Hodges, 576 U.S. 644, 677 (2015) ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to . . . vindicate their own direct, personal stake in our basic charter.").

368. Think *Brown I*, *Roe*, and *Obergefell* as straightforward but weighty.

369. *See, e.g.*, *Obergefell*, 576 U.S. at 651–81 (examining a claim for a legal right for same-sex marriage).

statute, or another instrument recognizes the right or identity. Recognition is thus simple *and* antecedent to either civil liberties or civil rights claims.

In contrast to the new property disputes and recognition cases, civil rights disputes are defined by structural complexity. In such cases, individuals are cast less against the government as against one another. In employment discrimination disputes, for example, the courts are asked to intervene on one or another's behalf where the government is not necessarily present. Or, in structural injunction cases, courts are asked to intervene to manage the reform of bureaucratic institutions that themselves manage complex webs of individual interests.[370] An equity-like approach is viewed as more appropriate for addressing such a dispute, whether the relief prayed for is equitable or legal. Potentially sprawling private discrimination cases like *Wal-Mart Stores, Inc. v. Dukes*[371] are the prototype here, with the court asked to referee a private dispute governed by public law.[372]

Public agency discrimination demonstrates how a case can float between the two characterizations. Such a dispute is like a new property case (with individual property deprived by the government on an impermissible basis). Yet the narrowly conceived dispute can transform in instances where the court perceives the interests of private citizens behind the governmental action, prompting the court to resort to equity-like language of balancing, particularly, but not exclusively, where the relief requested is equitable. Thus, where remedies for the aggrieved parties would affect the rights of incumbents to jobs in public discrimination cases, the court invokes equitable management devices and equitable constraints to address the dispute. This is *Martin v. Wilkes*.[373] But even where damages are the requested remedy, courts will sometimes invoke those equitable doctrines to limit their role as

370. *See* Gilles, *supra* note 272, at 144 ("And for a time, the structural reform injunction loomed large as a powerful tool for the transformation of social institutions.").

371. 564 U.S. 338 (2001).

372. *See id*. at 342 (analyzing the plaintiff's claim for violation of a public law against a private party rather than the government).

373. 490 U.S. 755 (1989).

"between" the interests of private parties (some of whose interests are bound to those of the government).[374]

Police abuse cases lie at the intersection of civil liberties and civil rights and highlight that party structure is not controlling in courts' characterization or treatment. Courts can, and in police cases do, locate the public interest behind the government or state actor's behavior.[375] From *Monroe* through to *Board of Commissioners of Bryan County v. Brown*,[376] the Court has weighed the effects of § 1983 recovery on the public's interest in policing. Qualified immunity jurisprudence does so expressly.[377] So conceived, the dispute is complex and triggers courts' reluctance to intervene. Because they see the interests of the citizenry behind the government's action, creating a clash between individuals more so than a conflict between individual and state, courts recognize a need for the more equity-based approach of civil rights equity. Invariably, in cases short of egregious treatment by the government, the balancing of civil rights equity is tilted in favor of the government acting in the interests of the public over those of a victim or group that is often perceived as undeserving (without clean hands).

Assessments of when civil rights equity tools ought to be applied to rights claims create this hierarchy. Disputes over recognition are structurally simple and avoid civil rights equity management, even if recognition of an identity might trigger complex civil rights claims down the line. Recognizing a person's ability to assert rights claims on the basis of their identity or recognizing a person's ability to claim a particular right is a straightforward, if critical, question. For LGBTQ persons to claim protection from discrimination because of their identity is vital where seeking protection from discrimination on the basis of their sex means a defendant's admission of sexual orientation

374. *See* Diego M. Papayannis, *Independence, Impartiality and Neutrality in Legal Adjudication*, 28 REVUS 33, 37 (2016) (explaining that, if the courts were to think with a non-neutral mindset when it pertains to the parties, the function of the law would be defeated).

375. *See* Donald L. Horowitz, *The Courts as Guardians of the Public Interest*, 37 PUB. ADMIN. REV. 148, 149 (1977) (detailing that in modern society courts play a more established role in protecting the public interest).

376. 520 U.S. 397 (1997).

377. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 50 (2018) (examining how qualified immunity operates as a defense for § 1983 claims).

discrimination operates as a complete defense.[378] Recognition is essential, though not necessarily sufficient, to success in a rights regime.

Civil liberties suits arising from government interference with recognized interests on impermissible bases also avoid civil rights equity management. But the category is unstable, with disputes seemingly included in it always subject to transformation into civil rights cases through the recognition of interests in the background that render the case more complex (and thus subject to civil rights equity). Prominent in the civil liberties category is the Court's aggressive protection of free speech, association, and religious rights from interference by government officers.[379] Perhaps surprisingly, the right to be free from government discrimination lies here, explaining the Court's aggressive response to narrowly defined de jure or overt discriminatory practices[380] and its related suspicion of affirmative action policies.[381] In contrast lies the Court's strikingly more passive "civil rights" approach to private discrimination or in providing broad, forward looking anti-discrimination remedies, both of which create a multidimensional dispute structure by implicating the interests of nonlitigants.[382]

Courts treat most rights cases as civil rights cases, utilizing civil rights equity management in response to the complex interests in play. Though civil rights are recognized as valuable to individuals and particular identities are recognized as protected from discrimination on the basis of protected

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378. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737–54 (2020).

379. *See Roberts Court*, *supra* note 364 (explaining that the Court has taken a firm stance in protecting First Amendment rights).

380. *See* Theresa M. Beiner, *Shift Happens: The U.S. Supreme Court's Shifting Antidiscrimination Rhetoric*, 42 U. TOL. L. REV 37, 38 (2010) (discussing the Court subjecting congressional acts that have discriminatory effects to "strict fact-finding rules" for justification).

381. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (stating, in response to the defendant's assertion that the affirmative action policy was necessary to prevent discrimination, that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

382. *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2001) (examining class certification under the Federal Rules of Civil Procedure in a private sex discrimination suit).

categories, civil rights equity diminishes the practical import of such recognition. Though rights are defined in property-like language, implying protection on the same basis as property (or new property), the perceived, often implicit, multidimensional structure leads courts to approach these cases as though they were sitting in equity.[383] Whoever the defendant and whatever the remedy, such suits are subject to doctrines rooted in equitable management devices and equitable constraints that characterize civil rights equity.

The structuring of civil rights disputes is evident in the Supreme Court's recent treatment of Section 2 of the Voting Rights Act where, though acknowledging the existence of a right to vote in the Fifteenth Amendment and the Voting Rights Act and recognizing the Act's prohibition on intentional denial of a right to vote,[384] the Court constructed the statute to grant courts the ability to judge voting restrictions for the degree to which they are unreasonable.[385]

In *Brnovich v. Democratic National Committee*,[386] the Supreme Court imposed a reading on Section 2 of the Voting Rights Act that limited the ability of plaintiffs to challenge voting restrictions that had a disparate impact on voting, even though the Act had been amended in 1982 specifically to reject the Court's limitation of Section 2 to cases of intentional discrimination.[387] The Court achieved the result in *Brnovich* by reading the 1982 language in the Act to require a "totality of the circumstances" analysis.[388] Using that analysis the Court weighed the "size of the burden imposed," the degree to which the voting rule or regulation at issue departs from standard

383. *See* Subrin, *supra* note 46, at 920–21 (outlining the historical basis for equity jurisdiction).

384. *See* Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (holding that Arizona's House Bill and out-of-precinct policy did not violate § 2 of the Voting Rights Act of 1965). Gorsuch and Thomas, concurring, would read the Voting Rights Act not to permit a private right of action. *See id.* at 2350 (Gorsuch, J., concurring).

385. *See id.* at 2346 (majority opinion) (upholding the voting regulation "[i]n light of the modest burdens allegedly imposed, . . . the small size of its disparate impact, and the State's justifications").

386. 141 S. Ct. 2321 (2021).

387. *See* City of Mobile v. Bolden, 446 U.S. 55 (1980), *legislative abrogation acknowledged in* Thornburg v. Gingles, 478 U.S. 30 (1986).

388. *Brnovich*, 141 S. Ct. at 2338.

practice, and the size of the resulting disparate impact against opportunities in the whole system to mitigate the impact, and balanced them against the State's interest in the voter restrictions.[389]

Though the Court ostensibly assessed the disparate impact of the voting rules, it rejected the prevailing disparate impact analysis that surely motivated Congress when it amended the Voting Rights Act to overturn *City of Mobile v. Bolden*[390] and to ensure that disparate impact was a means to prove a Section 2 violation.[391] The Court's characterization of the case as one of first impression (analyzing facially neutral time, place, and manner restrictions on voting)[392] foreshadows its insistence that the plain language of the statute requires the totality-of-the-circumstances assessment,[393] and thus permits the Court to read the Act as requiring the kind of search for outrages that characterizes civil rights equity. In contrast, the dissent would have required the analysis to focus on the disparate impact test that Congress insisted on reinserting into Voting Rights Act litigation in the 1982 statutory amendment.[394]

In creating the totality-of-the-circumstances approach, the Court read the statute to permit itself (and subsequent lower courts) to engage in a generally unbounded assessment of how problematic (how outrageous) the State's voting restrictions are.[395] It says of burdens imposed on voters by the two restrictions in question: "these tasks are quintessential examples of the *usual burdens of voting*. . . . Not only are these unremarkable burdens, but the District Court's uncontested findings show that the State made extensive efforts to reduce their impact on the number of valid votes ultimately cast."[396]

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389. *Id*. at 2338–40.

390. 446 U.S. 55 (1980).

391. *See Brnovich*, 141 S. Ct. at 2332.

392. *See id*. at 2325.

393. *Id*. at 2338.

394. *See id*. at 2362 (Kagan, J., dissenting) ("The language in Section 2 is as broad as can be. It applies to any policy that 'results in' disparate voting opportunities for minority citizens.").

395. *See id*. (stating that the Court is enabling itself to make any limitations to the Act that it would like).

396. *Id*. at 2344 (majority opinion) (emphasis added).

That is, there is no outrage here because the restrictions are ordinary in the Court's mind. The State's efforts to reduce the effects of the voting requirements on the overall population render irrelevant the disparate impact the voting requirements might impose on the minority populations the Act was enacted to protect, and makes it immaterial that voting requirements were passed either because of those effects or in spite of them.[397] Importantly, the Court implied that there could be voting restrictions that violate the Act; however, it is fair and likely better to read the opinion as completely undermining the Act,[398] at least, as the dissent argues, to the extent that "Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber."[399]

Whether these arguments represent a convincing reading of the Act and its legislative intent, the point is that the Court has constructed a means of analyzing Voting Rights Act challenges that vests broad discretion in courts to act, but only where the State's limitations on voting are extreme and outrageous in the eyes of jurists. In exercising an equity-like approach through the totality-of-the-circumstances analysis, courts are charged with balancing the interests involved to determine whether an injustice is occurring, subject of course to the review of higher courts and their assessment of the equities of the case.

The "rights" in the statute may be protected in cases where discriminatory intent is shown (a civil liberties approach) or through the more conditioned approach of civil rights equity. Having reversed an intent finding in the Ninth Circuit Court of Appeals,[400] the Court's totality-of-the-circumstances assessment

397. *See id.* at 2341 (concluding that the disparate impact model was not useful on these facts).

398. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse than People Think*, ATLANTIC (July 8, 2021), https://perma.cc/G7XG-DV7J (suggesting that the Court's decision "is a repudiation of the Act's core aims").

399. Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2121, 2363–64 (2021) (Kagan, J., dissenting); *see* Linda Greenhouse, *On Voting Rights, Justice Alito Is Stuck in the 1980's*, N.Y. TIMES, July 17, 2021, at A17 (arguing that the Court's opinion undermined the purpose of the Act).

400. *See Brnovich*, 141 S. Ct. at 2348–50.

becomes the only basis for recovery.[401] Of course, had intent been proven, the State would have lost.[402] Similarly, had a state officer blocked an individual or racial group from voting, the Court might have viewed the State as violating the Constitution or statute, though this would have already been prohibited by *Mobile*.[403] Treating the dispute as a "civil rights" controversy, the Court analyzed the erstwhile neutral application of the Arizona statute on the abilities of racial, ethnic, and language groups to vote, not by assessing those effects directly, but by judging the broad equities implicated by the case, thus making room for the state interest to be balanced against the effects of the voting restrictions.[404] Last, the right to vote is constructed so that it is not the positive right it appears to be in the statute. States need not take any affirmative steps to ensure their citizens can vote.[405] Rather, states only need to refrain from interfering with the vote for illegitimate reasons.

III. CIVIL RIGHTS EQUITY AS A POPULAR EQUITY

Civil rights are equity because, in the contemporary legal system, it fulfills the role traditional equity occupied in the past.[406] It does so by operating in ways similar to equity. That is, it draws on popular equity to define an appropriate role for civil rights jurisprudence. Civil rights equity is a juridical style applied to cases that threaten to upset the status quo both in society and among judicial traditions. Rather than a reversion to the "received tradition" that Chayes contrasted with the structural injunction—with its emphasis on judges as neutrals resolving disputes between individuals asserting common law rights[407]—civil rights equity reveals courts mimicking the style

401. *Id*. at 2332.

402. *See id.* at 2325 (highlighting that discriminatory intent is a violation of the Act but that Congress amended the Act to reach further).

403. *See* City of Mobile v. Bolden, 446 U.S. 55, 63 (1980) (suggesting that this would have been permissible because it was not motivated by a discriminatory purpose).

404. *See Brnovich*, 141 S. Ct. at 2330.

405. *See id.* at 2338.

406. In this way civil rights equity parallels ADR, one of the systems nurtured, in part, to cabin its reach. *See* Main, *New Equity*, *supra* note 20, at 344–45.

407. Chayes, *supra* note 182, at 1285–88.

of equity. The substance of that style is the supplementary, subordinate, and instrumental character of equity transposed onto civil rights jurisprudence through substantive, procedural, and structural rules.[408] In civil rights equity the judge is no umpire; she is central to a characteristically conservative jurisprudence.

Civil rights equity is a popular version of equity, less a comprehensive jurisprudence than a framework for managing complex rights disputes. It reflects use of the assumptions and style of equity to manage civil rights disputes without necessarily breaching the law-equity distinction by explicitly applying equity rules to damages claims. Civil rights equity is thus neither an application of traditional equity, nor an unbounded, ends-driven imposition of justice on disputes. Instead, it lies between—drawing on widely known, generalized aspects of equity and applying them in the interest of justice.[409] As a popular equity, the terms and requirements of equity are invoked (directly or tacitly) to cabin courts' use of power.

The nature of *popular equity* and how generalized notions of equity are invoked in contemporary jurisprudence is apparent in the Supreme Court's "revival" of equity requirements for injunctions in *eBay, Inc. v. MercExchange L.L.C.*[410] There "the Court sought to determine the remedies 'typically available in equity' in the days of 'the divided bench,' before law and equity merged" and structure equitable relief around past practice.[411] Samuel Bray observed that the Court sought to identify traditional standards though a quasi-historical inquiry, focusing on contemporary and nineteenth-century treatises, restatements (necessarily from recent years), and law review articles from the 1970s.[412] He sees the Court cobbling together a

408. *See* Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 23 (1951).

409. *See* Alexandru Florin Magureanu, *Equity, Justice and Law*, 3 J.L. & ADMIN. SCI. 223, 223 (2015) (discussing the cohesion of equity and justice into a general principle of equity and justice).

410. 547 U.S. 388 (2006).

411. Bray, *The Supreme Court and the New Equity*, *supra* note 31, at 1015 (quoting U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 94 (2013); Cigna Corp. v. Amara, 563 U.S. 421, 438 (2011); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006); Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 211 (2002)).

412. *Id.*

vison of equity "from when those rules were most systematically expounded"[413] while "sometimes work[ing] into its artificial history more recent cases and scholarship"[414] to create an approach with a "measure of stability and the capacity for change that are characteristic of a tradition."[415] Whatever its value as history, the Court's conclusions commanded support from a variety of Justices, culminating in two unanimous opinions in the line of jurisprudence following *eBay*.[416] Its approach works as jurisprudence.[417]

The Court's artificial history is utilized in *eBay* to articulate a "traditional" four part test for permanent injunctions on the basis of "well established principles of equity" despite the absence of such a test before.[418] Key to the Court's test is the "entrenchment of doctrinal formulations that distinguish legal and equitable remedies: the irreparable injury rule and the 'no adequate remedy at law' requirement"[419] that most scholars thought had been superseded by the merger and by general practice.[420] *eBay* transforms a popular equity-based artificial history into hard doctrine, requiring a moving party seeking a permanent injunction to show

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that

413. *Id*. at 1022.

414. *Id*.

415. *Id*. at 1023.

416. *See id*. at 1015–16 ("[T]he opinions for the Court have been written by four different Justices. One was by Justice Scalia, for a narrow majority; another was by Chief Justice Roberts for a unanimous Court; the third was by Justice Breyer for a large majority; and the most recent was by Justice Kagan.").

417. *See id*. at 1020–23.

418. *Id*. at 1023–30.

419. *Id*. at 1029.

420. *See id*. at 1006 (stating that most remedies scholars concur that the adequacy requirement is outdated and has no effect on judicial decision-making).

> the public interest would not be disserved by a permanent injunction.[421]

This formulation bore some relationship to approaches in some states but was in fact new.[422] Though each part of the test has roots in traditional equity, scholars had presumed the first two to be one—and one that was largely dead.[423] In any case, the test has proved popular in lower courts and was made central to the exercise of equitable powers as it was extended to apply notwithstanding the statutory basis of the suit[424] and was extended to preliminary injunctions[425] and to stays.[426]

In other words, the Court engaged in a popular equity analysis to revive rules of equity that, while generally referenced by courts, had been thought to have lost any decisional authority. As Bray notes, those rules emphasize aspects popularly associated with equity by jurists:

> The Court's repeated inquiries into the scope and content of "equitable relief," and its turn to an idealized history and tradition as the authoritative source for those inquires, represent an unexpected and striking revival of equity. It was unexpected, given decades of scholarship skeptical of

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421. eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

422. Bray notes that Kansas's and Tennessee's state supreme courts utilized similar formulas but that, "as Douglas Laycock put it, 'There was no such test before, but there is now.'" Bray, *The Supreme Court and the New Equity*, *supra* note 31, at 1025 (quoting DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 427 (4th ed. 2010)).

423. *See* LAYCOCK, *supra* note 292, at 37 ("Injury is irreparable if plaintiff cannot use damages to replace the specific thing he has lost.").

424. *See, e.g.*, Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 155–58 (2010) (suit under National Environmental Policy Act). Bray summarizes: "[T]he formulation of the injunction standard in *eBay* has had extensive reach. As is common with decisions in remedies and procedure, it has transcended the substantive context in which it arose. It has become the leading federal authority on the requirement for a permanent injunction." Bray, *The Supreme Court and the New Equity*, *supra* note 31, at 1024 (citations omitted).

425. *See* Munaf v. Geren, 553 U.S. 674, 689–91 (2008). The Court has emphasized that the requirements are not permissive and plaintiffs must prove that irreparable injury is likely. *See* Nat. Res. Def. Council, Inc. v. Winter, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction.").

426. *See* Nken v. Holder, 556 U.S. 418, 428–32 (2009) (applying a similar approach to that applied in *Winter* to stays).

> equity's past. More importantly, these cases are striking because of the doctrines they reinforce. The Court has emphasized that equitable remedies are never given as of right, may only be given when there is a showing of irreparable injury, are exceptional, and are marked by discretion—a discretion that is guided by traditional tests but exercised case by case.[427]

This foray into popular equity by the Court makes sense because it concerns equitable *remedies*. However, general notions of equity are part of our juridical DNA. A parallel system to the common law—adopted into most states' legal regimes wholly from the law of England like the common law—equity is an echo resonating throughout American jurisprudence.[428] General notions of equity constitute a part of the background understanding of "law" for American lawyers that, particularly after the merger, is not limited to equity jurisprudence.[429] This is especially the case with federal rights that invoke the courts' equitable remedial powers but are not so limited.[430]

The popular equity analysis that gives meaning to *eBay*'s equity rules reflects the use of traditional equity as a generalized source of rules of decision, a judicial style even. Popular equity permits courts to invoke historical notions of equity to declare how aspects of American jurisprudence ought to operate, particularly, but not exclusively, when equitable remedies are implicated. Equity has well-known characteristics that structure its use. It is permissive, supplemental, exceptional, and discretionary. Thus, invocations of popular equity are not unbounded and drawing on it means drawing on a particular and conservative structure.

Civil rights equity is the use of popular equity to mold and structure courts' approach to civil rights cases. In contrast to

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427. Bray, *The Supreme Court and the New Equity*, *supra* note 31, at 1044.

428. *See* Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 230–32 (2018) (outlining the history, importance, and variety of equity in American legal jurisdictions).

429. *See* Douglas Laycock, *The Triumph of Equity*, 56 L. & CONT. PROBS. 53, 53 (1993) [hereinafter Laycock, *The Triumph of Equity*] ("The distinctive traits of equity now pervade the legal system. The war between law and equity is over. Equity won.").

430. *See* Morley, *supra* note 428, at 238 ("Uniform, federally established equitable standards governed all aspects of injunctive relief in both federal question and diversity cases.").

eBay, its use is not limited to equitable remedies nor is it limited by the revival of historically rooted rules to limit structural injunctions. Civil rights equity restricts the courts' powers in particular cases—civil rights claims implicating multiple interests. Courts manage such cases and delink right from remedy by mimicking equitable constraints. Like equity cases, civil rights cases are "managed," with plaintiffs asked to overcome a number of tests questioning whether they are deserving of a remedy, beginning with justiciability, but including special and demanding pleading rules, and subjecting their demand to the weighing of their interests against the interests of the defendant to determine deservedness in a characteristically fact-intensive litigation. The result of this approach is a civil rights regime that treats cases less as claims of right than as requests for succor in extraordinary circumstances. Well-worn notions of equity as intervening to resolve an injustice where there is no adequate remedy at law and for claimants with clean hands are represented in a civil rights landscape where plaintiffs' claims are subordinated to private rights implicated by their claim, made fact-specific, and where courts are given to intervention only where cases present "outrages" to commonly held notions of justice. Civil rights recovery becomes permissive, supplemental to the private law, exceptional, and largely discretionary.

IV. CIVIL RIGHTS AS CIVIL RIGHTS EQUITY

What appears to be a complex, detailed legal regime giving meaning to rights recognized under the Constitution or in statutes has become a juridical backstop, focused on addressing injustices and with relatively little day-to-day value to citizens in courts.[431] Civil rights jurisprudence is simultaneously complex and vague; it is characteristically procedural and fact-intensive. This nature situates judges to sit as in equity, limit civil rights to extraordinary circumstances, and subordinate civil rights to private law.

431. *See, e.g.*, ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 5 (2017) (describing the complexity of the legal framework and the challenges faced by plaintiffs in discrimination law).

A. *How Civil Rights Operates as Civil Rights Equity*

The procedural and the fact-intensive nature of civil rights actions make civil rights like traditional equity. Civil rights litigation is characteristically procedural.[432] Plaintiffs face heavy pleading burdens,[433] stringent justiciability requirements[434] that are applied independently to each remedy sought,[435] and limits on access to equitable remedies derived from traditional equity.[436] The generally open-ended substantive causes of action mean many of these procedural hurdles reemerge as the facts of a case are developed and proof structures foreclose any shifting of burdens of proof to the defendant.[437] These procedural hurdles make civil rights claims difficult to pursue and win.[438]

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432. Suits in federal courts are subject to procedural hurdles due to federal courts' limited jurisdiction. U.S. CONST. art. III, §§ 1–2.

433. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). Though the Court rejected heightened pleading in § 1983 cases, *see* Crawford-El v. Britton, 523 U.S. 574 (1998), the *Twombly* and *Iqbal* pleading requirements might amount to much the same. *See, e.g.*, Wood v. Moss, 572 U.S. 744, 759–61 (2014) (holding that allegations of First Amendment viewpoint discrimination did not meet the pleading standard).

434. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 738 (1984) ("[F]ederal courts may exercise power only in the last resort and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process.").

435. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (differentiating between the availability of damages and an injunction); *see also* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 473 (2d ed. 2004)

> *Lyons*, then, makes it virtually impossible for the victim of police abuse to secure injunctive relief against a local government entity for practices of its police or sheriff's department. Evidently the Court places considerable faith in civil damage actions and, in criminal cases, the exclusionary rule to deter police misconduct. This faith, if not completely ill founded, is at least exaggerated.

436. *See* Bray, *Systems of Equitable Remedies*, *supra* note 90, at 545.

437. "Much of the development of federal employment discrimination law in the courts and many of the Supreme Court's employment discrimination opinions have focused on the proof structures used to analyze individual disparate treatment claims." William R. Corbett, Young v. United Parcel Service, Inc.*:* McDonnell Douglas *to the Rescue*, 92 WASH. U. L. REV. 1683, 1687 (2015).

438. *See, e.g.*, Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Willkie v. Robbins, 2006 CATO

Civil rights cases are also characteristically fact intensive.[439] Discrimination,[440] due process,[441] illegal seizure,[442]

SUP. CT. REV. 23 (2007) (discussing limitations to *Bivens* actions); Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUDS. 4, 5–7 (2015).

439. Consider the requirements in Title VII employment discrimination cases. The Supreme Court's key precedents in employment discrimination cases consistently avoid defining discrimination. *McDonnell Douglas Corp. v. Green* sought to structure the proof of discrimination from limited facts that showed the plaintiff applied and was qualified for the job. *See* 411 U.S. 792, 802 (1973). That limited-facts approach is now abandoned. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993) (plaintiff's burden to prove discrimination persists even when pretext is shown); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (emphasizing that the plaintiff must show discrimination); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 313 (1977) (statistics can be used to prove discrimination); Tex. Dept. of Cmty. Affs. v. Burdine, 450 U.S. 248, 257 (1981) (presumptions go away when met); Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) (discrimination is a question of fact); Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1993) (mixed illegal and legal motives might support discrimination); McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362 (1995) (after-acquired evidence that would support dismissal does not bar a plaintiff's suit); Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 136 (2000) (proof of pretext could support a finding of discrimination); Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003) (circumstantial evidence alone can support a "motivating factor" instruction to the jury in a mixed motives case); Ash v. Tyson Foods, Inc., 546 U.S. 454, 458 (2006) (stating that pretext might be shown by evidence of superior qualifications and refusing to define standard for pretext claims based on superior qualifications). In none of these decisions does the Court seek to describe what discrimination is, much less structure the plaintiff's proof around such a substantive definition. Instead, the Court has tinkered with structures for proof and asked what to make of different kinds of evidence proffered by the defendant, leaving the question of discrimination open-ended and unchanged from its articulation in *Teamsters*. *See* 431 U.S. at 357–58.

440. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 (1993) (stating that presumptions in employment discrimination cases go away and plaintiff must prove discrimination).

441. Procedural due process guarantees the process due under the circumstances. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (discussing the factors that guarantee procedural due process). Substantive due process prohibits arbitrary government behavior of an extreme kind that is context-specific. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' . . . ." (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992))).

442. Unreasonable use of force is judged by considering objective reasonableness, a test that is fact specific, incapable of precise definition, and viewed from the officer's perspective. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989). The "objective reasonableness" that governs use of force cases

and others are broadly and vaguely defined rights, with proof of claims turning heavily on negligence-like notions of reasonableness[443] and cause.[444] In suits against government officers, the qualified immunity defense imports another layer of fact intensive inquiry focused on the officer's perception of reasonableness under the circumstances.[445] "The effect is to

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resembles and duplicates qualified immunity analysis. *See* Brosseau v. Haugen, 543 U.S. 194, 196 (2004); County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017) (rejecting the Ninth Circuit's "provocation rule" in favor of an objective reasonableness test); Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) (clarifying that the objective reasonableness test is the only test in qualified immunity cases).

443. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 380–84 (2007) (reexamining the record to determine the objective reasonableness of an officer's actions).

444. *See, e.g.*, Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403 (1997) (reciting the Courts' decisions on municipal liability and the requirement of showing causation between the single decision of the policy maker and the injury causing employee's action).

445. The Court first read qualified immunity as an included part of Section 1983 in *Scheuer v. Rhodes*. 416 U.S. 232 (1970). *Scheuer*'s focus on subjective intent was jettisoned in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), which emphasized the objective reasonableness requirement in the interest of defendants avoiding meddlesome suits that might make officers hesitant to do their jobs and expressed concern that subjective intent did not permit suits to be dismissed without trial and may have necessitated intrusive discovery. *See id.* at 816–18. In *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), the Court modified the objective component of the test, emphasizing that the right alleged to be violated must be "sufficiently clear that every 'reasonable official would have understood that what he was doing violates that right.'" *Id.* at 741. Though the Court did not require a case on point, it said that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

In cases involving police use of force, the application of these rules has been increasingly deferential to officer decisions. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court reversed denial of immunity, emphasizing that immunity would attach if "a reasonable officer could have believed that the search" was constitutional. *Id.* at 668 n.23. Similarly, in *Brosseau v. Haugen*, 543 U.S. 194 (2004), the Court found that qualified immunity was available for an officer who shot a fleeing suspect that he had been chasing on foot when the suspect got in a car and started to back out despite being ordered to stop. *Id.* at 201. *Brosseau's* per curiam opinion pointed to the dearth of cases involving "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 200. The Court has emphasized that a case on point was not required to support clearly established law. *See* Hope v. Pelzer, 536 U.S. 730, 744–45 (2002). However, the Court focused on the absence of a case on point in *Brosseau*, 543 U.S. at 199; *Lane v. Franks*, 573 U.S. 228, 245 (2014); *Plumhoff v. Rickard*, 572 U.S. 765, 768 (2014); and *Wood v. Moss*, 572 U.S. 744, 759 (2014). In *Plumhoff v. Rickard*, a unanimous Court emphasized the

establish a liability rule of negligence with respect to illegality . . . [shielding] a vast range of garden-variety unconstitutionality from vindication though money damages."[446] Yet, the requirement that the plaintiff bear the ultimate burden of proving discrimination or illegal use of force is said to be justified by the fact that constitutional and statutory rights cases require proof of *intentional* rights violations.[447] The effect is that cases turn heavily on the facts and that outcomes have limited precedential value with each case tried anew on its unique facts.

The fact-intensive nature of civil rights claims and the multiple procedural hurdles confronting plaintiffs permit judges to sit as though in equity, no matter the relief sought.[448] Judges are required to determine whether the plaintiff has stated sufficient cause to proceed as soon as suits are filed.[449] If an officer is the defendant, the judge must reexamine the facts to determine whether a reasonable officer would know a clearly established right might have been violated under the specific

"severe threat to public safety" in supporting qualified immunity for the officer: "It stands to reason that, if police officers are justified in firing at a suspect in order to end a serious threat to public safety, the officer need not stop shooting until the threat has ended." *Id.* at 777. The Court has taken a similar approach in cases with much less evidence of exigency. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018). It is evident that the Court's main concern is to analyze the situation from the perspective of the officer claiming immunity to determine whether the law was clear and the actions represent a knowing violation of that law. The focus on the threat and the exigency both justifying the behavior under the Fourth Amendment and supporting qualified immunity in *Plumhoff* is made more significant by the Court's consistent emphasis that qualified immunity determinations be made early in the proceedings and that discovery should usually not be allowed. *See* Sigert v. Gilley, 500 U.S. 226, 231 (1991).

446. Jeffries & Rutherglen, *supra* note 273, at 1402.

447. Despite the intent language, civil rights cases are made into a kind of negligence with "fault" as the key focus. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999) ("[C]urrent doctrine sharply curtails damages lability for constitutional violations, chiefly by requiring proof of fault . . . by a government officer . . . . [g]enerally . . . negligence . . . .").

448. *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1994 (2006) ("Legal process legitimacy concerns, legal realist outcome-oriented goals, and the peculiarities of the human mind are all, to varying degrees, consistent with a preference for fact-base adjudication.").

449. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

circumstances of the case.[450] Thereafter, discovery might proceed only for the judge to determine, on loosely defined substantive grounds, whether the facts developed in discovery might still support recovery.[451] Having cleared these hurdles, a plaintiff can present his case to the fact finder who is, like the judge before, largely unbounded in their assessment of whether a right was violated.[452] That assessment is, ultimately, a search for a justification for judicial intervention: is this a case of an outrage committed by the defendant, whether private or public?[453] Vesting judges with this degree of authority is arguably why employment discrimination litigants face steep odds of prevailing.[454]

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450. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

451. *See id.* at 817 ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues.").

452. *See* Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1981) (Gesell, J., concurring) ("It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved.").

453. The effect and operation of qualified immunity as a search of outrageous behavior is underscored by a comparison of *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Plumhoff v. Rickard*, 572 U.S. 768 (2014). The two cases are usually cited to note the Court's requirement in *Hope* that a case on point is not necessary to show clearly established law while *Plumhoff* finds qualified immunity in part because there is no case on point. But the facts of the cases highlight the consequences of looking at the case from the eyes of the officer and, from that perspective, a generalized search for an outrage. *Hope* involved officers supervising a prison work crew who implemented a practice of chaining prisoners they thought malingering to a post in the hot sun. *See* 536 U.S. at 733–35. *Plumhoff* involved a police chase that ended in a shooting. *See* 572 U.S. at 768. In *Hope*, the officers faced no exigency; instead, theirs was a considered decision to enforce compliance with the work crew assignment. 536 U.S. at 734–35. Looking through the officer's eyes, the adoption of a disciplinary policy by officers on the ground could nevertheless be considered outrageous. The constitutional right could be determined to be clearly established because the facts of the case were largely static and not subject to much second-guessing. The event was largely binominal with the plaintiff injured by the policy decision of the officers, and the Court's role much like that of an umpire. Deciding that the constitutional right was clearly established removed the Court from the center of the dispute.

454. Summarizing a vast literature on this phenomenon, Margaret Lemos notes:

> Employment discrimination plaintiffs win about thirty percent of the cases that go to trial, compared to a win rate between fifty to

Fact intensiveness also means that where private law governs the underlying dispute, the presence of a superior federal right is no guarantee of plaintiff success. As Robert Glennon said of the Burger Court in 1978, "Evidence is mounting that the most important theme . . . is the protection of state interests and deference to state courts."[455] The unbounded nature of the inquiry, combined with courts' emphasis on causation and on the plaintiff's burden of proof, means that plaintiffs must exclude all alternative explanations of the harm in question. If private law supports the outcome, the plaintiff is hard pressed to show that the rights violation asserted is the cause of the harm.[456] Similarly, a de facto deservedness analysis underlies civil rights suits where jurisprudence has been dominated by questions about how much weight to give to plaintiff's deservedness (e.g., the weight given an officer's perception of threatening or criminal behavior in excessive force cases).[457]

Civil rights jurisprudence has become equity of a sort. It is rooted in exceptional circumstances that triggered the crafting

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> sixty percent for plaintiffs in tort and contract cases. They tend to do even worse in cases that are decided prior to trial on a motion to dismiss or for summary judgment, winning less than ten percent of those cases, while tort and contract plaintiffs win slightly more than thirty percent. Employment discrimination plaintiffs also fare terribly on appeal—a phenomenon that scholars have attributed to an erroneous belief among appellate judges that trial judges are too plaintiff friendly. Moreover, while litigation rates shot up after Congress made noneconomic and punitive damages available to Title VII plaintiffs in 1991, the plaintiff win rate went down.

Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L REV. 782, 831 (2011) (footnotes omitted). While Lemos notes that settlement of Title VII cases went up after 1991, she argues that was not necessarily a sign of improvement. *Id.* at 831–32; *see also* Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973, 1982 (2017) [hereinafter Johnson, *Equality Law Pluralism*] ("Yet there is also evidence of a countertrend in that the volume of cases does not necessarily lead to better implementation of the statutory goals.").

455. Robert Jerome Glennon, *Constitutional Liberty & Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355, 355 (1978).

456. *See* Goldberg, *supra* note 448, at 1962 ("Facts alone do not supply the judgment necessary to decide whether a legal burden on a social group is reasonable. As David Hume famously put the point, an 'ought' cannot be derived from an 'is.'").

457. *See id.* at 1973.

of exceptional remedies drawn from equity; circumscribed by application of traditional equity doctrine to restrict courts' power as the focus of such suits shifted from eradicating Jim Crow to addressing individual discrimination claims; and transferred to damages actions by drawing on popular notions of equity. It has come to reflect presumptions of equity as a definition of the proper role of courts in society.

B. *Is There Anything Wrong with Civil Rights Equity?*

Civil rights equity is offered as a description of the state of civil rights jurisprudence, but it is not clear that that state would be different if subject to significant reform.[458] After all, Douglas Laycock has argued that the merger of law and equity has so integrated the systems that it is distracting to speak of them separately; thus civil rights equity might be little more than a demonstration of the combined system produced by the merger as it operates in civil rights jurisprudence.[459] Still, civil rights equity at least suggests that "rights" are less valuable than we think, operating as they do without the character Chief Justice Marshall ascribed to them in analogy to private rights.[460]

Nor might civil rights equity be necessarily problematic in its operation, as it produces a civil rights jurisprudence that is sensitive to community-held notions of justice.[461] It is true that the "community" vison of justice is largely articulated by district court judges who may represent only a tiny sliver of the community and who have, for years, been hostile to civil rights claims and, it seems, claimants.[462] Further, the fact-intensive

458. This is a point made by Jeffries and Rutherglen concerning the results of limitations on damages actions. Jeffries & Rutherglen, *supra* note 273, at 1405.

459. *See* Laycock, *The Triumph of Equity*, *supra* note 429, at 82 ("Except where references to equity have been codified, as in the constitutional arguments about jury trial, law-equity arguments are always exclusively a misleading distraction.").

460. *See supra* note 26 and accompanying text.

461. *See* Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 702 (1913) ("But justice according to magisterial good sense, unhampered by rule, is more apt to accord with the moral sense of the community, when administered by a strong man, than justice according to technical rule.").

462. *See* Lemos, *supra* note 454, at 823–40.

nature of civil rights claims so structured gives lay juries the ability to project their biases and prejudices onto civil rights claims.[463] But such a structure gives considerable legitimacy to civil rights, even if, given the low success rate of such cases, the public maintains a distorted view of the frequency of civil rights violations.[464]

However commonplace or community-rooted, it must be said that what civil rights equity does is sap civil rights law of its social change capacity. Rights claims that are multidimensional cease to be the basis for changing behavior of powerful actors and institutions.[465] Nor does civil rights equity offer succor to plaintiffs in cases that run against broadly held expectations.[466] For victims of widespread but underacknowledged discrimination, police abuse, or sexual violence, civil rights litigation so framed is not built to help. And this suppression of civil rights law's social change capacity might override the benefit of restrictions on damages liability—facilitating constitutional innovation[467]—by focusing courts not on fault as such, but on outrageousness of governmental conduct. Constitutional or statutory civil rights can still be utilized to get courts to recognize groups or claims heretofore unrecognized.[468] In any case, civil rights actions

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463. Or just their reluctance to explain outcomes as discriminatory. *See* Eyer, *supra* note 302, at 1291.

464. *See* Lemos, *supra* note 454, at 789 ("Although American society frequently is denounced as excessively litigious, the reality is that only a tiny fraction of those who encounter potential justiciable problems consult a lawyer, much less sue.").

465. *See* Goldberg, *supra* note 448, at 2010 ("Because the current fact-based model enables courts to sidestep stare decisis constraints, the case law regarding a given social group often appears to have a random quality, with no overarching theory to explain why burdens are sustained in some areas but not in others.").

466. *See id.* at 1974 (explaining that only when new perceptions of group members reveal and reject normal expectations are courts likely to experience pressure to incorporate those changed views).

467. *See* Jeffries, *supra* note 447, at 90–91 (arguing that a de facto fault requirement in constitutional rights cases facilities constitutional innovation).

468. *See* Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1350 (2012) [hereinafter Johnson, *Equality Directives in American Law*] ("In considering legislation to overturn *Twombly* and *Iqbal*, many members of Congress explicitly invoked private enforcement as a key to vindicating statutory and constitutional goals of equality.").

remain effective to combat gross abuses of government authority through policy or aimed at an individual, either because the interests in the litigation are narrow or because such an abuse is outrageous—that is, either because it is not treated as civil rights equity or because it satisfies the requirements of civil rights equity.[469]

This view of civil rights litigation may disappoint, but it is not worthless, especially because it permits *recognition* of identities and rights. The public learns what it should and shouldn't do from both the recognition and enforcement of rights by courts. A decision that a government or private defendant has violated a right helps demarcate the defining values of the American political and legal landscape.[470] Judicial decisions make a unique and powerful contribution to the edifying process, transforming some kinds of behavior from boorish to "illegal" or from acceptable to discriminatory. This aspect of rights is particularly prominent in the recognition of protected identities[471] and rights, but civil rights equity corrupts this useful aspect of rights litigation by suppressing decisions applying rights except where notions of outrage give emerging or deep-seeded views of appropriate behavior great significance.[472] Courts cede their role in developing civic norms, as perhaps they intend to do, but their role recognizing identities and rights is not unimportant.

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469. *See id.* at 1363 ("Under these statutes, a set of regulatory requirements has emerged that places proactive and affirmative duties on federally funded actors.").

470. *See* CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALIST STATE 22 (2010) (stating that "legalized accountability" might also change behavior).

471. Though a LGBTQ person might be able to assert a claim of discrimination on the basis of sex, for example, that claim is beside the point if the discrimination is based on the person's LGBTQ identity. Recognition of that identity both educates the public and operates in a law-like way, establishing rights that have real value in courts and in the world. But that value comes from the recognition itself. This is why decisions like *Obergefell* are important and ought not be underestimated.

472. *See* Goldberg, *supra* note 448, at 1957 ("But where longstanding judgments regarding a group have become destabilized and new norms have yet to be settled, courts' involvement in selecting between 'old' and 'new' norms produces anxieties regarding the judicial role in responding to societal change.").

This theory of civil rights litigation is almost surely different, however, from what most have come to expect civil rights to be. Indeed, civil rights equity mutes much of the promise of rights by making rights enforcement contingent and variable.[473] It circumscribes the "social change" potential of rights, buttressing rather than challenging the status quo ante. Civil rights equity is a vehicle for normalizing civil rights, doing so by draining them of their revolutionary implications.

C. *Caveats*

A few caveats are in order. First, this Article does not cover the extent of the influence of civil rights. Civil rights equity is a theory of the treatment of civil rights in civil litigation. Civil rights have been nurtured and have taken on much of their form from administrative guidance.[474] Similarly, what rights exist, their form, and their function is largely a product of the polity's, rather than courts', view of what is "right."[475] Second, as an introduction, this Article does not detail the operation of the many areas that constitute civil rights law.

Third, civil rights equity is not offered as an exclusive theory of courts' behavior. Civil rights equity neither requires nor discounts, for instance, theories that judges are biased or hostile to civil rights litigants or civil rights claims. Nor is civil rights equity a detailed critique of procedural law, constitutional law, or remedies jurisprudence. Instead, civil rights equity maintains that the jurisprudential style that informs judges' view of how civil rights cases *ought* to be handled is one rooted in equity, is informed by equity constraints, and substantively envisages a role for civil rights that resembles popular notions of the role of traditional equity. This style is partly imposed by

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473. *See* Johnson, *Equality Directives in American Law*, *supra* note 468, at 1354 (describing the success of civil rights enforcement as heavily dependent on the judicial embrace of rules governing pleading, summary judgment, standing, and fee recovery).

474. *See id.* at 1362–70 (describing a model for American equality directives); Johnson, *Equality Law Pluralism*, *supra* note 454, at 193 (explaining regulatory tools that promote inclusion).

475. *See* Goldberg, *supra* note 448, at 1988 (stating that where legislative and public policy shifts have eliminated legal burdens on certain groups, courts that affirm the traditional negative norm disrespect and disrupt the democratic process).

precedent and partly by judicial attitude.[476] Civil rights, it seems, is assumed to be supplemental, subordinate, and for deserving plaintiffs in unusual circumstances.

V. THE ALLURE OF CIVIL RIGHTS EQUITY

Civil rights equity has a number of significant effects. By softening the operation of civil rights, civil rights equity dampens the revolutionary legacy of the Civil Rights Movement and moderates its larger impact on government, society, and the economy. It is the operative basis for a conservative rights regime that can aggressively respond to government abuse but without opening the courts to everyday rights litigation. Structurally, civil rights equity: preserves the primacy of private law over civil rights; does the heavy lifting in keeping courts out of complex political disputes as anticipated by Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority*;[477] and permits a judicial restraint that nonetheless keeps the judiciary central to rights enforcement.[478] The power of civil rights equity as a theory might most strongly derive from its resolution of a number of paradoxes about civil rights that bedevil popular discussion of rights.

A. *Dampening the Revolutionary Implications of Civil Rights*

Civil rights equity responds to three different revolutionary implications of civil rights by importing a flexibility that significantly reduces the disruptive effect of rights on the constitutional system. Rights-based legalism threatened to make public rights dominant over private rights, perhaps making anti-discrimination and due process in the Fourteenth Amendment the principle legal doctrines in American law. Similarly, the twentieth-century rights revolution promised to realize the structural implications of the Fourteenth Amendment, subordinating state law to a supreme rights regime at the federal level. Last, such a regime would involve

476. *See id.* at 1964 (discussing the pervasive practice of fact-based adjudication).

477. 297 U.S. 288 (1936).

478. This is the second, structural function of constitutional remedies described by Fallon and Meltzer. Fallon & Meltzer, *supra* note 73, at 1787–91.

federal courts in everyday legal disputes: retail cases, if you will. Civil rights equity dampens these revolutionary implications, perhaps achieving the balance that legal process scholars sought.[479]

B. *Structuring a Conservative Rights Regime*

Civil rights equity provides a basis for a conservative rights regime, clawing back the social change focus of rights in the Civil Rights Era while preserving rights as a means to combat government abuse. The contemporary conservative movement's focus on limited government and the increasingly libertarian tenets of that conservatism have always been of two minds about rights. Understanding that government abuse could be corralled by rights, the broad conservative call to go back to a pre-*Brown* world made sense only because *Brown* was cast as improper. For such critics, *Brown* was not about rights but about something else—sociology, psychology, social engineering, defiling of the constitutional order. The substance of the civil rights period aside, rights-based legalism was always a potentially conservative approach to constitutionalism, depending on how rights were constructed.

By structuring rights cases and treating the most complicated as something akin to equity, civil rights equity empowers courts to operate as a bulwark against government abuse in civil liberties cases while limiting the role of courts in more complicated disputes.[480] In those complicated disputes, civil rights equity permits courts to express what judges insist are broad sentiments of the general public.[481] With successful civil rights cases turning on outrages, the community's vision of injustice is defended and courts remain generally respectful of

479. *See* Bickel, *supra* note 111, at 65.

480. *See* Goldberg, *supra* note 448, at 1999–2000 ("Because fact-based reasoning places an extra barrier that must be overcome before a would-be detractor can criticize a court's legitimacy and capacity, courts are less vulnerable to criticism of overstepping by hinging decisions on relatively uncontested facts and avoiding overt selection among competing norms.")

481. *See* Vilhelm Lundstedt, *Relation Between Law and Equity*, 25 TUL. L. REV. 59, 61 (1950) ("They are only nominal judgments depending on the valuing feeling or sentiment of the person who makes them.").

separation of powers and federalism,[482] while ensuring that everyday disputes can be dismissed.

C. *Preserving Pre-Rights Era Understandings of the Legal System*

Civil rights equity has operated to buttress pre-civil rights era understandings of the legal system. Civil rights equity operates to prioritize private law over ostensibly supreme public rights. It is a mechanism for achieving the restraint goals of *Ashwander*, providing a rationale for such restraint as it does so. More generally, it fulfills the post-civil rights period's aspiration of judicial restraint while cementing the federal judiciary as the ultimate arbiter of constitutional and statutory rights.[483]

1. Prioritizing Private Rights over Civil Rights

As rights identified in the Constitution or created by federal statute, civil rights trump state law by virtue of the Supremacy Clause.[484] In doing so, civil rights threaten to supplant private law. This threat was somewhat mitigated by the state action requirement that several civil rights statutes abandoned.[485] And, in a pre-*Erie* world, one could imagine the private law insulated from civil rights because federal courts could actively manage the line between federal rights and the common law.[486] After *Erie*, private law is understood to be state law and federal

482. Of course, such an alignment of civil rights with community impressions can make rights illiberal if the community is so. *See* Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENT 227, 234 (1990) ("Hence the only purpose which Brennan could perceive in American federalism was the creation of a 'federal structure' conducive to 'securing individual liberty.'").

483. *See* Goldberg, *supra* note 448, at 2003 (discussing how equity can curtail the reach of stare decisis considerations).

484. *See* U.S. CONST. art. VI, cl. 2.

485. *See* Isaac Saidel-Goley, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 445–47 (2018).

486. *See* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 924 (2013) (describing the relationship between state and federal courts before *Erie*).

civil rights claims, when they come into conflict with private rights claims, supersede them.[487]

In cases involving equitable relief judges could manage conflicts between federal rights and the common law, particularly because traditional equity prioritized the common law (private law) over equitable intervention, supplying a ready hierarchy of rights. Civil rights equitable remedies inherited this tradition, which was readily deployed as the Court shifted its focus from Jim Crow to individual civil rights. But as damages suits became more prominent in civil rights litigation, the conflicts with state law were magnified, and magnified further in suits against private parties. *Paul v. Davis* underscores the frustration—there, Justice Rehnquist complained that Section 1983 is not a font of common law.[488] By treating civil rights law like equity, courts diminish the circumstances for applying civil rights law, the scope of its impact, and the development of precedent. The effect is the preservation of the primacy of private law governing social relations[489] by limiting the scope of civil rights to extraordinary cases, defined to a great degree as those not governed by the common law.

2. Working as a Mechanism of *Ashwander* Restraint

Civil rights equity also provides a means of operationalizing *Ashwander* restraint. In Justice Brandeis's *Ashwander* concurrence, the Justice articulated canons of judicial self-restraint that would operate to keep the court from exceeding its political authority when jurisdiction and the existence of recognized rights otherwise counseled for judicial

487. *See id.* at 950–973 (discussing the impact and significance of the *Erie* decision).

488. Paul v. Davis, 424 U.S. 693, 701 (1976).

489. "As a matter of substantive constitutional doctrine, the Court has drawn distinct lines between what it considers state law wrongs and constitutional torts, and has relegated the former to the arena of state tort remedies." David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 25 (1989) (citing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 109 S. Ct. 998, 1005 (1989); Daniels v. Williams, 474 U.S. 327, 330–31 (1986); Whitley v. Abers, 475 U.S. 312, 319 (1986); Baker v. McCollan, 443 U.S. 137, 144–46 (1979); Paul v. Davis, 424 U.S. 693, 709 (1976)).

intervention.[490] These principles of judicial self-restraint would inform Alexander Bickel's *The Least Dangerous Branch* and become known as doctrines of justiciability—standing, mootness, ripeness, and political question—which courts have increasingly used to stymie broad civil rights attacks on persistent social problems.[491] More broadly, the cry of judicial activism has reigned as the seminal attack on civil rights jurisprudence, particularly where it effects social change.[492] Though the growth of justiciability doctrines has created a basis for judicial self-restraint, the doctrines still amount to the Court's assessment of whether there is a case or controversy for it to decide.[493] Judicial self-restraint presumably also encourages courts to decline to act even where there is a case or controversy, particularly if a basis for not acting is the risk to the court's legitimacy rather than the extent of its jurisdiction.[494]

Civil rights equity provides a basis for operationalizing *Ashwander* in two complementary ways. First, it defines the kinds of cases where courts should exercise caution: those where the question goes beyond recognition (of identities or rights) under the Constitution or statutes, especially those implicating complex, multidimensional disputes. This basis for self-restraint is malleable to be sure, but it is principled and reflects the very concern that seemed to underlie *Ashwander*.[495] That is, civil rights equity becomes operative where the court is

490. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (recounting cases that the Court has dismissed that have challenged the constitutionality of acts of Congress).

491. *See* Allen v. Wright, 468 U.S. 737, 766 (1984).

492. *See* Rudovsky, *supra* note 180, at 24–25 (discussing how 42 U.S.C. § 1983 has become "the statute of choice for the litigation of constitutional tort actions" and how the "reorientation of civil rights jurisprudence has blunted the impact of § 1983").

493. *See* Spencer v. Kemna, 523 U.S. 1, 7 (1998).

494. *See Ashwander*, 297 U.S. at 356

> In proceedings for a mandamus, where, also, the remedy is granted not as a matter of right but in the exercise of a sound judicial discretion, courts decline to enter upon the enquiry when there is a serious doubt as to the existence of the right or duty sought to be enforced. (citation omitted)

495. *See id.* at 318–22 (finding that, because the Court had previously decided cases where shareholders challenged corporate acts on constitutional grounds, standing should be found here).

at risk of being pulled into a complex, politically charged dispute in which the Court's role as a neutral umpire is undermined and it is least likely to be able to provide simple orders.[496] Cases implicating social change especially reflect these characteristics and trigger equity-like limitations that insulate courts from such controversies.[497] Second, civil rights equity provides a means of processing cases of this complex nature that avoids casting the Court as just walking away.[498] The result might be the same but civil rights equity provides courts a range of tools to actually "decide" such cases according to what appears to be traditional judicial doctrines.

3. Permitting Judicial Restraint in a Supreme Judiciary

Most broadly, civil rights equity implements the Court's post-Civil Rights Movement aspirations for judicial restraint while keeping the judiciary central to calibrating the rights regime.[499] This balance is delicate and the work that civil rights equity does is central to it. The equity-infused approach allows courts to reject most rights cases that run against prevailing social expectations.[500] Thus, the social change capacity of civil rights is throttled. Simultaneously, civil rights equity permits courts to intervene where they believe an injustice or outrage exists.[501]

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496. *See* Reinert, *supra* note 39, at 936 (discussing how in the issue of qualified immunity, for example, legal remedies are often barred but equitable remedies will be made available).

497. *See id.* at 943 (arguing that the justiciability requirement standards make it difficult to prove standing in civil rights cases and create a barrier to injunctive relief).

498. *See Ashwander*, 297 U.S. at 321 (stating that "the opportunity to resort to equity, in the absence of an adequate legal remedy . . . should not be curtailed because of reluctance to decide constitutional questions").

499. Alex Reinert argues that though the Court placed procedural limitations on damages actions "the Court is consolidating its power. And moving civil rights litigation into the equitable camp is one way of doing so, because equity is controlled by judges." *See* Reinert, *supra* note 39, at 946. Framing damages actions to mimic equity does so more broadly.

500. *See id.* at 931 (stating that "[c]ommentators for good reason often speak of the Court's general hostility to civil rights litigation as a thumb on the scale in the most contested cases").

501. *See id.* (stating that, contrarily, there has been a line of cases that "suggests an openness to enforcing traditional civil rights values of due process and rule of law").

Though central under civil rights equity, the judiciary is not wholly independent. First, judges are loosely constrained by public opinion defining (however imperfectly) social outrage.[502] Second, the fact-intensive nature of most civil rights cases means that even a judge with a strong opinion about an "injustice" will often still need to submit that case to the jury to identify its view of a remediable outrage. Third, judges are subject to an appeals process that subjects their view of an outrage to judgment by appellate peers. The ongoing contest for control of the judiciary through the appointments process, while a manifestation of the divisive nature of political discourse today, is made more relevant by the extreme power that the civil rights equity approach preserves in courts.[503] Courts can defy public opinion or even the sentiments of the elected branches by constructing disputes as outrages that need to be addressed if their views are broadly shared within the judiciary.[504]

The flexible approach to civil rights cases that civil rights equity establishes permits the federal judiciary to preserve its supremacy in constitutional interpretation while cabining the disruptive effect of civil rights from overwhelming the courts' constitutional jurisprudence. One version is the aforementioned extension of *Ashwander*. But the other, broader effect of civil rights equity is that it distinguishes "civil rights" from constitutionalism and ensures that the former is a lesser, included part of the latter. The Civil Rights Movement and the rapid expansion of rights-based constitutionalism implied that the Constitution was fundamentally substantive (at least after the adoption of the Fourteenth Amendment) and that structural aspects of the Constitution were secondary to this substantive

502. *See* Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 76 (2010) (arguing that "justices have an institutional incentive to think about the context in which they make decisions, and this context includes public opinion").

503. *See* Reinert, *supra* note 39, at 946 (positing that the Court's preference for injunctions in civil rights cases comes from the Court consolidating power to and within the judiciary).

504. *See* Rachlinski, *supra* note 334, at 1252–54 (discussing the new heightened pleading standard under *Iqbal* and the "reluctance to allow individuals to use access to the courts (and discovery) as a means of scrutinizing institutional actors" perhaps stemming from the increased number of federal judges who previously worked for these institutional actors).

regime.[505] Civil rights equity reverses this by making rights claims exceptional and contingent on broad notions of outrage and injustice.[506] Routine disputes are no longer the stuff of civil rights cases, even as the Court's rejection of structural reform made broad institutional challenges a dead letter. Thus, in civil rights jurisprudence, the role of the judiciary is defined as intervening to address governmental incursions of individual liberty (civil liberties cases) or, in more complex cases (civil liberties cases implicating multidimensional disputes between multiple individuals or groups, or civil rights cases, which always implicate multidimensional disputes), intervening to address abuse of rights (outrages, miscarriages of justice).

D. *Resolving Civil Rights Paradoxes*

Civil rights equity is also helpful to explain widely held notions about civil rights that seem contradictory. First, many see the broad civil rights jurisprudence as ever-present and robust, some would say oppressive, even as claimants in civil rights cases have extremely low success rates.[507] Generally, the explanation of this contradiction is that civil rights cases are sufficiently embarrassing that individuals tread lightly.[508] Civil rights equity offers another explanation: successful cases, however rare, constitute broad indictments of the institution and its leaders precisely because it will rightly be understood that the underlying behavior was sufficiently outrageous to justify extraordinary judicial intervention.[509] So civil rights litigation comes to be understood as a contest to appeal beyond

505. *See* Glennon, *supra* note 208, at 358 ("The fourteenth amendment and its substantive cause of action, section 1983, created federal rights and provided a federal forum for their vindication.").

506. *See* BLAUSTEIN & FERGUSON, *supra* note 101, at 162–64 (discussing how pecuniary damages have limitations as a solution to controversy, while courts in equity can impose direct orders—though not without their own limitations).

507. *See* BERREY ET AL., *supra* note 431, at 293 (showing the percentage of plaintiff trial wins for employment discrimination cases is 2.14 percent).

508. *See* EPP, *supra* note 470, at 22 (observing the fear of liability for the public embarrassment and reputational damages that goes along with it).

509. *See* Chayes, *supra* note 182, at 1302 (concluding that "[t]he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy").

the courts, to establish that a deep miscarriage of justice has occurred. In this view, it is not just that defendants resist settlement because they are likely to win, but also that settlement implies acknowledgement of more than the routine right or wrong of a car accident or breach of contract; it suggests a moral and institutional failing.

Second, it is widely assumed that civil rights robustly protect minorities, despite the failure of civil rights law to produce substantial benefits linked to particular areas of civil rights law for minority communities.[510] In the case of Black Americans, for example, employment discrimination protections have not wiped away disproportionate unemployment, wage inequalities, and broad disparaging assumptions about Black Americans' fitness for attractive employment.[511] Much has been written in an effort to explain this contradiction, but the notion that civil rights protections are available only for extreme cases of discrimination as opposed to the routine prejudice that infects employment decisions is a strong explanation of this paradox.[512] Civil rights litigation focused on outrages is not amenable to addressing problems like embedded, routine prejudice, much less implicit bias.

An additional, related paradox that this view of civil rights explains is how civil rights protections can expand continuously and remain unsatisfactory to those they are supposed to protect.[513] Though more rights have been recognized and more groups covered by civil rights, that expanded coverage does not seem closely correlated with social change.[514] Arguably, the lack

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510. *See id.* at 1310 (discussing the issues surrounding the widespread impact of public law litigation and lack of adequate representation for those affected).

511. *See Economic New Release: Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age*, U.S. BUREAU OF LAB. STAT. (Sept. 3, 2021), https://perma.cc/C4TN-XYU7 (showing the unemployment rate for the black civilian noninstitutional population being 9.1 percent in August of 2021 compared to the white civilian noninstitutional population being 4.6 percent).

512. *See* Eyer, *supra* note 302, at 1276 (noting that "less than 5% of all discrimination plaintiffs will ever achieve any form of litigated relief").

513. *See id.* at 1279–80 (suggesting that expansion of recognition might be related to lower success rates).

514. *See id.* at 1280 (positing that in order to effectuate improved outcomes for victims of discrimination, alternative methods for reform may need to be employed).

of recognition is tantamount to a kind of non-existence in a shrinking, pop-culture infused world. Yet rights for the recognized group seem ancillary to social change, except in initiating a conversation about status. Thus, many arguments about the limits of law have emerged, suggesting that law is an inappropriate, clumsy, or broken tool for change that should be relegated to a secondary role to organizing, protesting, or voting.[515] Surely law's role is not superior to these important political tools but neither should it be regarded as subordinate to them. In any case, the promise of "rights" implies a powerful if not superior role for law that is not supported by how civil rights have worked in the United States. Law's importance in ensuring "justice" where there is none underscores the value of recognition, while its operation as a supplement to "normal law," tailored for use in cases of outrages, explains the limitations of and disappointments with civil rights law in producing social justice.

Ultimately, the civil rights equity view of civil rights law explains an uncomfortable adage. It is commonplace for people to say, "but if it were a black person, you wouldn't . . . ," implying that, in whosever's interest the speaker is speaking, they should get the same rights that Black people do. Unfortunately, in most of these cases it isn't clear that a Black person would enjoy protection from civil rights. This use of a notion of the Black person as the special ward of the state through civil rights is an assumption that has undercut the legitimacy of civil rights[516] by positing it as biased, but it also glosses over the significant hurdles to recovery in civil rights cases.[517] Thus, the adage extends the benefits of civil rights law on whosever's behalf it is invoked, while the Black citizens to which the adage referred may never have enjoyed those benefits. Because civil rights

515. *See, e.g.*, Johnson, *Equality Directives in American Law*, *supra* note 468, at 1342–43 (arguing to place "positive duties on state actors to promote equality and inclusion" rather than relying on a fragmented enforcement system via the courts).

516. This dates to at least Justice Bradley's opinion in *The Civil Rights Cases*. 109 U.S. 3, 25 (1883).

517. *See* Suzette M. Malveaux, *Clearing Civil Procedure Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 621 (2011) (suggesting that pleading standards, class action requirements, and forced arbitration are creating substantial procedural hurdles in bringing civil rights cases).

equity permits widely held presumptions to guide legal outcomes, the contradiction described here falls away.

The public believes civil rights law is robust and seeks to extend its benefits horizontally to all those meeting the presumption of their beliefs. Consequently, civil rights law has been disseminated broadly even if its depth of coverage leaves much to be desired. And since civil rights equity presumes civil rights are available only in extreme cases measured against popular presumptions, civil rights protections extend vertically only to those cases jurists believe represent injustice. The imagined recoverable violation against the Black litigant operates comfortably as the standard for protecting others.

CONCLUSION

Because of equity's focus on substantive justice, popular notions of equity cast it as liberating: equity comes to the rescue where the law fails. But as a system that is supplemental, equity is also limiting. Equity as a model for law diminishes it, preventing it from doing justice. Similarly, flexibility in legal regimes—standards over rules—is seen as liberating, giving judges the means to do justice. But that very flexibility can work against achieving justice. In a flexible regime, justice becomes optional. And where the tools created to reconcile a flexible system of equity with law's important values of consistency and predictability are deployed to avoid consistency and predictability, flexibility becomes a ready means of limiting the occasions for justice. The pursuit of justice is reserved for some cases, some of the time. This is civil rights equity: a special use of equity ideals to make civil rights more flexible, less certain, and less consistent—less law.