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ARTICLES

THE BITTER WITH THE SWEET: TRADITION, HISTORY, AND LIMITATIONS ON FEDERAL JUDICIAL POWER—A CASE STUDY

Stephen B. Burbank*

The distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won. We should stop thinking of equity as separate and marginal, as consisting of extraordinary remedies, supplemental doctrines, and occasional exceptions, as special doctrines reserved for special occasions. Except where references to equity have been codified, as in the constitutional guarantees of jury trial, we should consider it wholly irrelevant whether a remedy, procedure, or doctrine originated at law or in equity.¹

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A critical use of history may be an excellent guide to present problems, but a critical use takes account of changes in conditions as well as similarities.²

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² Fleming James, Jr., Right to Jury Trial in Civil Actions, 72 YALE L.J. 655, 664 (1963).
I. Introduction

It did not take long after Professor Chayes celebrated the "triumph of equity" in public law litigation\(^3\) to recognize that the announcement was premature—part prophecy, partly unfulfilled—at least if equity meant what he thought or hoped it meant.\(^4\) In today's legal landscape, where the foreground is occupied by questions regarding the constitutional limits of federal legislative power,\(^5\) the matters he addressed may seem of secondary importance. If so, questions regarding the status, in a merged system of law and equity, of the irreparable injury rule\(^6\) or of any other aspect of the doctrine associated with procedure, whether deriving from law or equity, are not likely to generate great professional, let alone public, interest. Who cares whether equity has triumphed in "adjective law," as procedure used to be called?\(^7\) It is no wonder that teachers of civil procedure have long filled their courses with a heavy diet of *Erie Railroad Co. v. Tompkins*\(^8\) and *International Shoe v. Washington*\(^9\).

Without depreciating the importance of the constitutional questions that command current attention, I suggest that neglecting the terrain of procedure is, as it always has been, a mistake. Fundamentally, that is because procedure is power, whether in the hands of law-

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\(^3\) See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1292 (1976).


\(^8\) 304 U.S. 64 (1938).

\(^9\) 326 U.S. 310 (1945). "For many years, and perhaps still today, [the emphasis in Civil Procedure courses on the constitutional limitations on state court jurisdiction] could also be explained in part by the utility function of law professors: the desire of most of us to teach at least some constitutional law." Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 Tulane J. Int’l & Comp. L. 111, 112–15 (1999).
yers or judges. Smart lawyers and judges recognize the power of procedure.\footnote{\textit{See} Stephen B. Burbank \& Linda J. Silberman, \textit{Civil Procedure in Comparative Context: The United States of America}, 45 \textit{Am. J. Comp. L.} 675, 699–704 (1997); Stephen B. Burbank, \textit{Procedure and Power}, 46 \textit{J. Legal Educ.} 513 (1996).} That is probably the best explanation of their attempts to persuade us that there is no ascertainable boundary separating substantive law from procedure and that procedure is not important, is technical, and is difficult—that, in short, it is best left to the experts.\footnote{\textit{See} Stephen B. Burbank, \textit{Afterwords: A Response to Professor Hazard and a Comment on Marrese}, 70 \textit{Cornell L. Rev.} 659, 662 (1985).} If we do that, we are ceding extraordinary power and, moreover, accountability for its exercise. Substantive rights, including constitutional rights, are worth no more than the procedural mechanisms available for their realization and protection.

Neglecting cases and other material covered in courses on procedure is also a mistake because questions of power they raise can implicate dilemmas, in particular separation of powers and federalism, that loom large in constitutional law, and because consideration of judicial responses to those dilemmas may cast light on the broader landscape. This is most obviously true—although it may not be obvious to teachers of either procedure or constitutional law—where the doctrine is constitutional law. Why did Justice Black, who agreed with the result in \textit{International Shoe}, invest so much effort in a separate opinion in that case if not as part of a broader assault on what he deemed the natural law approach of the jurisprudence of procedural due process, which the Court imported into substantive due process cases?\footnote{\textit{See} \textit{International Shoe}, 326 U.S. at 322–26 (Black, J.). “Superimposing the natural justice concept on the Constitution’s specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion, and the right to counsel. This has already happened.” \textit{Id.} at 325–26 (citing \textit{Betts v. Brady}, 316 U.S. 455 (1942)).} And what generated so much heat (and so little light) in the nasty exchange between Justice Scalia and Justice Brennan in \textit{Burnham v. Superior Court},\footnote{\textit{Id.} at 325–26 (Black, J.). “Superimposing the natural justice concept on the Constitution’s specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion, and the right to counsel. This has already happened.” \textit{Id.} at 325–26 (citing \textit{Betts v. Brady}, 316 U.S. 455 (1942)).} if not a similar struggle in a landscape where substantive due process had come to include, in addition to the protections of criminal defendants, issues like abortion?\footnote{\textit{See id.} at 622–27 (Scalia, J., plurality opinion); \textit{id.} at 628–40 (Brennan, J., concurring in the judgment); \textit{see also} infra text accompanying notes 105–12.}

Apart from issues of constitutional stature, attitudes towards procedure may illuminate other parts of the public law landscape. Thus, it is commonplace for those aware of Felix Frankfurter’s pre-judicial career, which was characterized by sustained and vigorous advocacy of progressive causes, to wonder about, if not lament, his apparently and
increasingly unprogressive approach to the role of the federal judiciary. It helps, I believe, to know that, as an activist and a scholar in his pre-judicial career, Frankfurter was intimately familiar with the ways in which lawyers and federal judges had manipulated the law, including prominently the law of procedure, to the disadvantage of the causes and the people he cared about. Having worked on numerous occasions to reduce opportunities for the illiberal use of procedural law, Frankfurter was more aware than most of the power of procedure, and in writing history, he sought to avert in the future problems that he had witnessed at close hand.15

Revisionist history (if that is not redundant) may be better than no history at all when a court is called upon to decide an issue of procedure, particularly one that implicates separation of powers or federalism. For it may be only the consideration of history that prompts awareness that separation of powers or federalism concerns are implicated. Moreover, when a court acknowledges the relevance of history to the decision of an issue, scholars and others who follow that court’s work can better assess its performance and whether it has made “a critical use [that] takes account of changes in conditions as well as similarities.”16

From this perspective, reliance on the supposed requirements of a legal tradition to provide answers to contemporary problems of procedure is not a technique that should commend itself to the courts, however much, as a rhetorical technique, it may ease the stultifying task of marking the limits of judicial power. Even those who believe in the existence and continuing influence of an autonomous legal tradition must acknowledge that outside influences impinge on that autonomy.17 That is to say, viewing history exclusively through the lens of a


The Business of the Supreme Court was designed to advance an extensive political agenda that included constraining the reach of the conservative Supreme Court, limiting the ability of corporate litigants to exploit federal jurisdiction, abolishing the doctrine of Swift v. Tyson . . . , blocking passage of the proposed declaratory judgment act, expanding substantially the issues on which the lower federal courts would defer to state courts, and justifying a series of progressive legislative proposals to restrict the jurisdiction and alter the structure of the national judiciary.

Id. at 684; see also id. at 700–01. For the collaborative effort of Frankfurter and Justice Brandeis to overrule Swift by statute, see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1109–10 & n.433 (1982).

16 James, supra note 2, at 664; see also supra text accompanying note 2.

legal tradition may leave out of sight a good deal of potential importance. Indeed, such a view may obscure everything except doctrine, including the reasons for doctrine. Finally, understanding the reasons for inherited doctrine is essential to determining whether it satisfactorily meets contemporary needs and whether, if not, a court is an appropriate vehicle of change.

Professor Laycock, who has followed Professor Chayes in proclaiming the "triumph of equity," argues persuasively against the use of legal tradition to decide concrete cases and, accordingly, against the "use of the law-equity distinction as a dysfunctional proxy for a series of functional choices." One can (and I do) agree with almost everything he says and still regret the impoverished role that his account of the problem and his suggested solution appear to accord to history. One might interpret him as holding the view that, unless referenced in a legal provision of continuing peremptory force, such as the Seventh Amendment, history is irrelevant. More likely, with his lens focused on a "dysfunctional proxy" that obscures attention to the real influences that animate, or should animate, doctrine, he neglected to remark the role that attention to history may play in uncovering those influences in the first place.

To be sure, the limitations of either law or equity that antedated the merger of the two may have captured nothing more than their respective, interdependent, and at times, internecine traditions. But they may have captured more. Thus, understanding the history of such limitations within the broader culture may be the only way to evaluate the wisdom, in a post-merger world, of the containment they reflect. In that sense, history may be a source of "front end containment" which, although it should not be accepted today simply be-

18 Laycock, supra note 1, at 78; see also David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 580 (1985). For a recent decision that relies on tradition to restrict the power of the federal courts to dismiss on abstention grounds a case seeking only money damages, but that appears to approve a stay if abstention is otherwise appropriate, see Quackenbush v. Allstate Insurance Co., 517 U.S. 706 (1996). Because it is not clear that dismissal and stay are functionally distinguishable for these purposes, see Lewis Yelin, Note, Burford Abstention in Actions for Damages, 99 COLUM. L. REV. 1871 (1999), the case may represent a knowing wink in the direction of, rather than an effort to honor, separation of powers.

19 See Laycock, supra note 6, at 11–12.

History has its claims, and lawyers should understand the history of equity. But law and equity have been merged for half a century in federal courts and for well over a century in many states. The legal or equitable origin of a remedy should no longer be the starting point for analysis.

Id.

20 Laycock, supra note 1, at 80.
cause of its "pedigree,"\textsuperscript{21} may nonetheless well serve policies and interests of no less relevance today.

Last Term, the Supreme Court decided a case, \textit{Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.},\textsuperscript{22} that put in relief questions concerning the role of legal tradition in the resolution of contemporary problems of procedure. The Court held that the federal courts lack the power to freeze a defendant's assets by preliminary injunction in an action seeking only money damages. In a legal culture accustomed to claims for the "triumph of equity" and to thinking about equity as an engine of legal development, the Court's decision is likely to be widely unpopular,\textsuperscript{23} because it insisted on, and refused to alter, limitations on federal judicial power found in the tradition of equity. There is room for regret about the Court's opinion, as well as about the dissent.\textsuperscript{24} More like an alligator than an iceberg, \textit{Grupo Mexicano} leaves largely beneath the surface much of what was or should have been important. By choosing one question to answer, the Court not only left many more unanswered, it also obscured the larger context in which all of the relevant questions should be addressed. At least, however, the Court sought to explain the reasons animating the doctrine it applied, and its opinion suggests some of the influences for which tradition might be thought to have served as a "proxy." Unfortunately, history (apart from legal tradition) does not appear to have been one of them.

My goals in this Article are to evaluate the opinions in \textit{Grupo Mexicano} on their own terms, to bring to the surface the submerged influences that did affect, and those that should have affected, the decision, and to redefine the context in which the questions remaining after the Court's decision should be addressed. I conclude that, in deciding the case on the broadest possible ground, the Court not only rewrote the history of remedies in equity\textsuperscript{25} but—the focus of my attention—neglected both the history of provisional remedies at law and the history of Federal Rules of Civil Procedure 64 and 65. Under-

\textsuperscript{21} Burnham v. Superior Court, 495 U.S. 604, 621 (1990) (Scalia, J., plurality opinion).
\textsuperscript{22} 119 S. Ct. 1961 (1999).
\textsuperscript{23} See \textit{The Supreme Court, 1998 Term—Leading Cases}, 113 Harv. L. Rev. 200, 317 (1999) [hereinafter \textit{Leading Cases}] ("rest[ing] its decision on a cramped understanding of the equitable powers of federal courts"); see also id. at 326 (stating that a "formalist interpretation of equity jurisdiction . . . was inappropriate even from an originalist perspective").
\textsuperscript{24} Moreover, there is room for regret in the quality of advocacy, particularly that provided by the United States as amicus curiae. \textit{See infra} notes 123, 232, 266.
\textsuperscript{25} \textit{See infra} text accompanying notes 99–122.
standing the history of provisional remedies at law provides non-ideological support for the result in *Grupo Mexicano* on the broad ground chosen by the Court, and understanding both suggests that the same result should have been obtained if the Court had chosen one of the narrower grounds for decision that were available, both of which pointed to state law. I also conclude that consideration of the case's international aspects, which the Court's chosen route to decision permitted it to ignore, should not have led to a different result under any of the available grounds for decision. More important, taking into account the delicate problems of international relations implicated in a case like *Grupo Mexicano* supports the broadest implication of the Court's decision—that lawmaking in the area requires active congressional involvement—and suggests that such lawmaking should not be confined to the remedies available in federal court or to provisional remedies.

II. *Grupo Mexicano*

A. The Underlying Dispute

Grupo Mexicano de Desarrollo, S.A. (GMD) is a large Mexican holding company specializing in public works and infrastructure construction projects in Mexico and throughout Latin America. One of those projects was a program of toll road construction sponsored by the Mexican Government and effected through the medium of concessions to private companies (the "concessionaires") that retained construction companies to build and that operated the toll roads. As both a substantial investor in the concessionaires and as a contractor, starting in 1990 GMD made massive commitments to the program, and in 1994 it issued $250 million of notes (the "Financing Notes"), guaranteed by four of its subsidiaries, to finance its ongoing operations. The Financing Notes, bearing interest at 8.25%, were issued to institutional investors. They contained a provision designed to ensure that the obligation remained on the same footing

26 See infra text accompanying notes 174–232.
27 See infra text accompanying notes 129–232.
28 See infra text accompanying notes 233–89.
30 See id.
31 See id.
32 See id.
as all other unsecured and unsubordinated debt, and they provided for jurisdiction over GMD and its guarantors in New York.

In an economy gone sour and with the peso devalued, the new toll roads failed to attract the traffic or generate the revenue expected, the concessionaires stopped paying the construction companies, and GMD, which was holding substantial unpaid invoices (the "toll road receivables"), experienced serious financial difficulties. Neither GMD nor the guarantors made the August 17, 1997 interest payment required by the Financing Notes.

Within days, the Mexican Government announced a program pursuant to which it apparently promised to guarantee notes issued by a special purpose government trust (the "Toll Road Notes") that would be used to retire the concessionaires' bank debt and a portion of the toll road receivables. The Mexican Government in return assumed ownership and operation of the toll roads (the "Toll Road Rescue Program"). In late August and October, 1997, reports from Reuters and GMD itself revealed that GMD was attempting to reduce costs and restructure its debt, that it was giving priority in the restructuring effort to Mexican creditors, and that it was assigning to certain creditors, by placing toll road receivables in trust for them, some $117 million of its rights under the Toll Road Rescue Program. These creditors included the Mexican Government (back taxes) and former employees (severance compensation).

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33 According to Alliance's complaint, "[t]he Notes are pari passu with all other unsecured and unsubordinated GMD debt and the Note instrument prohibits GMD from incurring any secured debt without the Notes also becoming equally and ratably secured, with exceptions not relevant here." Id. at *29aa.

34 See id. at 2 n.2.

35 See id. GMD's June 1997 Form 20-F filing with the Securities and Exchange Commission revealed that its current liabilities (debts of approximately $450 million in addition to the Financing Notes) exceeded its current assets and that there was "substantial doubt" about its ability to continue as a going concern. See Grupo Mexicano, 119 S. Ct. at 1964–65.

36 See Petitioners' Brief at 4, Grupo Mexicano (No. 98-231).

37 See id. The precise details of the Toll Road Rescue Program remained uncertain even after final judgment was entered by the district court. See infra text accompanying note 261.

38 See Petitioners' Brief at 5, Grupo Mexicano (No. 98-231). GMD's October press release indicated that during the first nine months of 1997, it had revenues of approximately $119 million but an expected loss of $802 million and a negative net worth of $214 million.

39 See id. GMD estimated the receipt of approximately $309 million under the Toll Road Rescue Program.

40 See id. at 5–6.
B. Proceedings in the Lower Courts

GMD's efforts to restructure included the debt represented by the Financing Notes, but those efforts were unsuccessful and on December 12, 1997, the holders of Financing Notes in the amount of $75.8 million (Alliance), having caused the acceleration of the principal amount, sued for breach of contract in the United States District Court for the Southern District of New York.\textsuperscript{41} Alliance sought damages of $80.9 million in principal and interest, as well as a temporary restraining order and a preliminary injunction, alleging that "on information and belief, defendants either are insolvent or at risk of insolvency, and are dissipating or about to dissipate their only substantial liquid asset."\textsuperscript{42}

The district court entered a temporary restraining order against the transfer or encumbrance of the Toll Road Notes, and following hearings on December 19 and 23, 1997, granted a preliminary injunction restraining GMD and its guarantors from "dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting [their] right to, interest in, title to or right to receive or retain, any of the [Toll Road Notes]."\textsuperscript{43} The district court judge found that Alliance had "satisfied their burden for the issuance of a preliminary injunction because: (1) they would almost certainly succeed on their breach of contract claims against GMD; and (2) without the injunction they faced an irreparable injury since GMD's financial condition and dissipation of assets would frustrate any judgment recovered."\textsuperscript{44}

Alliance was required to post a bond of $50,000.\textsuperscript{45}

\textsuperscript{41} See id. at 6.

\textsuperscript{42} Id. at *23aa. Alliance's complaint also requested that the district court "requir[e] defendants to deposit the [Toll Road] Notes into an appropriate trust established under Mexican Law and approved by the Court." Id. at *31aa.

\textsuperscript{43} Id. at *1aa. Affidavits and other papers filed in connection with the hearings revealed that GMD had assigned between $214 million and $258 million of its interest in the Toll Road Notes, that it intended to make additional assignments, and that its plans called for only $5.5 million of its interest in the Toll Road Notes to be available for satisfaction of its indebtedness on the Financing Notes. See Respondents' Brief at 4, Grupo Mexicano (No. 98-231).

\textsuperscript{44} Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 698 (2d Cir. 1998), rev'd, 119 S. Ct. 1961 (1999). The order granting the preliminary injunction provided that "nothing contained herein shall prohibit the defendants from commencing any insolvency proceedings under any applicable law." Respondents' Brief at 6, Grupo Mexicano (No. 98-231). The district court declined to require the establishment of a trust in Mexico, observing that it was not inclined "to start running things in Mexico" and that other interested parties were not before the court. Id.

\textsuperscript{45} See Petitioners' Brief at *1aa, Grupo Mexicano (No. 98-231).
On interlocutory appeal, a panel of the United States Court of Appeals for the Second Circuit affirmed. Rejecting GMD’s argument that Federal Rule of Civil Procedure 64—and through it state law—is the exclusive repository of power in a district court, prior to judgment, to freeze assets in which the plaintiff claims no equitable interest, the court of appeals held that such power exists under Rule 65 and that the “two Rules... are complementary, not mutually exclusive.” Expressing confidence in the capacity of the traditional requirements for obtaining equitable relief adequately to protect defendants against abuse and noting the “successful twenty-year history of” asset freeze orders in similar circumstances in England, the court found no abuse of discretion.

C. Grupo Mexicano in the Supreme Court

Long before GMD and its guarantors sought or were granted review in the Supreme Court, the district court had granted Alliance’s motion for summary judgment, awarded judgment in the amount of $82,444,259, ordered GMD to “irrevocably assign or transfer” to Alliance a sufficient amount of the toll road receivables or the Toll Road Notes to satisfy the judgment (the “Turnover Order”), and converted the preliminary injunction into a permanent injunction that would remain in effect until the assignment or transfer was accomplished. This led Alliance to make an unsuccessful suggestion of mootness in the court of appeals prior to decision in the appeal from the preliminary injunction. Moreover, seeking to derive additional support from the fact that GMD had effectively abandoned its appeal from the permanent injunction, while pressing the appeal from the Turnover

46 See Alliance Bond Fund, 143 F.3d at 697. For a review of the state of the law prior to Grupo Mexicano, see In re Estate of Ferdinand Marcos, 25 F.3d 1467, 1476–80 (9th Cir. 1994).

47 Alliance Bond Fund, 143 F.3d at 692. According to the Court of Appeals, Rule 64 did not authorize the preliminary injunction because New York law does not permit preliminary injunctions in actions seeking only a sum of money and New York’s attachment statute reaches only property that is located in the state. See id. at 693.

48 Id. at 696.

49 See id. at 697. Although it rejected GMD’s argument that, on the assumption of power to issue such an order, intent to frustrate an eventual judgment should be required, the court of appeals observed that “[t]he plain import of Judge Martin’s findings is that the actions of GMD were less than benign.” Id. “Judge Martin clearly believed that GMD was improperly establishing a priority of creditors,” and, in the court of appeals’s view, “GMD’s duplicity in disclosing the full extent of its assignments further supports this conclusion.” Id.

50 Petitioners’ Brief at *1aa, Grupo Mexicano (No. 98-231).

51 See id. at 7 & n.4.
Order, Alliance renewed its mootness argument in opposing certiorari and in its brief on the merits.52

The Supreme Court unanimously rejected the argument, distinguishing cases in which, because the preliminary injunction and the merits claim involved the same substantive issue, "there was no sense in trying the preliminary injunction question separately."53 In this case, by contrast, "[t]he resolution of the merits is immaterial to the validity of petitioners' potential claim on the bond."54 That was about the limit of unanimity, however,55 and the Court split 5–4 on the question of the district court's power to issue the preliminary injunction.

Justice Scalia's opinion for the Court framed the issue as whether the district court had authority to issue the preliminary injunction "pursuant to Federal Rule of Civil Procedure 65."56 Noting its consistent view that the federal courts' equity jurisdiction was "an authority to administer in equity suits the principles of the system of judicial remedies" inherited from the English Court of Chancery at the time of separation,57 and agreeing with commentators that Rule 65 does not alter the "substantive prerequisites for obtaining an equitable remedy ... [which] depend on traditional principles of equity jurisdiction,"58 the Court turned to the question of "whether the relief [Alliance] requested here was traditionally accorded by courts of equity."59

Here, finding no help in Alliance's brief, the Court took up the argument of the United States, as amicus curiae, that the preliminary injunction granted by the district court was analogous to relief tradi-

52 See Respondents' Brief in Opposition to Petition for Writ of Certiorari at 4 n.3, Grupo Mexican (No. 98-231); Respondents' Brief at 12–20, Grupo Mexican (No. 98-231).
54 Id.
55 See infra text accompanying note 99.
56 Grupo Mexican, 119 S. Ct. at 1968. In a footnote, the Court stated, Although this is a diversity case, respondents' complaint sought the injunction pursuant to Rule 65, and the Second Circuit's decision was based on that rule and on federal equity principles. Petitioners argue for the first time before this Court that under Erie the availability of this injunction under Rule 65 should be determined by the law of the forum State (in this case New York). Because this argument was neither raised nor considered below, we decline to consider it.
Id. at 1968 n.3 (citation omitted).
58 Id. (quoting 11A Wright, Miller, & Kane, infra note 161, § 2941, at 31).
59 Id.
tionally available in equity under a creditor’s bill.\textsuperscript{60} The Court rejected the argument, however, finding that, “as a general rule, a creditor’s bill could be brought only by a creditor who had already obtained a judgment establishing the debt.”\textsuperscript{61} This rule, the Court explained, was “a product, not just of the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also of the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor’s use of that property.”\textsuperscript{62} Acknowledging the United States’s argument that there were exceptions to the general rule, some of which might have been relevant in this case, but noting also amicus’s studied agnosticism on that question, Alliance’s failure even to address it, and the absence of discussion of the point in the lower courts, the Court declined “to speculate upon the existence or applicability to this case of any exceptions.”\textsuperscript{63}

At this point the case was over, but you would not know it simply by looking at the Court’s opinion, which was only half over and just beginning to pick up steam. The Court next responded to the call in Justice Ginsburg’s dissenting opinion for a more generous view of the aims and traditions of equity and, hence, of the power of the federal courts today. Invoking Joseph Story for “the general role of equity in our ‘government of laws, not of men,’”\textsuperscript{64} and through him, Blackstone, and without questioning “the proposition that equity is flexible,” the Court asserted that “in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.”\textsuperscript{65} Because the relief sought in this case had never been available in the federal courts and because those courts had long “specifically disclaimed” it, at stake was a “default rule,”\textsuperscript{66} as the dissent put it, “not of flexibility, but of omnipotence.”\textsuperscript{67} Doubting the dissent’s suggestion that either debt avoidance, preferential treatment of credi-

\begin{itemize}
\item \textsuperscript{60} See Brief for the United States as Amicus Curiae Supporting Respondents at 13–14, \textit{Grupo Mexicano} (No. 98-231). “This remedy was used (among other purposes) to permit a judgment creditor to discover the debtor’s assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances.” \textit{Grupo Mexicano}, 119 S. Ct. at 1968.
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.} at 1969.
\item \textsuperscript{64} \textit{Id.} (quoting 1 \textit{JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE} § 12, at 14–15 (1836)).
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} at 1970 (quoting \textit{id.} at 1979 (Ginsburg, J., dissenting)).
\item \textsuperscript{67} \textit{Id.}
\end{itemize}
tors, or the use of "sophisticated . . . strategies" to accomplish them, were modern developments, the Court asserted that "[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy." Next, the Court turned to Alliance's argument, echoed by the United States, that the merger of law and equity had changed the traditional rule, dispatching that argument with the reminder that merger did not alter substantive rights and with the suggestion that

*even in the absence of historical support, we would not be inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment. It seems to us that question goes to the substantive rights of all property owners.*

The Court then took up Alliance's argument, which had also been a focus of attention in the opinion of the court of appeals, that two of the Court's post-merger decisions "support the district court's order 'in principle.'" Distinguishing those cases as involving either the availability of preliminary equitable relief in aid of final equitable

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68 Id. (quoting id. at 1977-78 (Ginsburg, J., dissenting)).

69 Id.

70 Id. The Court noted that no one had raised the potential applicability of Federal Rule of Civil Procedure 18(b) and declined, therefore, to consider it, while noting that "it says nothing about preliminary relief, and specifically reserves substantive rights (as did the Rules Enabling Act, see 28 U.S.C. § 2072(b))." Id. Rule 18(b) provides:

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.

Fed. R. Civ. Pro 18(b). The Court's doubts were well founded. The Rule, which has not been amended since 1938, applies "only to cases where there are at least two distinct claims or causes of action and not to a case that involves only one cause of action which may give rise to legal or equitable relief or both." 3A JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE ¶ 18.03 (1938). Moreover, fraudulent conveyance law requires jurisdiction over the property or the transferee. See Rhonda Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 WASH. L. REV. 257, 269 n.33 (1992).

relief, or the powers of a federal court pursuant to a specific statute in a case involving public rather than private interests, or both, the Court found support for such distinctions in a third post-merger decision and in dictum in that case which had specifically raised and rejected the availability of "a so-called injunction sequestering . . . assets pending recovery and satisfaction of a judgment in . . . a law action." Directing an argument made by Alliance against it, the Court found in the practice of English courts granting so-called Mareva injunctions "support for the proposition that the relief accorded here was unknown to traditional equity practice." Observing that such orders dated only from 1975 and that they represented "a dramatic departure from prior practice," the Court deemed irrelevant the source of authority in English courts to enter them, since it would be "incompatible with our traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress, to decree the elimination of this significant protection for debtors."

Finally, the Court considered the policy arguments advanced by the parties. Content merely to quote the factors supporting such a remedy adduced by the United States, the Court devoted far more

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72 See id. at 1971 (distinguishing Deckert v. Independence Shares Corp., 311 U.S. 282 (1940)).
73 See id. at 1971–72 (distinguishing United States v. First Nat'l City Bank, 379 U.S. 378 (1965)).
74 Id. at 1972 (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 223 (1945)).
76 Grupo Mexicano, 119 S. Ct. at 1972.
77 Id. at 1973.
78 Id.
79 See id. The United States suggests that the factors supporting such a remedy include simplicity and uniformity of procedure; preservation of the court's ability to render a judgment that will prove enforceable; prevention of inequitable conduct on the part of defendants; avoiding disparities between defendants that have assets within the jurisdiction (which would be subject to pre-judgment attachment "at law") and those that do not; avoiding the necessity for
attention to the "weighty considerations on the other side." Most significant, it observed, "is the historical principle that before judgment (or its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor." Also relevant, according to the Court, are the debtor's jury trial right on the legal claim, the impact that recognizing the remedy sought by Alliance could have on Federal Rule of Civil Procedure 64, rendering it "a virtual irrelevance," and the possibility that by "adding, through judicial fiat, a new and powerful weapon to the creditor's arsenal, the new rule could radically alter the balance between debtor's and creditor's rights which has been developed over centuries through many laws—including those relating to bankruptcy, fraudulent conveyances, and preferences." In a passage that as accurately describes its opinion as the tradition it invoked, the Court declined to choose sides in the policy argument because to do so would be "incompatible with the democratic and self-deprecating judgment we have long since made" and because the "debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress."

Justice Ginsburg's dissent took pains, repeatedly, to demonstrate the dilemma facing Alliance, the solicitude shown by the district court for the harms that the relief afforded might cause GMD, and the consistency of the order with "the exacting standards for preliminary equitable relief," thus seeking to answer concerns that the remedy if recognized might prove an engine of abuse. Accepting the Court's statement of the general boundaries of the grant of equity jurisdiction, the dissent maintained that the relief at issue was in fact consistent with the relevant principles. Criticizing the Court for relying on

plaintiffs to locate a forum in which the defendant has substantial assets; and, in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions.

Id. (quoting Brief for the United States as Amicus Curiae Supporting Respondents at 16, Grupo Mexicano (No. 98-231)).

80 Id.
81 Id.
82 Id. at 1974.
83 Id. The Court expressed concern about promoting a "'race to the courthouse' in cases involving insolvent or near-insolvent debtors," id., and about "unregulated competition among the creditors of a struggling debtor," id. at 1974 n.11. It noted in that regard reports of the rapid proliferation of Mareva injunctions in England. See id. at 1974.
84 Id. at 1974.
85 Id. at 1975 (footnote omitted).
86 Id. at 1975-76 (Ginsburg, J., dissenting); see also id. at 1978.
"an unjustifiably static conception of equity jurisdiction," the dissent drew a distinction between principles and practice, noted the Court's oft-stated embrace of the "adaptable character of federal equitable power" and of its need to "evolve over time," and remarked the "special importance in the commercial law context" of a "dynamic equity jurisprudence." In support of this understanding, the dissent recalled the numerous injunctions upheld by the Court—as in school desegregation and antitrust cases—"that would have been beyond the contemplation of the eighteenth century Chancellor." In comparison, Justice Ginsburg observed, the remedy here was "a modest measure" and, moreover, "a less heavy-handed remedy than prejudgment attachment.

Distinguishing traditional practice from the question of power, and asserting changed circumstances in a world of "increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad," the dissent invoked the development of Mareva injunctions in England, opting for the view that their jurisdictional basis lies in "equity's traditional power to remedy the 'abuse' of legal process by defendants and the 'injustice' that would result from defendants 'making themselves judgment-proof' by disposing of their assets during the pendency of the litigation."

In conclusion, the dissent disputed the notion that the district court's order involved a "judicial usurpation of Congress' authority." Acknowledging Congress's power to regulate in the area, and noting that statutes "restricted the equity jurisdiction of federal courts in a variety of contexts," in the absence of relevant legislation, the dissenting Justices would "find the default rule in the grand aims of equity," protecting rights and doing justice "[w]here, as here, legal remedies are not 'practical and efficient.'"

87 Id. at 1976.
88 Id. at 1976–77.
89 Id. at 1977.
90 Id.
91 Id.
92 Id. at 1978 (quoting Iraqi Ministry of Defence v. Arcepey Shipping Co., 1 All E.R. 480, 484–87 (1979)).
93 Id. at 1979.
94 Id.
95 Id. (quoting Payne v. Hook, 74 U.S. (7 Wall.) 425, 431 (1868)).
III. How to Define a Legal Tradition

For a scholar of procedure, *Grupo Mexicano* is a peculiar decision. To some extent, of course, the Court is hostage to the record it receives, and to the course of the proceedings below more generally. Moreover, while by no means hostage to the views of the lower courts or of the advocates in the case before it, the Court does benefit from considered judicial treatment of the issues as it does from good advocacy. Withal, the Court's opinion seems both underwritten and overwrought. The number of issues the Court identified as of potential relevance to the decision in this case, both argued and not argued, but that it declined to consider, is surprising. In the context of the Court's holding, the explanations for those choices are not wholly persuasive when one considers that (1) in order to reach that holding, the Court was required to pass over issues that might be thought logically anterior and that were clearly preserved,96 (2) the Court's explanation for one of its choices is in tension with that holding,97 and (3) the Court's first and most important choice in the case—to reach decision on a sweeping basis—is not supported by the very values, or tradition if you will, on which it drew in choosing issues not to decide.98

A. Of "Grand Aims"

The Justices agreed in their statements of the traditional scope of the equity jurisdiction of federal courts,99 but they parted company when it came time to work out the statements' implications for the problem before them. For the majority, the fact that the type of relief sought by Alliance and granted by the district court had not been "traditionally accorded by courts of equity"100 and had been "specifically disclaimed by longstanding judicial precedent"101 sealed its fate. Flexibility is one thing, but it must be "confined within the broad boundaries of traditional equitable relief."102

96 See infra text accompanying notes 129–48.
97 See supra text accompanying note 63; infra text accompanying notes 127, 150.
98 See supra text accompanying notes 63, 70; infra text accompanying notes 127, 131, 149–50.
100 *Grupo Mexicano*, 119 S. Ct. at 1968.
101 Id. at 1970.
102 Id. at 1969.
To the dissenters, the majority was conflating principles and practice; the remedy in question was an injunction, and the needs of the times called for capitalizing on the adaptable character and evolutionary potential of equity to devise a remedy to a serious problem, one that was sensitive to all of the interests involved.\textsuperscript{103}

If this were all—and it may be for many readers of the opinions, if only because of the structure and style of the Court's opinion—one would be hard pressed to disagree with Justice Ginsburg's dissent. To be sure, remaining two hundred years in one place may give doctrine the appearance of a fixture that makes the adjective "static" seem about right, as it makes "dynamic" seem like wishful thinking.\textsuperscript{104} But where, after all, are the "principles" in the practice relied on by the Court? Why does practice rather than principles define the "broad boundaries of traditional equitable relief" within which flexibility can be exercised? And how can the principle of practice trump the obvious inadequacy of Alliance's legal remedies, including its legal provisional remedies, and its seeming ability to satisfy the traditional standards for the award of preliminary injunctive relief if such can be awarded at all?

From this perspective, the debate between Justice Scalia and Justice Ginsburg about the nature and limits of equity is reminiscent of the debate between Justice Scalia and Justice Brennan in \textit{Burnham v. Superior Court},\textsuperscript{105} to which I have referred.\textsuperscript{106} There Justice Scalia relied on long-continued and widespread state practice as defining the "traditional notions of fair play and substantial justice"\textsuperscript{107} relevant in determining whether a state's exercise of personal jurisdiction satisfies the requirements of due process, concluding that the historical "pedi-

\textsuperscript{103} \textit{See id.} at 1975–79 (Ginsburg, J., dissenting).

\textsuperscript{104} \textit{See id.} at 1976–77 (Ginsburg, J., dissenting); \textit{see also supra} text accompanying notes 87–88.

\textsuperscript{105} 495 U.S. 604 (1990).

\textsuperscript{106} \textit{See supra} text accompanying note 13.

\textsuperscript{107} \textit{Burnham}, 495 U.S. at 618 (Scalia, J., plurality opinion) (quoting \textit{International Shoe Co. v. Washington}, 326 U.S. 310, 316 (1945)).

But now that the \textit{capias ad respondendum} has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." \textit{Milliken v. Meyer}, 311 U.S. 457, 463. \textit{See also Holmes, J., in McDonald v. Mabee}, 243 U.S. 90, 91.

\textit{International Shoe}, 326 U.S. at 316. For some of the problems created by this borrowing, for a problem of substantive due process, from the jurisprudence of procedural due process, see \textit{Burbank, supra} note 9, at 113–14, 116.
of jurisdiction based on in-state service ("tag jurisdiction") sufficed. Justice Brennan, on the other hand, insisted that it was the notions themselves that were traditional and that, although the history of a jurisdictional practice was relevant in answering the constitutional question, it could not foreclose a conclusion that, in light of evolution in thinking about those notions, a practice long blessed was no longer constitutionally acceptable.

Justice Scalia’s opinion in *Burnham* did not garner a majority at least in part because of his insistence that traditional practice as such was the measure of due process. It is impossible to know, of course, whether he would have lost his majority in *Grupo Mexicano* if his opinion had stopped at the point where, I have ventured, the “case was over.” In any event, the comparison with *Burnham* will doubtless already have alerted the reader to the possibility that Justice Scalia, if not the Court, had “grand aims” in deciding the case on the basis of a broad issue of power.

As Justice Ginsburg’s dissent suggests, students of federal litigation, including federal constitutional litigation, may be surprised to learn of “the self-deprecating judgment . . . long since made . . . that [the federal courts lack] the power to create remedies previously unknown to equity jurisprudence” or of “our traditionally cautious approach to equitable powers.” Those may be accurate statements of the Court’s current general posture, but at that level, they are revisionist doctrinal history unless whole periods in our history, from the days of the labor injunction to the period since 1954, do not count.

Shortly after Professor Chayes’s celebration of the “triumph of equity” in public law litigation appeared, Professor Nagel deplored the breach in separation of powers caused by “the innovative and expansive remedies that federal courts have utilized with increasing fre-

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108 *Burnham*, 495 U.S. at 621 (Scalia, J., plurality opinion).
109 Id. at 608–22 (Scalia, J., plurality opinion).
110 See id. at 628–40 (Brennan, J., concurring in the judgment).
111 See id. at 628 (Brennan, J., concurring in part and concurring in the judgment); id. at 640 (Stevens, J., concurring in the judgment).
112 Supra text accompanying note 63.
114 Id. at 1974.
115 Id. at 1973.
116 See Rowe, supra note 4, at 105–09.
quency, especially against state governments." He criticized the judiciary for "inadequate self-discipline . . . in defining the limits of its own authority" and for ignoring "the possibility that 'traditional equity jurisdiction' had been limited by the courts as an implementation of the separation of powers." In *Grupo Mexicano*, the Court was playing Professor Nagel's, not Professor Chayes's, symphony. But that was more music than the case required.

**B. The Roads Not Taken**

There are answers to the questions posed by the principles/practice dichotomy in *Grupo Mexicano* that do not require a broad revisionist account of the equitable powers of federal courts. Some of them are suggested in the Court's opinion. The suggestions are clearest in the second half of that opinion, after the case had been effectively decided, the "grand aims" had been implemented, and Justice Scalia was engaged in the clean-up operation of rebutting contrary arguments. Moreover, these answers become more persuasive in the light of history that neither the majority nor the dissenters considered and might have been forced to confront, had they not chosen to focus on the broadest possible ground of decision and taken an internal view of the tradition of equity.

In defining the relevant limiting principles of equity jurisdiction through traditional practice, the Court did not rest on the existence of that practice alone, seeking to explain the reasons for the rule re-

120 Id. at 663.
121 Id. at 674.
122 The Court's quotation from Story in *Grupo Mexicano*, 119 S. Ct. at 1969, is revealing in that regard. Story went "out of his way to blast the unconstrained and moralizing license of early equity." Peter Charles Hoffer, *The Law's Conscience* 82 (1990). Hoffer suggests that Story was concerned lest "a chancellor troubled by conscience . . . reach out beyond the suit before him to reorder social and economic relationships in the society as a whole" and lest "[s]uch systemic, institutional relief . . . overthrow social custom and political structures and tumble the entire judicial system into the cauldron of political crisis." Id. Blackstone's (and Story's) grudging view of equity had earlier been criticized by Pomeroy. See 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States* 76 (Spencer W. Symons ed., 5th ed. 1941). Student commentary on *Grupo Mexicano* notes this fact, see *Leading Cases*, supra note 23, at 323, without, however, also noting that Pomeroy's description of creditors' suits supported the position taken by the Court, see 4 Pomeroy, *supra*, § 1415, at 1065. For an indication of the influence of *Grupo Mexicano* in this aspect, see *Johnson v. Collins Entertainment Co.*, 199 F.3d 710, 727 (4th Cir. 1999).
quiring a creditor to have a judgment before a court of equity would afford relief. Only part of the explanation, the Court observed, had to do with relations between the separate systems of law and equity, which yielded "the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued." The other part reflected "the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property." Later in the opinion, when canvassing the "weighty considerations" against the creation of the remedy sought by Alliance, the Court termed "most significant . . . the historical principle that before judgment (or its equivalent) an unsecured creditor has no rights at law or equity in the property of his debtor." This, the Court asserted, "is a fundamental protection in debtor-creditor law—rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim."

This looks like a "principle" worthy of the name, one that, according to the Court, animated both law and equity. Its status as such, however, is cast in doubt both by the unresolved possibility that the rule relied on by the Court had exceptions in equity and by the Court's failure to address some fairly obvious questions suggested by the dissent's comparison of the remedy in question with the legal remedy of attachment. These difficulties would have been obviated, and both the result in the case and the Court's deference to Congress would have been more persuasive, had the Court chosen to decide the case on one of the bases urged by the petitioners and reached deeply, 

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123 Grupo Mexicano, 119 S. Ct. at 1968. In explaining why the amicus brief of the United States chose not to pursue the possibility that there were exceptions to the rule in equity, the Solicitor General termed "any such debate . . . an arid one," attributing the rule itself to the felt need to preserve boundaries between law and equity, a need that disappeared with their merger. Brief for the United States at 14, Grupo Mexicano (No. 98-231); see also id. at 9, 14–15.

124 Grupo Mexicano, 119 S. Ct. at 1968. The existence or non-existence of such an interest is also relevant to the procedural protections required by due process in connection with prejudgment attachment. See Connecticut v. Doehr, 501 U.S. 1, 16 (1991).


126 Id. at 1973–74.

127 Cf. Leading Cases, supra note 23, at 323 n.63 ("The applicability of historical exceptions . . . is exactly the sort of issue that should have concerned this Court, given its attention to the particular nature of the relief 'traditionally accorded by courts of equity.'") (citation omitted).

128 See Grupo Mexicano, 119 S. Ct. at 1977 (Ginsburg, J., dissenting); see also supra text accompanying note 90.
rather than broadly, in probing the problems of judicial power implicated in the issue before it.

1. Rules 64 and 65

Petitioners argued in the Supreme Court, as they had argued in the court of appeals, that the question of power was governed by Federal Rule of Civil Procedure 64, that Rule 65 was not a grant of authority to provide the relief in question, and that, if the matter was not controlled by the Federal Rules, *Erie Railroad Co. v. Tompkins* 129 required that state law be applied. 130 In framing the issue for decision, the Court ignored Rule 64, and in deciding it both failed to explain the relevance of Rule 65 and refused to consider the implications of *Erie*.131 I believe that consideration of the argument, of Rule 64 and its history, and of the larger social context in which that history was played out demonstrate why the Court reached the correct result in *Grupo Mexicano*, whether or not Rule 64 applied.

a. Doctrinal Puzzles

Simply as a matter of language, it would appear that Rule 64 required the district court in *Grupo Mexicano* to look to New York law, under which the relief sought was not available.132 That Rule applies to, and with exceptions not here relevant requires that state law govern, "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action."133 It elaborates the remedies affected as "includ[ing] arrest, attachment, garnishment, replevin, sequestration,

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129 304 U.S. 64 (1938).
131 See *Grupo Mexicano*, 119 S. Ct. at 1968 n.3.
132 See supra note 47.
133 Fed. R. Civ. P. 64.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state
and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

For those tempted to stick on, and to attempt to distinguish an asset freeze by preliminary injunction on the basis of, the Rule’s initial reference to “seizure of person or property,” the later, emphatic specification of “other corresponding or equivalent remedies, however designated,” should serve as a deterrent. It is true that the type of preliminary injunction granted by the district court in Grupo Mexicano does not deprive the enjoined party of possession and may not totally deny use of the property subject to it, whereas provisional remedies like attachment typically do, a distinction that prompted Justice Ginsburg’s characterization of the injunction as “less heavy-handed.”

The injunction, unlike pre-judgment attachment, also does not create a lien on the property. One might therefore argue that it is not “corresponding or equivalent” within the meaning of Rule 64.

But what good is possession of money or intangible property simpliciter, and what comfort is use under the tight control of a court? Moreover, the status of a provisional remedy as a lien is an ancillary matter determined by state law that is neither logically nor legally entailed in the “seizure . . . for the purpose of securing the satisfaction of the judgment” that is the Rule’s touchstone for judgments concerning procedure the remedy is ancillary to an action or must be obtained by an independent action.

Id. 134 Id.
135 Grupo Mexicano, 119 S. Ct. at 1977 (Ginsburg, J., dissenting). The dissent drew on Wasserman, supra note 70, which describes the respects in which prejudgment attachment is both more and less powerful than a preliminary injunction as a weapon in the hands of putative creditors. See id. at 276–85. As Professor Wasserman would surely acknowledge, whether a preliminary injunction is “less heavy-handed” than prejudgment attachment depends upon one’s perspective, and it also depends upon the particular state law governing attachment. Apart from cases in which assets are located outside the jurisdiction and thus not subject to attachment, that remedy may be confined to particular types of cases or to particular types of property, or it may be available only on the posting of a substantial bond, any of which could make it less attractive to putative creditors than a preliminary injunction. See Wasserman, supra note 70, at 276–80; Note, Equity—Hoxworth v. Binder, Robinson & Co., Inc.: Use of a Preliminary Injunction to Secure a Future Damage Remedy, 21 MEMPHIS ST. U. L. REV. 773, 776–78 (1991); see also EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir. 1988).

But see infra note 144 (injunction in aid of attachment). “A preliminary injunction to secure a later damage judgment interferes with a defendant’s property before trial, bypasses more restricted prejudgment remedies such as attachment, and may prefer plaintiff over other creditors.” Laycock, supra note 6, at 77.

136 See Wasserman, supra note 70, at 282–84, 327 n.312.
correspondence or equivalence, as "interference" is the touchstone for judgments concerning implication of the principle on which the Court relies.\textsuperscript{137}

GMD's efforts to restructure its debt and to continue as a going concern\textsuperscript{138} were not facilitated by its continuing possession of whatever rights it had under the Toll Road Rescue Program,\textsuperscript{139} and they were not impeded by a lien. They were impeded by an injunction that drastically limited its rights to use its property.\textsuperscript{140} Why, after all, do some courts refer to the remedy sought by Alliance as "equitable attachment?"\textsuperscript{141} Is it not best to "call a duck a duck when characterizing district court rulings in this context?"\textsuperscript{142}

For those tempted to confine the operation of Rule 64 to traditionally legal provisional remedies, the fact that "sequestration" originated in equity should give pause.\textsuperscript{143} Long before the Federal

\textsuperscript{137} See Grupo Mexicano, 119 S. Ct. at 1968; see also United States ex rel. Rahman v. Oncology Assocs., P.C., 198 F.3d 489, 499-501 (4th Cir. 1999) (dictum); supra text accompanying note 62. I assume that no one would seek to avoid Rule 64 on the argument that, not being territorially confined, a preliminary injunction is not "corresponding or equivalent" to remedies like attachment that are so confined, particularly when it is recalled that the situs of property is manipulable. Cf. Shaffer v. Heitner, 433 U.S. 186, 192 (1977) (adjudicating constitutionality of jurisdiction under Delaware statute that "makes Delaware the situs of ownership of all stock in Delaware corporations").

\textsuperscript{138} GMD asserted that the preliminary injunction "interfered with [its] efforts to restructure its debt and substantially impaired [its] ability to continue its operations in the ordinary course of business." Petitioners' Brief at 7, Grupo Mexicano (No. 98-231).

\textsuperscript{139} See infra text accompanying note 261.

\textsuperscript{140} See infra note 43 and accompanying text. Professor Wasserman acknowledges that "[w]here the property in issue is a bank account, an attachment of the account and a preliminary injunction barring the defendant from drawing on the account would be equally intrusive." Wasserman, supra note 70, at 300 n.164; see also George A. Bermann, Provisional Relief in Transnational Litigation, 35 Colum. J. Transnat'l L. 553, 563 (1997) (stating that it "may well produce the same practical effect").

\textsuperscript{141} See Lewis v. West Side Trust & Sav. Bank, 6 N.E.2d 481, 484 (Ill. App. Ct. 1937); see also In re Fredeman Litig., 843 F.2d 821, 826 (5th Cir. 1988) ("This preliminary injunction ... is in the nature of an attachment whose availability is governed by Federal Rule of Civil Procedure 64.").

\textsuperscript{142} Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1521 (11th Cir. 1994). But see id. at 1525 (Carnes, J., concurring in part and dissenting in part) ("[O]ne should not be quick to lend the majority a retriever the next time it goes duck-hunting . . . ."). This disagreement, however, arose from the question in that case whether a constructive trust was an available remedy under state law, on which the majority and dissenter disagreed. See infra note 146.

\textsuperscript{143} See Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective 511-15 (1952). In a case sustaining the power of the circuit court of the district of Vermont to adopt by equity rule Vermont law providing for a writ of
Rules, provisional remedies originating in one tradition became available in proceedings under the other.\textsuperscript{144} We have been constantly reminded that the Federal Rules merged law and equity.\textsuperscript{145} \textit{Grupo Mexicano} stands for the proposition that the merged system includes limitations on federal judicial power emerging from the tradition of equity. Rule 64 suggests that it will not do to ignore limitations deriving from either tradition. One must take the bitter with the sweet.

Perhaps the strongest arguments against reading Rule 64 to cover the situation in \textit{Grupo Mexicano} are the existence of a rule dealing with injunctions, Rule 65, and the difficulties of drawing a line between Rule 64 and Rule 65 if the former were interpreted to cover a preliminary injunction. But these arguments do not in fact appear to be very strong.\textsuperscript{146} The former consideration seems to have prompted the

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sequestration that differed from the writ in traditional equity practice and functioned as an attachment, Justice Blatchford, sitting on circuit, observed, "It is a mesne security, given \textit{pendente lite}, operating, in that regard and to that end, like a provisional injunction, or a temporary receivership, or a writ of \textit{ne exeat}, or the filing of a \textit{lis pendens}.” Steam Stone Cutter Co. v. Jones, 13 F. 567, 582 (C.C.D. Vt. 1882). With all the Latin in this quotation, requiring italics, I had best point out the court’s analogy to "a provisional injunction.” On the traditional use of the writ of sequestration in equity, see Walter Wheeler Cook, \textit{The Powers of Courts of Equity} (pt. II), 15 COLUM. L. REV. 106, 110–11 (1915). In the course of thoroughly devastating the traditional in personam/in rem distinction between law and equity in connection with the enforcement of judgments, Professor Cook observed, “Apparently the end of the evolution along these lines with its tendency to eliminate the differences between legal and equitable procedure where the end sought is the same—to obtain payment of a sum of money—has not yet been reached.” \textit{Id.} at 117. Cook might thus have approved of Rules 64 and 69, but certainly not if they could easily be evaded by resort to a label.
\end{quote}

\textsuperscript{144} See, e.g., \textit{Millar}, supra note 143, at 490, 495, 514. Note that under Rule 64 and the governing state law, a federal court may be empowered to issue an injunction requiring a defendant to bring property within the state in aid of attachment. See, e.g., Chemical Bank v. Haseotes, 13 F.3d 569, 572–73 (2d Cir. 1994); \textit{see also} Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152, 154–55 (2d Cir. 1977).

\textsuperscript{145} See \textit{7 Moore \& Friedman}, supra note 70, § 64.01. Since the Rules effect a union of law and equity, nothing is to be gained by attempting to analyze a particular action as one at law or in equity. It may well present both "legal" and "equitable" issues and claims. The proper analysis is to determine, for example, whether the substance of a claim warrants the injunctive remedy, or whether an attachment is warranted for that type of claim pursuant to applicable federal or state law. \textit{Id.} (footnotes omitted). This reasoning is circular to the extent that considering "whether the substance of a claim warrants the injunctive remedy" requires resort to traditional distinctions between equity and law. \textit{Id.}

\textsuperscript{146} See Mitsubishi Int’l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1523 (11th Cir. 1994) (Carnes, J., concurring in part and dissenting in part) ("An injunction is not permissible to secure post-judgment legal relief in the form of damages. Such an injunction to secure future payment of possible money damages would be in
court of appeals’ assertion that the “two Rules . . . are complementary, not mutually exclusive.” It is harder to divine the Court’s view of the matter, particularly given its expression of concern that affording relief of the sort sought by Alliance “could render [Rule 64] . . . a virtual irrelevance.” The Court had already done that.

Even if Rule 64 was the only actual obstacle to the achievement of the Court’s “grand aims,” failing to confront that Rule when and where it mattered may not have been the only end run in the Court’s opinion. Putting Rule 64 to the side (and assuming the relief sought would be available under federal law), the Court could have addressed the question whether, as petitioners contended, state law was nonetheless applicable in a diversity case. Its excuse for not doing so is weak, all the more so when one realizes that the result was to force (permit?) decision on the broadest possible ground. A decision that state law controlled would have avoided the problem arising from the fact that the existence of exceptions to the traditional rule had not been considered below and thus preserved for another day the possibility that one or more of such exceptions might be recognized in federal question cases. Of course, that would have called into question the “principle” on which the Court relied.

the nature of a ‘prejudgment attachment’ subject to . . . Rule 64.” (quoting Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 560 (5th Cir. 1987))); see also infra text accompanying notes 153-61 (discussing Rule 65). The Fourth Circuit’s recent decision concluding that the preliminary injunction under review was authorized both as an exercise of power in aid of final equitable relief and under Rule 64 and Maryland state law may be thought to muddy the waters. See United States ex rel. Rahman v. Oncology Associates, P.C., 198 F.3d 489 (4th Cir. 1999). For if, in fact, “the scope of [Rule] 64 incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets to aid in satisfying the ultimate judgment in the case,” then a federal court should be confined to state law remedies, even in a federal question case, and even when state law does not provide for injunctive relief. Id. at 501. On the view taken here, there is no such problem in a diversity state law case, because whether the court proceeds under Rule 64 or Rule 65, state law determines the availability of preliminary injunctive relief. See infra text accompanying notes 153–73. But Oncology Associates may suggest the need for more careful line-drawing in connection with federal law claims (including state law claims borrowed as federal law, as presumably in Oncology Associates itself) for which no statute authorizes preliminary injunctive relief. See infra note 165.

148 Grupo Mexicano, 119 S. Ct. at 1974 (“Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available?”).
149 See id. at 1968 n.3.
150 See supra text accompanying note 127.
Moreover, since petitioners consistently argued, while the Court ignored, the applicability of state law under Rule 64, and since the Court taught us in *Hanna v. Plumer* that there is more than one *Erie* problem, the choice not to consider the argument appears to have been driven by considerations other than those the Court stated.

There is a silver lining in this mess. Although the contribution was inadvertent, the Court’s treatment of Rule 65 should help to put an end to some residual nonsense that plagues the allocation of lawmaking power when injunctive or other traditionally equitable relief is in question.

If Rule 65 did not alter the “substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief,” and if the question “whether a person’s unencumbered assets can [or cannot] be frozen by general-creditor claimants before their claims have been vindicated . . . goes to the substantive rights of all property owners,” it is hardly plausible that a federal policy choice on such matters that was in conflict with state law could be shielded under the cover of Rule 65 and *Hanna*. Rule 65 does make a few policy choices, but they have nothing to do with

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152 *Erie* R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

153 *Grupo Mexicano*, 119 S. Ct. at 1968 (quoting WRIGHT, MILLER, & KANE, infra note 161, § 2941); see also supra text accompanying note 58.


(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party’s attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the
either the occasions or the standards for the grant of preliminary or

efforts, if any, which have been made to give the notice and the reasons 
supporting the claim that notice should not be required. Every tempo-
rary restraining order granted without notice shall be endorsed with the 
date and hour of issuance; shall be filed forthwith in the clerk's office 
and entered of record; shall define the injury and state why it is irrepa-
ible and why the order was granted without notice; and shall expire by 
its terms within such time after entry, not to exceed 10 days, as the court 
fixes, unless within the time so fixed the order, for good cause shown, is 
extended for a like period or unless the party against whom the order is 
directed consents that it may be extended for a longer period. The rea-
sons for the extension shall be entered of record. In case a temporary 
restraining order is granted without notice, the motion for a prelimi-
nary injunction shall be set down for hearing at the earliest possible 
time and takes precedence of all matters except older matters of the 
same character; and when the motion comes on for hearing the party 
who obtained the temporary restraining order shall proceed with the 
application for a preliminary injunction and, if the party does not do so, 
the court shall dissolve the temporary restraining order. On 2 days’ no-
tice to the party who obtained the temporary restraining order without 
notice or on such shorter notice to that party as the court may prescribe, 
the adverse party may appear and move its dissolution or modification 
and in that event the court shall proceed to hear and determine such 
motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue ex-
cept upon the giving of security by the applicant, in such sum as the 
court deems proper, for the payment of such costs and damages as may 
be incurred or suffered by any party who is found to have been wrong-
fully enjoined or restrained. No such security shall be required of the 
United States or of an officer or agency thereof. The provisions of Rule 
65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order grant-
ing an injunction and every restraining order shall set forth the reasons 
for its issuance; shall be specific in terms; shall describe in reasonable 
detail, and not by reference to the complaint or other document, the 
act or acts sought to be restrained; and is binding only upon the parties 
to the action, their officers, agents, servants, employees, and attorneys, 
and upon those persons in active concert or participation with them 
who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These 
rules do not modify any statute of the United States relating to tempo-
rary restraining orders and preliminary injunctions in actions affecting 
employer and employee; or the provisions of Title 28, U.S.C., § 2361, 
relating to preliminary injunctions in actions of interpleader or in the 
nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions 
required by Act of Congress to be heard and determined by a district 
court of three judges.

Id.
final injunctive relief, and for good reason, as that Rule's history reveals.\textsuperscript{156}

Laboring in the mid-1930s, the rulemakers were well aware of the delicacy of the subject of federal injunctions,\textsuperscript{157} and they consciously chose to treat the subject lightly,\textsuperscript{158} taking the provisions of Rule 65 "bodily from 28 U.S.C. §§ 381, 382, 383 and Equity Rule 73, which in turn was substantially a restatement of § 381."\textsuperscript{159} When the House of Representatives considered the proposed Federal Rules in 1938, much of the attention focused on Rule 65's implications for the balance of power between labor and management.\textsuperscript{160} The history of the Rule therefore confirms what the language suggests, that only someone de-

\textsuperscript{156} Rule 65 does require notice prior to the issuance of a preliminary injunction, see Fed. R. Civ. P. 65(a), and it does specify standards for temporary restraining orders; see Fed. R. Civ. P. 65(b). But those provisions were said to have been taken from a statute, with which Equity Rule 73 (1912) was said to be "substantially equivalent." 7 Moore & Friedman, supra note 70, (reprinting original Advisory Committee Note). Borrowing from either a statute or an Equity Rule presents difficult questions of power under the Rules Enabling Act, see Burbank, supra note 15, at 1147–68, and in any event Rule 65 does not come close to such policy choices with respect to preliminary or final injunctions. The addition of Rule 65(a) (2) in 1966, which authorizes the consolidation of the hearing on an application for a preliminary injunction with the trial on the merits, does not change the analysis. See Reebok Int'l, Ltd. v. Marnatech Enter., Inc., 970 F.2d 552, 558 (9th Cir. 1992); In re Feit & Drexler, Inc., 760 F.2d 406, 415 (2d Cir. 1985).

\textsuperscript{157} See supra text accompanying note 117.

\textsuperscript{158} “The subject of injunctions in federal courts (particularly in labor disputes) is so loaded with potential dynamite that the committee played quite safe and made very few changes in the existing practice under [Rule 65].” Armistead M. Dobie, The Federal Rules of Civil Procedure, 25 Va. L. Rev. 261, 301–02 (1939). Professor Dobie was a member of the Advisory Committee.

\textsuperscript{159} 7 Moore & Friedman, supra note 70, ¶ 65.01.


A memorandum submitted to the Supreme Court by the Advisory Committee in 1939 suggested the following as an explanation for Congress's interest in rules uniting procedure at law and in equity:

No one can say positively what reasons the Congress had, but the fact that all the principal labor unions took a vital interest in the rules which relate to injunctions and suits against labor unions, and appeared before the Judiciary Committee on that subject, and insisted that no amendments to the rules be made without submission to Congress, supports the view that it was the subject of injunctions in the united rules which the Congress was most sensitive about.

terminated to shield federal judge-made law on the substance of preliminary or final injunctive relief could regard the Rule as a charter for its creation.161

Stripped of the cover of Rule 65, a putative federal judge-made rule permitting preliminary injunctive relief on the facts of Grupo Mexicano would be required to yield to the requirements of contrary state law. And so the petitioners contended.162 Apart from the Court's own characterization of the issue,163 differences in federal and state law on that question surely would materially affect the character or result of the litigation, and just as surely would lead to forum shopping between the state and federal courts.164 Moreover, if one sought to explain to a sophisticated client whose assets had been frozen by a preliminary injunction in a state law diversity case seeking money damages why a federal court should be able to use a different rule on this subject, one would be hard pressed to come up with a plausible federal interest, at least if one were candid and considered the deafening sounds of silence in Rule 64, which applies in federal question as well as diversity cases.165 One should also consider means of self-de-

161 For an example of such overreaching, see 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2943, at 75–80 (2d ed. 1995), and see also 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4513, at 442–44 (2d ed. 1995).

162 See Petitioners' Brief at 20–30, Grupo Mexicano (No. 98-231).

163 See supra text accompanying notes 62, 70.


165 This is one way of giving independent content to the notion of "inequitable administration of the laws" as used in Hanna's dictum. Hanna, 380 U.S. at 468; see also Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428–30 (1996); Walker, 446 U.S. at 753 ("There is simply no reason why, in the absence of a controlling federal rule [an action that would be barred in state court by a state statute of limitations should proceed to judgment in a federal diversity court]."); Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 CORNELL L. REV. 733, 789 n.279 (1986). It probably breathes more life into Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958), than is warranted by the Court's subsequent decisions, allowing it to live outside of the sphere of influence of the Seventh Amendment. See Gasperini, 518 U.S. at 431–39; see also Burbank, supra, at 788–89.

Rule 64 provides, as a qualification of the direction to follow state law, that "any existing statute of the United States governs to the extent to which it is applicable." FED. R. CIV. P. 64. The amicus brief of the United States was evidently prompted in part by concern that nothing the Court might do in Grupo Mexicano should prejudice the rights of the United States in litigation. To that end, the brief set forth numerous statutory provisions that give district courts authority to grant provisional injunctive relief to secure satisfaction of a judgment. See Brief for the United States at 22 n.7, 30–34, Grupo Mexicano (No. 98-231).
fense before suggesting to such a client that no harm is done because a preliminary injunction "do[es] not permanently proscribe defendant's freedom of action." 166

The "equitable remedial rights doctrine" 167 in the federal courts has been on "the cutting edge of obsolescence" 168 since 1938. Statements about the relationship between federal equity and state law prior to 1938 have as much salience today as *Swift v. Tyson:* 169 they are history. Moreover, even prior to 1938, federal courts tended to follow state law that expanded the remedial rights of litigants, and assertions concerning the inability of state law to affect federal equity from that period must be carefully evaluated to account for both the need to preserve federal diversity jurisdiction in equity, when states either did not recognize equity or provided legal remedies not previously accorded, and the need to protect the right to jury trial under the Seventh Amendment. 170 In any event, there is nothing about remedial law that preserves it from the merger of law and equity in the Federal Rules or from the positivist mandates of *Erie* and the Rules of Decision Act. 171 If Justice Frankfurter intended to suggest


167 This doctrine "required a federal court of equity to redress state-created rights in accord with the remedies determined by a uniform federal equity jurisprudence." *Note,* The *Equitable Remedial Rights Doctrine: Past and Present,* 67 Harv. L. Rev. 836, 836 (1954) [hereinafter *Equitable Remedial Rights*]. There have been developments in *Erie* jurisprudence since 1954, some of which render the concluding section out of date. See *id.* at 843–45. But nothing in those developments diminishes—indeed, taken as a whole they reinforce—the thrust of the thoughtful and concise analysis.

168 This is the expression used by a disc jockey on a radio station in Cape Cod, Massachusetts, to describe the group Jay and the Americans.

169 41 U.S. (16 Pet.) 1 (1842). It is surely no coincidence that many of the statements asserting broad federal power in equity issued from the pen of Justice Joseph Story, the author of *Swift.* See *Equitable Remedial Rights,* supra note 167, at 838 n.21.


otherwise for the Court in *Guaranty Trust Co. v. York*,\(^{172}\) Homer nodded.\(^{173}\)

b. Historical Clues

The Court's dispatch of Rule 64 in *Grupo Mexicano* is symptomatic of other, larger problems in its opinion and in the dissent, in addition to the problem of choosing to decide the case on a broader ground than necessary. Both opinions approach the case from what I have called "an internal view of the tradition of equity."\(^{174}\) Such a perspective can be "internal" in two senses. It can focus on equity to the exclusion of law, or it can focus on doctrine to the exclusion of social context.

The Court pays attention, but not really, to law in explaining traditional equitable doctrine, with the result that its comments raise more questions than they answer.\(^{175}\) The dissent pays attention to

\(^{172}\) 326 U.S. 99, 105 (1945).

\(^{173}\) For an analysis that does not require that interpretation, see *Equitable Remedial Rights*, supra note 167, at 841 ("This use of the remedial rights doctrine seems more for rhetorical emphasis than as a reaffirmance of the doctrine itself."). But see 11A *Wright, Miller, & Kane*, supra note 161, § 2943, at 77 (seeking to "give some effect" to dictum in *Guaranty Trust*). Compare the more balanced treatment in 19 *Wright, Miller, & Cooper*, supra note 161, § 4513 and *Cendant Corp. v. Forbes*, 70 F. Supp. 2d 339, 343–45 (S.D.N.Y. 1999) (dictum), *aff'd*, No. 99-9180, 2000 U.S. App. LEXIS 1253 (2d Cir. Jan 28, 2000).

\(^{174}\) Supra text accompanying notes 122–23.

\(^{175}\) See supra text accompanying notes 62, 81; infra text accompanying note 180. It is also difficult to know what to make of the Court's assertion that the rule requiring a judgment is "rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim." *Grupo Mexicano*, 119 S. Ct. at 1973–74. Obviously the Court did not believe that the Seventh Amendment, which is binding on Congress as it is on the federal courts, forecloses a grant of power to the district courts to issue preliminary injunctions prior to judgment in cases seeking only a damage remedy. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 n.20 (1962) (dictum). Erroneous use for summary judgment purposes of credibility determinations made in ruling on a preliminary injunction motion could sap the jury trial right, but that is why we have courts of appeals. See *Country Floors, Inc. v. Gepner*, 930 F.2d 1056 (3d Cir. 1991). More generally, since juries also have nothing to do with decisions regarding provisional remedies, "respect for the right to a jury trial can play no role in deciding between prejudgment attachment and preliminary injunction." *Wasserman*, supra note 70, at 322–23; see also *Grupo Mexicano*, 119 S. Ct. at 1977 n.5 (Ginzburg, J., dissenting). The Court has not taken the view that Congress has discretion to define the scope of the right under the Seventh Amendment. See Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICHMOND L. REV. 407 (1999). But attachment and the like are creatures of statute. Perhaps, therefore, the Court's invocation of the jury trial right is simply an additional consideration in favor of its separation of powers rationale.
contemporary, but not really to historical, social context, and not really to law. Yet, "critical use" of even doctrinal history presumably requires an understanding of the relevant social conditions that once affected the content of, and that now may call for a change in, doctrine. Moreover, the fact that law and equity have been merged should not obscure the fact that, when they were separate, they were also interdependent so that developments in one shaped both attitudes and doctrine in the other.

As I have noted, one of the questions raised by the Court's assertion that the traditional practice rested in part on a "substantive rule" of equal relevance in law or equity is suggested by the dissent's comparison of the remedy sought in *Grupo Mexicano* with the legal remedy of attachment. Indeed, one might have thought that the Court's own tepid reference to Rule 64—its concern that according preliminary injunctive relief would render that Rule "a virtual irrelevance"—would have prompted additional inquiry. What happened to this "substantive rule" at law, and why is it that, in the absence of a pertinent federal statute, federal courts must apply state law as to the manner and circumstances in which they can accord provisional remedies under Rule 64, even in federal question cases? The answers to these questions require attention to the history of provisional and final remedies in the federal courts in actions at law, which profoundly influenced not only the content of Rule 64 but, as an anterior matter, the original understanding of the Rules Enabling Act of 1934.

An important reason for the existence of Article III federal judicial power in diversity (including alienage diversity) cases and for the First Congress's decision to create lower federal courts had to do with concerns that state courts were hostile to creditors. Although this concern was at its height in connection with British creditors, the discriminatory treatment of whom might prove a cause of war, it was

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176 "Chancery may have refused to issue injunctions of this sort simply because they were not needed to secure a just result in an age of slow-moving capital and comparatively immobile wealth." *Grupo Mexicano*, 119 S. Ct. at 1977 (Ginsburg, J., dissenting).
177 *See id.; see also supra text accompanying notes 90, 128.
178 *James, supra note 2, at 664.
180 *See supra text accompanying note 128.
by no means confined to such cases. In the period immediately pre-
ceeding the Constitutional Convention there was ample evidence of
the propensity of states to favor debtors. Indeed, concerns about
the impact of such laws on contract and property rights and on the
ability of the new country to progress to a developed commercial state
led to more than a head of judicial power; they contributed to a sub-
stantive restriction in the Constitution, the prohibition against the im-
pairment of contracts.

Recent events elsewhere in the world serve as a reminder that
nascent democracies tend to experience recurrent economic turbu-
ulence, challenging political leadership, and testing fundamental as-
sumptions. And so it was in this country. The economic miseries that
ushered in the Age of Jackson again witnessed attempts by a number
of states to relieve the misery of their debtors. The most obvious relief
came through the abolition of imprisonment for debt. But there were
numerous other measures putatively available to ease the plight of
judgment debtors faced with ruin, from laws requiring the appraisal of
property to be sold on execution and a price meeting a specified per-
centage of appraised value, to laws providing for stay and replevin
upon the debtor posting a bond, to laws requiring the acceptance of
payment in a form other than gold and silver. It appears that Ken-
tucky tried most of them in 1821. Its efforts were, at least in part,

183 See G. Edward White, The Marshall Court and Cultural Change:

In the period of the Articles of Confederation several states had responded
to problems in the supply of money by passing laws designed to provide for
alternative means of repaying debts. The laws allowed states to issue paper
currency and made that currency legal tender in the payment of debts, pro-
vided for the payment of debts in certain commodities, extended the time
for debt obligations beyond the periods fixed in contracts, and allowed debts
to be paid in installments despite the absence of contract installment
provisions.

Id. (footnote omitted); see also Charles Warren, Federal Process and State Legislation (pts.

184 See U.S. Const. art. I, § 10; White, supra note 183, at 600–01; Warren, supra
note 183, at 547. Of course, these concerns were hardly universal. There were plenty
of people involved in the process of framing and ratifying the Constitution who fa-
vored neither lower federal courts nor creditors. The fact that they lost does not
mean that it was a walk-over. See, e.g., Julius Goebel, Jr., History of the Supreme
Court of the United States: Antecedents and Beginnings to 1801, at 196–412
(1971).

185 See Warren, supra note 183, at 437–38. For broader context, see Tony Allan
Freyer, Forums of Order: The Federal Courts and Business in American History
19–35 (1979), and 2 Charles Warren, The Supreme Court in United States His-
tory 93–111 (1922).
thwarted by the lower federal courts, both by holding that the statute was unconstitutional as applied to pre-existing contracts or debts, and by refusing to follow the Kentucky statute under the Process Acts of 1789 and 1792. The Supreme Court managed to avoid the constitutional question presented by the Kentucky and similar legislation until 1843. But it blessed the strategy of procedural avoidance in two 1825 decisions, *Wayman v. Southard* and *Bank of the United States v. Halstead.*

*Wayman* is famous as the *locus classicus* of federal constitutional law on the delegation of legislative power and of the constitutional theory of federal court rulemaking. For our purposes, however, the case is significant because of the furor it created in Congress. The Court held that the federal courts in Kentucky were not bound by state laws concerning final process under section 34 of the Judiciary Act of 1789, and that they were not bound by such laws enacted after 1789 even under the Process Acts unless, and to the extent, that they had adopted them pursuant to power conferred there. The conformity enjoined by the Process Acts, the Court held, was static, and it was subject in any event to alteration by the federal courts. As a result, the marshal had erred when, in executing on a federal judgment, he had taken a replevin bond as provided for by Kentucky law.

Although it appears that the Kentucky federal courts were the exception in declining to adopt state law on final process prior to *Wayman,* any lower federal court judge who might have been inclined to exercise his power to adopt post-1789 state debtor relief legislation thereafter would have been given pause by Chief Justice

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186 See Warren, supra note 183, at 498. More recent and more focused scholarship on the lower federal courts in Kentucky demonstrates that Warren misinterpreted certain correspondence and accepted political propaganda in retrojecting to the first two decades of the 19th century general antipathy towards the federal courts in that state. See Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816,* at 24-25 n.27 (1978).

187 See Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Warren, supra note 164, at 549-50.

188 See Freyer, supra note 185, at 27 ("Cases coming from the aforementioned difficulties in Kentucky, Tennessee, and Alabama reveal how the Supreme Court could use procedural technicalities to defeat state power.").

189 23 U.S. (10 Wheat.) 1 (1825); see also Burbank, supra note 15, at 1036-37.

190 23 U.S. (10 Wheat.) 51 (1825).


193 See Warren, supra note 183, at 549. Note, however, that in both *Wayman,* 23 U.S. (10 Wheat.) at 21, and its companion case, see United States v. Halstead, 23 U.S. (10 Wheat.) 51, 52 (1825), the marshal complied with state law, triggering a motion to quash the return on the execution.
Marshall's remarkably candid, if unsupported, speculation about the reason Congress conferred local federal power to alter state final process law in the Process Act of 1789. It bears quotation in full:

Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles, had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that, in many of the States, the pressure of the moment had produced deviations from that course of administering justice between debtor and creditor, which consisted, not only with the spirit of the constitution, and, consequently, with the views of the government, but also with what might safely be considered as the permanent policy, as well as interest, of the States themselves. The new government could neither disregard these circumstances, nor consider them as permanent. In adopting the temporary mode of proceeding with executions then prevailing in the several States, it was proper to provide for the return to ancient usage, and just, as well as wise principles, which might be expected from those who had yielded to a supposed necessity in departing from them. Congress, probably, conceived, that this object would be best effected by placing in the Courts of the Union the power of altering the "modes of proceeding in suits at common law," which includes the modes of proceeding in execution of their judgments, in the confidence, that in the exercise of this power, the ancient, permanent, and approved system, would be adopted by the Courts, at least as soon as it should be restored in the several States by their respective legislatures. Congress could not have intended to give permanence to temporary laws of which it disapproved; and, therefore, provided for their change in the very act which adopted them.\footnote{Wayman, 25 U.S. (10 Wheat.) at 46–47. "The thrust of this passage was to suggest a connection between the Framers' distinct disapproval of the efforts of some states to disregard creditors' rights and the delegation of power to the federal courts to prescribe their own 'modes of proceeding.'" White, \textit{supra} note 183, at 851. Professor White concludes that the Marshall Court "succeeded remarkably in establishing the impression in public consciousness" that it was "removed from politics and faithful to the impersonal dictates of the law." \textit{Id.} at 964. But he observes, "it is not at all clear that the Court's opinions were nonpartisan, or even that they were so perceived by those who followed its actions closely." \textit{Id.} Professor Freyer notes that "during its first forty-five years, the federal judiciary strongly favored the right of interstate creditors in commercial cases; it did so, however, only on a case-by-case basis." Freyer, \textit{supra} note 185, at 46.}
The constitutionality of debtor relief legislation aside, as a result of *Wayman* the situation in states like Kentucky, and in states admitted after 1789, where the question of a federal court's final process was wholly independent of state law, "aroused intense excitement and indignation." The objections included the resulting lack of equality between in-state and out-of-state creditors, but they also included the assumption of power by federal judges and the pro-creditor (anti-debtor) manner in which that power had been exercised. After a few unsuccessful attempts, the proponents of change secured legislation in Congress that required federal courts to follow state laws concerning final process as of 1828 and that channeled their power to alter state law on final process in one direction, namely the adoption of post-1828 state laws.

Although the Process Act of 1828 could be justified exclusively in terms of equality between litigants, as Charles Warren recognized, it "conferred its chief benefit upon the debtor class, for, through its provisions as to final process, there was automatically extended to debtors in federal Courts the state legislation of a more modern and progressive nature which was being adopted between 1820 and 1860." Indeed, having aroused such intense controversy with an opinion only thinly veiled in the obscurity of procedure, the Supreme Court got the message and interpreted the 1828 statute to the benefit of debtors. Warren concluded,

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For a similar rhetorical technique in Supreme Court opinions calculated to dissuade lower federal courts from following state procedure—in this instance code procedure—see Burbank, *supra* note 15, at 1038–39.

195 See *supra* text accompanying note 187. It should not be assumed that state courts in the 19th century followed the decisions of the Supreme Court in this area. During the next fifteen years, these decisions of the Supreme Court were followed, reluctantly, by State Courts in Michigan, Indiana, Iowa and California. On the other hand, the States of Alabama, Minnesota, New York and Pennsylvania refused to adopt such views of their state laws, and, in spite of the fact that those laws were not applied by the Federal Courts, continued to extend relief to debtors in State Courts.


197 See id. at 439–44.

198 See Act of May 19, 1828, ch. 68, § 3, 4 Stat. 278, 281. "This restriction was a very essential change from the provisions of the Act of 1792 and materially limited the former rule-making authority of the Federal Courts. It was the direct result of the attack made by Kentucky upon the right of such courts to regulate executions." Warren, *supra* note 183, at 445.

199 Warren, *supra* note 183, at 446.

200 See id. at 446–49.
Consequently, this Act of 1828 and the decisions of the Supreme Court in interpreting its effect had an important effect upon the history of the relations between the Federal and the State Governments and upon the attitude of the people in general towards the Federal Courts. Less attention has been paid by historians and other writers on American law to the decisions of the Court on this subject than to the decisions involving some of the more prominent questions of Constitutional law. But while the latter affected, in general, only particular classes or sections of the community, the former affected every individual throughout the United States who might be either a creditor or a debtor in a Federal Court. Hence, while statutes and cases dealing with Federal process have now a somewhat dry aspect to the student, they, nevertheless, touched the life of the ordinary individual in the community more closely than any other subject.\textsuperscript{201}

Thus far we have been concerned with final process. What of so-called mesne process?\textsuperscript{202} The Process Act of 1828 lumped mesne process with “the forms and modes of proceeding” more generally, requiring federal courts to follow state law as of 1789 or 1828 (depending on date of admission), but empowering them to alter or add to state law locally or through Supreme Court rules.\textsuperscript{203} According to Charles Warren, the subject was not controversial in 1828,\textsuperscript{204} and the legislation of that year did not elicit much litigation over its interpretation.\textsuperscript{205}

Yet, in 1872, when Congress next comprehensively regulated the practice and procedure of the federal courts, provisional and final remedies were treated identically, and both were treated differently than all other elements of pleading and practice. As to both Congress required conformity to state law (“similar remedies”) as of 1872, with the federal courts empowered only to adopt subsequent state laws and

\textsuperscript{201} Id. at 446–47 (footnote omitted).


The term “mesne,” as used in the law of process, is a source of confusion to many modern students because although the literal meaning of the term is “middle,” today we begin our law suits with mesne process. At common law, mesne process was any process between the “original” process of summons under the original Chancery writ and the “final” process of execution upon judgment. With the demise of the writ system, the initial process then came out of the courts of law, but the name “mesne” continued to be used for it. Id. at 57 n.21.

\textsuperscript{203} See Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278.

\textsuperscript{204} See Warren, supra note 183, at 443.

\textsuperscript{205} See id. at 546.
only by general rules. What had happened in the meanwhile? In the absence of instructive legislative history, I suggest explanations for the different treatment of provisional and final remedies in 1828 and for their assimilation in 1872.

First, "mesne process" included more than provisional remedies and the provisional remedy we know as attachment is an American adaptation of a procedural device which, in England, served to coerce the defendant's appearance. It was, in other words, the forerunner of the method of asserting jurisdiction that we associate with Pennoyer v. Neff and Shaffer v. Heitner. Although in this form "quite ancient" in the United States, and although transformed into a security device and generally available in money actions in the New England states from early on, elsewhere its development was slower and more restricted. In either form, it was a creature of statute. Recalling that the Kentucky experience captured in Wayman was aberrational, there is no reason to believe that federal courts would have failed to follow state provisional remedy law prior to that decision or, given the uproar it created, after it came down. In any event, it is inconceivable that a federal court would have departed from state arrangements by purporting to create a provisional remedy without benefit of statute.

Second, notwithstanding attempts to solve it in both the Process Act of 1828 and in 1840, a problem that continued to plague the system for administering justice between creditors and debtors concerned the status of judgments as liens in the federal and state courts.

206 See Act of June 1, 1872, ch. 255, § 6, 17 Stat. 197. Compare the provision with respect to "the practice, pleadings, and forms and modes of proceeding." Id. § 5, 17 Stat. at 197; see also Burbank, supra note 15, at 1039.
207 See Levy, supra note 202.
209 95 U.S. 714 (1877).
211 Glenn, supra note 208, § 38, at 65.
212 See Millar, supra note 143, at 485-91; Levy, supra note 202, at 96 n.223; Wasmann, supra note 70, at 271-75. Millar's detailed and nuanced historical account requires refinement of Glenn's dichotomy between attachment in its original usage, to secure the defendant's appearance, and "American attachment," which he claimed "is quite modern, because today it accomplishes a purpose that was wholly unknown in the Custom of London." Glenn, supra note 208, § 38, at 66.
213 See Drake, supra note 208, § 83, at 67; Glenn, supra note 208, § 38, at 66-67; Millar, supra note 143, at 486-92.
214 See Act of May 19, 1828, ch. 68, § 2, 4 Stat. 281.
Because at common law judgments did not constitute liens on real estate,216 judgment creditors in federal courts in which state lien statutes were not applicable were at a disadvantage. On the other side of the ledger sheet were judgment creditors in some state courts forced to wait a term of court to execute while judgment creditors in federal court were not so constrained. "Finally, Congress, in 1888, cleared up the whole subject, by passing an Act which provided specifically that such judgments should be liens on property throughout the State in which the Federal Court sat, in the same manner and to the same extent, and under the same conditions only, as if rendered by the State Courts."217

By 1872 then, it must have been clear that both provisional and final remedies involved questions of property law that held the potential consequentially to affect the balance of power between creditors and debtors, as well as the balance of power between the states and the federal courts. The history of the antecedent period illuminates the reasons for Congress's choice to require strict conformity to state law. The Conformity Act of 1872 by no means addressed all areas of federal court involvement in debtor-creditor relations, and it by no means closed off all of the avenues for the federal courts to weigh in on the side of the creditor class.218 But as to the matters of provisional and final remedies, Congress's choices had a foundation in considerations of policy deeper and more contentious than the convenience of lawyers,219 which is why those choices withstood the Rules Enabling Act of 1934 and the Federal Rules of Civil Procedure.

217 Warren, supra note 183, at 557 (footnote omitted); see also Act of Aug. 1, 1888, ch. 729, 25 Stat. 357.
219 Inconvenience and inconsistency resulting from optional static conformity under the Process Acts seem to have been the prime causes of the switch to dynamic conformity in section 5 of the 1872 Conformity Act. See Burbank, supra note 15, at 1036–39.

Brainerd Currie asserted that Congress's purpose in section 6 was "unmistakably clear" and that "[i]t could hardly be plainer that Congress was attempting to change the rule that actions could not be commenced in the federal courts by attachment or garnishment, without personal service, if state law so provided." Brainerd Currie, Attachment and Garnishment in the Federal Courts, 59 Mich. L. Rev. 337, 353 (1961). Professor Currie was mistaken. His dismay with the way in which the federal courts arrived at the rule allegedly sought to be changed is fully justified. See id. at 337–52. But not even the language he selectively quoted from section 6 suggests such a purpose, see id. at 352, and he failed to note that the section also dealt, in exactly the same way, with remedies "by execution or otherwise, to reach the property of the
I have told the history of the Rules Enabling Act and of the original Federal Rules of Civil Procedure elsewhere and, as it bears on doctrine, in great detail. That account makes clear that neither the American Bar Association proponents of the statute that became the Act, nor its proponents in Congress, nor the original Advisory Committee had a clear or clearly coherent view of the limitations that the proposed statute would place, or that the enacted statute did place, on the Supreme Court. In part, as to the first two groups, the difficulty arose from the borrowings they made from the allocations of lawmaking power and descriptions of those allocations, in a state, New York, with a history and problems of lawmaking power quite different from those in the federal government. In part, as to all three groups, it arose from the impulse of those favoring broad judicial power to speak as generally as possible and to descend to specifics only when forced to by the arguments of opponents.

However difficult it may be to derive interpretative guidance for a statute enacted in 1934 from a legislative and extra-legislative record going back more than twenty years, the history adumbrated above makes much easier the task of explaining the treatment of provisional and final remedies in the Federal Rules. Those rules were (and are) exceptional in opting for conformity to state law in preference to uniform federal regulation. They took that form because, notwithstanding the desire of some members of the Advisory Committee to subject those matters, or some of them, to uniform federal law, the Committee as a whole recognized that to do so would be controversial and would perhaps exceed the limits of the Court's power. The legitimacy of the latter concern is confirmed by the Act's long legislative history and by contemporary scholarly literature. As to the

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judgment debtor," Act of June 1, 1872, ch. 255, § 6, 17 Stat. 196, 197; see also supra text accompanying note 206. Moreover, the result of the rejection of this interpretation in Nazro v. Cragin, 17 Fed. Cas. 1259 (No. 10062) (C.C.D. Iowa 1874) (Miller, J.), was not "that section 6 effected no change in the prior law," Currie, supra, at 353 n.70, once one focuses on what Congress was in fact trying to regulate—namely, federal court practice and procedure with respect to provisional and final remedies.

220 See Burbank, supra note 15.
221 See id. at 1056-61, 1087-88, 1125-27.
222 See id. at 1063-65, 1127-31, 1133-37.
223 See id. at 1098-1106.
225 See Burbank, supra note 15, at 1145-47.
226 See id. at 1085-86.

The [1926 Senate Judiciary] Committee... took very seriously the claim by Senator Walsh that the delegation in the Cummins bill extended to matters
former concern, the Chairman of the Advisory Committee's personal regret that the Committee opted for conformity in respect to "the practice in seeking . . . provisional remedies" must have been assuaged when he was able to parry a hostile question at the Senate hearings on the proposed Federal Rules by pointing out that Rule 64 would not, as asserted by Senator Austin, "change the rights of citizens of this country in respect of their holding property." In light of the history of provisional and final remedies in the federal courts, the Senator's concern is understandable, and the Committee's decision not to change the law bespoke recognition that this was an area "involving a certain public policy which . . . Congress and the public [were] vitally interested in."\(^{230}\)

such as "limitations of actions, provisional remedies, such as orders of arrest and attachment, and the selection or qualification of jurors." In the longest section of the 1926 Senate Report, entitled "The Bill Does Not Attempt to Affect Substantive Rights or Remedies," the Committee explained why the bill authorized neither court rules relating to those matters nor, as also argued by opponents, court rules relating to "substantial rights and remedies in a manner contrary to the public policy of the several States embodied in local statutory law."

\textit{Id.} (footnotes omitted).


A question might perhaps be raised whether the right to arrest the person or seize property on original process, or the right to employ attachment, garnishment, execution or other similar remedies, all of which constitute direct interference with personal liberty or control over property, ought, on grounds of public policy, to be deemed procedural rather than substantive. \textit{Id.} at 406; see also Richard W. Montague, \textit{Restoring to the Courts the Power to Make Rules of Procedure}, 6 Or. L. Rev. 17, 19–20 (1928); Warren, \textit{supra} note 188, at 570. Professor Sunderland was subsequently appointed to the Advisory Committee, but concern about revisionist aspects of the cited article and another article almost prevented that appointment, as it surely prevented him from becoming the Reporter. \textit{See} Burbank, \textit{supra} note 15, at 1135–37.

\(^{228}\) William D. Mitchell, \textit{Uniform State and Federal Practice: A New Demand for More Efficient Judicial Procedure}, 24 A.B.A. J. 981, 982 (1938); see also Burbank, \textit{supra} note 15, at 1146 n.572. "Mitchell may well have been referring to aspects of provisional and final remedies that do not raise problems of power under the Act." \textit{Id.}

\(^{229}\) \textit{Hearings on S.J. Res. 281 Before a Subcomm. of the Senate Comm. on the Judiciary, 75th Cong., 3d Sess., pt. 1, at 8} (1938). Mitchell replied, "I do not think so. I do not think it had any such purpose. I think the practice in the Federal courts today in the matter of seizures of property by attachment, and so on, conforms to State practice, and that rule simply says that shall be continued." \textit{Id.}

\(^{230}\) \textit{Id.} at 25; see also Burbank, \textit{supra} note 15, at 1147 n.577. In fact, there was a small change from conformity as of 1872 with power to adopt subsequent state law by
The same light illuminates the territory in which the questions in *Grupo Mexicano* should have been addressed. That territory includes law as well as equity, and the history suggests that, when the traditions were separate, a general claim of inherent power in the federal courts sitting in equity to tie up the property of a putative debtor, prior to judgment, in aid of a legal claim for damages would have been greeted as an abuse, and if blessed by the Supreme Court, likely would have prompted corrective legislation.

The perceived disregard by federal courts of the state law property rights of debtors subsequent to judgment had caused great controversy in the nineteenth century, as had inconsistencies in the treatment of creditors arising from the different status as liens of judgments issued by state and federal courts. The need for statutory authority to create provisional remedies seemingly reduced the scope of potential friction, but lack of conformity could have yielded problems of inconsistency akin to those arising from the different status as liens of state and federal judgments. Indeed, in the absence of a Supreme Court Rule under its (never exercised) 1842 rulemaking authority in actions at law, a claim of equitable power might have been the only way for the federal courts to add to the arsenal of provisional remedies available under state law. The Conformity Act of 1872 closed off the avenues of potential discord in actions at law. Once burned in a cognate area, the federal courts were smart enough not to risk legislative override by claiming equitable power, the exercise of which would have been politically, if not functionally, indistinguishable.

The history, as much as the principle that Justice Scalia identified and that it nourished, explains why the Court reached the right result in *Grupo Mexicano* and why the same result should have obtained if the Court had decided the case on a narrower basis. Moreover, the history brings to life the Court's expressed concern about the potential effect the remedy sought might have on the balance of power between debtors and creditors, and it frees from the eternity of ideology the Court's conclusion that any such step would require congressional action.

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general rule to dynamic conformity. *See* 7 Moore & Friedman, *supra* note 70, at ¶ 64.01[2] (reprinting the original advisory committee note).

231 *See* Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518.

232 Although the Solicitor General acknowledged that history is not "irrelevant to the proper modern application of equitable principles," Brief for the United States at 16, *Grupo Mexicano* (No. 98-231), he ignored the history of provisional remedies in actions at law, *see id.* at 16–18. As a result, the brief described Rule 64's language as "permissive and supplementary," *id.* at 21, and went so far as to invoke *Wayman v. Southard*, 25 U.S. (10 Wheat.) 1 (1825), for the proposition that, "if a state-law remedy
IV. "CHANGES IN CONDITIONS?"

If Grupo Mexicano is a peculiar decision for scholars of procedure, it is likely to seem most peculiar to scholars who are interested in international civil litigation and to others who remarked the prominent international features of the case and the striking inattention to those features in the Court's opinion. No matter what the rule was for domestic cases, one might have expected the Court to take account of special needs and concerns when foreign parties are involved, perhaps framing a new rule that might then have been extended to domestic cases. International civil litigation has in the past proved fertile ground for domestic law reform.233

The dissent does suggest respects in which international features might be thought to support the flexible use of equity to do justice in the circumstances. Traditional provisional remedies such as attachment cannot reach assets located outside of the jurisdiction. In today's commercial world, locating them there is easier and faster than ever before, and once they are there, other protections against preferential treatment of creditors or fraudulent transfers may be unavailable.234 Apart from disputing whether the supposed changes represented a difference in kind rather than degree, the Court's response was limited to an assertion of the comparative superiority of Congress to "perceive" changes in conditions and to "design the appropriate remedy."235 It remains to determine whether a "critical use of history . . . [that] takes account of changes in conditions as well as similarities"236 calls for a different conclusion.

Confining the inquiry to doctrines limiting the exercise of judicial power, but not on the broad territory staked out by the Court, the analysis of issues of power under Rule 64, Rule 65, and Erie Railroad Co. v. Tompkins237 offered above took account of most relevant devel-

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is unavailable or inadequate under the circumstances of a particular case, a federal court is not left powerless to protect the parties before it and its own ultimate ability to enter an effective judgment." Brief for the United States at 21–22, Grupo Mexicano (No. 98-231). This is revisionism on stilts. See supra text accompanying notes 182–218.


235 Id. at 1970.

236 Supra text accompanying note 2.

237 304 U.S. 64 (1938).
opments since 1938, and that analysis does not support the existence of power in the federal courts to do what the district court did in *Grupo Mexicano* in the absence of authority in state law.\(^{238}\)

One relevant datum not included in that analysis is the 1988 amendments to the Enabling Acts.\(^{239}\) The legislative history of those amendments makes clear the concern of the members of Congress who sponsored them that the Court had paid insufficient attention to the limitations on its rulemaking power in the 1934 Act.\(^{240}\) It also makes clear the view that those limitations should be interpreted to foreclose rulemaking on "matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law."\(^{241}\) But in this respect there was no change, since the 1926 Senate Report on the bill that became the 1934 Act had made clear that the grant of rulemaking power did not extend to "matters involving substantive legal and remedial rights affected by the considerations of public policy."\(^{242}\) Under either formulation, rulemaking with respect to provisional remedies is off limits, although perhaps only an academic would object to a rule requiring the federal courts to follow state law.\(^{243}\)

As explained above, the language of Rule 65 does not support viewing that rule as a broad charter for federal common law and its history is persuasive evidence against any such interpretation.\(^{244}\) The Court has not been immune to the temptation broadly to construe the coverage or reach of a Federal Rule in order to avoid a conclusion that state law applies under the cases following *Erie* that arbitrate between state law and federal judge-made law.\(^{245}\) This transparent tech-

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\(^{238}\) See supra text accompanying notes 129–73.


\(^{243}\) See Burbank, *supra* note 15, at 1147.

\(^{244}\) See supra text accompanying notes 153–173.


With the source of applicable law turning on what may seem to be the fortuity of federal lawmaking arrangements, it is an understandable temptation to
nique, which buries policy choices from congressional view, including the critical choice to insulate federal common law of procedure from the jurisprudence of procedural federalism, has nothing to recommend it other than the augmentation of judicial power. Fortunately, the Supreme Court’s most recent decision exploring conflicts between federal and state law where there is an arguably pertinent Federal Rule appears to repudiate it.

One final development pertinent to the formal doctrinal question has to do with the Supreme Court’s attitude towards the Enabling Act. It may not be a coincidence that, subsequent to the 1988 amendments, more members of the Court seem to have taken the Enabling Act’s limitations more seriously than was the norm for the first fifty years of the Act’s existence. “More seriously” is a relative concept, and it remains the case that the Enabling Act is most often invoked in dissent or, as it were, indirectly—a factor to be considered, but not too seriously, and one that, like tradition, “may ease the stultifying task of marking the limits of judicial power.” It also remains true that, hear federal statutes or Federal Rules speaking when they appear to be silent, or at least to hear enough noise nearby to silence state law.


Justice Scalia finds in Federal Rule of Civil Procedure 59 a “federal standard” for new trial motions in “direct collision” with, and “leaving no room for the operation of,” a state law like CPLR § 5501(c) . . . . The relevant prescription, Rule 59(a), has remained unchanged since the adoption of the Federal Rules by this Court in 1937 . . . . Rule 59(a) is as encompassing as it is uncontroversial. It is indeed “Hornbook” law that a most usual ground for a Rule 59 motion is that “the damages are excessive. . . .” Whether damages are excessive for the claim-in-suit must be governed by some law. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York. See 28 U.S.C. §§ 2072 (a) & (b) (“Supreme Court shall have the power to prescribe general rules of . . . procedure”; “[s]uch rules shall not abridge, enlarge or modify any substantive right”).

Id. at 437 n.22.


249 Supra text accompanying note 17. For examples of such treatment of the Enabling Act, see Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2313–14 (1999) (invoking Enabling Act in aid of narrow interpretation of Rule 23(b)(1) in asbestos settlement class action), Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613 (1997), and Gasperini,
in invoking the Enabling Act, the Justices typically see only, or largely, concerns about federalism rather than the concern that prompted the Act's limitations on rulemaking: separation of powers.\textsuperscript{250} The Court's invocation of and allusion to the Enabling Act in \textit{Grupo Mexicano} were typically indirect, but the way in which the Court framed the issue for decision necessarily gave to those references authority in the separation of powers.\textsuperscript{251}

Still focusing on the source of authority rather than the content of the rule, there is nothing about the international elements in \textit{Grupo Mexicano} that should alter the conclusion that the federal courts lacked the power to tie up the defendants' assets prior to judgment. On the contrary, those elements fortify the view that the problems with which the lower courts attempted to deal in that case require the attention of Congress. Indeed, they highlight the need for congressional action in a broader field that includes state courts. The notion that Congress is in a "much better position . . . to perceive"\textsuperscript{252} changed conditions warranting a change in the law in this area may be silly. But not so the Court's linked, and the only operative, assertion that Congress was in a "much better position" to "design an appropriate remedy."\textsuperscript{253}

The limitations regarding substantive rights in the Enabling Act aside, if it were proposed to amend either Rule 64 or Rule 65 so as to empower the federal courts to do what the district court did in \textit{Grupo Mexicano}, the likelihood that the proposed rule would have bite in, and perhaps chiefly in, cases involving internationally foreign parties should give pause, prompting further inquiry. If that inquiry revealed either that the matter implicated an existing treaty or that exercises of power under it could, in a predictable class of cases, adversely affect the foreign relations of the United States, the judiciary should abandon the effort as rulemaking and recommend the desired rule as leg-

\textsuperscript{518} U.S. at 437 n.22. The Court's reliance in \textit{Ortiz} on limitations emerging from the tradition of equity and supposedly captured in Rule 23(b)(1)(B), see 119 S. Ct. at 2308-12, is another technique that the decision shares in common with \textit{Grupo Mexicano}.

\textsuperscript{250} See Burbank, \textit{supra} note 15, at 1106-12. There has been some progress, however. See Burbank, \textit{supra} note 233, at 1498 n.255.

\textsuperscript{251} See \textit{Grupo Mexicano}, 119 S. Ct. at 1970 (stating that Rule 18(b) "specifically reserves substantive rights (as did the Rules Enabling Act)"); \textit{id.} (stating that merger of law and equity did "not alter substantive rights" and that the Court was not "inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment").

\textsuperscript{252} \textit{id.} at 1970.

\textsuperscript{253} \textit{id.}
islation. The Enabling Act process does not require, and it often does not engage, the active attention of Congress, and it does not contemplate any involvement of the President. Both the Congress and the President should be involved in making policy choices where the foreign relations implications of procedure are direct and obvious.

Assume next that the Court had decided Grupo Mexicano on a narrower basis, leaving open, for instance, the possibility of judicial power to grant preliminary injunctive relief in some subset of federal question cases, and that a case in other respects just like it arose thereafter. Does attention to the international elements of such a case change the calculus in favor of the exercise of this putative power?

It is customary, when limning the powers of a court of equity, to fasten on jurisdiction over the person of the defendant and thence to derive power to fashion relief having extraterritorial effect on property. There is probably no harm done, so long as one does not pretend that this exercise of power in personam is any less an exercise of power in rem than any exercise of power in rem is an exercise of power in personam. When the property that would be affected by such equitable relief is located abroad, the exercise of power may be a most delicate enterprise, instinct with potential ramifications for the interests of the United States. Our courts have struggled with similar problems, whether in connection with extra-territorial discovery or the extra-territorial application of United States law, and in the view of many, they have not been notably successful in devising solutions.

One problem is that, in a regime of self-regulated and ad hoc deci-


255 See Burbank, supra note 254, at 144.

256 Proceeding along this path also requires the assumption that Rule 64 would not control, remitting the question to state law. See supra note 146.


258 See Cook, supra note 143. But see Republic of the Philippines v. Marcos, 862 F.2d 1355, 1363–64 (9th Cir. 1988) (en banc) (“Because the injunction operates in personam, not in rem, there is no reason to be concerned about its territorial reach.”). The tendency of American courts to ignore such extraterritorial aspects is noted by Bermann, supra note 140, at 564–66.

259 See, e.g., GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 595 (3d ed. 1996); David J. Gerber, International Discovery After Aerospatiale: The Quest for an Analytical Framework, 82 AM. J. INT’L L. 521 (1988); David J. Gerber,
sion-making, consistent preference for domestic law gives "comity" the appearance of window-dressing, while the refusal to apply domestic law whose policies are implicated looks like a giveaway.260

How much more delicate would the enterprise be in a case like Grupo Mexicano, where the "property" affected by the preliminary injunction involved rights or interests issuing from, and controlled by, a foreign government. Incredibly, the precise nature of those rights or interests was not known to the district court even at the time it granted final relief, including the Turnover Order, a fact that prevented a definitive decision on appeal from that order.261 Such uncertainty, and the risks to amicable foreign relations, could only be greater at the stage of preliminary injunctive relief.

The district court in Grupo Mexicano was apparently persuaded that the defendants were less than candid in the litigation and unfair in their preferential treatment of Mexican creditors, and this sufficed for the court of appeals to distinguish one of that court's previous decisions and to put the nail in the coffin of a qualification on judicial power sought by the defendants.262 Again, one regrets the factual uncertainty understandably attending a decision on preliminary relief. Yet, it is not at all clear that—the costs to the defendant aside263—


261 In a decision dated August 20, 1999, the court of appeals vacated the Turnover Order and remanded for fact-finding necessary to determine whether that order was authorized under New York law, observing:

On the current record, we lack sufficient information to choose between the competing characterizations promoted by the parties. The district court received no evidence and made no findings concerning either the nature of Mexico's promise to exchange government notes for toll road receivables or the financial characteristics of those government notes. On appeal, no party has drawn our attention to the text of either the Toll Road Rescue Program or the government notes—both of which are presumably written in Spanish. We are therefore unable to determine whether the district court's issuance of the turnover order accorded with New York law.

Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 190 F.3d 16, 22 (2d Cir. 1999).

263 See Laxcoo, supra note 6, at 81 ("Defendant may be irreparably harmed if a court shifts tactical advantage without sufficient justification.") (footnote omitted); see also supra note 138. Although the district court stated that it would entertain requests to modify the terms of the preliminary injunction to meet GMD's ordinary course business needs, what GMD needed was restructuring. See Transcript of Oral Argument at *3, Grupo Mexicano (No. 98-231), available in 1999 WL 216177.
when the costs to the public interest are potentially so high, even the "exacting standards for preliminary equitable relief" would be sufficient. Thus, as the petitioners maintained in the Supreme Court, what looked like lack of candor to the district court may have been the product of difficulty in ascertaining accurate current information from abroad in the heated environment of proceedings for preliminary injunctive relief. Then too, what looked to the district court like an unfair preference to Mexican creditors may have been, at least in large measure, the product of responses to domestic legal requirements and necessary efforts, some of which long antedated the August 1997 default, to stay in business. In any event, Lawrence Collins, perhaps the foremost English expert on Mareva injunctions has expressed doubt whether, in the circumstances of Grupo Mexicano, an English court would have issued such an injunction.


265 See Petitioners' Reply Brief, Grupo Mexicano (No. 98-231).

GMD, on its own initiative, updated its submissions to the district court as soon as additional information became available (and before any ruling by the district court). . . . Any incompleteness in GMD's initial submission was attributable directly to the need to respond hurriedly, with information gathered from abroad, to respondents' ex parte application for a preliminary injunction.

Id. at 2.

266 See id.; Petitioners' Brief at 5-6, Grupo Mexicano (No. 98-231). The Solicitor General acknowledged the need for "judicial sensitivity in framing an injunctive order to avoid any unnecessary interference with obligations imposed on petitioners under Mexican law." Brief for the United States at 18, Grupo Mexicano (No. 98-231). But he was content to assert that

the district court took account of both the international and insolvency aspects of this case, by declining respondents' request that it order petitioners to create a trust under Mexican law, and by accepting respondents' suggestion to include in the injunction a provision specifying that it did not prohibit petitioners from commencing insolvency proceedings "under any applicable law."

Id. at 18-19 (footnote omitted). The footnote pointed out the district court's expressed willingness to consider modifications. See id. at 19 n.5.

267 See Lawrence Collins, United States Supreme Court Rejects Mareva Injunctions, 115 Law Q. Rev. 601 (1999).

[B]oth the majority and minority opinions ignore the comity implications of the exercise of injunctive power in relation to assets abroad. The jurisdiction under New York state law to make a pre-judgment attachment of assets was not available because the assets were situated abroad. It must be very doubtful whether an English court would have granted an injunction in like circumstances against a foreign defendant, having no assets or business in England, which was making a bona fide effort to restructure its debt and to
There are other circumstances, in addition to basic differences in traditions and governmental structure noted in the Court's opinion and by its author at oral argument, that may make the experience of the English courts in creating and issuing *Mareva* injunctions a less attractive candidate for emulation than argued by Alliance or by the dissent in *Grupo Mexicano.*

First, whatever the formal basis for the authority the English court claimed in 1975, its initial exercise was prompted by the desuetude of prejudgment attachment in England since the late nineteenth century and by the increasing pressure to devise another remedy to prevent the disappearance of assets from the jurisdiction. *Mareva* injunctions thus filled a large hole that does not exist in this country.

Second, it is true that the remedy thus devised was extended, quite recently, to cases involving assets located abroad, but that development has not been without problems, controversy, or compensat-

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*Id.* at 604; *see also* Lawrence Collins, *Provisional and Protective Measures in International Litigation,* 234 RECUEIL DES COURS 19 (1992) [hereinafter Collins, *Provisional and Protective Measures*].


**QUESTION:** And you think we have the same freedom in developing new rules of equity as the—as the House of Lords does? I mean, don't forget the supreme court of England is the House of Lords.

MR. DAYS: I understand that, Justice Scalia.

*Id.* at *40. This may not be an accurate picture of the English experience. *Mareva* injunctions were an innovation of the Court of Appeal, and they received "only mild support" from the House of Lords prior to statutory amendments in 1981. Lawrence Collins, *The Territorial Reach of Mareva Injunctions,* 105 LAW Q. REV. 262, 264 (1989) [hereinafter Collins, *Territorial Reach*]; *see also* Siskina v. Distros Compania Naviera S.A., A.C. 210 (Eng. 1979); Lawrence Collins, *The Legacy of The Siskina,* 108 LAW Q. REV. 175 (1992) [hereinafter Collins, *Legacy*].

270 "English civil procedure has consigned the term 'Mareva injunction' to legal history. The order is described as a 'freezing injunction' in the Civil Procedure Rules which took effect 26 April 1999." Peter Devonshire, *Mareva Injunctions and Third Parties: Exposing the Subtext,* 62 MOD. L. REV. 539, 539 n.* (1999).


272 *See* 119 S. Ct. at 1978 (Ginsburg, J., dissenting).


Careful study of that experience would seem prudent before adopting the model.

Third, the United Kingdom is a party to the Brussels Convention, which regulates provisional remedies to some extent and which therefore provides a shared framework, judicial review, and diplomatic cover for the application of such remedies to assets located in other signatory states.

At the end of the day, the appropriateness of the Mareva model may come down to traditions and governmental structure. Yielding to none in my respect for the English judiciary, I hope that it is not unkind to point out that a power it also claims, one that is often linked with Mareva injunctions in the literature, is the power to issue so-called Anton Piller orders, which authorize a party to civil litigation, on the basis of an ex parte demonstration, to enter and search the premises of an opponent.

Whatever its factual basis, the district court's concern that GMD was inappropriately favoring Mexican, to the detriment of American, creditors expressed the frustration that often seems to animate the application of American law in international civil litigation: "if we don't have it our way, they will have it their way." That, of course, is what treaties are for, although you might not know that if you looked

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276 See, e.g., Bermann, supra note 140, at 567–76; Collins, Territorial Reach, supra note 269; Zuckerman, supra note 166.
277 See, e.g., Case C-391/95, Van Udem Maritime BV v. KG in Firma Deco-Line, [1999] I.L. Pr. 73; Bermann, supra note 140, at 586–92; Lawrence Collins, Provisional Measures, the Conflict of Laws and the Brussels Convention, 1 Y.B. EUR. L. 249 (1981); Gerry Maher & Barry J. Rodger, Provisional and Protective Remedies: The British Experience of the Brussels Convention, 48 INT'L & COMP. L.Q. 302 (1999); Andrew Lenon, Mareva Injunctions in Support of Foreign Proceedings, 147 NEW L.J. 1234 (1997); .
278 See Anton Piller K.G. v. Manufacturing Processes Ltd., [1976] 2 W.L.R. 162 (Eng. 1976); Collins, Provisional and Protective Measures, supra note 267, at 180 ("The English Anton Piller order is a drastic form of injunction requiring a defendant to give the plaintiff entry to the defendant's premises for the purpose of discovering material which, for example, infringes copyright or is a breach of confidence."). Acknowledging the value of such orders in certain intellectual property and trade secret cases, Collins goes on to note that there is little doubt that the exercise of the jurisdiction gives rise to serious misgivings about the propriety of granting drastic and oppressive orders against defendants who are neither notified nor heard, and who must obey the order before they have an opportunity to apply to the court to have it discharged.
279 See supra note 49.
280 See Burbank, supra note 254, at 135–39; see also Brief of the Amicus Curiae the Dominican Republic in Support of Petitioners, Grupo Mexicano (No. 98-231).
only at the way in which the Supreme Court has interpreted treaties in the area of private international law. There must be a better way than (1) the flurry of temporary restraining orders and preliminary injunctions, and the possibly unnecessary foreign bankruptcies, that would have followed a contrary holding in Grupo Mexicano and (2) the uncertainty, risk aversion, and resulting loss of sources of capital for the developing world that may follow in its wake. This would seem to be fertile ground for negotiation between nations, and it appears that the American Law Institute’s Transnational Insolvency Project may lay the groundwork.

Whether or not proposed legislation or treaties emerge from the work of the American Law Institute, and apart from any such proposals, legislation will probably be necessary. In the absence of both, Grupo Mexicano leaves the federal courts powerless, as a matter of fed-

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282 See Grupo Mexicano, 119 S. Ct. at 1974 n.11 (1999) (discussing “unregulated competition among the creditors of a struggling debtor”). For an argument that preliminary injunctions are less likely than attachments to result in involuntary bankruptcies, see Wasserman, supra note 70, at 301–02. Of course, attachment was not an available alternative in Grupo Mexicano, and Professor Wasserman recognizes that, even when there is a choice, her argument rests on empirical assumptions that may not be accurate. See id. at 302 n.171.


Phase II of the Project is an attempt to state principles and procedures that will permit better coordination of transnational bankruptcy cases within the NAFTA under existing law. It also includes recommendations for legislation or international agreements to put in place reforms that cannot be fully achieved without a change in existing law in one or more of the NAFTA countries.

Id.; see also Capper, supra note 275, at 347–48 (calling for international treaties on recognition and enforcement of interlocutory orders).
eral law, to grant preliminary injunctive relief freezing assets in aid of a potential judgment for damages. The decision does not, by its terms, affect the powers of state courts, and it would require both a blinkered view of the history of provisional remedies in the United States and an expansive view of preemption in aid of foreign relations for the Supreme Court, unassisted, to reverse an asset freeze order entered by a state court. Indeed, Grupo Mexicano does not clearly leave it open to a federal district court to grant provisional injunctive relief when such relief is authorized by state law. And yet, the difficulties that could attend such an order issuing from a state court seem even more serious, and we would be reliving the nineteenth century if the state courts could do it and the federal courts could not.

The concerns that should trigger legislative attention to and direction in this area are not logically confined to cases in which state law furnishes the rules of decision or to cases in which the final relief sought is money damages. The sensibilities of foreign governments may be immune to such distinctions, as they may even be to a distinction between a preliminary injunction in aid of a potential judgment and a post-judgment injunction. The latter possibility suggests the importance of including within the scope of legislative consideration possible federal limitations on final relief granted in cases, whether in federal or state court and no matter what the source of the rules of decision, where property that is essential to that relief is located abroad. Again, study of the experience of the English courts in de-

285 But the Court would have to make a bunch of mistakes in order to foreclose application of state law, including holding that Rule 64 does not apply to injunctions and that “under Rule 65” a federal court is not required to follow state law authorizing provisional injunctive relief. See supra text accompanying notes 130-73.
286 See supra text accompanying notes 214-17.

The effect of this proviso is that in principle acts by third parties (i.e. persons who are not themselves parties to the action) abroad do not give rise to a contempt of court by them unless and until a foreign court enforces or recognizes the English order.

Id. at 119.
288 Such matters are now usually governed by state law, even in federal court. Fed. R. Civ. P. 69(a) provides:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution,
veloping and refining *Mareva* injunctions would be helpful to the cre-
ation of American federal law on the subject, although again, it would be important to mark differences in the broader legal and political contexts before borrowing wholesale from that experience.\(^{289}\)

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See supra text accompanying notes 268–78. An additional reason, as well as an opportunity, to fashion federal legislation on these matters will be presented if current negotiations at The Hague yield a treaty on jurisdiction and foreign judgments to which the United States becomes a party. The current draft’s Article 13 deals with provisional and protective measures as follows:

1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.

2. The courts of a state in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.

3. A court of a contracting state not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that—

   a) their enforcement is limited to the territory of the state, and

   b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

**Hague Conference on Private Int’l Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters** 6 (Oct. 30, 1999). This and other documents pertaining to the proposed convention are available at <http://www.hcch.net>. The American Law Institute has begun a project to prepare legislation implementing the convention, if successfully concluded, or to propose legislation suitable in the absence of such a treaty. See American Law Institute, International Jurisdiction and Judgments Project, Council Memorandum No. 1 (Nov. 19, 1999).
V. Conclusion

Professor John Maguire described a system of laws as "those wise restraints that make us free."²⁹⁰ We have been fortunate that our system has included, most of the time and in most American jurisdictions, both law and equity, each of which requires the other and both of which, in combination, have helped us over more than two hundred years to make social and economic progress. That progress has often not come easily, and there is much of it still to be made.

In meeting the challenge of progress in a world that is in every respect more accessible than before, we cannot allow our traditions to hold us hostage. Neither can we afford to neglect them. Honoring our legal traditions sometimes requires a change in the rules to reflect the changed circumstances in which they operate. Honoring any legal tradition requires that claims of changed circumstances be filtered through an understanding of the reasons for the rules tradition bequeaths, both those that are formal and, to the extent implicated, those that reflect the social context in which the rules were born or nourished. It also requires that attention be given, in both dimensions, to traditional rules about who should decide.

History is littered with the wreckage of both "grand aims" and good intentions. In bringing to life the problems of the past, and in showing us that there almost never is something truly new under the sun, history has a sobering, not to say humbling, influence. We could use more of that in our lawmakers, including our judges, on all sides.