

MORRIS V. ALLEN AND THE LOST HISTORY OF THE ANTI-INJUNCTION ACT OF 1793

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ABSTRACT—Adopted in 1793, the Anti-Injunction Act (AIA) has come to symbolize the early republic’s concern with protecting state court autonomy from an overbearing federal judiciary. Modern observers view the AIA and its prohibition of injunctions to stay state court proceedings as an absolute barrier to federal interposition. All agree that the origins of the Act were, as the Supreme Court observed, “shrouded in obscurity.”

To remove the shroud, we return to an eighteenth-century world in which separate courts of law and equity exercised concurrent jurisdiction, and courts of equity secured their role through injunctions to stay proceedings at law. One such proceeding unfolded in North Carolina, as founding financier Robert Morris attempted to stay the enforcement of an adverse state court judgment. The language of the AIA was likely drafted to address the specific problem of federal–state concurrency laid bare in that case, *Morris v. Allen*. By limiting its restriction to “writs of injunction,” the AIA barred *original* federal interposition but left the federal courts free to issue *ancillary* stays to protect federal jurisdiction and federal decrees. Reclaiming this lost distinction between original and ancillary injunctive relief calls for a fundamental reconsideration of the place of the 1793 Act in the legislative output of the early republic. Far from the absolute bar that it later became in the hands of twentieth-century jurists such as Felix Frankfurter, the 1793 Act struck a balance that protected state court autonomy even as it authorized federal judicial self-defense.

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INTRODUCTION

While a variety of different themes crop up in historical treatments of the Anti-Injunction Act of 1793 (AIA),¹ scholars agree that the statute’s origins are “shrouded in obscurity” or “lost in the mists of history.”² This narrative of historical obscurity informs the work of those, like Professor Charles Warren, who viewed the AIA’s declaration that no “writ of injunction” shall be issued to stay proceedings in state courts³ as a “firm bar” against federal court interference.⁴ Similar claims of obscurity animate the work of such historians as William Mayton and Wythe Holt, both of

¹ Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 334–35. The modern AIA is codified at 28 U.S.C. § 2283 (2006).

² See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 232–33 (1972) (footnote omitted) (“The precise origins of the legislation are shrouded in obscurity, but the consistent understanding has been that its basic purpose is to prevent ‘needless friction between state and federal courts.’” (quoting *Okla. Packing Co. v. Gas Co.*, 309 U.S. 4, 9 (1940))); 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4221 (3d ed. 2011) (footnote omitted) (“Why Congress [adopted the AIA] in 1793 is lost in the mists of history. There is no record of debate in Congress about it, and historians have only been able to speculate inconclusively about the motivation for the statute.”); Edgar Noble Durfee & Robert L. Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1145 (1932) (“We know next to nothing of the parliamentary history of this statute.”); Telford Taylor & Everett I. Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1170–72 (1933) (describing the history as a matter of “some uncertainty”).

³ § 5, 1 Stat. at 335.

⁴ Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 367 (1930) (“[T]he very explicit words of the statute have been considerably stretched by the Court so as to admit of implied exceptions, and substantial breaches have been made in this apparently firm bar against federal interference.”).

whom regard the AIA as limiting only the power of a single circuit-riding Justice and as leaving the injunctive power of federal courts entirely intact.⁵ The Supreme Court itself appears to have subscribed to the narrative of historical inaccessibility even as it continues to work out a complex body of law to govern the relations between state and federal courts.⁶

The relatively thin historical record has left ample room for scholarly theorizing.⁷ Some view the AIA as the brainchild of its draftsman, Connecticut Senator (and future Chief Justice) Oliver Ellsworth, who was known for his general antipathy to equity.⁸ Others have linked the AIA to Edmund Randolph, the Attorney General whose lengthy 1790 Report proposed broad reforms to the Judiciary Act of 1789 and included a provision (or two) much like the AIA.⁹ But some scholars have dismissed the Randolph connection on two grounds: that Congress did not, as a general matter, take up his reforms, and that the particular provision that

⁵ See Wythe Holt & James R. Perry, *Writs and Rights, "Clashings and Animosities": The First Confrontation Between Federal and State Jurisdictions*, 7 LAW & HIST. REV. 89 (1989); William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 332 (1978) ("Instead of erecting a bar applicable to all federal courts, Congress in 1793 seems to have enacted only a law prohibiting a single Justice of the Supreme Court from enjoining a state court proceeding."); see also John Daniel Reaves & David S. Golden, Commentary, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294, 297–98 (1971).

⁶ See *Mitchum*, 407 U.S. at 232 (describing the origins of the Act as "shrouded in obscurity"). Nonetheless, the Court has drawn on the AIA in working out problems of federal–state concurrency. See, e.g., *Younger v. Harris*, 401 U.S. 37, 43 (1971) ("Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. . . . A comparison of the 1793 Act with 28 U.S.C. § 2283, its present-day successor, graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language of the old Act.").

⁷ This dearth of legislative history is exacerbated by the fact that the Supreme Court did not decide a case in express reliance on the AIA until 1872. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 719–20 (1872). Notably, the Court has sometimes treated its 1807 decision in *Diggs & Keith v. Wolcott*, 8 U.S. (4 Cranch) 179 (1807), as an early application of the AIA. See, e.g., *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 134 & n.5 (1941); *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849).

⁸ See Taylor & Willis, *supra* note 2, at 1171 (suggesting "that the inclusion of the injunction provisions [in the 1793 Act] was the result in part of then prevailing prejudices against equity jurisdiction" and observing that "Ellsworth had a pronounced dislike for chancery practice"); *id.* (observing that Ellsworth "at one time joined forces with anti-federalists in urging an amendment to the first Judiciary Act of 1789 which would have required that the facts in federal equity suits be found by a jury"); see also WILLIAM MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES, IN 1789–90–91, at 94, 99 (George W. Harris ed., Harrisburg, Lane S. Hart Printer & Binder 1880) (observing that, during debates over the Judiciary Act of 1789, Ellsworth found himself opposing Morris—then a Senator from Pennsylvania—on that very topic: whereas Ellsworth was "generally . . . for limiting the chancery powers," Morris "seemed almost disposed to join" members of the House who sought "to push the power of Chancery as far as possible").

⁹ See EDMUND RANDOLPH, REPORT OF THE ATTORNEY-GENERAL TO THE HOUSE OF REPRESENTATIVES (DEC. 31, 1790) [hereinafter RANDOLPH'S REPORT], reprinted in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 122, 127, 162–63 (Maeva Marcus et al. eds., 1992) [hereinafter DHSC]; Warren, *supra* note 4, at 347 (arguing that the AIA was "undoubtedly" adopted in consequence of Randolph's Report).

some portray as a precursor to the AIA was part of a project (aimed at more completely separating the state and federal courts) that Congress chose not to implement.¹⁰

An equally intriguing and problematic suggestion appears in the editorial notes of the indispensable Supreme Court Documentary History project.¹¹ The editors of the project hypothesize that the AIA may have sought to calm the waters in the wake of a particularly controversial petition for certiorari in *Morris v. Allen*, a debt-related dispute between Founding Era banker Robert Morris and a group of North Carolina merchants. Morris sought to remove the case to federal court after what he viewed as a series of flawed state court proceedings—a litigation strategy that resulted in an early clash between the state and federal courts in North Carolina.¹² But that hypothesis presents a puzzle: the *Morris* controversy arose from the use of certiorari to remove an action from state to federal court, posing the question why the drafters of the Act would ban the issuance of writs of injunctions to address the concern. As we will see, certiorari was a common law process that effected the removal of an action from an inferior to a superior court.¹³ A statute (like the AIA) that bars the federal courts from issuing writs of *injunction* to state courts would not foreclose issuance of writs of *certiorari* if otherwise appropriate, and it would not foreclose the use of a body attachment (contempt) as a mode of enforcing obedience to the certiorari. Nor would a ban on injunctions address the implication of state court inferiority embedded in the federal courts' reliance on certiorari—reliance that helped to inflame passions in North Carolina following *Morris*.¹⁴

Our examination of the AIA has revealed an important textual wrinkle that we think will clarify the meaning and purpose of the Act. As noted above, the AIA prohibited the issuance of “writs of injunction” to stay proceedings in state courts and seemingly brooks no exception.¹⁵ But when we view the Act’s reference to “writs of injunction” against the backdrop of practice in the Anglo-American Courts of Chancery, we find an important distinction between original and ancillary proceedings. Most suits brought in equity to stay proceedings at law were commenced through the submission of an original bill of injunction, which was served on the opposing party along with a subpoena, and which would (if successful)

¹⁰ See RANDOLPH’S REPORT, *supra* note 9, at 122–27.

¹¹ See 4 DHSC, *supra* note 9, at 202 n.9.

¹² Among other important events, the materials offer a more detailed portrait of the controversial attempt of Morris, a prominent Pennsylvania merchant and financier, to remove litigation from state to federal court in North Carolina. See *id.*; see also Holt & Perry, *supra* note 5.

¹³ See Harold Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 504 (1963).

¹⁴ See Declaration of the Judges of the Superior Court of North Carolina (Nov. 19, 1790), in 2 DHSC, *supra* note 9, at 111, 111–12 [hereinafter Declaration of North Carolina Judges].

¹⁵ See Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 335.

result in the issuance of a writ of injunction against further proceedings.¹⁶ In addition to these original actions for writs of injunction, courts of equity also entertained motions or petitions for the issuance of ancillary relief in the nature of an injunction to protect their jurisdiction and ensure the effectiveness of their decrees.¹⁷ From Chancery's perspective, the original bill for a writ of injunction initiated an action and brought parties before the court with proper notice through service.¹⁸ The ancillary injunction on motion, by contrast, operated on those who were already parties to an equitable proceeding and were subject to equitable control.¹⁹ We think the AIA was drafted to pick up this distinction, barring only original applications for the "writ of injunction" but leaving federal courts of equity free to grant ancillary relief, including injunctive relief, against state court proceedings that threatened prior federal litigation.

We tell the story of the AIA in three parts. Part I briefly summarizes scholarly assessments of the Act's origins. Part II focuses on the *Morris* case, using that litigation as a window into the distant and yet somewhat familiar world of eighteenth-century litigation. Part II also explores the strategic challenges that confronted the lawyers for Robert Morris as they tried to steer the case into a federal forum, and it recounts the reaction of the state court to the federal certiorari. Part III closely examines the language of the AIA in light of the equitable distinction between original bills for writs of injunction and ancillary proceedings to effectuate a decree. Part III also shows that the distinction helps to clarify most (but not all) confusing features of anti-suit injunctions in the nineteenth century. A brief conclusion follows.

I. SETTING THE STAGE: ACCOUNTS OF THE AIA'S ORIGINS

Scholarship on the Anti-Injunction Act nicely reflects the concerns of the day in which it was written (and tends to confirm a lasting truth about historically informed legal scholarship). Then-Professor Felix Frankfurter helped to inspire a growing interest in the statute at a time when

¹⁶ See, e.g., Lecture LVI: Of Injunction Causes, in 3 RICHARD WOODDESSON, LECTURES ON THE LAW OF ENGLAND 158, 158 (W.R. Williams ed., Philadelphia, John S. Littell 1842) (footnotes omitted) ("Injunction causes are those, in which the bill prays, besides the writ of subpoena to compel the defendant to appear and answer, a writ also of injunction, inhibiting him from suing the complainant at common law For, generally, it is requisite, that he who seeks an injunction, should have a bill filed in court at the time. Yet in cases specially circumstanced, this has been dispensed with.").

¹⁷ See, e.g., *Morrice v. Bank of Eng.*, (1736) 36 Eng. Rep. 980 (Ch.); 3 Swanst. App. 573; Cas. t. Talbot 217, 226; 2 Bro. P.C. (Toml. ed.) 465.

¹⁸ See JOHN WYATT, THE PRACTICAL REGISTER IN CHANCERY 237 (London, A. Strahan 1800) ("No injunction for stay of suit at law shall be granted, revived, dissolved, or stayed, upon a petition, nor any injunction of any other nature pass by order upon petition, without notice and a copy of the petition first had by, or given to the other side").

¹⁹ See, e.g., *Morrice*, Cas. t. Talbot at 223 (suggesting that the Court viewed the power to grant an injunction against enforcement of judgments as essential to carry its jurisdiction into effect).

Progressive Era distrust of federal equity was at its height.²⁰ Justice Frankfurter's own 1941 opinion in *Toucey v. New York Life Insurance Co.* signaled an end to freewheeling federal court assertions of injunctive authority and invoked the Act's origins in the course of inviting Congress to define the power of federal courts to enjoin state proceedings.²¹ By the 1970s, students of federal jurisdiction argued for a broader federal judicial role in enforcing constitutional rights and offered a correspondingly narrower vision of the AIA.²² Echoes from the Warren Court's expansion of equitable power to enforce civil rights continue to reverberate.²³

Beneath these broad patterns, one finds pockets of consensus as well as areas of disagreement. Perhaps the most widely accepted view is that we lack a detailed legislative history of the statute.²⁴ This is due in large part to the fact that we cannot reconstruct the debates in either the House or the Senate.²⁵ House debates in 1793 were only intermittently recorded, often by newspapers.²⁶ Meanwhile, the Senate's proceedings were closed to the

²⁰ See Taylor & Willis, *supra* note 2, at 1169 n.† (dedicating their article to Professor Felix Frankfurter); cf. Warren, *supra* note 4, at 346 (noting that the “hasty” assumption of federal jurisdiction in challenges to the constitutionality of state laws had aroused “public antagonism” and led to demands on Congress to curtail federal jurisdiction).

²¹ See 314 U.S. 118, 139, 141 (1941) (reversing an injunction issued to prevent relitigation in state court on the ground that the text of the AIA allowed for no judge-made exceptions).

²² See, e.g., Mayton, *supra* note 5 (arguing that the Act applied only to the work of a single Justice riding the circuit and left lower federal courts free as courts to enjoin state proceedings).

²³ See ERWIN CHERMERINSKY, FEDERAL JURISDICTION 736 & n.5 (5th ed. 2007) (describing Mayton's account as a persuasive showing); Wythe Holt, “*The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects*”: *The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 336–37 & n.145 (1987) (expressing agreement with Mayton's view that the Act limited only the power of a single Justice).

²⁴ See Durfee & Sloss, *supra* note 2, at 1145 (“We know next to nothing of the parliamentary history of this statute.”); Taylor & Willis, *supra* note 2, at 1170–72 (describing the history as a matter of “some uncertainty”); cf. *Mitchum v. Foster*, 407 U.S. 225, 232 (1972) (describing the origins of the Act as “shrouded in obscurity”).

²⁵ See 17A WRIGHT ET AL., *supra* note 2; Taylor & Willis, *supra* note 2, at 1170 n.9 (“It is apparent from the Annals, however, that there was considerable debate which is not reported.” (citing 3 ANNALS OF CONG. 607, 645, 875, 882 (1792–1793))).

²⁶ See, e.g., H. JOURNAL, 2d Cong., 2d Sess. 663 (1793) (internal quotation marks omitted) (“The Senate have passed a bill, entitled An act in addition to the act, entitled An act to establish the Judicial Courts of the United States; to which they desire the concurrence of this House. . . . The bill sent from the Senate, entitled An act in addition to the act, entitled An act to establish the Judicial Courts of the United States, was read the first time.”); *id.* at 705 (internal quotation marks omitted) (“The House . . . resolved itself into a Committee of the Whole House on the bill sent from the Senate, entitled An act in addition to the act, entitled An act to establish the judicial courts of the United States; and, after some time spent therein, Mr. Speaker resumed the chair, and Mr. Steele reported that the committee had, according to order, had the said bill under consideration, and made several amendments thereto; which he delivered in at the Clerk's table, where the same were severally twice read, and agreed to by the House. *Ordered*, That the said bill, with the amendments, do lie on the table.”).

Records are available in the Annals of Congress, but they were compiled decades later using, for the most part, newspaper accounts. See *Annals of Congress*, LIBR. CONGRESS AM. MEMORY, <http://memory.loc.gov/ammem/amlaw/lwac.html> (last visited Dec. 29, 2013).

public, and the debates were not transcribed.²⁷ No House or Senate report accompanied the measure, as it would today, and we therefore lack an official account of what the legislation was meant to achieve.²⁸

The absence of an official account has opened the way to a measure of scholarly speculation, more or less well-informed, about the likely origins and purpose of the AIA.²⁹ Scholars generally agree that the Judiciary Act of 1793 came about in response to President George Washington's suggestion in November 1792 that Congress consider revisions to the judiciary system.³⁰ Washington's suggestion reflected concerns that the Justices had expressed about the burdens of circuit riding; he enclosed a "representation" from the Justices which described circuit riding as "too burthensome" and criticized the portion of the Judiciary Act of 1789 that called upon Justices to sit in review of decisions they had made as circuit judges.³¹ But the linkage to circuit-riding concerns may itself serve to obscure the Act's purpose. Professor Mayton, for example, argued that the anti-injunction provision meant to qualify only the power of a single Justice on circuit, and thus left the injunctive power of "courts" fully intact.³²

The possible relevance of the Randolph Report also plays a recurrent but somewhat unsettled role in the scholarly debate.³³ In August 1790,

²⁷ Senator Maclay's journal, which gave "meaning and life to the journal record," only covers the years 1789–1791 and so, with regard to post-1791 legislation like the AIA, "it is impossible to follow with any assurance of a right comprehension the votes and other officially recorded acts of any senator." WILLIAM GARROTT BROWN, *THE LIFE OF OLIVER ELLSWORTH* 208 (1905).

²⁸ See Mayton, *supra* note 5, at 336 (noting the absence of recorded debates); Taylor & Willis, *supra* note 2, at 1170 (same); see also 2 DHSC, *supra* note 9, at 200–03 (recounting the legislative history of the Act from the evolution of drafts and contemporaneous correspondence).

²⁹ For example, Professor Warren speculated that the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), upholding the suability of states, may have offended the states and helped build support for limits on federal judicial power. See Warren, *supra* note 4, at 347–48. But Warren's account has gained little traction in the literature. See, e.g., Mayton, *supra* note 5, at 335 n.35 (rejecting the linkage to *Chisholm* on the ground that the Senate draft of the Act preceded the *Chisholm* decision by several weeks).

³⁰ See 4 DHSC, *supra* note 9, at 201.

³¹ See 2 DHSC, *supra* note 9, at 289–90 (reproducing a "representation," dated August 9, 1792, from the Justices to Congress). By assigning individuals appointed as Justices of the Supreme Court the additional task of serving as circuit judges, the Act of 1789 created the possibility that actions taken by circuit-riding Justices would come before the full Court for further review. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75. Circuit riding had long been a painful duty for the Justices; their complaints dated from the summer after they concluded their first round. See 2 DHSC, *supra* note 9, at 3–4 (editor's note) (dating the Justices' objections to the propriety of requiring the same individuals to serve as judges of both a supreme and inferior court to August 1790). The salary structure in place at the time may have complicated the task of according relief; the Justices' salary had been set to cover the cost of travel associated with circuit riding and Congress could not, in keeping with Article III, reduce that salary if and when it chose to reduce the Justices' circuit obligations. See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 32–34 (2008).

³² See Mayton, *supra* note 5, at 332–38.

³³ See *infra* Part III.A (discussing Randolph's Report).

Congress asked Randolph, the nation's first Attorney General, for a report on the federal judicial system.³⁴ The fact that Randolph's Report and the AIA both discuss writs of *ne exeat* and injunction in closely related provisions might explain why some scholars have seen a connection between the two.³⁵ Others have been less sure that Randolph's Report was a precursor to the AIA.³⁶ Finally, scholars have put forward a range of views about the possible relevance of the *Morris* certiorari litigation.³⁷ Scholars associated with the Documentary History project in particular have suggested that the *Morris* certiorari may have led, in some indirect way, to the adoption of the AIA.³⁸

These accounts all help to identify fruitful lines of inquiry but omit a crucial part of the story: the fact that courts of equity were generally free to relitigate matters decided by courts of law and to enjoin the parties from enforcing any judgments they had obtained previously. The *Morris* litigation presented this problem of federal equitable relitigation in sharp relief; the federal circuit court had issued a writ of certiorari to secure the removal of the action from state to federal court, but the relief sought in the removed action was an injunction against the enforcement of a previous state court judgment.³⁹ In other words, *Morris* had invited the federal court to take over a state court proceeding in equity that had been brought to challenge on equitable grounds the merits of an action previously resolved by the state's courts of law. We think, as we discuss in the next Part, that the AIA was meant to foreclose this particular form of federal equitable relitigation, avoiding the problem of bifurcated proceedings identified in Randolph's Report. *Morris v. Allen*⁴⁰ brought these issues to a head.

³⁴ See 4 DHSC, *supra* note 9, at 122 & n.2.

³⁵ See Warren, *supra* note 4, at 347 (declaring that the AIA was "undoubtedly" drafted in consequence to Randolph's Report); see also *infra* note 208 and accompanying text (discussing the writ of *ne exeat*).

³⁶ Thus, Taylor and Willis described Randolph's proposed amendment as "of much more limited scope . . . , inasmuch as it operated only upon the district courts, applied only to *judgments at law* . . . , and was merely procedural in purpose." Taylor & Willis, *supra* note 2, at 1171 n.14. Similarly, Wythe Holt acknowledges the similarity, but contends that Randolph's provision was part of a larger scheme designed to separate the state and federal courts and immunize state court judgments from Supreme Court review. See Holt, *supra* note 23, at 336 n.145.

³⁷ For the view that the continuing availability of federal writs of certiorari highlights the narrowness of the AIA restriction, see Mayton, *supra* note 5, at 336 (citing Note, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612, 620–23 (1971) (describing both the *Morris* certiorari and a similar writ issued to the South Carolina state court in *Washington & Beresford v. Huger*)).

³⁸ See 4 DHSC, *supra* note 9, at 202 n.9.

³⁹ See *infra* Part II.B–C.

⁴⁰ See *Allen v. Morris & Nisbitt*, Minute Docket, 1787 and 1795–1796, Chowan County Court of Pleas and Quarter Sessions, North Carolina Office of Archives and History (entries for Mar. 29, 1787 and June 28, 1787), Chowan County [hereinafter *Chowan County Minutes*] (on file with authors).

II. *MORRIS V. ALLEN*: THE FIRST INTERJURISDICTIONAL CLASH

The *Morris* certiorari case, *Morris v. Allen*, grew out of a long-simmering dispute between Robert Morris, the “Financier of the American Revolution,”⁴¹ and a group of merchants in Edenton, North Carolina.⁴² The litigation,⁴³ which has been the subject of a detailed and extremely helpful historical treatment,⁴⁴ went through four phases. Each phase reveals something distinctive about the perceived failure of the state courts to provide an unbiased forum for disputes involving nonresidents and the difficulty of fashioning a federal judicial solution to that failure. The saga begins with what Morris regarded as a flawed state court proceeding.⁴⁵ In the second phase, Morris sought relief from a state court of equity.⁴⁶ In the third phase, Morris sought to shift his equitable proceeding to the newly created federal court system through certiorari,⁴⁷ thereby triggering phase four: a national crisis in federal–state judicial relations. By situating the dispute in the complex world of late eighteenth-century commercial litigation, we hope to shed light on the meaning of the AIA. We start with a brief overview of the dispute.

A. *Phase One: Morris and the North Carolina Jury*

Robert Morris was a man of wealth and repute in the early republic.⁴⁸ He was Superintendent of Finance under the Articles of Confederation, one

⁴¹ ELLIS PAXSON OBERHOLTZER, *ROBERT MORRIS: PATRIOT AND FINANCIER* 1 (1903).

⁴² See Chowan County Minutes, *supra* note 40.

⁴³ The legal battle that pitted Robert Morris and his Philadelphia associates David Conyngham (alternatively spelled “Cunningham”), Redmond Conyngham (or “Cunningham”), and John Nesbitt against Nathaniel Allen and a group of Edentonian merchants took on a variety of case names as it wound its way through the North Carolina state courts. For example, the original state court action at law was docketed under *Allen v. Morris & Nisbitt* and *Allen v. Nesbit*. See Chowan County Minutes, *supra* note 40. For simplicity and in the interest of remaining consistent with the DHSC’s manner of indexing this litigation, see generally DHSC, *supra* note 9, we refer to all of these proceedings in state and federal court as “*Morris v. Allen*.”

⁴⁴ See generally Holt & Perry, *supra* note 5 (examining the *Morris* dispute). We are indebted to Professor Holt and Mr. Perry for their meticulous archival research.

⁴⁵ See *infra* Part II.A.

⁴⁶ See *infra* Part II.B.

⁴⁷ See *infra* Part II.C.

⁴⁸ See BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 202–05, 207 (2002); JOHN R. VILE, *1 THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING* 218 (2005). Morris and his good friend, future Justice James Wilson, had speculated in land, and when the speculative bubble burst in the late 1790s, both men found themselves in debtors’ prisons. See MANN, *supra* at 203, 207; William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 908 (2008). Morris bears the distinction of being (along with Wilson) one of two men to have signed the Declaration of Independence, the Articles of Confederation, and the U.S. Constitution. MICHAEL E. NEWTON, *ANGRY MOBS AND FOUNDING FATHERS: THE FIGHT FOR CONTROL OF THE AMERICAN REVOLUTION* 77 (2011); see also VILE, *supra*, at 209; *The Declaration of Independence: A Transcription*, ARCHIVES.GOV, http://www.archives.gov/exhibits/charters/declaration_transcript.html (last visited Dec. 29, 2013). Some

of Pennsylvania's delegates to the constitutional convention, and later a U.S. Senator from Pennsylvania.⁴⁹ During the 1780s, Morris found himself embroiled in a series of disputes with his former business associates in the North Carolina state courts. The suits involved creditors' claims filed against Morris's North Carolina assets—assets that had been managed by one Robert Smith.⁵⁰ When Smith died suddenly in March 1782, executors were called upon to conduct an accounting of his disorderly estate.⁵¹ The first suit, filed by John Cooper in June 1782, alleged that Morris owed debts of £2800, but a “special” North Carolina jury comprised entirely of merchants awarded Cooper an amount more than triple the claimed debt.⁵² James Iredell, one of the executors of the Smith estate,⁵³ was surprised by the sum and observed that Morris's attorney, future Senator Samuel Johnston, would “make a motion in arrest of Judgme[nt], conceiving the proceedings in the conduct of the suit to have been irregular.”⁵⁴ The motion was discontinued and the parties settled in the spring of 1785.⁵⁵ Morris's decision to settle appears to have been prompted both by the difficulties of defending against an action in a distant court and by an expectation that, as an outsider, he would not get a fair shake in North Carolina state court.⁵⁶

historians regard Morris as having been “the most powerful man in America—aside, perhaps, from George Washington.” TERRY BOUTON, *TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 72 (2007); *see also* CHARLES RAPPLEYE, *ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION* 4 (2010).

⁴⁹ OBERHOLTZER, *supra* note 41, at 58, 74.

⁵⁰ *See generally* Complaint at 252–84, *Morris v. Allen*, Record of the Pleadings and Decrees in the Court of Equity, Superior Court of Law and Equity for Edenton District, North Carolina Office of Archives and History (1788) [hereinafter Complaint, *Morris*] (on file with authors); Answer of Nathaniel Allen, John Maxwell Nesbitt, and David Hayfield Cunningham at 285–92, *Morris v. Allen*, Record of the Pleadings and Decrees in the Court of Equity, Superior Court of Law and Equity for Edenton District, North Carolina Office of Archives and History (1788) [hereinafter Answer, *Morris*] (on file with authors); Pleading of Josiah Collins and James Iredell at 293–98, *Morris v. Allen*, Record of the Pleadings and Decrees in the Court of Equity, Superior Court of Law and Equity for Edenton District, North Carolina Office of Archives and History (1788) [hereinafter Collins & Iredell Pleading, *Morris*] (on file with authors); *see also* Holt & Perry, *supra* note 5, at 90–91.

⁵¹ *See* Holt & Perry, *supra* note 5, at 91, 112 n.6.

⁵² *Id.* at 91, 113 n.8.

⁵³ Iredell, a North Carolina lawyer and Federalist, and later a Justice of the Supreme Court, found himself ensnared in the Morris affair as an executor of the Smith estate. *See* Letter from James Iredell, Assoc. Justice of the Supreme Court, to John Jay, Chief Justice of the Supreme Court, and William Cushing and James Wilson, Assoc. Justices of the Supreme Court (Feb. 11, 1791), in 2 DHSC, *supra* note 9, at 131, 134.

⁵⁴ Holt & Perry, *supra* note 5, at 91, 113 n.8 (alteration in original) (quoting a letter from Iredell to Conyngham, Nesbitt & Co. dated January 3, 1784). Iredell did not specify the nature of the irregularities. *Id.* at 91–92.

⁵⁵ *Id.* at 92.

⁵⁶ *See id.* at 92–93, 113 n.13 (quoting a letter to Morris from his attorney, Samuel Johnston, dated April 1, 1785, stating that “it would have been much against you to defend a Law Suit at so great a distance from home against an Adversary on the Spot ready to avail himself of every favorable occurrence”). Before settling the *Cooper* matter, Morris complained that he had been “the Subject of

The second suit arose from a shipping venture gone awry. Morris and three other Pennsylvanians held a one-third interest in the cargo vessels *Hancock* and *Franklin*; nine merchants from Edenton, North Carolina, held the remaining two-thirds interest.⁵⁷ One of the Edentonians, Nathaniel Allen, was named “[s]hip’s husband,” with sole authority to give orders as to cargo contents and ports of call.⁵⁸ Morris was concerned that the ships, which were based in Edenton, might be vulnerable to British attack because the port of Edenton was “particularly infested by Cruizers of the Enemy.”⁵⁹ Morris convinced Allen that the ships “might be sent upon voyages of much greater profit and safety” if they set sail from Philadelphia instead of Edenton.⁶⁰ He maintained that Allen ordered the ships to rendezvous at Philadelphia, “to be placed under the care controul and management” of Morris.⁶¹ (Allen later claimed that he had “signified his disapprobation of that part of the plan which had in view the return of the vessels to the port of Philadelphia.”)⁶² In January 1782, both vessels set sail from Philadelphia for foreign ports with orders from Morris to return to Philadelphia.⁶³ On the return voyage, British ships seized the fully laden *Hancock*; the *Franklin*’s captain, ostensibly fearing the same fate, disobeyed Morris’s orders and returned to Edenton instead.⁶⁴ Armed with profits from the *Franklin*’s successful return, the Edentonians pursued Morris and his associates on the theory that, in contravening Allen’s instructions that both ships return to Edenton, Morris had caused the loss of the *Hancock*.⁶⁵

As luck would have it, Allen was also a North Carolina state court judge. Judge Allen and his fellow Edentonians brought their action against Morris and his Philadelphia business partners in 1786 in North Carolina’s Chowan County Court of Pleas and Quarter Sessions—the same court in which Allen served as judge.⁶⁶ In keeping with the vicinage rules of the day, Morris’s jury would have been composed of individuals drawn from

abuse & misrepresentation in No. Carolina on Acct. of this affair.” *Id.* at 92, 113 n.12 (quoting a letter from Morris to John Williams, dated November 23, 1784).

⁵⁷ See Complaint, *Morris*, *supra* note 50, at 252–53; see also Holt & Perry, *supra* note 5, at 90, 112 n.4.

⁵⁸ Answer, *Morris*, *supra* note 50, at 286; see also Holt & Perry, *supra* note 5, at 90.

⁵⁹ Complaint, *Morris*, *supra* note 50, at 255.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Answer, *Morris*, *supra* note 50, at 287–88.

⁶³ See Complaint, *Morris*, *supra* note 50, at 254–55; see also Holt & Perry, *supra* note 5, at 91, 112 n.5.

⁶⁴ Complaint, *Morris*, *supra* note 50, at 263–64; Holt & Perry, *supra* note 5, at 91, 112 n.5.

⁶⁵ Answer, *Morris*, *supra* note 50, at 288–89; Holt & Perry, *supra* note 5, at 91.

⁶⁶ See Holt & Perry, *supra* note 5, at 93. Holt and Perry observe that although Judge Allen apparently did not sit on the days Morris’s case was heard, “it is reasonable to conclude that [Allen’s] fellow judges might favor the interests of the North Carolinian.” *Id.* at 93, 113 n.14 (citing Chowan County Minutes, *supra* note 40).

the local community.⁶⁷ In June 1787, the Edentonians prevailed with a jury verdict of £2775,⁶⁸ resulting in what we will sometimes call the *Hancock* judgment. At the time, Morris was in Philadelphia attending the Constitutional Convention as a representative of the state of Pennsylvania.⁶⁹ Based on his experience in North Carolina, Morris may well have supported the efforts of his fellow Pennsylvania delegate, James Wilson, to provide in Article III of the Constitution for a set of independent federal tribunals with diversity jurisdiction over disputes between locals and the citizens of another state.⁷⁰

⁶⁷ Common law practice in the early republic adhered to the “vicinage principle,” wherein juries were “drawn from the immediate vicinity, or vicinage, of the area in which the cause of action arose” because “[o]nly a local jury . . . would be in a position to judge the credibility and motives of the parties and witnesses.” Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1003, 1070 (2007).

Vicinage was of such importance that debates over its rejection arose in the ratifying conventions of several states, including North Carolina, with Antifederalists supporting vicinage. *See id.* at 1038, 1073. Compare Joseph M’Dowall, Remarks at the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 28, 1788), in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 149–51 (Jonathan Elliot ed., 2d ed. Philadelphia, J.B. Lippincott Co. 1891) [hereinafter DEBATES IN THE STATE CONVENTIONS] (“Suppose a crime is committed at the Mississippi; the man may be tried at Edenton. They ought to be tried by the people of the vicinage; for when the trial is at such an immense distance, the principal privilege attending the trial by jury is taken away; therefore the trial ought to be limited to a district or certain part of the state.”), with Governor Samuel Johnston, Remarks at the Convention of the State of North Carolina on the Adoption of the Federal Constitution, in 4 DEBATES IN THE STATE CONVENTIONS, *supra*, at 150 (“We may expect less partiality when the trial is by strangers; and were I to be tried for my property or life, I would rather be tried by disinterested men, who were not biased, than by men who were perhaps intimate friends of my opponent.”).

Moreover, as was customary, these local jurors would have wielded the power to decide issues of both law and fact subject to minimal bench control. *See* Jones, *supra*, at 1031; William E. Nelson, *Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660–1775*, 88 N.C. L. REV. 2133, 2146 (2010) [hereinafter Nelson, *Politicizing the Courts*] (footnote omitted) (“Judges [in colonial North Carolina], even in chancery, always relied on juries to assess damages, and juries passed on legal issues, such as the validity of service of process, that were more appropriately raised with the court prior to trial.”). *But see* William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1025 (2010) [hereinafter Nelson, *Lawfinding Power*] (finding that North Carolina judges exercised control over jury lawfinding). Professor Jones argues that diversity jurisdiction has its roots in the Framers’ “desire to circumvent state court juries” whose “almost unfettered power to decide legal controversies” constituted a “direct, and therefore dangerous, form[] of democracy.” Jones, *supra*, at 1003–04.

⁶⁸ *See* Trial, Appearance, and Reference Docket, *Allen v. Morris & Nesbitt*, Chowan County Court of Pleas and Quarter Sessions, North Carolina Office of Archives and History (entry for June 1787), Chowan County [hereinafter Chowan County Trial Docket] (on file with authors); *see also* Holt & Perry, *supra* note 5, at 92, 113 n.10.

⁶⁹ The records of the Convention report that Robert Morris attended as a delegate from Pennsylvania from the convention’s opening day in May 1787 to the date on which he added his signature to the document in September 1787. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 1 (Max Farrand ed., 1911); 2 *id.* at 664.

⁷⁰ *See* Holt & Perry, *supra* note 5, at 95; James Wilson, Remarks at the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 7, 1787), in 2 DEBATES IN THE STATE

B. Phase Two: Equitable Relitigation in State Court

Again finding himself in North Carolina state court, Morris moved along two separate tracks to block enforcement of the *Hancock* judgment against him. First, he filed a petition for a writ of error with the North Carolina Superior Court of Law, seeking review of the jury's verdict.⁷¹ Second, and somewhat surprisingly to a modern observer, he filed a bill in equity seeking to enjoin the enforcement of the jury verdict.⁷² Today, in a court system where law and equity have merged, one would expect Morris to litigate all of his claims and defenses in the first proceeding, and then to seek direct review of the final judgment in an appellate court. Under the doctrine of claim preclusion, such a judgment would preclude a second or collateral round of litigation. By contrast, in the 1780s the English court system and many colonial and early state court systems in America separated the courts of law and equity and did not regard judgments at law as a bar to a second proceeding in equity; this absence of *res judicata* effect was the essence of a divided regime where courts of equity entertained claims and defenses unavailable in courts of law.⁷³ As a result, litigants in

CONVENTIONS, *supra* note 67, at 491–92 (“[I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who has his debts at the mercy of tender laws in other states?”). This stands in stark contrast to Judge Henry Friendly’s assertion that there is no evidence of state court bias to justify constitutional provisions for diversity jurisdiction. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493 (1928) (“But such information as we are able to gather from the reporters entirely fails to show the existence of prejudice on the part of the state judges.”).

Several years later, during a debate to repeal the Midnight Judges Act of 1801, Morris would ask his fellow Senators to “[e]xamine the annals of history” and “see what has been the ruin of every Republic”—“[t]he vile love of popularity.” He asked, “Why are we here? To save the people from their most dangerous enemy; to save them from themselves.” 11 ANNALS OF CONG. 41 (1802); see also Jones, *supra* note 67, at 1037 & n.186.

⁷¹ See Answer, *Morris*, *supra* note 50, at 288–89 (“[A]n attachment hath been levied on the monies of the Complainants [Morris et al.] in the hands of Robert Smith’s Executors, and . . . the same hath been removed by Appeal on the part of the Complainants to the Superior Court of Law for the said District, altho’ this Defendant [Nathaniel Allen] and the other Plaintiffs in the said suit have prevailed in two trials in the said County Court.”).

⁷² See Complaint, *Morris*, *supra* note 50; Holt & Perry, *supra* note 5, at 92, 113 n.11.

⁷³ See *Marine Ins. Co. v. Hodgson*, 11 U.S. (7 Cranch) 332, 336 (1813) (“Without attempting to draw any precise line to which Courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery.”); GEO. TUCKER BISPHAM, *THE PRINCIPLES OF EQUITY* § 380, at 331–32 (Joseph D. McCoy rev. ed., 11th ed. 1931); 1 HENRY CAMPBELL BLACK, *A TREATISE ON THE LAW OF JUDGMENTS* § 378, at 601–03 (2d ed. 1902); see also *infra* Part III.C. Similarly, a judgment in equity was not *res judicata* as to a proceeding at law. 28 WRIGHT ET AL., *supra* note 2, § 4410, at 253 (generally acknowledging the absence of *res judicata* effect as between law and equity as

complex or high-stakes disputes often conducted two rounds of litigation: one in the courts of law for breach of contract or other claims and a second proceeding in the court of equity to press claims of an equitable nature.⁷⁴

Morris's invocation of equity after suffering an adverse ruling at law was hardly a novel strategy. Rules of equity dating back to Lord Coke's feud with Chancellor Ellesmere in 1616 held that a litigant could invoke the equity or conscience of the Chancellor with allegations of fraud, mistake, unconscionability, or accident.⁷⁵ Moreover, courts of equity typically made available depositions and other tools of discovery unavailable at common law that could justify a litigant's invocation of equitable jurisdiction.⁷⁶ Sometimes, equitable proceedings ran alongside the action at law, performing a supplemental function.⁷⁷ But often, the party invoking equitable jurisdiction would claim that fraud or mistake vitiated a contract that would have been regarded as binding at common law.⁷⁸

a historical matter and observing that "a first proceeding at law or in equity often could be followed by a second proceeding in equity or at law"). For an early English case illustrating the refusal of law courts to take notice of decrees in equity, see *infra* note 261.

Collateral estoppel was a different matter. Courts of equity routinely decided questions of fact—normally the province of law courts (and juries)—and their findings could enjoy issue-preclusive effect in subsequent actions at law. See *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (declaring that the Seventh Amendment right to trial by jury cannot be lost through a prior determination of common factual issues in an equitable claim); *Hopkins v. Lee*, 19 U.S. (1 Cranch) 109, 113–14 (1821).

⁷⁴ See Nelson, *Politicizing the Courts*, *supra* note 67, at 2141, 2145–48.

⁷⁵ See 1 BLACK, *supra* note 73, § 356, at 561–62; 3 WILLIAM BLACKSTONE, COMMENTARIES *330 (writing that the decision on "whether a court of equity could give relief after or against a judgment at the common law" came "by the royal prerogative in favor of the court of chancery, of the dispute set on foot by Sir Edward Coke"); GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY *xxviii, *8 (New York, Riley 1813); 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1360, at 973 (Spencer W. Symons ed., 5th ed. 1941) ("The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction."); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 51, at 55 (W.H. Lyon, Jr., ed., 14th ed. 1918); 2 *id.* § 1197, at 562 (noting the importance of equity to interpose in cases of "accident, mistake, and fraud" and to provide discovery "which a Court of Law cannot grant").

⁷⁶ See BISPHAM, *supra* note 73, § 380, at 331 ("It is well established that equity will interfere to restrain proceedings at law wherever through . . . want of discovery one of the parties in a suit at law obtains, or is likely to obtain, an unfair advantage over the other, so as to make the legal proceedings an instrument of injustice."); *id.* § 385, at 336 ("[W]here one of the parties to a common-law action desires to obtain discovery from his adversary, the jurisdiction of a Court of Chancery will be exercised to restrain the other party from proceeding with the action until discovery is obtained."); 2 STORY, *supra* note 75, § 877, at 255.

⁷⁷ See 1 STORY, *supra* note 75, §§ 116–17, at 116–17 (describing the concurrent jurisdiction of courts of equity).

⁷⁸ See 1 HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY *111 (New York, Clayton & Kingsland 1817) ("It is a general rule . . . that wherever a party by fraud, accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, a court of equity, to prevent a manifest wrong, will interpose, by restraining the party whose conscience is thus bound, from

Hence, courts of equity exercised the power to stay proceedings at law or to enjoin the enforcement of common law judgments.⁷⁹ This injunctive power knew no temporal limits—courts of equity were free to interpose at any time, whether to stay trial, to stay enforcement of a judgment, to stay execution of a judgment, to prevent assignment of a judgment, or even “to stay the money in the hands of the sheriff” following execution of a writ of *feri facias*.⁸⁰

Applications for writs of injunction to stay proceedings at law could thus result in the virtual relitigation of the dispute, an unusual consequence when viewed through the modern lens of *res judicata*. To be sure, the eighteenth-century lawyer did not necessarily conceive of equity as a mode of pure relitigation.⁸¹ Common law courts did not take cognizance of equitable defenses, thus distinguishing the two proceedings in formal terms.⁸² But as a practical matter, the initiation of a claim in equity could, with allegations of fraud or mistake, trigger a second round of litigation.

using the advantage he has improperly gained.”); 1 STORY, *supra* note 75, § 29, at 26 (describing injuries in which “Courts of Equity will interfere and grant redress, but which the common law takes no notice of or silently disregards”).

⁷⁹ See BLACK, *supra* note 75, § 356, at 561–62 (describing the origins of the power of courts of equity to enjoin the enforcement of judgments at law); ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 14 (Jacob D. Wheeler ed., 2d ed. New York, Gould, Banks & Co. 1839) (“[I]t has become one of the most ordinary modes of equitable interposition to afford relief by *Injunctions to stay proceedings at law*.”); 1 SAMUEL TURNER, THE PRESENT PRACTICE AND COSTS OF THE HIGH COURT OF CHANCERY 368–69 (Robert Venables ed., 5th ed. London, W. Flint 1817) (footnote omitted) (“The Writs of Injunction are made out by the Clerk in Court, the Orders being left with him, and must be served personally on the Defendant, his Solicitor, and Attorney. If the Defendant, or his Attorney, afterwards proceed in the Cause at Law, contrary to the Direction of the Writs, it will be a Contempt of Court, which the Court will punish on Application by Motion for that Purpose”); WOODDESSON, *supra* note 16, at 162 (recognizing the commonplace quality of the injunction to stay proceedings at law and its broad application); WYATT, *supra* note 18, at 232 (“Where it is prayed to stay proceedings, it is commonly upon some matter suggested in the bill; as that the complainant is not able, for some reasons shewn, to make his defence in the other court; though he hath a good discharge here in equity”).

⁸⁰ BISPHAM, *supra* note 73, § 380, at 331; see 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 618 (Boston, Cummings, Hilliard & Co. 1824) (“An injunction may stay trial, or verdict, or judgment, or execution, or money levied thereon in the officer’s hands.”); 1 MADDOCK, *supra* note 78, at *109 (footnote omitted) (recognizing that injunctions to stay proceedings at common law may be “used to stay *trial*, or after a verdict to stay *judgment*, or after a judgment, to stay *execution*, or *proceedings* under an execution; or if execution has taken place, to stay the money in the hands of the sheriff”); WOODDESSON, *supra* note 16, at 162; WYATT, *supra* note 18, at 251.

⁸¹ Indeed, early treatises are quick to explain that the equitable power did not constitute an unrestrained license to intervene with law-court proceedings and judgments. Rather, equitable jurisdiction would typically attach under particular circumstances: fraud, mistake, accident, or unconscionability; where parties through no fault of their own were unable to present at trial defenses only available in equity; where the more limited availability of discovery in courts of law (as compared to equity, where discovery was readily available) would work an injustice; or where necessary to protect equitable rights. See BISPHAM, *supra* note 73, §§ 380, 383–84, at 331, 334–35; BLACK, *supra* note 73, § 365, at 577–78; 3 STORY, *supra* note 75, §§ 2042–44, at 590–92.

⁸² See 1 STORY, *supra* note 75, § 25, at 22–23 (distinguishing legal rights and remedies from equitable ones).

Professor William Nelson highlighted this feature of equitable practice in his study of colonial North Carolina.⁸³ As Nelson explained:

[A]ppeals to Chancery . . . were possible and frequent and could result in reconsideration of all aspects of a case. . . . [North Carolina] offered a set of dispute-resolving institutions and a hope that as litigants tried different forums they ultimately would find an acceptable one or alternatively exhaust themselves in the process of search.⁸⁴

Indeed, Nelson's study reveals that North Carolina was more freewheeling than other colonial courts in allowing equitable relitigation. Unlike, say, South Carolina, the courts of North Carolina did not strictly adhere to the English limits on equity and as a consequence, relitigation in equity was a common occurrence.⁸⁵ Thus a North Carolina court sitting in equity resembled an appellate court of general jurisdiction.⁸⁶ Couple this wide-ranging relitigation authority with equity's traditional reliance on judicial (as opposed to jury-based) fact-finding, and one can quickly understand why supporters of the common law right to trial by jury may have viewed equity with some suspicion.

The bill of complaint that Morris filed in 1788 to trigger equitable relitigation of the *Hancock* dispute with Allen and the Edentonians is revealing.⁸⁷ Sure enough, the bill recited in great detail the circumstances surrounding the capture of the vessel, the prior litigation, and the entry of the judgment at law in favor of the Edentonians.⁸⁸ It went on to identify two bases for equitable intervention: Morris alleged a fraudulent conspiracy between the plaintiffs at law and two of his co-defendants at law (Iredell and Collins); he also sought discovery.⁸⁹ Morris further added the traditional allegation that remedies at common law were inadequate.⁹⁰ His

⁸³ Nelson, *Politicizing the Courts*, *supra* note 67, at 2147–48.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2141, 2147–48. Professor Nelson's study of Carolina colonial courts has revealed that whereas South Carolina's bench and bar were well versed in the common law, "[i]n a sense, North Carolina had no law." *Id.* at 2141, 2146–48.

⁸⁶ *See id.* at 2145 (explaining that only rarely "did the Court of Chancery act as an equity court with limited jurisdiction rather than a court of appeals broadly empowered to hear any case brought to its attention"). Other states had been equally freewheeling during the colonial era. *See* Oliver Perry Chitwood, *Justice in Colonial Virginia*, in 23 *JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE* 48 (J.M. Vincent, J.H. Hollander & W.W. Willoughby eds., 1905) (reporting that in colonial Virginia, anyone wronged by a decision at common law could seek a rehearing in chancery, albeit one heard before the same judges).

⁸⁷ *See* Complaint, *Morris*, *supra* note 50.

⁸⁸ *See id.*

⁸⁹ *See id.* at 265, 268–69.

⁹⁰ *See id.* at 268. Morris also sought something in the nature of an accounting from the executors of Robert Smith's estate, James Iredell and Josiah Collins. *See id.* at 281–82. Although typically treated as an equitable remedy—mostly for fear that such complex tasks would go beyond the ken of the average juror—the request for an accounting alone may not have been enough to warrant equitable interference with a judgment at law. *See* *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) ("As our cases indicate,

state court bill of complaint identified the law-court plaintiffs by name and prayed that

each and every of them may be restrained from proceeding at Law against your Orators or any of them in the said suit or action instituted against them and now depending as aforesaid in one or other of the said Courts of Law of the State of North Carolina aforesaid by injunction of this Honorable Court.⁹¹

Under standard principles of equity, these allegations would assure reexamination of a judgment that was also pending on appeal.⁹²

C. Phase Three: Certiorari to Remove the Action to Federal Court

Much happened in the two years between Morris's initiation of an equitable action in North Carolina state court and his decision to remove that action, by certiorari, to the federal circuit court in 1790. First, and most obviously, the states ratified the new Constitution.⁹³ Second, Congress convened for its first session to legislate the new federal government into existence.⁹⁴ Among other important provisions, the congressional output of that year included "An Act to establish the Judicial Courts of the United States," or what we know today as the Judiciary Act of 1789.⁹⁵ Third, North Carolina somewhat reluctantly agreed to join the Union.⁹⁶ After the state's first ratification convention voted against the new Constitution, leading Federalists (including James Iredell and Samuel Johnston) secured a second convention at which they carried the day.⁹⁷ By February 1790, President Washington had appointed Justice Iredell to the Supreme Court⁹⁸ and by

the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."); Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 663 (1963) ("One reason often given for assuming equitable jurisdiction over an accounting was the difficulty of the case for a jury.").

⁹¹ Complaint, *Morris*, *supra* note 50, at 283.

⁹² See *supra* notes 75–80 and accompanying text.

⁹³ Ratification occurred on September 13, 1788. See Res. of Cong., Sept. 13, 1788, available at <http://memory.loc.gov/service/rbc/bdsdcc/2410h/0001.jpg>.

⁹⁴ Congress held its first proceedings under the Constitution on March 4, 1789. See H. JOURNAL, 1st Cong., 1st Sess. (1789), available at <http://memory.loc.gov/ll/hj/001/0000/00010000.tif>.

⁹⁵ Judiciary Act of 1789, Ch. 20, 1 Stat. 73.

⁹⁶ See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 412 (1971).

⁹⁷ See *id.*

⁹⁸ See Letter from James Iredell, Assoc. Justice of the Supreme Court, to George Washington, President of the United States (Mar. 3, 1790), in 1 LIFE AND CORRESPONDENCE OF JAMES IREDELL 284 (Griffith J. McRee ed., 1949) [hereinafter MCREE'S IREDELL].

June 1790, Congress had passed new legislation incorporating North Carolina into the federal court system.⁹⁹

The prospect of litigation in the newly minted federal courts in North Carolina must have attracted litigants in the position of Robert Morris, who was serving (along with William Maclay) as part of the Pennsylvania Senate delegation to Congress.¹⁰⁰ But the current state of the law made it hard to see how he could shift his dispute with Allen and the Edentonians into federal court. The jurisdiction of the North Carolina federal district court, like other federal district courts around the country, was limited to criminal proceedings, admiralty and maritime proceedings associated with shipborne trade along the coast, and revenue proceedings.¹⁰¹ Even if Morris's dispute had presented a federal question, the district courts did not have general federal question jurisdiction.¹⁰²

The jurisdiction of the circuit court may have looked more promising. These courts were to be staffed by the district court judge from North Carolina and two of the six sitting Supreme Court Justices, whose duties included the difficult and expensive task of riding three "circuits" to convene courts throughout the country.¹⁰³ The jurisdiction of the federal circuit courts extended to disputes between parties of diverse citizenship, such as that between Morris and his Pennsylvania business associates on one side against Allen and his fellow North Carolinians on the other.¹⁰⁴ While the diversity provision included a \$500 amount-in-controversy requirement, Morris's dispute easily met that threshold.¹⁰⁵ Moreover, the

⁹⁹ See Act of June 4, 1790, ch. 17, 1 Stat. 126, 126 (extending the federal judiciary to North Carolina on June 4, 1790, and providing that "the first session of the circuit court shall commence on the eighteenth day of June next").

¹⁰⁰ See JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787, at 302–03 (2006); Holt & Perry, *supra* note 5, at 94–95. Wilson was also a member of the Committee of Detail, which in 1787 wrote the first draft of Article III. See 1 DHSC, *supra* note 9, at 118, 119 n.26. Also part of the important Committee of Detail were future Supreme Court Justice and signer of the *Morris* certiorari John Rutledge, future Attorney General Edmund Randolph, future Senator and drafter of the Judiciary Act of 1793 Oliver Ellsworth, and Nathaniel Gorham. See *id.*; *infra* note 128 and accompanying text (discussing the role of Justice Rutledge in the *Morris* affair); *infra* Part III.A (discussing Randolph's role in shaping the AIA); *infra* note 270 and accompanying text (discussing Ellsworth's role in drafting the AIA).

¹⁰¹ See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77; 1 GOEBEL, *supra* note 96, at 471–75.

¹⁰² The first grant of federal question jurisdiction came several years later, in the ill-fated Midnight Judges Act of 1801. See 4 DHSC, *supra* note 9, at 127.

¹⁰³ See 1 GOEBEL, *supra* note 96, at 471–72.

¹⁰⁴ See § 11, 1 Stat. at 78; 1 GOEBEL, *supra* note 96, at 475–77.

¹⁰⁵ See § 11, 1 Stat. at 78; Complaint, *Morris*, *supra* note 50, at 282–83 (praying for relief in the amount of "Five thousand Pounds and upwards").

1789 Judiciary Act included provisions that authorized the removal of an action in diversity from state to federal court.¹⁰⁶

Yet the jurisdiction of the circuit court was hemmed around with exceptions that were apparently designed to frustrate the removal of actions like the one that Morris brought. Section 12 of the 1789 Act provided in relevant part:

[I]f a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, . . . it shall then be the duty of the state court to accept the surety, and proceed no further in the cause¹⁰⁷

Section 12 thus provided for the removal of actions only by out-of-state citizen defendants sued by North Carolinians in a North Carolina state court; it did not apply to actions like the one that Morris brought as a plaintiff in equity, in the North Carolina state courts.¹⁰⁸ Moreover, Section 12 required the defendant to initiate removal by filing a petition with the state court at the outset of the proceeding and thus appeared to foreclose removal of pending actions.¹⁰⁹ Morris could not rely on these elements of the statute to perfect removal.

Nor was it obvious that Morris could shift the matter to federal court by discontinuing (or nonsuiting) his state action and bringing a new action in federal circuit court. To be sure, Section 11 of the Judiciary Act conferred on circuit courts “original cognizance, concurrent with the courts

¹⁰⁶ See § 11, 1 Stat. at 79–80 (permitting removal only at the request of defendants, for litigation “commenced” in state court after the effective date of the statute and brought by a citizen of the state “in which the suit is brought” against an alien or citizen of another state).

Such a phrasing of removal jurisdiction was apparently designed to preserve state court control over all debtor–creditor litigation then pending in the state courts, even where the dispute in question was (like the Morris case) between diverse citizens and a potential subject of federal judicial power. Of particular concern at the time were existing state cases involving British creditor–plaintiffs. By limiting removal to defendants only, Section 12 ensured that British plaintiffs with debt actions pending in state court could not suddenly alight to friendlier federal forums. See Wythe Holt, *John Blair: “A Safe and Conscientious Judge,”* in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 155, 189 n.25 (Scott Douglas Gerber ed., 1998); see also *infra* note 107 and accompanying text.

¹⁰⁷ § 12, 1 Stat. at 79. By limiting the right of removal to defendants only, Senator Oliver Ellsworth—chief drafter of the 1789 Act—made a “shrewd concession to Anti-Federalists.” Holt, *supra* note 106, at 189 n.25. Section 12 did, however, allow removal by either plaintiff or defendant where the parties were citizens of the same state claiming land under grants from different states. § 12, 1 Stat. at 80.

¹⁰⁸ See Holt & Perry, *supra* note 5, at 101 (explaining that Morris’s “case did not meet the conditions for removal set out in Section 12 of the Judiciary Act because . . . Morris was the plaintiff rather than defendant”).

¹⁰⁹ See § 12, 1 Stat. at 79.

of the several States,” of suits in law and equity between citizens from different states.¹¹⁰ But unlike courts of law, which recognized an essentially absolute right in the plaintiff to dismiss voluntarily before judgment,¹¹¹ courts of equity would review applications to dismiss a bill and would deny leave to dismiss on a showing of prejudice to the defendant.¹¹² Thus, in North Carolina and elsewhere, once a proceeding had reached a certain level of maturity (comparable to what we might describe today as “proceedings of substance on the merits”¹¹³), the plaintiff could not dismiss as of right.¹¹⁴ As we will see, the North Carolina state court raised this relative maturity as an argument against removal through certiorari, noting that several “decretal” orders had been entered.¹¹⁵ In any event, it appears that a voluntary dismissal would have occasioned the imposition of a substantial award of costs that Morris may have preferred to avoid.¹¹⁶

¹¹⁰ § 11, 1 Stat. at 78.

¹¹¹ For the common law rule, permitting the plaintiff to dismiss without prejudice at any time before judgment (nonsuit), see *O’Mealey v. Wilson*, (1808) 170 Eng. Rep. 1029, 1029; 1 Camp. 482, 482. The post-verdict right of dismissal was abolished by statute. See *Price v. Parker*, (1795) 91 Eng. Rep. 163, 163 (K.B.); 1 Salk. 178, 178 (refusing to permit plaintiff to file a nonsuit after return of a general verdict); *Keat v. Barker*, (1794) 87 Eng. Rep. 612, 612 (K.B.); 5 Mod. 208, 208 (same); Neil C. Head, *The History and Development of Nonsuit*, 27 W. VA. L.Q. 20, 23–24 (1920).

¹¹² This longstanding rule of English equity was carried into American practice and eventually incorporated into the Federal Rules of Civil Procedure, which in Rule 41 qualified the right of the plaintiff to dismiss the action voluntarily. See *Booth v. Leycester*, (1836) 48 Eng. Rep. 301, 301; 1 Keen 247, 247 (refusing to permit plaintiff to dismiss bill after matter had been set for a hearing that was likely to have led to a decree). For a restatement of the English rule, see *Bronx Brass Foundry, Inc. v. Irving Trust Co.*, 297 U.S. 230, 232 (1936), which confirms that a court of equity may refuse to permit a plaintiff to discontinue the action upon a showing of prejudice to the defendants, and *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924), which quotes *Pullman’s Palace Car Co. v. Central Transportation Co.*, 171 U.S. 138, 146 (1898), to explain that prejudice to the defendant was the ordinary basis on which a court of equity would decline to permit the plaintiff “to dismiss his bill without prejudice at his own costs.” See generally Head, *supra* note 111 (discussing the history and development of the common law nonsuit).

¹¹³ See *Hicks v. Miranda*, 422 U.S. 332, 349 (1975) (requiring federal courts to apply the doctrine of equitable restraint so long as the state proceeding was initiated before the federal court had conducted “proceedings of substance on the merits”). Notably, the Supreme Court did not apparently draw on equity practice in formulating its rule.

¹¹⁴ See 89 A.L.R. 45 (1934) (“[T]he [North Carolina] rule in cases of a purely equitable nature is that the plaintiff may submit to a judgment of nonsuit at any time before any decree or decretal order has been made under which rights of the defendant have attached in the course of the action which he has a right to have settled and concluded therein.”). Ostensibly, the rule guarded against abuse of the voluntary nonsuit mechanism by plaintiffs.

¹¹⁵ See *infra* note 166 and accompanying text.

¹¹⁶ See Nelson, *Politicizing the Courts*, *supra* note 67, at 2189 (noting that “the [North Carolina] county courts were hostile to outsiders, as evidenced by a court rule that ‘if any attorney’ brought ‘suit . . . in behalf of one out of the county such attorney shall be liable to pay the fees’ in the event of ‘a nonsuit . . . [.] verdict against the plaintiff,’ or default in prosecution” (citing Order re Suits by Nonresidents, Rowan County Court (July 15, 1755), in 1 ABSTRACTS OF THE MINUTES OF THE COURT OF PLEAS AND QUARTER SESSIONS, ROWAN COUNTY, NORTH CAROLINA 1753–1762, at 40 (Jo White Linn ed., 1977))).

For Morris, then, certiorari provided an appealing alternative. The writ had originated at common law to enable either party to remove a pending action—often but not invariably a criminal proceeding—from an inferior to a superior court.¹¹⁷ (Today, we think of the Supreme Court’s statutory certiorari authority as a form of appellate jurisdiction, but common law certiorari could operate to effect the removal of an action for trial or other disposition on the merits in a superior court.)¹¹⁸ As for legal authority, Section 14 of the Judiciary Act of 1789 had empowered the federal courts

¹¹⁷ On the origins of the common law writ of certiorari, see Weintraub, *supra* note 13, for a description of the early use of certiorari in Tudor England as a writ to effect the removal of both civil and criminal proceedings for further proceedings in a superior court. Weintraub explains that the writ later evolved into an all-purpose tool for judicial review of administrative action. *Id.* at 505–16.

¹¹⁸ For the elements of common law certiorari, see 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW *349–59 (6th ed. 1793), which discusses the removal of indictments into King’s Bench for trial and the requirement that bond be posted to ensure a relatively speedy trial after removal, and 2 AN ABRIDGMENT OF THE MODERN DETERMINATIONS IN THE COURTS OF LAW AND EQUITY: SUPPLEMENT TO VINER’S ABRIDGMENT 1–30 (London, A. Strahan 1799) [hereinafter AN ABRIDGMENT OF THE MODERN DETERMINATIONS], which notes the power of King’s Bench, by virtue of its general superintendency over inferior tribunals, to remove any criminal action by certiorari. Among other things, these authorities make clear that certiorari affects removal of the action for proceedings in a superior court, that it applies to both criminal and civil proceedings, *id.* at 11 n.22 (citing *Daniel v. Phillips*, (1792) 100 Eng. Rep. 1141 (K.B.); 4 T.R. 500), that the plaintiff in a civil matter can remove his own action by certiorari, *id.* at 23–24 (citing *Keeling v. Elliott*, (1790) 94 Eng. Rep. 974; *Trinity* 28 Geo. 2; *Barnes* 399), and that a party can attempt to show cause for removal by pointing to prejudice on the part of a local court, *id.* at 9, 11, 17 (citing *Daniel*, 100 Eng. Rep. 1141; *Rex v. Cowle*, (1759) 97 Eng. 587 (K.B.); 2 Burr. 834, 859; *Williams v. Thomas* (1782), East. 22 Geo. 3; *Doug.* 751 n.2). Viner and Bacon also agree as to the proper remedy for disobedience: an attachment directed at the judges of the inferior court. See BACON, *supra*, at 359; AN ABRIDGMENT OF THE MODERN DETERMINATIONS, *supra*, at 17 (describing motion for attachment against lower court officer for noncompliance with writ).

One finds some disagreement in the cases on the question of what sort of showing must be made to secure a certiorari. In some criminal matters, the writ issued as a matter of course. But in other matters, the superior court required a showing of cause and notice to the court below. See AN ABRIDGMENT OF THE MODERN DETERMINATIONS, *supra*, at 17 (citing *Williams*, *Doug.* 751, in which Lord Mansfield ruled that the writ did not issue as a matter of course); *id.* at 18 (citing *Rex v. Nicholls* (1785), Hil. 25 Geo. 3; 5 T.R. 280, in which the superior court quashed the writ of certiorari on the ground that no notice had been given to the justices before the motion for a rule to show cause). Viner also reports that a certiorari “ought not to be granted in vacation, but in open court, and upon a ground shewn.” *Id.* at 9 (citing *Rex v. Eaton*, (1787) 100 Eng. Rep. 49; 2 T.R. 89). Even if sufficient cause were shown at the outset, the opposing party might move to quash or supersede the certiorari. *Id.* at 17–18 (citing *Rex*, 5 T.R. 280; *Williams*, *Doug.* 751). One can probably best characterize the practice as one in which the party moving or petitioning for certiorari makes an initial showing and secures issuance of the writ if the superior court agrees that the petition makes out a plausible claim. The writ would operate as a show-cause order, directing a removal of the proceedings in the absence of further proceedings, but inviting the opposing party to move to quash if the initial writ issued in error. For suggestions along these lines, albeit in the context of the practice of King’s Bench, see Kevin Costello, *The Writ of Certiorari and Review of Summary Criminal Convictions, 1660–1790*, at 7–8 (Nov. 6, 2009) (unpublished manuscript) (on file with authors), which describes a process in which the party seeking certiorari first notified the justices of the lower court, then filed a petition with King’s Bench along with supporting affidavits to secure removal, then served the writ on the lower court, and then proceeded in the superior court following the certification of the record into that court.

to issue “all . . . writs” and thus seemingly included the writ of certiorari.¹¹⁹ But Section 14 was qualified too: it applied only to writs “necessary for the exercise of [the federal courts’] respective jurisdictions” and allowed courts to issue such writs only in accordance with “the principles and usages of law,” an apparent reference to the rules of common law inherited from England.¹²⁰ The statute thus implied that the writs in question could not operate to confer jurisdiction on a federal court but could issue only to secure or effectuate a jurisdiction elsewhere conferred. (Eventually, the Supreme Court confirmed this understanding, holding some two centuries later that the All Writs Act did not provide a freestanding source of removal authority.)¹²¹

One could thus question the power of the federal circuit court to proceed via certiorari on at least two grounds. First, to the extent that Congress had foreclosed the exercise of removal jurisdiction over pending cases like *Morris v. Allen*, the use of certiorari to effect removal would appear to violate the statutory requirement that the writ issue only where necessary to effectuate the court’s stated jurisdiction. Moreover, to the extent that the writ operated at common law to effect removal of proceedings from an inferior to a superior court, one can question the power of a lower federal court to issue the writ to a state court. State courts were creatures of state governments, needless to say, and were not made inferior to the federal courts, except to the extent that the Judiciary Act subjected their decisions to review in the Supreme Court. Nor did the state court’s power to hear the *Morris* case depend on congressional authorization; the state’s jurisdiction over such disputes predated the Constitution as part of what Alexander Hamilton and others termed the state’s primitive or preexisting jurisdiction.¹²²

¹¹⁹ Judiciary Act of 1789, Ch. 20, § 14, 1 Stat. 73, 81–82.

¹²⁰ *Id.*

¹²¹ See *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 34 (2002) (“Section 1441[, the removal statute,] requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement.”). Today’s All Writs Act, 28 U.S.C. § 1651 (2006), is “the lineal successor” to the all writs powers conferred under Section 14 of the Judiciary Act of 1789. James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1466–67 (2000).

¹²² For an account of Hamilton’s conception of the primitive or preexisting jurisdiction of the state courts, and his notion that such jurisdiction would remain intact following the creation of the federal courts under Article III, see James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. Rev. 191, 216–20 (2007), which describes Hamilton’s argument in Federalist No. 82 about the presumption in favor of concurrent state and federal jurisdiction over diversity proceedings, among others. In contrast to diversity proceedings, one can argue that the power of the state courts to hear federal question cases depends on the willingness of Congress to assign those matters to the states, thus providing a basis for considering the state courts inferior to their federal counterparts. *Id.* at 216 (quoting Hamilton’s comment that assignment of federal jurisdiction to state courts would constitute them as inferior tribunals within the meaning of Article I of the Constitution).

One might try to answer these doubts in various ways. If one were to regard federal jurisdiction as mandatorily vested in federal courts, then one might argue that the All Writs Act served to implement the “jurisdiction” conferred in the Constitution, rather than that conferred by statute.¹²³ A more promising approach would be to argue that the use of certiorari serves to implement the provision in Section 11 that gives the federal circuit courts original cognizance, concurrent with the state courts, of diversity matters arising in law or equity.¹²⁴ On a generous interpretation, and leaving aside the implications of Section 12 removal limits, one might consider certiorari as serving to effectuate the Section 11 grant of original and concurrent jurisdiction over matters brought by out-of-staters like Morris against locals from North Carolina. Certainly, Morris’s conspiracy claims against a group of state insiders would appear to implicate the bias-

¹²³ The Supreme Court’s original jurisdiction has been widely described as mandatory and self-executing. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1568 (1986) (“For Attorney General Randolph and all of the [J]ustices except Iredell, federal jurisdiction was mandatory or at least self-executing; it was neither dependent upon congressional grant nor subject to congressional curtailment.”); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1289 n.141 (1989) (“I do not regard it as established that, in fact, the Supreme Court’s original jurisdiction was intended by the framers to be self-executing. I do regard it as relatively clear, however, that four of the five [J]ustices in *Chisholm* might reasonably have been thought by the adopters of the Eleventh Amendment to have held that opinion.”).

The All Writs Act might be regarded as authority for the judicial recognition of writs to carry the Court’s original jurisdiction into effect, as Justice Iredell recognized in his dissent in *Chisholm*. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432–34 (1793) (Iredell, J., dissenting) (“I conceive, that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only. . . . The [All Writs Act] . . . provides in the following words: ‘All the before mentioned Courts of the United States, shall have power to issue writs of feire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.’ These words refer as well to the Supreme Court as to the other Courts of the United States.” (emphasis omitted)). For an argument that the All Writs Act also implements the Court’s constitutional grant of appellate jurisdiction, see Pfander, *supra* note 121, at 1497–98, which observes that the Supreme Court, but not the lower federal courts, receives its jurisdiction directly from the Constitution.

Scholars have, to be sure, occasionally argued that some portion of the jurisdiction of the *lower federal courts* might also be regarded as constitutionally compelled. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). But the argument has yet to carry the day. Cf. John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997) (defending the “traditional view that Congress’s authority [to limit the federal courts’ jurisdiction] is substantial”). But whatever the merits of the argument for mandatory vesting, few would contend that it applies to jurisdiction over disputes based on the citizenship of the parties. See Amar, *supra*, at 209–10 (distinguishing between mandatory jurisdiction over federal question cases and permissive jurisdiction over diverse party controversies).

¹²⁴ See § 11, 1 Stat. at 78–79.

prevention rationale most often associated with the exercise of diversity jurisdiction.¹²⁵

Unfortunately, the historical record does not reveal on what basis the U.S. Circuit Court for the District of North Carolina issued the certiorari to the North Carolina state court. The actual certiorari itself does not appear to exist¹²⁶ and the scant surviving correspondence provides little evidence of the Justices' thinking.¹²⁷ We do know that three Supreme Court Justices, James Wilson, John Rutledge, and John Blair, acting in their capacity as circuit judges, signed the writ of certiorari in the fall of 1790.¹²⁸ That in itself seems odd; federal law provided for circuit courts to meet at specified times, convened by *two* circuit-riding Supreme Court Justices and one district judge.¹²⁹ The fact that three Justices and no district judge signed the papers tends to suggest that the certiorari was drafted by Morris's attorney and presented to the Justices out of court for their signatures.

Correspondence from Morris's attorney, Richard Harison, confirms this supposition.¹³⁰ Harison made it clear that he had approached Justice Rutledge out of court in August or September 1790 to secure both a certiorari and a writ of injunction staying the state court proceedings.¹³¹

¹²⁵ See *supra* note 70 and accompanying text.

¹²⁶ Based on Morris's correspondence discussing the planned removal to federal court in September 1790, see Letter from Richard Nichols Harison, U.S. Attorney for the District of N.Y., to Robert Morris (Sept. 7, 1790) [hereinafter Harison Letter 1], in 2 DHSC, *supra* note 9, at 87, 87–88, and the reaction of North Carolina Superior Court judges in November 1790, see *infra* note 166 and accompanying text, we estimate that the certiorari issued during the fall of 1790. See also Holt & Perry, *supra* note 5, at 103, 117 n.43.

¹²⁷ We do have some evidence that the certiorari may have been issued on the fly, so to speak, without careful consideration of opposing arguments. See *infra* notes 128–30 and accompanying text. Moreover, we have evidence that at least one of the Justices who signed the certiorari—Justice Blair—came to entertain substantial doubts about its propriety. He wrote to Justice Wilson, fellow signatory of the certiorari:

I have even doubted whether a certiorari ought ever to issue, in any case, from the courts of the U.S. to those of a State; & whether that, or any other writ, ought ever to be sent for arresting the progress of a cause, of which a State-court has once had possession. . . . But I have never known a Certiorari to issue, except to inferior, for calling up a record before superior judges, who have confessed a right to control[] their proceedings.

Letter from John Blair, Assoc. Justice of the Supreme Court, to James Wilson, Assoc. Justice of the Supreme Court (Feb. 2, 1791), in 2 DHSC, *supra* note 9, at 126, 128; see also *infra* note 128 and accompanying text.

¹²⁸ See 2 DHSC, *supra* note 9, at 126, 130 n.1; see also *supra* note 126.

¹²⁹ See *supra* note 103 and accompanying text.

¹³⁰ See Harison Letter 1, *supra* note 126, at 87–88; Letter from Richard Nichols Harison to Robert Morris (Sept. 24, 1790) [hereinafter Harison Letter 2], in 2 DHSC, *supra* note 9, at 95, 98 (concluding that the best course was to transmit the certiorari and associated papers to Morris, where he could obtain signatures from Justices Wilson and Rutledge “who will be in Philadelphia in a few Days”). Harison explained that this course was necessitated by the view of the Justices that “two of them should concur in granting an Injunction when the Court was not sitting.” *Id.* at 98.

¹³¹ See Harison Letter 1, *supra* note 126, at 87 (footnote omitted) (“Judge Rutledge is now absent upon a Tour to the Eastward, but upon his Return I shall use every Effort to get your Cause into the

Justice Rutledge was reportedly willing to grant both writs, but ostensibly demurred on the basis that the Judiciary Act extended the all writs power to the “Court” and could not be read to empower a single Justice to act for the court in granting writs.¹³² Other pieces of the historical record confirm that the signatures were obtained out of court. During the fall of 1790, Justices Rutledge and Iredell rode the Southern Circuit (North Carolina, South Carolina, and Georgia).¹³³ Justices Wilson and Blair were then riding the Middle Circuit (New Jersey, Delaware, Pennsylvania, Maryland, and Virginia).¹³⁴ It seems likely that the signatures of Justices Wilson and Blair and perhaps even Rutledge were obtained while they were riding their circuits, rather than in open court in North Carolina.¹³⁵

Building on Justice Rutledge’s well-founded concern with proceedings occurring out of court,¹³⁶ one can certainly question the procedural propriety of the writ’s issuance on the basis of the ambulatory fiat of three Justices. For starters, three Justices do not make a circuit court any more than does a single Justice. Congress had provided for the circuit courts to

federal Court & to procure that Justice for the concerned which may be expected from an impartial Tribunal.”); Holt & Perry, *supra* note 5, at 102–03. Although ex parte injunctions were certainly not the norm, one early treatise suggests that “in pressing cases,” an injunction would “be granted upon *petition and affidavit* before the bill filed” and that this was “often done in vacation.” 2 MADDOCK, *supra* note 78, at *174; *see id.* at *177–78 (explaining that injunctions normally issued only after the bill was filed and served on the defendant).

¹³² See Harison Letter 2, *supra* note 130, at 95, 98.

¹³³ See *Judicial Administration and Organization—Organization of the Southern Circuit*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/admin_02_14.html (last visited Dec. 29, 2013); *U.S. Circuit Courts for the Districts of North Carolina*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetCourt?cid=249&order=c&ctype=cc&instate=nc> (last visited Dec. 29, 2013).

¹³⁴ See *Judicial Administration and Organization—Organization of the Middle Circuit*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/admin_02_13.html (last visited Dec. 29, 2013); *U.S. Circuit Court for the District of New Jersey*, FED. JUD. CENTER, <http://www.fjc.gov/servlet/nGetCourt?cid=248&order=c&ctype=cc&instate=nj> (last visited Dec. 29, 2013).

¹³⁵ This is consistent with correspondence from Morris’s attorney, Richard Harison. See *supra* notes 130–32 and accompanying text. Notably, Harison also served as the United States attorney for the district of New York and would have doubtless attended the August 1790 Term of the Supreme Court, held in New York City. See Harison Letter 1, *supra* note 126, at 87; *The Court as an Institution*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/institution.aspx> (last visited Dec. 29, 2013) (describing the Court’s first session). Although Harison could have easily approached the three Justices, in town for the Court’s Term, to secure their signatures, it appears that he did not obtain their signatures until sometime later. He reported in September 1790 that he was still hoping to obtain Justice Rutledge’s fiat when he returned from his tour of the Eastern circuit. See Harison Letter 1, *supra* note 126. Only after Harison realized that Justice Rutledge would not alone sign the writ did he decide to approach more Justices, well after the August Term had ended and the Justices had dispersed on their circuits. See Harison Letter 2, *supra* note 130.

¹³⁶ As noted above, Section 14 conferred the power to issue all writs necessary to effectuate jurisdiction on the courts themselves, rather than the judges who staff those courts. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82; *supra* notes 119–20 and accompanying text. The explicit exception, granting power to circuit judges to grant writs of habeas corpus out of court, tends to prove the rule. See Mayton, *supra* note 5, at 334.

sit at specified times and places, to ensure due consideration of the issues on the basis of open proceedings in which all could participate. Justices who did judicial business out of court would undermine this commitment to transparency and deliberation. One might also criticize the out-of-court issuance of the writ on the additional ground that the opposing party was denied notice and an opportunity to be heard on the points of law presented by the application.¹³⁷ But practice on the writ of certiorari may have entailed *ex parte* issuance of the writ on a petition with supporting papers from the moving party, followed by service of the writ on the inferior court and opposing parties and further proceedings before the superior court.¹³⁸ Perhaps then one can understand the issuance of the certiorari as a rule to show cause aimed at initiating removal and inviting further proceedings as needed to determine the removal's propriety.¹³⁹

One final procedural wrinkle deserves separate discussion. Correspondence from Morris's attorney makes clear that he meant to seek both a writ of certiorari to effect the removal of the action, and a writ of injunction.¹⁴⁰ Perhaps the injunction was meant to stay the state court proceeding and was to have issued as a writ ancillary to the certiorari, but perhaps not. At common law, certiorari itself operated as a mandatory writ, compelling the inferior court to certify the record to a higher court and to

¹³⁷ As a further complicating factor, one of the Justices assigned to the Southern Circuit, James Iredell, was a party to the *Morris* litigation and could not participate in any decision about the issuance of the certiorari. One might suppose that the two remaining circuit judges (Justice Rutledge and District Court Judge John Stokes) could have conducted circuit business even after Justice Iredell recused himself. But Stokes died in 1790, shortly after receiving his nomination to the bench, and never sat with the court. See 2 DHSC, *supra* note 9, at 107. Perhaps Morris's attorney anticipated the inability of the Southern Circuit to grant effective relief and approached the Justices of the Middle Circuit in order to avoid having to wait until spring 1791 to secure the certiorari.

¹³⁸ On the two-step process common to applications for such prerogative writs as habeas corpus and mandamus, see James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 919–20 & n.71 (1997), which describes the initial issuance of the writ in the nature of an order to show cause. This served to start the proceeding, invited a reply from the respondent, and led to the issuance of the mandatory writ. On the extension of this familiar two-step process to certiorari, see FORREST G. FERRIS & FORREST G. FERRIS, JR., *THE LAW OF EXTRAORDINARY LEGAL REMEDIES* §§ 176–80, at 201–06 (1926); GEORGE E. HARRIS, *A TREATISE ON THE LAW OF CERTIORARI AT COMMON LAW AND UNDER THE STATUTES* (New York, Lawyers' Coop. Publ'g Co. 1893); and Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 529 (1923), which reports that although certiorari was available as a matter of right to remove criminal matters, it came to be regarded as a prerogative writ to be issued only in the exercise of judicial discretion based on a showing of cause.

The *ex parte* basis on which the Justices apparently proceeded may also help to explain why they issued the certiorari, but did not issue the writ of injunction that Morris's attorney, Richard Harison, had also requested. See *infra* note 145 and accompanying text. Injunctive relief would bind the parties, making *ex parte* proceedings especially problematic.

¹³⁹ Certainly Justice Iredell was to experience the *Morris* certiorari less as a one-off event than as a matter of ongoing concern that was to remain alive on the docket of the North Carolina circuit for several months to come. See *infra* notes 266–68 and accompanying text.

¹⁴⁰ See Harison Letter 2, *supra* note 130; see also *supra* note 138.

proceed no further in the action.¹⁴¹ Like other prerogative writs, certiorari was enforceable through a body attachment (contempt) directed at the judges of the inferior court.¹⁴² In other words, the writ of certiorari, if issued, would itself effect a stay of the lower court proceeding and would threaten the judges with contempt if they continued proceedings in the case.

Although Morris may have asked to stay the equity proceeding that he was proposing to remove from state court, it seems to us likely that the application for an injunction was meant to stay the enforcement of the state court *Hancock* judgment, which had awarded damages to Allen and his associates. It was the *Hancock* common law judgment that Morris was seeking to enjoin in his North Carolina equity proceeding. The purpose of the application for certiorari was to shift the forum for equitable relitigation of the *Hancock* judgment from state to federal court. The Justices who signed the certiorari may well have concluded that it was premature to issue a stay of the *Hancock* judgment through writ of injunction. Such an order would have been directed not to the North Carolina court of equity or its judges but to the parties to the *Hancock* proceeding, in keeping with equity's in personam operation.¹⁴³ We therefore see a fundamental difference between the writ of certiorari, which operated to initiate the removal and was addressed to the state court, and the writ of injunction, which would have run against the parties and would have provided the

¹⁴¹ By definition, a certiorari is “[a]n extraordinary writ issued by an appellate court, at its discretion, directing a *lower* court to deliver the record in the case for review.” BLACK’S LAW DICTIONARY 258 (9th ed. 2009) (emphasis added). The Court of Exchequer, for example, required that bills praying for writs of certiorari “state the proceedings which have been had in the *inferior* court” and “the *incompetency* of that court.” 1 DAVID BURTON FOWLER, THE PRACTICE OF THE COURT OF EXCHEQUER, UPON PROCEEDINGS IN EQUITY 44 (London, T. Burton 1795) (emphasis added). The King’s Bench claimed the power to issue writs to all inferior jurisdictions as part of its general supervisory power. 1 BACON, *supra* note 118, at 350 (“The Court of *King’s Bench* has a Superintendency over all Courts of an Inferior Criminal Jurisdiction, and may by the Plenitude of its Power award a *Certiorari*, to have any Indictment removed and brought before itself. . . .”). As described in an early writ formulary documenting mid-nineteenth-century practice in North Carolina, the writ itself would routinely “command” removal of the case to the superior issuing court. See WILLIAM EATON, JR., BOOK OF PRACTICAL FORMS, WITH EXPLANATORY NOTES AND REFERENCES TO AUTHORITIES 219 (Philadelphia, C. Sherman 1854) (“We . . . command you that the transcript of the proceedings in the said cause, and of the record of the said judgment, . . . you send to the honorable the Judge of the Superior Court of Law . . . so that we may have them before the Judge of the said Superior Court . . . and further do thereupon what of right we shall see fit to be done.”).

¹⁴² See 1 BACON, *supra* note 118, at 359 (“AFTER the *Certiorari* delivered, if the Inferior Court proceeds, where by Law it ought not, it is a Contempt, for which the Court will grant an Attachment.”).

¹⁴³ 3 STORY, *supra* note 75, § 2041, at 590 (footnote omitted) (“Equity never attempts to act upon the Court of Law itself, and does not claim any supervisory power over such courts or the proceedings therein. It acts solely upon the party”); 4 POMEROY, *supra* note 75, § 1360, at 974 (“Injunction is the remedy which, above all others, necessarily operates *in personam*.”). Contrast the writs of certiorari and prohibition, which operated not on the parties but on the inferior court itself. See BISPHAM, *supra* note 73, § 381, at 333.

procedural context in which the federal court would assess (and relitigate) the equities of the *Hancock* judgment.

Precisely such a distinction seems to have informed Justice Rutledge's reported reaction to Morris's out-of-court application for writs of certiorari and injunction. Justice Rutledge reportedly said that he had "no Objection to the Propriety of removing the Suit, or to granting the Injunction as far as the Merits of the Cause were concerned."¹⁴⁴ Justice Rutledge thus appears to have distinguished the writ of certiorari, which would serve to remove the action, from the writ of injunction, which could call for an assessment of the merits. The other Justices drew a similar distinction, apparently; the limited evidence we have suggests that the Justices agreed to sign Morris's writ of certiorari but not the writ of injunction.¹⁴⁵

The *Morris* certiorari controversy thus raised two questions. First, and most obviously, it presented the question whether a writ of certiorari could properly issue from a federal circuit to a state court (and whether the state court was obliged to comply). It was that question that attracted most of the attention in the press.¹⁴⁶ Second, and less obviously but perhaps of more far-reaching significance, the *Morris* case raised the possibility that parties could invoke federal diversity jurisdiction (either originally or by removal) for the purpose of revisiting a dispute that had been previously settled in a common law action in state court.

D. Interlude: Federal Relitigation of State Judgments

Before we move to the final phase of the *Morris* saga, the early crisis in state–federal judicial relations that erupted in the wake of his well-publicized certiorari, we pause to observe the legal backdrop against which Morris formed his litigation strategy—a strategy that may seem unusual to modern eyes. Recall that Morris was seeking relief from an adverse state court judgment at law—the *Hancock* judgment—by first resorting to the state court (as both a defendant–appellant at law and a plaintiff in equity) and then seeking to remove his equitable action to the federal courts through the mechanism of certiorari. One might suppose that the obligation of the federal courts to accord full faith and credit to state court judgments would have precluded any federal equitable relitigation of final state court judgments like the *Hancock* judgment. But such an understanding rests

¹⁴⁴ See Harison Letter 2, *supra* note 130, at 95.

¹⁴⁵ Although Morris's attorney, Richard Harison, had requested both writs, *see* Harison Letter 2, *supra* note 130 ("I am persuaded that Mr. Rutledge will join in granting the proper Writs, the most material of which I think is the Injunction[.] The Certiorari might be deferred till the Meeting of the Court, if it is at all necessary, which I very much doubt[.]"), there is no evidence that an injunction ever issued, *see* Holt & Perry, *supra* note 5, at 103; *see also supra* note 138. Such an approach makes sense if one regards the certiorari as the first step in perfecting removal, directed to the "lower" court, and further understands the injunction as a decree that would issue to the parties after service of process was completed in the federal court.

¹⁴⁶ *See infra* Part II.E.2 (discussing national reaction to the *Morris* certiorari).

upon modern notions of claim preclusion— notions informed by the twentieth-century merger of actions at law and equity into a single civil action in which the parties are expected to resolve all related issues.¹⁴⁷ In the eighteenth century, by contrast, law and equity remained quite disjoint; a judgment at law did not bar equitable relitigation of the same claim, as the colonial history of North Carolina makes clear.¹⁴⁸ So long as state courts of equity were free to relitigate law-court judgments from the same state,¹⁴⁹ nothing in the pre-AIA federal law would prevent similar relitigation in a federal court.

In reaching this conclusion we consider both the Constitution’s Full Faith and Credit Clause and the full faith and credit legislation that Congress adopted in May 1790 (1790 Act).¹⁵⁰ The Constitution governs only the respect owed in “each state” to the judgments, records, and judicial proceedings of “other state[s].”¹⁵¹ *Morris* did not involve proceedings of another state. In contrast to the constitutional provision, the 1790 Act imposed on “every court within the United States” the obligation to give “such faith and credit” to the duly authenticated “records and judicial proceedings” as they have by “law or usage” in the courts from which the records were taken.¹⁵² This statute thus imposed a faith and credit obligation on the federal circuit court for the District of North Carolina in respect of the records and judicial proceedings of the North Carolina state courts—something that the Constitution had simply failed to address.¹⁵³

Scholars debate the degree to which the 1790 Act operates merely as an evidentiary rule for judgments or prescribes their substantive effect.¹⁵⁴

¹⁴⁷ See *supra* note 73 and accompanying text. For an account of the merger of law and equity, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

¹⁴⁸ See *supra* notes 83–86 and accompanying text.

¹⁴⁹ See *supra* Part II.B.

¹⁵⁰ See Act of May 26, 1790, ch. 11, 1 Stat. 122.

¹⁵¹ U.S. CONST. art. IV, § 1. The *Hancock* judgment was not being attacked in cross-border litigation; *Morris* was challenging the equities of the judgment in North Carolina.

¹⁵² We agree with those who understand the statutory provision to extend the faith and credit obligation to federal courts. One can certainly argue that the federal courts were not bound by the Constitution’s Full Faith and Credit Clause, but Congress presumably has ample power under the Necessary and Proper Clause to impose a “same faith and credit” obligation on federal courts. Act of May 26, 1790, 1 Stat. at 122.

¹⁵³ This omission makes sense in light of Article III’s agnosticism on the subject of lower federal courts.

¹⁵⁴ See Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEMPHIS ST. U. L. REV. 1, 39–56 (1981) (discussing the dispute over the meaning of the 1790 Act); compare, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 295 (1992) (“I am inclined to believe that the Full Faith and Credit Act specified the effects of state statutes from the beginning.”), with Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206–07 (2009) (arguing that the 1790 Act “address[ed] the authentication of state judgments while leaving their substantive effect unchanged”).

But whatever one's view of that question, the Act can scarcely have been understood to have foreclosed federal equitable relitigation of state court judgments at law, at least so long as relitigation was open in state courts of equity. The 1790 Act required at most that the prior judgment be given the *same* effect that it would have had in the court that entered the judgment. That was the lesson of *Mills v. Duryee*, which held that state courts called upon to recognize a prior judgment must "inquire in every case what is the effect of a judgment in the state where it is rendered" and give the judgment that same effect.¹⁵⁵ Justice Wilson, riding circuit in 1794, adopted the same approach in *Armstrong v. Carson's Executor*.¹⁵⁶ Armstrong, who had won a judgment against Carson's executor in the New Jersey Supreme Court, brought an action in the Pennsylvania federal circuit court to recover the debt.¹⁵⁷ The defendant offered a plea that would not have been accepted in New Jersey state court, had the action been brought there.¹⁵⁸ Justice Wilson reasoned that "[i]f the plea would be bad in the Courts of *New-Jersey*, it is bad here" because the 1790 Act "declar[es] in direct terms . . . that the record shall have the same effect in this Court . . . as in the Court from which it was taken."¹⁵⁹

We have no evidence that the 1790 Act, which took effect some months earlier, was discussed in connection with the issuance of the *Morris* certiorari. But the mode of reasoning that Justice Wilson used in *Armstrong* (and that the Court later adopted in *Mills*¹⁶⁰) would have almost certainly allowed federal courts to issue injunctions restraining state court judgments: to the extent that state *A*'s courts of equity would grant injunctions to restrain state *A*'s judgments at law, so too could federal court *B* using its equitable powers enjoin state *A*'s law-court judgment. We know that the state court of equity in North Carolina was free to restrain the enforcement of Allen's law-court judgment in *Hancock*. A federal court, adopting the same-effect test announced in *Armstrong* and *Mills*, would therefore enjoy similar freedom to use its equitable powers to enjoin enforcement of the *Hancock* judgment. The *Morris* certiorari thus served to underscore the threat to state court judgments posed by federal equitable relitigation—a threat that the 1790 Act was not designed to address.¹⁶¹

¹⁵⁵ 11 U.S. (7 Cranch) 481, 484 (1813).

¹⁵⁶ 2 U.S. (2 Dall.) 302 (C.C.D. Pa. 1794).

¹⁵⁷ *Id.* at 302.

¹⁵⁸ *Id.* at 303.

¹⁵⁹ *Id.*

¹⁶⁰ See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1647 (2009) (footnote omitted) ("What prevailed in [*Mills*] . . . was the view propounded at length by Justice Washington at circuit, and originally by the late Justice Wilson [in *Armstrong*].").

¹⁶¹ Notably, Justice Wilson's interpretation of the 1790 Act (as one prescribing the substantive effects to be granted sister-state judgments) did not represent the majority view at the time. See Sachs, *supra* note 154, at 1242–46 (discussing early decisions that did not embrace the *Armstrong* doctrine).

E. Phase Four: The Certiorari and Federal–State Judicial Relations

Whatever the propriety of the writ’s issuance out of court and in the teeth of statutory limits on removal jurisdiction, the historical record suggests that the federal marshal for North Carolina dutifully served the *Morris* certiorari on the state court.¹⁶² To the North Carolina Antifederalists who had long opposed constitutional ratification on the basis that the federal judiciary would “absorb and destroy” the state courts, the *Morris* certiorari was surely a confirmation of their worst fears.¹⁶³ What ensued was an important early clash between the federal and state judiciaries.¹⁶⁴

1. The Fallout in North Carolina.—Angered by the implication that their courts were inferior to a federal circuit court and that their proceedings were subject to midstream removal, all three judges of the North Carolina Superior Court refused to obey the writ of certiorari.¹⁶⁵ The judges promptly issued a “declaration,” announcing the court’s intention to defy the writ and outlining their reasoning:

First, Because that being a Court of original, general, Supreme and unlimited Jurisdiction, they apprehended that as such a Court they were not amenable to the Authority of any other Judiciary; and consequently that they did not conceive, that the Suits and Proceedings depending before them in their judicial Capacity, were subject to be called or taken from the said Court of Equity by the mandatory Writ of any other Court or Jurisdiction whatever; much less by that of a Court of Inferior and limited Jurisdiction.

Secondly, Because they conceived, that as Judges of the several Superior Courts of Law, and Courts of Equity, within the State, they were not subject to the Mandate of any Writ

Thirdly, that the Suit required to be certified by the aforesaid Writ of Certiorari, is not in such a stage, or so circumstanced, as to be removable from the said Court of Equity . . . pursuant to the Act of Congress in that Case provided; the aforesaid Suit in Equity being now not in its first Stage, and not unproceeded upon; but having been commenced several Years ago, and . . . had been twice heard on solemn Argument, and several decretal Orders had been made therein; And the Removal of the said Suit being required not at the Instance of Defendants . . . but at the Instance of the Complainants, . . . [t]hat

To the extent that contemporaries viewed the Act as performing a mere evidentiary function, it would have done even less to assuage concerns raised by *Morris*.

¹⁶² See Declaration of North Carolina Judges, *supra* note 14, at 111.

¹⁶³ “Marcus” (James Iredell), Answers to Mr. Mason’s Objections to the New Constitution Recommended by the Late Convention at Philadelphia (Jan. 8, 1788), in 2 MCREE’S IREDELL, *supra* note 98, at 193. In this essay written under the pseudonym “Marcus,” Iredell responded to Antifederalist concerns that “[t]he judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States.” *Id.*; see also Holt & Perry, *supra* note 5, at 97, 103.

¹⁶⁴ See generally Holt & Perry, *supra* note 5 (documenting in remarkable detail this interjurisdictional clash).

¹⁶⁵ See Declaration of North Carolina Judges, *supra* note 14, at 111–12.

this Case was therefore obviously not within the Purview of the aforementioned Act of Congress, for removing a Cause from a State Court to a federal Court¹⁶⁶

The judges dispatched their declaration to the North Carolina General Assembly.¹⁶⁷ In an accompanying letter, the judges characterized the *Morris* certiorari as a circumstance “which required . . . that they should then surrender to the Judiciary of the United States a controuling power over the Supreme Judiciary of this State, or refuse to comply with what they unanimously conceived to be an unconstitutional Mandate of the Judges of the Fœderal Court.”¹⁶⁸ The judges wrote that they had hoped to avoid such a “clashing between the Judiciaries of the United States” but that “[t]he duties they owe to their Country at large [i.e., North Carolina], and to themselves as Men” dictated noncompliance.¹⁶⁹ In fact one of the judges, staunch Antifederalist Samuel Spencer, had predicted just such an interjurisdictional clash during North Carolina’s ratification debates.¹⁷⁰ The state’s assembly, still flush with Antifederalist sentiment, rushed to applaud the judges’ defiance.¹⁷¹

Apart from the somewhat inflammatory character of the state court reaction, one must recognize that the judges’ declaration had substantial persuasive force. It highlighted three elements of the certiorari’s issuance that seemed most vulnerable: (1) it sought to remove a proceeding that had long been pending in state court and thus lay outside the scope of any statutory grants of removal jurisdiction, (2) it was pursued by the plaintiffs, whereas the removal statute authorized only defendants to remove, and (3) it branded the state courts as inferior to an intermediate federal court.¹⁷² Indeed, so persuasive was the response that one of those who signed the certiorari, Justice John Blair from Virginia, wrote an anguished letter to his

¹⁶⁶ See *id.* at 111–13 (footnote omitted). The Declaration recites that the term of court ended on “Saturday last,” or on November 13, 1790, and that the marshal delivered the certiorari during that term, which allows us to conclude that the writ was likely served in the first two weeks of November. See *id.* at 111.

¹⁶⁷ See Letter from Judges of the Superior Court of N.C. to the Gen. Assembly of N.C. (between Nov. 19 and Nov. 30, 1790), in 2 DHSC, *supra* note 9, at 110–11.

¹⁶⁸ *Id.* at 110.

¹⁶⁹ *Id.*

¹⁷⁰ See Samuel Spencer, Remarks at the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 28, 1788), in 4 DEBATES IN THE STATE CONVENTIONS, *supra* note 67, at 136 (“I have objections to [Article III, Sections 1 and 2] I would wish that the federal court should not interfere, or have anything to do with controversies to the decision of which the state judiciaries might be fully competent”). During the ratification debates, Spencer predicted that “[t]here will be, without any manner of doubt, clashings and animosities between the jurisdiction of the federal courts and of the state courts, so that they will keep the country in hot water.” *Id.* at 136–37.

¹⁷¹ See Resolution of the General Assembly of North Carolina (Dec. 15, 1790), in 2 DHSC, *supra* note 9, at 117, 117–18 (“Resolved, that the General Assembly do commend and approve of the Conduct of the Judges of the Courts of law & Courts of Equity in this particular.”).

¹⁷² See Declaration of North Carolina Judges, *supra* note 14, at 111–12.

colleagues some months later, expressing his doubts as to the propriety of the writ's issuance.¹⁷³

For all its rhetorical power, however, the state court declaration notably failed to object to the simple fact of federal equitable relitigation of state court judgments.¹⁷⁴ The declaration clearly contemplated that such relitigation was in the offing; the North Carolina court observed that the proceeding in the state court of equity was fairly advanced and had been the subject of several "decretal" orders.¹⁷⁵ The judges' declaration thus contemplated equitable relitigation in federal court and argued that such relitigation was improper, not because it would violate state norms of *res judicata*, but because federal law did not allow the transfer of a pending action like *Morris's* to federal court through the issuance of *certiorari*.

2. *National Reaction to the Morris Certiorari.*—News of the state-federal clash spread quickly through the republic.¹⁷⁶ Newspapers in North Carolina, Pennsylvania (by then, the seat of the federal government), and Virginia printed the North Carolina judges' defiant declaration.¹⁷⁷ In Richmond, Virginia, the declaration appeared under the following heading:

A copy of the declaration of the Judges of the state of North-Carolina and by them annexed to, and returned with, a writ of *certiorari*, issuing out of the Federal Circuit Court of the district of North-Carolina, *commanding* the said

¹⁷³ See *supra* note 127 (excerpting Justice Blair's letter to Justice Wilson).

¹⁷⁴ Of course, North Carolina judges may have been offended by a proposed injunction, even one aimed at the parties. While an injunction that sought in effect to relitigate a state court judgment would not convey the same direct message of judicial inferiority as a writ of *certiorari* aimed at the court itself, one must recognize that the injunction alone could have raised state judicial hackles. We are grateful to Professor Alison LaCroix for suggesting this explanation.

¹⁷⁵ See Declaration of North Carolina Judges, *supra* note 14, at 112.

¹⁷⁶ This eruption of Antifederalist sentiment in North Carolina occurred in November 1790, barely three months after the U.S. House of Representatives ordered Attorney General Edmund Randolph to prepare a report "on such matters relative to the administration of justice under the authority of the United States, as may require to be remedied" and on "such provisions in the respective cases as he shall deem advisable." RANDOLPH'S REPORT, *supra* note 9, at 122 (quoting H. JOURNAL, 1st Cong., 2d Sess. 289 (1790)); see also 2 DSHC, *supra* note 9, at 92 n.4. Randolph received his marching orders on August 5, 1790, and on that same day, he contacted Justice Wilson for assistance in preparing the Report. See 2 DHSC, *supra* note 9, at 122; RANDOLPH'S REPORT, *supra* note 9, at 123 n.10; 4 DHSC, *supra* note 9, at 535–36 (reprinting the letter from Randolph to Wilson). As a signatory of the *Morris certiorari*, Justice Wilson was no doubt acutely aware of the fallout in North Carolina. For a discussion of Randolph's resulting Report and its influence on the language of the AIA, see *infra* Part III.A.

¹⁷⁷ See 2 DHSC, *supra* note 9, at 112 n.1, 113 n.4; Declaration of North Carolina Judges, *supra* note 14, at 112. Although the state judges issued their declaration in November 1790, newspapers reprinted the document well into 1791. See Declaration of North Carolina Judges, *supra* note 14, at 112; 2 DHSC, *supra* note 9, at 112 n.1; see, e.g., *North Carolina—In Senate, December, 1790*, U.S. GAZETTE (Phila.), Feb. 23, 1791, at 760 (reprinting a portion of the North Carolina General Assembly resolution commending the defiance of its state judges).

Judges to *certify* to the said Federal Court, a cause depending before them, in the Court of Equity, for the district of Edenton.¹⁷⁸

By mid-December 1790, an abbreviated report had reached the nation's capital, highlighting the state court's concerns:

That though they were anxiously desirous, that no disagreement or misunderstanding might take place between the Judicial Authority of [North Carolina], and the tribunals established by the United States, concerning their respective rights, jurisdictions and prerogatives yet they conceived it their indispensable duty, which they owed to the citizens of the State, pursuant to their oath of office, not to obey, or comply with, the *mandate* of the aforementioned writ.¹⁷⁹

A short time later, Congressman John Steele of North Carolina sent President Washington copies of both the declaration of the North Carolina state judges and the resolution of that state's assembly.¹⁸⁰ A few days later President Washington asked Attorney General Edmund Randolph for his thoughts on the matter.¹⁸¹ On January 6, 1791, House member Fisher Ames sent word of the case back home to Massachusetts.¹⁸²

Despite the hubbub, no immediate congressional response to the *Morris certiorari* was forthcoming. It was, after all, still a Federalist legislative body; sympathies may have divided between the federal interest in unbiased adjudication and the expressions of state umbrage.¹⁸³ Senator Robert Morris himself remained a powerful member of the Pennsylvania delegation and a close friend of the President.¹⁸⁴ Although Morris would

¹⁷⁸ 2 DHSC, *supra* note 9, at 112 n.1 (reprinting material from the *Virginia Gazette, and General Adviser* dated June 1, 1791).

¹⁷⁹ *Edenton, (N.C.) November 19, from a Correspondent*, PA. MERCURY, & UNIVERSAL ADVERTISER, Dec. 14, 1790, at 3.

¹⁸⁰ 2 DHSC, *supra* note 9, at 130 n.1. In his letter, Steele described the North Carolina General Assembly's reaction as "a premeditated attempt to draw that state into a contest with the Union." Letter from John Steele, U.S. Representative, to George Washington, President of the United States (Jan. 4, 1791), in 7 THE PAPERS OF GEORGE WASHINGTON 181, 181 (Jack D. Warren, Jr. ed., 1998).

¹⁸¹ See 2 DHSC, *supra* note 9, at 130 n.1 (citing Letter from Tobias Lear, President Washington's personal secretary, to Edmund Randolph (Jan. 8, 1791)). President Washington's correspondence came barely one week after Randolph submitted his Report on the federal judiciary to Congress. See 4 DHSC, *supra* note 9, at 142.

¹⁸² See Letter from Fisher Ames, Representative from Mass., to Thomas Dwight, attorney from Springfield, Mass. (Jan. 6, 1791), in 2 DHSC, *supra* note 9, at 124, 124–25 (footnote omitted) ("Please to mention this affair to [John Worthington, an attorney from Springfield, Massachusetts] & to my friend [John] Hooker[, another Springfield attorney] . . .").

¹⁸³ The first Congress was, in many ways, a continuation of the constitutional convention that gave rise to it. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 3–4 (1997).

¹⁸⁴ See RALSTON HAYDEN, THE SENATE AND TREATIES, 1789–1817, at 63 (1920) (describing Morris's role, along with fellow Senators Oliver Ellsworth, George Cabot, Caleb Strong, and Rufus King, in procuring the Jay Treaty of 1794 and observing that "[f]ive more powerful men could not be

soon signal a desire to abate the federal action and proceed in state court, senatorial courtesy may have slowed any call to arms.¹⁸⁵ In any case, the *Morris* proceeding was fundamentally a dispute between *courts* and was just getting underway; perhaps the courts would hit upon a solution. Finally, and perhaps most importantly, the House had invited Edmund Randolph to submit a report on the federal judiciary, and he would do so on December 30, 1790—more than a month after the state court’s response brought the *Morris* certiorari to national attention.¹⁸⁶ We think Randolph’s Report represents the first step in what was to become the AIA.

III. DRAFTING THE AIA

A. *Randolph’s Report*

Randolph’s Report contained a proposed judiciary bill that bore striking textual similarities to the AIA and that would have solved the problems revealed by *Morris*. These clues, combined with the fact that the Report came so close on the heels of the headline-making interjurisdictional clash that erupted following the *Morris* certiorari, suggest that Randolph’s Report was at least in part a reaction to *Morris* and that it in turn laid the groundwork for the anti-injunction provision of the Judiciary Act of 1793: the AIA.

A few short months before the circuit court issued its controversial certiorari in *Morris*, the House invited Attorney General Edmund Randolph to prepare a report on improvements that might be made to the still-infant federal judiciary.¹⁸⁷ Whatever hopes House members may have harbored, Randolph’s Report did not provide useful tools for overhauling the Judiciary Act of 1789.¹⁸⁸ Historians have proposed a range of explanations for the Report’s apparent lack of impact: the complex politics of the day; the reluctance of Congress to embrace radical reform of a judicial system that, though regarded as a temporary expedient, appeared to be functioning

selected from the Senators of that period”); 9 ROBERT MORRIS, THE PAPERS OF ROBERT MORRIS, 1781–1784, at xxxiii (Elizabeth M. Nuxoll & Mary A. Gallagher eds., 1999).

¹⁸⁵ See Letter from John Sitgreaves, Judge of the U.S. Dist. Court for the Dist. of N.C., to James Iredell, Assoc. Justice of the Supreme Court (Aug. 2, 1791) [hereinafter Sitgreaves Letter], in 2 DHSC, *supra* note 9, at 196, 197 (footnote omitted) (“[W]ith respect to the Certiorari [Morris’s attorney] Mr. [John] Hamilton informed Judge Blair and myself that Mr. Morris has desired him not to urge it further, that as he was a Member of the Legislature of the United States, from motives of Delicacy he wou’d rather the Cause shou’d be proceeded on in the State Court”). It is not clear why Morris’s case remained on the federal docket until 1793 despite the state court’s refusal to send up the record. See 2 DHSC, *supra* note 9, at 239 n.6.

¹⁸⁶ See RANDOLPH’S REPORT, *supra* note 9, at 122, 127–67. The House had requested a report on August 5, 1790. See 4 DHSC, *supra* note 9, at 122 & n.2. North Carolina’s angry response to the *Morris* certiorari came in November of the same year. See *supra* Part II.E.1.

¹⁸⁷ See RANDOLPH’S REPORT, *supra* note 9, at 122 & n.2; *supra* Part II.E.1.

¹⁸⁸ See RANDOLPH’S REPORT, *supra* note 9, at 122–27.

relatively well; and continuing discontent at the state level with reforms that would strengthen federal institutions.¹⁸⁹ Perhaps most importantly, Randolph had embraced reform of the circuit-riding system; his judiciary act would have limited the Justices to their duties on the Supreme Court and would have shifted the burden of circuit riding to the district judges.¹⁹⁰ So long as the Court's appellate docket remained relatively light—and the Court as such had scant judicial business for the first few years—it was difficult to persuade Congress of the need to relieve the Justices of the burdens of circuit riding.¹⁹¹ The House referred the Report to a committee from which it never emerged.¹⁹²

Although it failed as a blueprint for judicial reform, Randolph's Report provides important evidence that the *Morris* certiorari helped to highlight concerns with overlapping state and federal jurisdiction, thus linking the *Morris* proceeding to the eventual adoption of the AIA.¹⁹³ Randolph explained that his principal goal in preparing his Report was to solve the problem of jurisdictional overlap and conflict.¹⁹⁴ He would have done so by demarcating certain matters of exclusive federal cognizance and leaving the remainder within the concurrent jurisdiction of the state and federal courts.¹⁹⁵ As to these matters of concurrent jurisdiction, Randolph would offer litigants a choice: they could proceed in state court and abide

¹⁸⁹ See *id.* at 124–27.

¹⁹⁰ See *id.* at 123.

¹⁹¹ Scholars overlook the significance of the cost factor in assessing Congress's willingness to staff the federal circuit courts with circuit judges and to relieve Supreme Court Justices of the burden of riding circuit. The Justices were paid an annual salary that included an allowance for their expected travel expenses and they had, as yet, little work to do as members of the Court. See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 19–21, 48 & n.245 (2008). Congress may have understandably wished to wait until the Court's own docket filled before relieving the Justices of circuit duties that were, as a practical matter, their most significant judicial assignments. The Justices' deference to Congress on issues of reform makes a good deal more sense when one recognizes that the issue was primarily one of ways and means. Cf. JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012) (expressing puzzlement as to why the Justices in the early republic tended to defer to Congress on the issue of judicial reform).

¹⁹² See H. JOURNAL, 2d Cong., 2d Sess. 465 (1791), available at <http://memory.loc.gov/ll/hj/001/0400/04590465.tif>; RANDOLPH'S REPORT, *supra* note 9, at 126 n.26.

¹⁹³ See RANDOLPH'S REPORT, *supra* note 9, at 127. For example, in the short-lived Judiciary Act of 1801, Congress conferred general federal question jurisdiction on the lower federal courts and abolished the circuit-riding duties of the Justices and thus took two pages from Randolph's Report. *Id.* In addition, as noted above, some scholars regard the Report as a likely precursor to the Anti-Injunction Act, which was adopted two years later in Section 5 of the Judiciary Act of 1793. See *supra* note 9 and accompanying text.

¹⁹⁴ See RANDOLPH'S REPORT, *supra* note 9, at 128–29 (stating that the “first object of this duty is to suggest any defects existing in the judiciary system” and arguing that some “classes of jurisdiction” must, by their nature, “shut[] out the jurisdiction of the state courts, as such, on the vital principles of the Union”).

¹⁹⁵ See *id.* at 129–31.

the result, without any prospect of review in the Supreme Court,¹⁹⁶ or they could initiate their actions in, or remove them to, federal court, where the Supreme Court would have the ultimate say about the resolution of the case.¹⁹⁷ (By barring federal review of state judgments, Randolph would have left intact state court decisions invalidating federal statutes or misapplying federal treaties.¹⁹⁸ This potentially controversial feature of his plan may have supplied the intellectual foundation for the arguments of Virginia's lawyers in such cases as *Martin v. Hunter's Lessee*¹⁹⁹ and *Cohens v. Virginia*.²⁰⁰)

Although Randolph did not mention the *Morris* litigation by name, his Report would have provided a straightforward solution to the problem presented by the case.²⁰¹ *Morris* chose to file in state court and would have been obliged to abide the choice. Even if *Morris* were to succeed in litigating his action in federal court, invoking its concurrent jurisdiction over disputes between citizens of different states, Randolph's legislation would have barred the federal court from granting an injunction against the enforcement of the *Hancock* judgment, a ruling of the North Carolina state court. As Randolph explained in his notes on the jurisdiction conferred to federal district courts, courts of equity frequently interposed to entertain equitable defenses to suits that began in courts of law.²⁰² He did not mean to debar such equitable involvement, but he objected to "throwing the common law side . . . into the state courts, and the equity side into the federal courts."²⁰³

Randolph's concern with federal equitable interposition connects his Report to the *Morris* certiorari. The Report, in turn, anticipated and may have provided a template for the terms of the AIA as enacted some two years later. Indeed, two textual clues suggest a strong link between Randolph's Report and the 1793 Act. First, the anti-injunction language in the two documents bears a striking resemblance.²⁰⁴ Compare Randolph's

¹⁹⁶ See *id.* at 133.

¹⁹⁷ See *id.* at 133–34.

¹⁹⁸ See *id.* at 133.

¹⁹⁹ See 14 U.S. (1 Wheat.) 304, 346 (1816) ("It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts . . . , because congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment.").

²⁰⁰ See 19 U.S. (6 Wheat.) 264, 320 (1821).

²⁰¹ In an intriguing development, Randolph chose certiorari as the mechanism for the removal of actions from state to federal court, choosing the same mode for removal that *Morris* had attempted. See RANDOLPH'S REPORT, *supra* note 9, at 132–33, 142, 149, 153, 154, 155. Randolph's choice nicely confirms the understanding that the common law writ of certiorari would issue to remove an action either for review of the proceedings below or for further proceedings on the merits in the higher court.

²⁰² See *id.* at 162–63.

²⁰³ *Id.* at 163.

²⁰⁴ Part III.C explores one subtle textual difference that we regard as significant.

prohibition (“[a]nd no injunction in equity shall be granted by a district court to a judgment at law of a state court”²⁰⁵) with the language of the 1793 AIA: “nor shall a writ of injunction be granted to stay proceedings in any court of a state.”²⁰⁶ The AIA went further than Randolph urged by prohibiting all federal interference (rather than that by specified courts) and by applying to interference with state proceedings (rather than only state judgments).²⁰⁷ But the provisions otherwise bear a family resemblance. Second, both documents addressed the injunction in close proximity to the writ of *ne exeat*—a quasi-injunctive equitable writ.²⁰⁸ Randolph’s Report addressed the two writs in successive paragraphs,²⁰⁹ the 1793 Act combined its treatment of both writs in Section 5.²¹⁰ No wonder Professor Charles Warren concluded that the Report was the obvious and undoubted precursor to the AIA.²¹¹

Critics of Warren’s conclusion advance arguments that we find unpersuasive. Taylor and Willis describe Randolph’s proposed amendment as “of much more limited scope . . . , inasmuch as it operated only upon the district courts, applied only to judgments at law . . . , and was merely

²⁰⁵ *Id.* at 142.

²⁰⁶ Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 333, 335.

²⁰⁷ The use of “proceedings” (rather than “judgments”) brought the AIA closer to the language of the 1790 Act, which stated that the “records and judicial *proceedings* authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.” Act of May 26, 1790, ch. 11, 1 Stat. 122, 122 (emphasis added).

²⁰⁸ Black defines the writ of *ne exeat* as “an equitable writ ordering the person to whom it is addressed not to leave the jurisdiction of the court or the state.” BLACK’S LAW DICTIONARY 1131 (9th ed. 2009). The writ is typically “issued to ensure the satisfaction of a claim against the defendant,” *id.*, and as such is “frequently termed an equitable bail.” *Id.* at 1132 (quoting WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 21 (2d ed. 1956)). Others describe the writ of *ne exeat* as “an unusual hybrid—a quasi-criminal blend of injunctive relief, indirect civil contempt and other forms of . . . civil arrest” that, if likened to an animal species, “would probably bear the closest resemblance to the duck-billed platypus, an unusual animal . . . fittingly described as ‘one of nature’s oddest creatures, seemingly assembled from the spare parts of other animals.’” Anthony E. Rebollo, *The Civil Arrest and Imprisonment of Taxpayers: An Analysis of the Writ of Ne Exeat Republica*, 7 PITT. TAX REV. 103, 156 (2010) (quoting Susan Brown, *Top Billing for Platypus at End of Evolution Tree*, 453 NATURE 138, 138 (2008)).

²⁰⁹ See RANDOLPH’S REPORT, *supra* note 9, at 141–42 (paragraphs 3 and 4).

²¹⁰ Section 5 reads as follows:

And be it further enacted, That writs of *ne exeat* and of injunction may be granted by any judge of the supreme court in cases where they might be granted by the supreme or a circuit court; but no writ of *ne exeat* shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States; nor shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.

1 Stat. at 334–35 (footnote omitted).

²¹¹ See Warren, *supra* note 4, at 347 (“[The AIA provision of the Judiciary Act of 1793] was undoubtedly made in consequence of a report by Attorney General Edmund Randolph to the House of Representatives, December 27, 1790, as to desirable changes in the Judiciary Act of 1789 . . .”).

procedural in purpose.²¹² We find the first argument mystifying; the authors must have overlooked the fact that Randolph’s proposed statute included separate sections that would have curtailed the power of both the district courts *and* the circuit courts in precisely the same terms.²¹³ Randolph appended his explanatory note to the district court provision, but its criticism of federal equitable interposition would surely have applied with equal force to his proposed restriction of circuit court power.²¹⁴ To be sure, the AIA would operate more economically with a simple prohibition against the issuance of writs of injunction without specifying a particular court. But Randolph proposed to qualify the authority of both federal courts.

As for the other supposed distinctions, we doubt that they disprove the connection that Warren identified. True, the AIA applies more broadly than Randolph’s proposed amendment. The AIA’s term “proceedings,” in contrast to Randolph’s “judgments at law,”²¹⁵ was broad enough to foreclose equitable interposition in pending state court actions at law, in equity, before probate courts, and so forth. What’s more, the AIA’s term “proceedings” would prohibit interposition at any stage of the state court litigation, rather than simply banning only a stay of “judgments” rendered by a state court of law. In evaluating the significance of these disparities, it bears noting that scholarly accounts of colonial North Carolina practice and other sources suggest that the most common form of equitable interposition was that aimed at proceedings at law.²¹⁶ Moreover, the expansion of the AIA prohibition did not alter the functional quality of the protection offered to state courts. As we noted above, courts of equity could enjoin an action at law at any time, from the point of the action’s first initiation (if based, for instance, on a contract procured by fraud), to the point of judgment, and ultimately to the point of postjudgment efforts to execute the judgment.²¹⁷ Congress may have concluded that it could better capture all of these points in the litigation process by describing them as proceedings, without setting out to broaden or narrow the nature of the protection afforded. After all, Randolph’s provision would appear to prohibit an injunction if, in seeking

²¹² Taylor & Willis, *supra* note 2, at 1171 n.14 (emphasis omitted).

²¹³ See RANDOLPH’S REPORT, *supra* note 9, at 142 (“[N]o injunction in equity shall be granted by a district court to a judgment at law of a state court.”); *id.* at 149 (“[A]nd no injunction in equity shall be granted by a circuit court to a judgment at law of a state court.”).

²¹⁴ See *id.* at 142, 162–63. Notably, Randolph’s proposed statute would have expanded the power of the district courts to entertain equitable proceedings—something they lacked under the Judiciary Act of 1789. See *id.* at 141–42 (“Writs of injunction in equity, may be granted by the judge of a district court, to judgments of the said court at common law.”). It was not until 1807 that district courts came to have injunctive powers. See Act of Feb. 13, 1807, ch. 13, 2 Stat. 418 (“An Act to extend the power of granting writs of injunctions to the judges of the district courts of the United States.”).

²¹⁵ See *supra* note 207 and accompanying text.

²¹⁶ See Nelson, *supra* note 67, at 2147–48; *infra* note 242 and accompanying text.

²¹⁷ See *supra* notes 77–80 and accompanying text.

to block postjudgment execution, it had the effect of staying a judgment at law, just as the AIA's ban would block such interposition.

We find ourselves equally perplexed by the characterization of Randolph's provision as "merely procedural in purpose."²¹⁸ Randolph was not proposing a merely procedural unification of law and equity at the state level—he was rather proposing to end federal equitable relief against state court judgments. After the merger of law and equity (achieved in the courts of the United States through the adoption in 1938 of the Federal Rules of Civil Procedure),²¹⁹ available remedies at law and in equity were to remain the same, and nothing of substance was to turn on the fact that the litigant was no longer obliged to pursue equitable relief in a "separate" court.²²⁰ One can readily see the potential for what we might today term outcome-determinative (that is, "substantive") differences in the legal rules that state and federal courts would apply in that pre-*Erie* world.²²¹ As the *Morris* case made clear, splitting a case into law and equity was one thing, but dividing it between state and federal courts was quite another.

B. *The Adoption of the AIA*

The AIA was enacted two years after the Randolph Report as part of the Judiciary Act of 1793,²²² legislation that would respond in part to the Justices' concerns with the burden and expense of circuit riding.²²³ Although the Justices sought radical relief in the form of an elimination of their circuit duties (along the lines set forth in the Randolph Report),

²¹⁸ Taylor & Willis, *supra* note 2, at 1171 n.14.

²¹⁹ FED. R. CIV. P. 2.

²²⁰ See FED. R. CIV. P. 2 advisory committee's notes (1937). For merger background, see Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 811–17 (1998), which describes the merger of law and equity, beginning with the Field Code in 1848 and culminating in the Federal Rules of Civil Procedure.

²²¹ As early as 1792, Congress conferred power on the Court to promulgate rules of equity; the Court responded by declaring the equitable jurisprudence of England as applicable in the United States. See An Act for Regulating Processes in the Courts of the United States, and Providing Compensations for the Officers of the Said Courts, and for Jurors and Witnesses (Process Act of 1792), in 4 DHSC, *supra* note 9, at 182, 182 (allowing federal courts to adopt equity procedures "according to the principles, rules and usages which belong to Courts of equity . . . as contra-distinguished from Courts of common law . . ."); Minutes of the Supreme Court (Aug. 8, 1792), in 1 DHSC, *supra* note 9, at 169, 203 (proclaiming that the Court would henceforth "consider the practice of the Courts of Kings Bench and of Chancery in England as affording outlines" for its practice).

Speaking for the Court in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), Justice Frankfurter held that suits brought in equity were nonetheless subject to state statutes of limitation. Professor Collins has argued that Justice Frankfurter "dismissed a long line of precedent that suggested a different view of federal equitable power" and instead used *Guaranty Trust* as an opportunity to limit the use of federal equitable injunctions as "a means of suppressing labor strikes." Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 336–43 (2010).

²²² Judiciary Act of 1793, Ch. 22, § 5, 1 Stat. 333, 334–35.

²²³ *Id.* § 1, 1 Stat. at 333–34.

Congress was unwilling to go quite that far.²²⁴ Instead, Congress reduced the number of circuit courts and declared that a circuit court would consist of a district court judge and a single Justice, rather than two Justices as specified in the Judiciary Act of 1789.²²⁵ These reforms alone cut the burden of circuit riding (for Justices) by more than half.

Other elements of the Act were aimed at filling gaps and addressing concerns associated with the advent of two-judge circuit courts. For example, the Act provided for certification of questions of law to the Supreme Court in cases where the two judges disagreed.²²⁶ In addition, Section 5 of the Act broadened the power of the circuit Justices to issue certain kinds of writs “out of court” that they had previously been authorized to issue only when acting as a court.²²⁷ This was, recall, the feature of the Judiciary Act of 1789 (with all writs power generally vested in courts but not judges) that had led Justice Rutledge to question his power to issue writs of certiorari and injunction on his own fiat in the *Morris* case.²²⁸ The Act of 1793 authorized a circuit Justice to issue the writs of *ne exeat* and injunction “in cases where they might be granted by the supreme or a circuit court.”²²⁹ Here, Congress was acting to empower a single Justice (but not a district judge) to grant emergency relief between court sessions when the threat of irreparable harm might make it inadvisable to wait until the full court could convene to hear the matter.²³⁰

Section 5’s evident concern with empowering the single circuit Justice has misled some observers. Professor Mayton argued, echoed by Professor Holt, that the AIA limits only the power of single Justices—power previously conferred in Section 5—and leaves the injunctive power of courts intact.²³¹ It is certainly true that the AIA appears immediately after

²²⁴ See 4 DHSC, *supra* note 9, at 124–27 (discussing Congress’s reluctance to radically reform the federal judiciary); Letter from Justices of the Supreme Court to George Washington, President of the United States (Aug. 9, 1792), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 51–52 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1834) (seeking relief from circuit-riding duties); RANDOLPH’S REPORT, *supra* note 9, at 134.

²²⁵ § 1, 1 Stat. at 333–34.

²²⁶ *Id.* § 2, 1 Stat. at 334.

²²⁷ See *id.* § 5, 1 Stat. at 334–35.

²²⁸ See *supra* notes 132–35 and accompanying text.

²²⁹ § 5, 1 Stat. at 334–35.

²³⁰ See Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1169–70 (2008) (citing Frank Felleman & John C. Wright, Jr., Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981, 999, 1019 (1964)).

²³¹ See Holt, *supra* note 23, at 336 n.145; Mayton, *supra* note 5, at 331–32 (arguing that “Congress in 1793 did not enact an anti-injunction statute” but instead “enacted only a law prohibiting a single Justice of the Supreme Court from enjoining a state court proceeding”); see also RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1030 (6th ed. 2009) (observing that Professor Mayton “marshals

the grants of power to the circuit Justices, but it does not follow that the general prohibition against injunctions was meant to qualify only the power of the single Justice. For starters, the unqualified language of the AIA, “nor shall a writ of injunction be granted to stay proceedings in any court of a state,”²³² would appear to apply broadly to any injunction at the federal level, be it issued by a court or a single Justice.

The overall structure of Section 5 confirms that its broad limitation on injunctive power applies to both courts and judges. The Act of 1793 was drafted to confer writ-granting power on single Justices as a supplement to the all writs power conferred on courts in Section 14 of the Judiciary Act of 1789.²³³ As we have seen, that provision empowered courts to issue writs only where necessary “for the exercise of their respective jurisdictions” and agreeable to the principles and usages of law.²³⁴ Section 5 incorporated all such limitations on the power to issue writs of injunction and *ne exeat* by specifying that the power of the single Justice comes into play only in cases “where they [i.e., the writs] might be granted by the supreme or a circuit court.”²³⁵ Since the power of courts was already limited in Section 14, similar limits would apply to circuit Justices.

The drafters of Section 5 thus plainly had the all writs power of courts in view when they extended that writ-issuing power to circuit Justices. This clinches the argument for treating Section 5’s limits on issuance of writs as generally applicable to courts and judges. Consider Section 5’s restrictions on the *ne exeat* power, allowing issuance of this writ only where the complainant has commenced an action in equity and made a showing that the defendant intended to leave the United States.²³⁶ This restriction applies to writs granted by both courts and Justices; the statute itself recites that sufficient proof must be made to satisfy “the court or judge” granting the same.²³⁷ Section 5 then prohibited writs of injunction to stay state court proceedings in terms that paralleled the *ne exeat* limits and apparently applied without any limitation as to the issuing court or Justice.²³⁸ The provision did not need to specify which writ-granting authority it qualified.

considerable support” for his view that the statute constrains only the power of a single Justice while riding circuit).

²³² § 5, 1 Stat. at 334–35.

²³³ Ch. 20, § 14, 1 Stat. 73, 81–82.

²³⁴ *Id.*

²³⁵ Ch. 22, § 5, 1 Stat. at 334–35.

²³⁶ *Id.*

²³⁷ *Id.* One might argue that this limit on *ne exeat* power was unnecessary if Section 5 already incorporated the requirement that the writs issue only where necessary for the exercise of the court’s jurisdiction. But notably, courts of equity would sometimes grant *ne exeat before* the commencement of a suit in equity. One could argue that such a precommencement writ would be necessary to keep the defendant from leaving the jurisdiction and would thus satisfy the Section 14 requirement that it issue in aid of jurisdiction even though no action was pending.

²³⁸ *Id.*

Nor did it need to specify that it meant to qualify the injunction-granting power of the district or circuit courts, as Randolph’s provisions had done.²³⁹ As a general prohibition, it seemingly applied across the board to any federal court or Justice that could exercise injunction-granting power.

C. “Writs of Injunction”

Although a variety of factors thus link the language of Randolph’s Report to the ultimate passage of the AIA, one crucial difference separates the two provisions. Randolph’s anti-injunction provision simply declared that “no injunction in equity shall be granted by a district [or circuit] court to a judgment at law of a state court.”²⁴⁰ The final version of the AIA subtly modified that text, declaring instead that no “writ of injunction [shall] be granted to stay proceedings in any court of a state.”²⁴¹ Such a change may not appear significant to the modern eye, but we think it had enormous significance for the expected operation of the AIA. As we shall see, rules of equity practice distinguished the “writ of injunction” (which issued following the filing and service of an original bill of injunction) from relief in the nature of an injunction. By forbidding only the issuance of writs of injunction, the drafters of the AIA left the federal courts free to provide injunctive relief as an ancillary remedy. In other words, where the federal court first obtained jurisdiction of a cause in equity, the AIA did not limit its power to grant injunctive relief to stay conflicting proceedings in state court and to protect and effectuate its decrees.

1. A Brief Primer on the Writ of Injunction to Stay Legal Proceedings.—The distinction between original process by way of a writ of injunction and ancillary relief in the nature of an injunction seems to have arisen in the seventeenth century during Francis Bacon’s hitch as Chancellor. At that point, the most common form of injunction was one issued to stay proceedings at common law.²⁴² Bacon understood that the practice had been controversial with common lawyers; he had headed up the royal commission that defended Chancellor Ellesmere’s power to stay

²³⁹ See *supra* note 213 and accompanying text (discussing Randolph’s Report).

²⁴⁰ RANDOLPH’S REPORT, *supra* note 9, at 142.

²⁴¹ § 5, 1 Stat. at 334–35.

²⁴² See EDEN, *supra* note 79, at 9–10 (“AN injunction is a writ, issuing by the order and under the seal of a court of equity . . . amongst the most ordinary objects of which the following may be enumerated: To stay proceedings in courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity . . .”); 1 TURNER, *supra* note 79, at 361 (“THE Writ of Injunction is granted by the Court in various Cases, and for various Purposes: It is frequently applied for to restrain a Party from proceeding at Law . . .”); WYATT, *supra* note 18, at 231 (indicating, under the heading “Injunction,” that such writs were issued either to stay waste or “to stay a suit in some other court, as in a Court of Law, Court of Admiralty, an Ecclesiastical Court, or a Court of Equity”).

Lord Coke's judgments in King's Bench.²⁴³ When Bacon later took over as Chancellor, he issued a series of famous ordinances with procedural protections designed to make the issuance of stays less controversial.²⁴⁴ Most relevant for our purposes, Bacon ordered that no writ of injunction to stay a common law action was to be granted on petition or motion alone.²⁴⁵ Instead, Bacon required that the party seeking relief file a formal bill to commence an action in the Chancery.²⁴⁶ By requiring that parties initiate an original action by bill, Bacon guaranteed a series of important procedural protections including service of process on the opponent (by way of subpoena) and notice of both the allegations in the bill and the requested relief.²⁴⁷

By the eighteenth century, these elements of practice in connection with writs of injunction to stay proceedings at law had become well established.²⁴⁸ Thus, in his Vinerian lectures of 1777, Richard Wooddesson

²⁴³ On the importance of Bacon's role as the head of the royal commission, see 5 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 231–38 (1966). For the text of Bacon's report to King James, see The King's Order and Decree in Chancery, Cary 115, 21 Eng. Rep. 61 (1616).

²⁴⁴ One change was to eliminate a race to the courthouse; some Chancellors were willing to enjoin actions at law whenever the equitable complainant was the first to file. See FRANCIS BACON, ORDINANCES MADE BY THE LORD CHANCELLOR BACON, FOR THE BETTER AND MORE REGULAR ADMINISTRATION OF JUSTICE IN THE CHANCERY, in 15 THE WORKS OF FRANCIS BACON 351, 356 (James Spedding, Robert Leslie Ellis & Douglas Denon Heath eds., Boston, Brown & Taggard 1860) (Ordinance 21) ("No injunction to stay suits at the common law shall be granted upon priority of suit only . . ."); EDEN, *supra* note 79, at 58 n.e (describing the prior willingness of equity to grant relief "merely upon priority of suit" and quoting Bacon as saying "that he did not mean to make it a matter of a horse race, who shall be first in Westminster Hall").

²⁴⁵ See BACON, *supra* note 244, at 353 (Ordinance 11) (stating that "[w]here causes come to a hearing in court, no decree bindeth any person who was not served with process . . . , according to the course of the court" or who did not appear).

²⁴⁶ See *id.* at 358 (Ordinance 33) (allowing suits after judgment only where the complainant puts up a bond "with good sureties to prove the suggestions of the bill"); see also EDEN, *supra* note 79, at 70 ("IT is directed both by Lord Bacon's and Lord Clarendon's orders, that no injunction for stay of suit should be granted or revived upon *Petition*.").

²⁴⁷ See LORD NOTTINGHAM, 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY' 46 (D.E.C. Yale ed., 1965) ("The subpoena, when served, did not disclose the cause of action and the litigation was in effect initiated by the bill setting forth the grounds of complaint. The bill will be noticed later in connection with pleading: as to the procedure, however, the writ was the basis of the Court's power to compel appearance and obedience."). Nottingham compiled his manual during the period of his Lord Keepership, from November 1673 to December 1675. *Id.* at 6.

This practice continued into the early nineteenth century. See 2 JOSEPH HARRISON, THE PRACTICE OF THE HIGH COURT OF CHANCERY 540–41 (John Newland ed., London, A. Strahan 1808) ("No injunction for stay of suit at law shall be granted, revived, dissolved, or stayed upon a petition, nor any injunction of any other nature pass by order upon petition without *notice*, and a copy of the petition first had by, or given to, the other side . . .").

²⁴⁸ A writ form entitled "The Form of a Writ of Injunction," printed in an early eighteenth-century English treatise, illustrates the practice:

Whereas it hath been represented unto us, in our court of Chancery, on the part of [blank space], complainant, that he hath lately exhibited this bill of complaint into our said court of Chancery against you the said [blank space], defendant, to be relieved touching the matters therein

explained injunction proceedings as “those, in which the bill prays, besides the writ of subpoena to compel the defendant to appear and answer, a writ also of injunction, inhibiting him from suing the complainant at common law.”²⁴⁹ Wooddesson went on to explain “that he who seeks an injunction, should have a bill filed in court at the time.”²⁵⁰ Robert Eden’s early nineteenth-century treatise on the law of injunctions was to much the same effect. He explained that “[a]n injunction is a writ, issuing by the order and under the seal of a court of equity,” which seeks among other things “[t]o stay proceedings in courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity.”²⁵¹ Eden also explained that practice on the writ of injunction required the complainant to file a bill, to include a request for the writ in the bill’s prayer, and to serve the bill on the defendant with the subpoena.²⁵² A type of injunction called a “common injunction” might issue, on proof of service of the bill, if the defendant failed to answer or appear in court.²⁵³

contained; and that you the said defendant being served with a writ, issuing out of our said court, commanding you to appear to and answer the said bill . . . ; and yet in the mean time you unjustly, as is alleged, prosecute the said complainant at law, touching the matters in the said bill complained of: We therefore, in consideration of the premises, do strictly enjoin and command you the said [blank space], and all and every the persons before mentioned under the penalty of two hundred pounds, . . . that you and every of you do absolutely desist from all farther proceedings at law against the said complainant

Id. at 555–56.

²⁴⁹ 3 WOODDESSON, *supra* note 16 (footnote omitted). This is a revised edition of Wooddesson’s *A Systematical View of the Laws of England: As Treated of in a Course of Vinerian Lectures, Read at Oxford, During a Series of Years, Commencing in Michaelmas Term, 1777*, first published in 1793.

²⁵⁰ *Id.*

²⁵¹ EDEN, *supra* note 79, at 2, 10; *see also* MADDOCK, *supra* note 78, at *107–08 (recognizing that chancery can stay proceedings in the ecclesiastical courts and courts of admiralty); WOODDESSON, *supra* note 16, at 163 (footnotes omitted) (“And by injunction proceedings may be stayed in another court of equity, or in the admiralty or ecclesiastical courts, as well as those of common law.”).

²⁵² EDEN, *supra* note 79, at 70–71, 73–83. A money deposit was also required, where the complainant sought to enjoin a judgment at law. WYATT, *supra* note 18, at 238 (“Where there is a verdict at law, and the defendant exhibits his bill for relief, the money must be deposited before an injunction will be granted.”).

Bills of injunction, so called, were special in that they specifically asked for injunctive relief in their prayer, instead of asking more generally for whatever relief the court should deem just and proper. *See* COOPER, *supra* note 75, at 13–14; EDEN, *supra* note 79, at 73–74; HARRISON, *supra* note 247, at 539 (“An injunction cannot be granted, but where it is expressly prayed by the bill; the prayer for general relief does not extend to an injunction.”); *id.* at 548 (recognizing that the validity of an injunction depends upon its being served on the defendant); 2 STORY, *supra* note 75, § 1183, at 553 (noting that an injunction must be “specifically prayed for by the bill”); TURNER, *supra* note 79, at 361 (“In order to ground the Application for the Writ, a Bill must be filed, praying for an Injunction, and such other Relief as the Case requires.”); WYATT, *supra* note 18, at 233 (“Neither can [an injunction] be granted, unless prayed for by the bill, and the prayer of general relief does not extend to an injunction.”).

²⁵³ *See* EDEN, *supra* note 79, at 121; HARRISON, *supra* note 247, at 541, 543 (defining the common injunction); 2 STORY, *supra* note 75, § 1215, at 571 (same); TURNER, *supra* note 242, at 361 (footnote omitted) (“If the Injunction required is to stay Proceedings at Law, the common Injunction of the Court will be granted, either for Want of an Appearance, in due Time after Service and Return of the

Apart from this formal practice in connection with writs of injunction, Eden also recognized that equity would, in certain specified cases, grant ancillary relief “in the nature of an injunction” upon motion without requiring the complainant to file a bill for a writ of injunction.²⁵⁴ First, he pointed to a situation in which the court of equity had issued a decree for the administration of assets.²⁵⁵ If a creditor of the estate under

Subpoena, or for Want of an Answer. If for Want of an Appearance, an Affidavit of the Service of the Subpoena must be made”); *see also* 3 EDMUND ROBERT DANIELL, A TREATISE ON THE PRACTICE OF THE HIGH COURT OF CHANCERY 275 (London, J. & W.T. Clarke 1837) (distinguishing “common injunctions” from “special injunctions”); EDEN, *supra* note 79, at 83–86 (describing four situations in which an injunction might issue following filing and service of the bill). Thus it was possible for an injunction to issue before the defendant’s filing of an answer, in order to preserve the status quo. *See* WYATT, *supra* note 18, at 233 (“If it be granted before answer, it is commonly till answer and further order.”). If the defendant answered and denied the bill’s equity, the court would dissolve the injunction absent a showing of good cause by the plaintiff. *See* EDEN, *supra* note 79, at 115; TURNER, *supra* note 79, at 370; WYATT, *supra* note 18, at 234; *id.* at 242 (“If an injunction is dissolved, yet if there be cause it may be revived on motion.”).

Although the common injunction would stay execution of a judgment, it did not absolutely bar further proceedings at law. *See* HARRISON, *supra* note 247, at 546 (“An injunction to stay trial cannot be had in the first instance. The common injunction must be had, and then a motion to extend it to stay trial.”). An early English writ formulary included in Joseph Harrison’s 1808 treatise makes this clear. The form provides that the “defendant is at liberty to call for a plea, and to proceed to trial thereon; and for want of a plea, to enter up judgment; but execution is hereby stayed.” *Id.* at 555–56.

²⁵⁴ 1 ROBERT HENLEY EDEN, A COMPENDIUM OF THE LAW AND PRACTICE OF INJUNCTIONS, AND OF INTERLOCUTORY ORDERS IN THE NATURE OF INJUNCTIONS 71-3 n.3 (3d ed. New York, Banks, Gould & Co. 1852); *see* EDEN, *supra* note 79, at 71; *see also* HARRISON, *supra* note 247, at 544 (“Though it is said . . . that the defendant could not have an injunction, because he had no bill filed; yet where [a pending suit revealed equities favoring the defendant], the court granted an injunction on the defendant’s application, though he had no bill filed.”); W.J. JONES, THE ELIZABETHAN COURT OF CHANCERY 184 (1967) (observing that during Elizabethan times, “the bulk of these writs [of injunction to stay proceedings at law] were only obtained after the bill had been filed” but noting two ways of obtaining injunctive relief: “It could be requested in a bill of complaint along with a *subpoena*, or it could be asked for by information or motion, once proceedings in Chancery had begun”); 2 STORY, *supra* note 75, § 1216, at 572; TURNER, *supra* note 79, at 377 (recognizing limits on the ability of a court of equity to grant ancillary relief pursuant to an earlier decree).

Although Eden recognized a distinction between writs of injunction and ancillary relief in the nature of an injunction, he noted that the distinction was often disregarded in practice. *See* 2 STORY, *supra* note 75, § 1181, at 549 n.1 (“In many cases [equity] enforces it by means of the process of the writ of injunction, properly so called. But [Eden] proceeds to remark: . . . [T]he prohibition has in numerous cases been issued and conveyed in the shape merely of an order in the nature of an injunction. . . . The distinction is consequently disregarded in practice, and these orders, though not enforced by means of the writ of injunction, have indiscriminately obtained the name of injunctions.”) (citing ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 290 (London 1821)). The wearing down of formal distinctions between ancillary and original injunctive relief so early in our history, acknowledged by Eden and later Justice Story, goes a long way in explaining why the distinction has since been largely forgotten.

²⁵⁵ *See* EDEN, *supra* note 79, at 71; *see also* 1 WILLIAM BROWN, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY *183 n.2 (Robert Belt ed., 4th ed. London, A. Strahan 1819) (reprinting *Brooks v. Reynolds*, (1782) 21 Eng. Rep. 406, 406; 1 Bro. C.C. 183; 2 Dick. 603) (“In all cases . . . where the Court has, by decree, taken upon itself the administration of assets, it will now restrain parties suing the executor at law; and it now is *unnecessary to file a separate bill* for such

administration later initiated a suit at law claiming title to the assets, the court of equity would stay the proceeding on motion, rather than on bill filed.²⁵⁶ Relief by motion was also available where the plaintiff had filed two actions, one in law and one in equity, for the same claim. Equity would require the plaintiff to elect his remedy; if he chose the equitable path, the plaintiff would be enjoined as a matter of course from pursuing the action at law.²⁵⁷ Third, relief by motion would issue when the plaintiff had pursued equitable relief without success and later sought to relitigate the matter by filing a duplicative action at law.²⁵⁸ Early cases suggest that such ancillary injunctive relief came in the form of an “order” of injunction, as distinguished from the traditional “writ” of injunction.²⁵⁹

These exceptions, which allowed a party to pursue ancillary equitable relief without filing a formal bill for a writ of injunction, have a good deal in common. For starters, they applied to situations in which a proceeding was first commenced in a court of equity and a subsequent action was brought in a court of law. Because the parties were already before the court of equity, there was no reason to insist on the commencement of a new action in equity with attendant service of process.²⁶⁰ In all of the situations

purpose, since an injunction can be applied for in the existing suit.”); 2 STORY, *supra* note 75, § 1213, at 570 (noting that injunctions to prevent creditors from going to other tribunals to assert their rights were “formerly granted only upon a bill filed” but that injunctions “may now be obtained upon motion after notice given to the creditor”).

²⁵⁶ See EDEN, *supra* note 79, at 54, 71; see also *Paxton v. Douglas*, (1803) 32 Eng. Rep. 456, 456; 8 Ves. 520, 520 (“[T]his Court has made a decree for administration of assets, that decree is in nature of a judgment for all creditors. The decree cannot be pleaded at law; and therefore . . . if a bill was filed, the Court has been in the habit of enjoining any creditor.”); 1 TURNER, *supra* note 79 at 374–75 (noting the same exception).

²⁵⁷ See EDEN, *supra* note 79, at 57, 71. An early English case confirms this practice. See *Jones v. Earl of Strafford* (1730) 3 P. Wms. 80, 90 (recognizing that the plaintiff must make an election as between pursuing a claim in law or equity and noting that if the plaintiff elects to proceed in chancery, “then the proceedings at law are by that order to be stayed by injunction”).

²⁵⁸ See EDEN, *supra* note 79, at 58–59, 71; NOTTINGHAM, *supra* note 247, at 83 (“No injunctions for stay of suits at law are to be granted, revived, dissolved or stayed upon petition And I think fit to add a further qualification, *vizl.* that injunctions to stay suits at law which are commenced contrary unto the decrees of the Court may be granted at any time upon petition and in time of vacation.”); *id.* at 147–48 (“Injunctions to stay suits at law contrary to the decrees of the Court may be granted at any time, and upon petition in the time of vacation.”).

An early English case illustrates this practice. In *Brooks v. Reynolds*, the Chancellor observed that where a decree had been made to take account of debts owed and to pay them from the estate, such that the creditors would have satisfaction under the decree, “he would not permit the defendant to proceed at law, which would be rendering the decree nugatory.” 21 Eng. Rep. at 406. On those grounds, the Chancellor granted an injunction to stay proceedings at law. *Id.*

²⁵⁹ See *Kershaw v. Thompson*, 4 Johns. Ch. 609 (N.Y. 1820); *Dove v. Dove*, (1783) 21 Eng. Rep. 411; Dick. 617; 1 Bro. 375; 1 Cox, 101 S.C.

²⁶⁰ WYATT, *supra* note 18, at 231 (“It is commonly by writ founded on an order of [the court of chancery]; but may be by word of mouth when the party to be inhibited is actually present in court.”).

A similar result obtained in an early New York chancery decision involving a decree and judicial sale of mortgaged property. In *Kershaw v. Thompson*, Chancellor Kent considered the question

described, moreover, relief by motion was necessitated by a gap in the doctrine of claim preclusion. As Eden explained, courts of law refused to take “notice of a decree in equity.”²⁶¹ As a consequence, a court of equity could only ensure the effectiveness of its decrees by granting injunctive relief against inconsistent legal proceedings.²⁶² Eden explained the matters in terms of the protection or effectuation of equitable authority; courts of equity were compelled “in support of their jurisdiction, to establish their decrees by injunction.”²⁶³ Eden’s phrasing of the matter anticipates the forms of ancillary relief that the federal courts would later recognize as having survived the AIA’s adoption.

2. *The Original–Ancillary Distinction and the AIA.*—The AIA appears to pick up the original–ancillary distinction from equity practice, barring the issuance of “writs of injunction” but saying nothing to foreclose ancillary relief. While we have yet to find any contemporaneous statements that describe the Act in precisely these terms, we think that lawyers of the day would have understood the implications of the AIA’s careful wording.

whether, after declaring the parties’ rights to the mortgaged property, a court of equity could also order relief in the nature of an injunction requiring the mortgagor to deliver possession of the property, or whether the purchaser would have to file a separate ejectment action at law. Kent explained:

It does not appear to consist with sound principle, that the Court, which has exclusive authority to foreclose the equity of redemption of a mortgagor, and can call all the parties in interest before it, and decree a sale of the mortgaged premises, should not be able even to put the purchaser into possession against one of the very parties to the suit, and who is bound by the decree. . . . The distribution of power among the Courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a Court of equity, and, afterwards, to a Court of law, to obtain a perfect foreclosure of a mortgage. . . . [I]t may be safely laid down as a general rule, that the power to apply the remedy is coextensive with the jurisdiction over the subject matter.

Kershaw, 4 Johns. Ch. at 612–18. Early treatises confirm the use of an “order” of injunction to deliver possession of land following a decree. See BACON, *supra* note 244, at 353 (Ordinance 9) (“In case of a decree made for the possession of land, . . . if he persist in disobedience, an injunction is to be granted for the possession; and in case also that he disobeyed, then a commission to the sheriff to put him into possession.”); NOTTINGHAM, *supra* note 247, at 134–35 (“After affidavit of service and non performance, there follow of course attachment . . . then an injunction for the possession. . . . [Thereafter,] in case of resistance a writ of Assistance is to go to the sheriff.”); 2 STORY, *supra* note 75, § 1291, at 637 & n.1 (citing *Kershaw* and explaining that “Courts of Equity also interfere and effectuate their own decrees in many cases by injunctions in the nature of a judicial writ or execution for possession of the property in controversy; as for example by injunctions to . . . deliver . . . possession, followed up by a writ of assistance”).

²⁶¹ EDEN, *supra* note 79, at 54; see also 28 WRIGHT ET AL., *supra* note 2, § 4410. An early English chancery case illustrates the problem. See *Morrice v. Bank of Eng.*, (1736) 36 Eng. Rep. 980 (Ch.); Cas. t. Talbot 217, 223; 3 Swanst. 573; 2 Bro. P.C. (Toml. ed.) 465. *Morrice* explained: “[I]t is clear that a Decree of this Court, if an Action is brought against an Executor on a Bond, is not pleadable, nor can be given in Evidence against it [in a court of law].” *Id.* If the chancery court were to have “any Jurisdiction” then its decrees “must have the same Lien upon Assets as a Judgment at Law.” *Id.* Thus the court concluded that “a Decree prior in Time must be prefer’d to a subsequent Judgment” otherwise “this Court must give up its Jurisdiction.” *Id.*

²⁶² See EDEN, *supra* note 79, at 54.

²⁶³ *Id.*

Indeed, we find that the Court's own discussions of the equitable powers of the federal courts in the antebellum period appear to rest on the assumption that the AIA blocks only original writs and leaves ancillary powers unconstrained.²⁶⁴

D. Denouement

1. *Dismissal of Morris v. Allen.*—Others have suggested that the AIA was designed to provide a legislative solution to the ongoing crisis triggered by the issuance of the *Morris* certiorari.²⁶⁵ A variety of factors support this hypothesis. The litigation remained alive on the circuit court's docket through early 1793²⁶⁶ and was an ongoing source of embarrassment to Justice Iredell, whose appearance as a party to the *Morris* litigation disabled him from presiding as a judge over any follow-up proceedings.²⁶⁷ Justice Iredell had brought this disability to the attention of the Chief Justice in seeking relief from his continuing assignments to the Southern Circuit.²⁶⁸ We also know that Justice Iredell's brother-in-law, North Carolina Senator Samuel Johnston, had been especially solicitous of Iredell's circuit burdens; Johnston had engineered the 1792 enactment of a provision that relieved Iredell of a disproportionate circuit assignment.²⁶⁹

²⁶⁴ Our examination of the Court's early applications of the AIA reveals that those situations in which federal courts were permitted to enjoin state proceedings, the supposedly judge-made "exceptions" to the AIA, are best understood as elaborations of the distinction between original and ancillary applications for the writ of injunction. See James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 20–38 (2013) (discussing ancillary exceptions and the rise of AIA "exceptions").

²⁶⁵ See 4 DHSC, *supra* note 9, at 202 n.9 ("It is possible this prohibition [i.e., the anti-injunction language] was inserted at the behest of Samuel Johnston, a member of the committee that drafted the bill, as the confrontation between federal and state court jurisdiction in North Carolina arising from the case of *Morris v. Allen* was still unresolved.").

²⁶⁶ *Morris*'s attorney John Hamilton discontinued the federal court action in June 1793. 2 DHSC, *supra* note 9, at 239 n.6.

²⁶⁷ See *supra* note 137.

²⁶⁸ See 2 DHSC, *supra* note 9, at 9; Letter from James Iredell, Assoc. Justice of the Supreme Court, to John Jay, Chief Justice of the Supreme Court (Jan. 17, 1792), in 2 DHSC, *supra* note 9, at 238, 238 (citing the pending *Morris* matter as a continuing reason why Iredell should not ride the Southern Circuit); Letter from James Iredell, Assoc. Justice of the Supreme Court, to Thomas Johnson, Assoc. Justice of the Supreme Court (Mar. 15, 1792), in 2 DHSC, *supra* note 9, at 246, 246 (describing the *Morris* affair as a "peculiar hardship" counseling against Iredell's traveling to the Southern Circuit).

²⁶⁹ See 2 DHSC, *supra* note 9, at 248 n.6; Wythe Holt, *Separation of Powers? Relations Between the Judiciary and the Other Branches of the Federal Government Before 1803*, in NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790S, at 183, 197 (Kenneth R. Bowling & Donald R. Kennon eds., 2000) ("[T]he justices . . . engaged in much informal lobbying to achieve desired changes in the judiciary laws. Iredell, for example, frequently dealt with his brother-in-law, Sen. Samuel Johnston of North Carolina, while Jay persistently exploited his close friendship with Sen. Rufus King of New York."). The bill introduced by Senator Johnston on March 20, 1792, became law on April 13, 1792, as the Circuit Court Act of 1792. 2 DHSC, *supra* note 9, at 248 n.6.

Johnston also served, with Oliver Ellsworth, on the Senate judiciary committee that formulated the AIA as part of the Act of 1793.²⁷⁰

The AIA language, if tailored in part to provide a solution to the *Morris* certiorari controversy, certainly would have performed that office capably. It would not have directly addressed the power of a federal circuit court to issue writs of certiorari to the state courts, but it would have deprived the North Carolina federal circuit court of the power to grant a writ of injunction to stay the state court's *Hancock* proceeding and would have thus required the discontinuance of the federal *Morris* action.²⁷¹ Such an approach may have suited Justice Iredell well. While he could not sit in judgment in the *Morris* matter, he expressed concern lest the state's defiant reaction to the issuance of the certiorari be left to stand as the final word on the subject.²⁷² Such unresolved defiance might encourage recalcitrance by other states (as indeed it apparently had in South Carolina, where a similar set of events had played out²⁷³) and cast doubt on the breadth of federal judicial power. By banning the issuance of writs of injunction to stay proceedings in state court, Congress would compel the parties to discontinue the federal proceeding without necessitating any judicial resolution of the certiorari issue one way or the other.

Morris dropped his federal court action in 1793,²⁷⁴ just a few months after the AIA became law,²⁷⁵ but it appears that he made the decision much earlier and for other reasons; perhaps he had grown sensitive to the concerns of the states as a member of the Senate. A letter dated 1791 indicates that *Morris* asked his attorney "not to urge it further, that as he was a Member of the Legislature of the United States, from motives of Delicacy he wou'd rather the Cause shou'd be proceeded on in the State Court."²⁷⁶ Thus ended the *Morris* tale.

While the *Morris* litigation ended, the disputed power of the federal courts to issue writs of certiorari to the state courts apparently remained alive. Indeed, at least one other federal circuit relied on certiorari to effect

²⁷⁰ See 4 DHSC, *supra* note 9, at 201 & n.4.

²⁷¹ In other words, *Morris*'s complaint (excerpted *supra* text accompanying note 91) was an original bill of injunction—just the sort that the AIA would foreclose.

²⁷² See Letter from James Iredell, Assoc. Justice of the Supreme Court, to John Jay, Chief Justice of the Supreme Court (Jan. 17, 1792), in 1 MCREE'S IREDELL, *supra* note 98, at 337, 338 ("To be sure the honor of the United States is deeply concerned in their courts deciding solemnly whether the writ issued erroneously, or ought to be enforced. It is of more importance that it should not go off by an act of defiance of the State Court, because the General Assembly of North Carolina in their session last Winter thanked the State Judges for their conduct in disobeying the Writ.").

²⁷³ See Holt & Perry, *supra* note 5, at 108 (discussing a "reprise" of the *Morris* debacle in March 1793, when South Carolina state judges refused to comply with a certiorari issued by the federal circuit court). The case was *Washington & Beresford v. Huger*, 1 S.C. Eq. (1 Des. Eq.) 360 (1794).

²⁷⁴ See 2 DHSC, *supra* note 9, at 239 n.6.

²⁷⁵ See Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 334–35.

²⁷⁶ See Sitgreaves Letter, *supra* note 185, at 196–97.

removal of an action from state to federal court in much the way that Morris had done.²⁷⁷ To the extent that the AIA sought to address federal–state tension without depriving the federal courts of certiorari power for use in appropriate circumstances, therefore, it appears that the legislation achieved its goal.

2. *The AIA in the Nineteenth Century.*—If framed in the heat of a controversy over the *Morris* certiorari case, the AIA certainly had enduring ramifications. Convention holds that the Supreme Court first applied the AIA in its 1807 decision in *Diggs & Keith v. Wolcott*.²⁷⁸ There, the plaintiffs, Diggs and Keith, obtained a judgment against Wolcott in Connecticut state court.²⁷⁹ Wolcott, in turn, filed a bill of injunction in Connecticut state court, seeking to block enforcement of that judgment.²⁸⁰ Diggs and Keith removed the state anti-suit action to the Connecticut federal circuit court,²⁸¹ where Wolcott obtained a writ of injunction against the state judgment.²⁸² Diggs and Keith appealed and the Supreme Court reversed.²⁸³ William Cranch, the Court’s reporter at the time, appears to have viewed the AIA as a factor in the dismissal; he reported the Court as having decided that the circuit court “had not jurisdiction to enjoin proceedings in a *state* court.”²⁸⁴ Although the *Diggs* Court did not mention the AIA by name, the wording of Cranch’s report²⁸⁵ has suggested to subsequent observers (as it does to us) that the dismissal was based on a finding that the AIA foreclosed the assertion of jurisdiction over actions to stay proceedings in state court.²⁸⁶ Indeed the Court itself cited *Diggs* as an

²⁷⁷ See *Washington & Beresford*, 1 Des. Eq. at 361–62; see also Holt & Perry, *supra* note 5, at 108 (discussing *Washington & Beresford*); Note, *supra* note 37, at 622 (same).

²⁷⁸ 8 U.S. (4 Cranch) 179 (1807).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ As the defendants in equity, statutory removal was a route available to Diggs and Keith. Recall that Morris, the plaintiff in equity, had no such option and hence resorted to certiorari. See *supra* notes 106–09 and accompanying text.

²⁸² *Diggs*, 8 U.S. (4 Cranch) at 179.

²⁸³ *Id.*

²⁸⁴ *Id.* at 180. According to the clerk’s entry in the official minutes, available in the National Archives, the Supreme Court ruled for the defendants on the ground that the federal circuit court lacked jurisdiction “in this cause.” Appellate Case Files of the Supreme Court of the United States, 1792–1831 (Feb. 26, 1807) (National Archives Microfilm Publication No. 215, file 230, roll 1) (on file with authors).

²⁸⁵ A summary in the margin of the Cranch report states in its entirety: “A court of the *United States* cannot enjoin proceedings in a *state* court.” *Diggs*, 8 U.S. (4 Cranch) at 179. Compare that to the language of the AIA: “nor shall a writ of injunction be granted to stay proceedings in any court of a state.” Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 335.

²⁸⁶ See *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 134 (1941) (“The early decisions of this Court applied the Act of 1793 as a matter of course.” (citing *Diggs*, 8 U.S. (4 Cranch) at 179)); *id.* at 134 n.5 (“The first case arising under the [anti-injunction] provision was *Diggs & Keith v. Wolcott*”); Peck v. Jenness, 48 U.S. (7 How.) 612, 625 (1849) (citation omitted) (“The [1793 Act] declares that a writ of

early application of the AIA, in its 1849 decision *Peck v. Jenness*.²⁸⁷ Thus, it seems that parties relatively close in time to the *Diggs* disposition consistently read the *Diggs* dismissal as an apparent application of the AIA. Even if *Diggs* did not so hold (as others have argued²⁸⁸), the willingness of well-informed observers to treat the case as one to which the AIA was thought to apply may have some persuasive force.

The conventional reading of *Diggs* comports with our account of the AIA. Indeed, *Diggs* was a virtual replay of the *Morris v. Allen* litigation: in an action removed from a state court of equity, a federal circuit court agreed to issue an original writ of injunction to stay proceedings in state court. But this time, the AIA stood in the way. What's more, the *Diggs* decision may explain why the AIA received scant attention in the nineteenth century. Having foreclosed federal interposition in state court proceedings, the Court had clarified that the AIA barred original "writs of injunction."

Another nineteenth-century case, *French v. Hay*,²⁸⁹ reveals the flip side of the original-ancillary distinction. Said to be the first decision in which the Supreme Court recognized "exceptions" to the "absolute prohibition of the injunction statute,"²⁹⁰ *French* arose from the removal of a state court proceeding to the Virginia federal circuit court.²⁹¹ Following removal and a decree for the defendant, the federal court granted an injunction against further proceedings by the losing party either in the Virginia or Pennsylvania state courts (where the plaintiff had sued to enforce the

injunction shall not be granted 'to stay proceedings in any court of a State.' In the case of *Diggs v. Wolcott*, the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a State court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a State court.").

²⁸⁷ 48 U.S. (7 How.) at 625.

²⁸⁸ Professor Mayton resists the conventional explanation in an effort to preserve the viability of his claim that the AIA limits only the power of single Justices rather than the power of courts. See Mayton, *supra* note 5, at 332, 339–40. Mayton argued that the dismissal may have been based on the Court's finding that the federal circuit lacked judicial jurisdiction over *Diggs* and Keith, rather than power under the AIA to grant a writ of injunction. *Id.* at 340 n.59. In support of his argument, Mayton notes that *Diggs* and Keith made such a jurisdictional argument unsuccessfully in the lower court. *Id.*

Mayton's judicial jurisdiction argument runs headlong into the fact that both *Diggs* and Keith invoked the jurisdiction of the Connecticut state court (to recover against Wolcott) and that of the federal circuit (by removing Wolcott's state court anti-suit action). Such deliberate invocation of the jurisdiction of the Connecticut federal circuit would surely have done much to lessen the strength of any argument against that court's authority to enter a decree binding *Diggs* and Keith. For us, then, the significance of *Diggs* lies in the Court's refusal to confirm an injunction that apparently fell squarely within the terms of the AIA's prohibition against federal interference.

²⁸⁹ 89 U.S. (22 Wall.) 238 (1874).

²⁹⁰ Taylor & Willis, *supra* note 2, at 1173.

²⁹¹ *French*, 89 U.S. (22 Wall.) at 250.

Virginia state court's judgment).²⁹² The plaintiff invoked the AIA, but the Court rejected its application.²⁹³

The *French* decision appears to reflect a conclusion that the relief in question was ancillary in character and did not run afoul of the AIA's restriction on writs of injunction brought by original bill. Early in its opinion, the Court explained that the federal court's injunctive proceeding was "not an original one."²⁹⁴ Rather, the Court explained, "[i]t is auxiliary and dependent in its character."²⁹⁵ As a consequence, the Court found that the "prohibition . . . against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here."²⁹⁶ The prior jurisdiction of the federal court was said to take "the case out of the operation of that provision."²⁹⁷ While scholars have viewed this as *ipse dixit*,²⁹⁸ we see a clear expression of the idea that the AIA was meant to limit only the issuance of original writs of injunction and to leave a federal court free to grant injunctive relief to effectuate a decree involving parties otherwise properly before that court.

CONCLUSION

By the mid-twentieth century, the original-ancillary distinction that the eighteenth-century drafters had embedded in the AIA's limiting reference to "writs of injunction" had disappeared from view. A variety of factors combined to consign the statutory distinction to "obscurity." Law and equity had been merged; the original bill of injunction had given way to a single "civil action" that was meant to provide an all-purpose vehicle for the assertion of claims in federal court.²⁹⁹ As a result, courts of equity no longer routinely entertained original bills of injunction to stay proceedings in the courts of law pending the resolution of equitable defenses; such equitable defenses as fraud and mistake were available in the context of a single merged civil action. In short, changes in the nature of legal practice made a once-familiar feature of equity remote and inaccessible.

These changes were complete in 1941, when Justice Frankfurter encountered the AIA in the well-known case of *Toucey v. New York Life Insurance Co.*³⁰⁰ Frankfurter was a brilliant legal theorist and a close

²⁹² *Id.* at 253.

²⁹³ *Id.*

²⁹⁴ *Id.* at 252.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 253.

²⁹⁷ *Id.*

²⁹⁸ See Taylor & Willis, *supra* note 2, at 1173.

²⁹⁹ See FED. R. CIV. P. 2 (proclaiming the advent of a single, all-purpose "civil action"). The rules took effect in 1938.

³⁰⁰ 314 U.S. 118 (1941).

student of the history of the federal court system, but he had precious little experience in the practice of law.³⁰¹ Acting on progressive impulses,³⁰² Frankfurter used the opportunity presented in *Toucey* to rethink the AIA. To Frankfurter, it was obvious that the ban on writs of injunction had been intended, whatever the Act's origins, as an absolute barrier to federal equitable interposition in pending state court proceedings. The exceptions that courts had developed over time were discarded; they were simply the product of "loose" language and a regrettable lack of judicial restraint.³⁰³

Time, to some extent, has marched on. Congress restored the exceptions to the Act in a 1948 codification of the AIA that survives to this day and authorizes federal courts to stay state court proceedings in aid of their jurisdiction and to effectuate their judgments.³⁰⁴ But Frankfurter's account continues to shape conventional understanding of the Act. The Court today regards the AIA as an important barrier to equitable interposition and treats the exceptions as subjects of narrow interpretation.³⁰⁵ While the Court neutralized the AIA to some extent in

³⁰¹ For a brief biography describing Frankfurter's career as a Harvard law professor and progressive advocate of judicial restraint before his appointment to the bench, see NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 10–15 (2010). Justice Frankfurter's many works included a casebook on federal jurisdiction and a history of the Supreme Court. See FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT (1928).

Justice Frankfurter graduated from law school in 1906 and worked at a law firm in New York City for only a few months before joining the U.S. Attorney for the Southern District of New York as Henry Stimson's assistant, where he worked primarily on criminal matters. In 1911, Justice Frankfurter went to Washington, D.C., as Stimson's assistant in the War Department. He remained in government service, as Stimson's assistant, until he accepted an appointment as a professor at the Harvard Law School in 1914. At Harvard, Justice Frankfurter specialized in administrative law, jurisdiction, and the Supreme Court's special place in American constitutional government. For accounts, see H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 22–41 (1981); HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 7–13 (1960).

³⁰² See EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000). Justice Frankfurter came by his distrust of equity honestly, having worked as a law professor to end the federal equitable role in labor disputes, see generally FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1963), and having criticized the expanded federal judicial role occasioned by the rise of substantive due process, see generally FELIX FRANKFURTER, *Exit the Kansas Court*, NEW REPUBLIC, June 27, 1923, in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 140 (Philip B. Kurland ed., 1970). He also worked to subject federal equity to the discipline of the *Erie* doctrine, holding in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), that suits brought in equity were nonetheless subject to state statutes of limitation. See Collins, *supra* note 221, at 336–43 (arguing that Justice Frankfurter "dismissed a long line of precedent that suggested a different view of federal equity power" and instead used *Guaranty Trust* as an opportunity to limit the use of federal equitable injunctions as "a means of suppressing labor strikes").

³⁰³ *Toucey*, 314 U.S. at 133.

³⁰⁴ See 28 U.S.C. § 2283 (2006).

³⁰⁵ See, e.g., *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

constitutional litigation,³⁰⁶ the doctrine of equitable restraint draws on Frankfurter's conception of the Act in defining limits on federal power to stay pending criminal proceedings.³⁰⁷

Our account of the history of the AIA calls Frankfurter's view into question. The political context in which the AIA was adopted suggests that the Act sought to tackle an important but limited problem that the North Carolina litigation in *Morris v. Allen* had uncovered. Drawing on eighteenth-century chancery practice, with its distinction between original process for "writs of injunction" and ancillary relief to defend federal power, we have proposed a more nuanced sense of what the AIA meant to prohibit and to leave in place. The limiting textual reference to writs of injunction both confirms the Act's connection to the *Morris* controversy and explains (and to some extent justifies) the judicial recognition of AIA exceptions in the nineteenth century.

And yet the historical puzzle remains. Frankfurter, the great apostle of judicial restraint, acted to foreclose what he perceived as judge-made exceptions to a statute that he regarded as self-evidently absolute in its prohibition. Viewed from the perspective on the Act's origins that we develop here, Frankfurter begins to look like something of an activist himself. When we revisit his *Toucey* opinion with a better appreciation of the origins of the 1793 Act, Frankfurter appears to have acted as much from a distrust of federal equity as from a desire to honor the intentions of Congress. Dissenting in *Toucey*, Justice Reed gave voice to a concern with Justice Frankfurter's headlong decision to end the relitigation exception. Reed explained "that courts of equity had long exercised the power to entertain bills to carry their decrees into execution by injunction against the parties."³⁰⁸ He could not believe that Congress would draft a statute in which "[s]uch needed powers would . . . be lightly withdrawn."³⁰⁹ We find it striking that the powers to which Justice Reed referred were the very ones Congress restored to the statute in 1948.³¹⁰ We find it all the more striking that they had been hiding in plain sight all along, in the language of the carefully drafted text of a much misunderstood piece of early republic legislation.

³⁰⁶ See *Mitchum v. Foster*, 407 U.S. 225 (1972).

³⁰⁷ See *Younger v. Harris*, 401 U.S. 37, 43–44 (1971).

³⁰⁸ See *Toucey*, 314 U.S. at 143 (Reed, J., dissenting).

³⁰⁹ *Id.*

³¹⁰ See 28 U.S.C. § 2283 (1948).

