

ARTICLES

The Supreme Court and the New Equity

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The line between law and equity has largely faded away. Even in remedies, where the line persists, the conventional scholarly wisdom favors erasing it. Yet something surprising has happened. In a series of cases over the last decade and a half, the U.S. Supreme Court has acted directly contrary to this conventional wisdom. These cases range across many areas of substantive law—from commercial contracts and employee benefits to habeas and immigration, from patents and copyright to environmental law and national security. Throughout these disparate areas, the Court has consistently reinforced the line between legal and equitable remedies, and it has treated equitable remedies as having distinctive powers and limitations.

This Article describes and begins to evaluate the Court's new equity cases. Faced with many federal statutes authorizing equitable relief, the Court

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has looked to history and tradition to determine what counts as an equitable remedy and also to determine the circumstances in which equitable relief should be given. There have been some blunders, and the Court has taken no account of the complexity of equity's history. On the whole, however, the Court's new equity cases represent a reasonable response to an enduring challenge: how to make sense of equitable doctrines in a world without equitable courts. This conclusion will prove controversial for scholars in remedies and in various substantive fields, but even those who disagree will need to grapple with the new equity cases, for they may shape the law of remedies for decades to come.

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I. INTRODUCTION

The division between law and equity has long been criticized by legal scholars. Six decades ago, Zechariah Chafee said that it would be “absurd for us to go on until the year 2000 obliging judges and lawyers to climb over a barrier which was put up by historical accident in 14th

century England.”¹ Since then, the number of states with separate courts of equity has dwindled.² In many areas of the law, such as contracts, the defenses that were available at law and those available in equity have been assimilated. The Federal Rules of Civil Procedure, adopted in 1938, took the disparate procedures of law and equity and transformed them into a unified whole.

In remedies, however, the division persisted. Courts and scholars continued to refer to some remedies as “legal” and others as “equitable.” Some doctrines appeared to make something turn on that classification, such as the requirement that a plaintiff seeking equitable relief must first show there is no adequate remedy at law. But that requirement, which might be considered the last redoubt of equitable exceptionalism, was forcefully critiqued over two decades ago as having no real effect on judicial decisionmaking.³ And so, a rough consensus developed among scholars that the division between legal and equitable remedies was, and should be, disappearing.⁴ A reader of law reviews might have thought that Zechariah Chafee’s wish had been granted.

But something remarkable has happened at the U.S. Supreme Court. Over the last decade and a half, the Court has been slowly, perhaps even accidentally, laying the foundation for a very different future for the law of remedies. In eleven different cases, from nearly as many substantive areas, the Court has deeply entrenched the “no adequate remedy at law” requirement for equitable relief, and it has repeatedly underscored the distinction between legal and equitable

1. Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY iii, iv (Edward D. Re ed., 1955).

2. One form of division or another, such as separate law and equity courts, divisions, jurisdictions, or venue rules, still obtains in Delaware, Georgia, Illinois (Cook County), Iowa, Mississippi, New Jersey, and Tennessee. *See infra* note 113.

3. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 3–36, 82–84 (1991).

4. *See, e.g.*, T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 509 (2008) (“Distinctions between legal and equitable defenses are dead. They were buried with the merger. It is time for courts to begin writing their obituary.”); Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 53–54 (1993) (“The war between law and equity is over. Equity won. . . . 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.”); Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 97 (2007) (urging “the profession to discard the nonfunctional terminology of separate legal and equitable discretion,” and calling on judges and legislators to “develop rules, standards, and precedents around the functional differences between types of decisions and remedies”); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1033, 1060 (2011) (endorsing Laycock’s call to “complete the assimilation of equity” and warning of any “unfortunate entanglement with equity’s ghosts, especially the irreparable injury rule”).

remedies.⁵ The Court has shown no appetite, however, for reviving old distinctions between legal and equitable courts or procedures.⁶ Yet in remedies, the Court has insisted with vigor on the historic division between law and equity.

The Court has not given a defense of perpetuating the division between legal and equitable remedies. Instead, at every point, the Court has supported its new equity jurisprudence by appealing to history and tradition. For example, in one of the new equity cases⁷—a mere eight pages in the U.S. Reports—the word *tradition* or a cognate appears fourteen times. That is the same number of times *tradition* appears in the first song of *Fiddler on the Roof*.

Despite all these appeals to history and tradition, what the Court is offering is not something that most historians would recognize, for it does not reflect the complexity and contingency of equity's past. And in constructing that history, the Court has sometimes made clear errors, as when it called mandamus an equitable remedy.⁸ Yet since there are many statutes that authorize "equitable remedies" or "equitable relief,"⁹ the Court must say what *equitable* means. The turn to equity's history should be evaluated in light of the other options the Court has.

This Article attempts to take the measure of the Court's new equity cases. It evaluates the Court's use of the history of equity to shape remedial doctrines. There are places to find fault, for the

5. The new equity cases are *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Nken v. Holder*, 556 U.S. 418 (2009); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Munaf v. Geren*, 553 U.S. 674 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 312 (1999). The next in the series is likely to be *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, 593 Fed. App'x 903 (11th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3560 (U.S. Mar. 30, 2015) (No. 14-723).

6. See, e.g., *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 n.3 (2013) (recognizing that equity had a different presumption than law about attorneys' fees, but implying that the distinction was erased by the Federal Rules of Civil Procedure).

7. *eBay*, 547 U.S. 388, 390–94.

8. *Knudson*, 534 U.S. 204, 215 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993) for the proposition that mandamus is typically equitable); *id.* at 234 (Ginsburg, J., dissenting) (same); see John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error* in Russell, Mertens, and Great-West, 103 COLUM. L. REV. 1317, 1353 (2003).

9. For examples, see *infra* note 76. Scholars who criticize the law/equity distinction in remedies recognize that these statutes pose an obstacle to full merger. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. a (2011); Keith Mason, *The Distinctiveness of Law and Equity in the Taxonomy of the Constructive Trust*, in THE RESTATEMENT THIRD: RESTITUTION AND UNJUST ENRICHMENT: CRITICAL AND COMPARATIVE ESSAYS 185, 194 (Charles Mitchell & William Swadling eds., 2013).

execution has been imperfect and the Court has been too critical of the existence of presumptions about equitable remedies.¹⁰ But on the whole, the Court has constructed an idealized history of equity that is well suited to judicial decisionmaking. This history is artificial, for it smooths over centuries of disparate practices in equity. It is therefore not good as historians' history. But it is good as history for legal purposes because its very artificiality makes it more suited to the judicial resolution of cases.¹¹ This artificial history of equity is also a sensible interpretation of the many statutes that authorize "equitable relief." And it is largely consistent with traditional equitable principles.

In the existing scholarship on these cases, however, the central focus is on the Court's blunders. Scholars in federal courts, remedies, and related fields have criticized the first two of the new equity cases, *Great-West Life & Annuity Ins. Co. v. Knudson*¹² and *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*¹³ In those cases, the Court divided 5–4 on ideological lines, and critics have faulted the majority's narrow and passive account of the judicial role.¹⁴ Scholars of remedies have analyzed some of the other new equity cases, especially *eBay v. MercExchange, L.L.C.*¹⁵ and *Winter v. Natural Resources Defense Council, Inc.*,¹⁶ that announced tests for permanent and preliminary injunctions. These scholars have sharply criticized the Court's overclaiming about the historical pedigree of the "traditional four-factor test" it announced in *eBay*.¹⁷ Scholars writing in some of the substantive

10. See Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012).

11. On the Court's artificial history of equity, see *infra* Part III.B.

12. 534 U.S. 204 (2002).

13. 527 U.S. 308 (1999).

14. See Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000) (criticizing *Grupo Mexicano*); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 346–51 (criticizing *Knudson*); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) (criticizing *Grupo Mexicano* and *Knudson*); David L. Shapiro, *Justice Ginsburg's First Decade: Some Thoughts About Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 22–23 (2004) (criticizing *Knudson*); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063 (2003) (criticizing *Knudson*); see also Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1616–23 (2002) (finding mistakes about restitution in both the *Knudson* majority and the primary dissent).

15. 547 U.S. 388, 391 (2006).

16. 555 U.S. 7, 21 (2008).

17. See Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008) (calling *eBay* "a spectacular example of the confusion that can result from litigating a remedies issue without a remedies specialist"); Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567, 582 (2013) (calling *eBay* a "judicial blunder[]"); Roberts, *supra* note 4, at 1034 (calling *eBay* "a move backwards").

domains implicated by the new equity cases have also censured them.¹⁸ Most notable in this regard is John Langbein's critique of *Knudson* and other cases interpreting the Employee Retirement Income Security Act ("ERISA").¹⁹ Langbein lacerated the Court for failing to recognize the trust-law purposes of the statute and for making historical errors about restitution.²⁰

Taken together, the scholarly indictment of the Court's cases on equitable remedies is stinging. But it is also incomplete. The early cases were marked by false starts, bitter divisions, and technical errors. Since then, seemingly unnoticed by scholars, the Court has had fewer sharp divisions about the boundaries and principles of equitable remedies and about the methodology it uses in these cases. There are fewer mistakes. In addition, the existing scholarly criticisms tend to rest on one or two cases in this series. It is hard to adequately assess the Court's work on equitable remedies without looking across all of these substantive domains.²¹ For example, when looking at only one or two cases, some scholars lament the constriction of equitable relief.²² But when the full sweep of the Court's equity cases is considered, a more complex picture emerges: the Court's appeals to tradition sometimes restrict, and sometimes increase, the available remedies.²³ This kind of cross-cutting view, not limited to a single substantive domain, is one for which a remedies analysis is well-suited—indeed, it is the very reason for remedies to exist as a field.

What the Court is doing is not new in the sense of a dramatic break with the immediate past. In many earlier cases, the Court said that equitable remedies are exceptional and available only where there

18. See Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 JOHN MARSHALL L. REV. 827 (2006); Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 164 (2009) ("Great-West's twisted reasoning, going back to the days of equity, causes even seasoned ERISA practitioners to refer to its holding as 'revolutionary.'").

19. Langbein, *supra* note 8, at 1355–66.

20. *Id.*

21. See Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1123 (2014).

22. See Resnik, *supra* note 14. *But see* Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 48 (2003) (describing that view as "alarmist").

23. To see this complexity compare (1) *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), which categorically restricted a kind of equitable relief; (2) *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006), which took a middle course between the district and appellate courts as to the availability of equitable relief; (3) *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which reinforced the discretion of district courts to deny equitable relief; (4) *Nken v. Holder*, 556 U.S. 418 (2009), which read narrowly a congressional limitation on relief; and (5) *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), which insisted that an equitable defense does not limit legal remedies. These cases are discussed in Parts III and IV.

is no adequate remedy at law.²⁴ Yet before the new equity cases the Court seemed unsure of how much force to give the historical distinctions between legal and equitable remedies. One might have detected a shift from a more historical approach to a more functional one, or at least the possibility of such a shift, in the Court's cases on abstention,²⁵ contempt,²⁶ appeals,²⁷ the Seventh Amendment jury trial right,²⁸ and injunctions to enforce federal statutes.²⁹ It was thus unclear

24. *E.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992); *N. Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1306 (1984) (Rehnquist, Cir. J., in chambers); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Younger v. Harris*, 401 U.S. 37, 43–44 (1971); *Bhd. of Locomotive Eng'rs v. Mo.-Kan.-Tex. R.R. Co.*, 363 U.S. 528, 532 (1960); *Enelow v. N.Y. Life Ins. Co.*, 293 U.S. 379, 384 (1935); *United Fuel Gas Co. v. R.R. Comm'n of Ky.*, 278 U.S. 300, 310 (1929); *Mass. State Grange v. Benton*, 272 U.S. 525, 527 (1926); *Georgia v. City of Chattanooga*, 264 U.S. 472, 484 (1924); *Ex parte Young*, 209 U.S. 123, 163 (1908); *Lacassagne v. Chapuis*, 144 U.S. 119, 124 (1892); *Lewis v. Cocks*, 90 U.S. 466, 469–70 (1874); *Watson v. Sutherland*, 72 U.S. 74, 79 (1866); *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98 (1838); *Boyce's Ex'rs v. Grundy*, 28 U.S. (3 Pet.) 210, 215 (1830); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 845–46 (1824); *Mayer v. Faulkrod*, 16 F. Cas. 1231, 1235 (E.D. Pa. 1823) (Washington, Cir. J.); *Hepburn & Dundas's Heirs v. Dunlop & Co.*, 14 U.S. (1 Wheat) 179, 197, 203 n.d (1816); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 417 (1793) (opinion of Iredell, J.).

25. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (allowing *Burford* abstention “only where the relief being sought is equitable or otherwise discretionary”—a position that could be seen as equitable exceptionalism or as a first step toward a nonhistorical distinction between remedies that are more discretionary and those that are less discretionary); *id.* at 734 (Kennedy, J., concurring) (“[A]bstention, including dismissal, is a possibility that may yet be addressed in a suit for damages, if fundamental concerns of federalism require us to face the issue.”).

26. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 844 (1994) (Scalia, J., concurring):

[T]he modern judicial order is in its relevant essentials not the same device that in former times could always be enforced by civil contempt. So adjustments will have to be made. We will have to decide at some point which modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement.

27. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279–88 (1988) (rejecting the *Enelow–Ettelson* doctrine, which treated certain orders as injunctions, and excoriating it because “[t]he doctrine, and the distinctions it drew between equitable and legal actions and defenses, lost all moorings to the actual practice of the federal courts”).

28. *See Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 574–81 (1990) (Brennan, J., concurring) (arguing that the Court should abandon its effort in Seventh Amendment cases to find a historical analogy to the cause of action at issue); *see also* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 446 (1995) (describing and critiquing functionalism in one aspect of the Court's Seventh Amendment jurisprudence).

29. *Cf. Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193–94 (1978) (mentioning traditional principles about equitable discretion, but adding that “these principles take a court only so far”). *But see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.”).

before the new equity cases exactly how committed the Court was to traditional equity.

The Court's equitable remedies cases are therefore new in two senses. First, the Court has reinforced what the prevailing view in remedies scholarship would eliminate: the "no adequate remedy at law" requirement and the sense that equitable remedies are exceptional. Second, there are a number of novel but more evolutionary developments, such as the explicit adoption of a methodology for looking to history and tradition, and also the prescription of tests (one of which is novel in form) that emphasize and shape the exercise of judicial discretion in giving equitable relief. These changes are beginning to be reflected in the lower courts, and they represent an unpredicted direction for the law of remedies.³⁰

This Article proceeds as follows. Part II sketches the conventional view that the distinction between legal and equitable remedies is and should be fading away. Part III considers the line of cases in which the Court has defined the boundaries of equity, and it assesses the Court's turn to history and tradition. Part IV considers the other line of new equity cases, those in which the Court has prescribed principles for decisionmaking about equitable remedies. Part V assesses the new equity cases and the criticisms that have been lodged against them. It concludes that the historical and doctrinal criticisms are overdrawn, but it finds more apt the criticism that the Court has failed to justify its new equity jurisprudence. Part VI concludes.

30. Intriguingly, beginning in the 1990s there was also a greater measure of judicial resistance to the total fusion of law and equity in the United Kingdom, Canada, and Australia. See Joshua S. Getzler, *Patterns of Fusion*, in *THE CLASSIFICATION OF OBLIGATIONS* 157, 159–63 (Peter Birks ed., 1997) (“[T]he wind now blows the other way, with courts favouring the continued distinction of legal and equitable doctrine.”); see also Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 *OXFORD J. LEGAL STUD.* 1 (2002) (recognizing a swathe of English private law “where common law and equity co-exist coherently and where the historical labels of common law and equity remain the best or, at least, useful terminology”); Mark Leeming, *Equity, the Judicature Acts and Restitution*, 5 *J. EQUITY* 199 (2011) (analyzing the limits of the fusion achieved by English and Australian legislation, and arguing that those legislative enactments do not support the construction of an undifferentiated law of restitution). Nevertheless, as Judith Resnik noted with some understatement when discussing *Grupo Mexicano*, the Court's jurisprudence in this area does not indicate a desire “to join in transnational jurisprudential dialogues.” See Resnik, *supra* note 14, at 246–49.

II. SCHOLARLY CRITICISM OF DISTINGUISHING LEGAL AND EQUITABLE REMEDIES

For over a century, scholars have been predicting the death of the division between law and equity.³¹ For nearly as long, scholars have argued that this death would be a good thing.³² The fate of the division between law and equity has been especially important in the field of remedies. In the law school curriculum, it was the disappearance of equity that made room for remedies to exist as a course.³³ And over the last few decades, some of the central questions in the field of remedies have involved the relationship of legal and equitable remedies.³⁴

One such question concerns the contemporary relevance of the requirement that plaintiffs, in order to obtain an equitable remedy, must first show that they have “no adequate remedy at law,” sometimes called the “irreparable injury rule.”³⁵ The adequacy requirement is old,³⁶ and it once served at least one clear purpose: when there was only a single English chancellor, he could avoid being overwhelmed by refusing to give relief where the law courts could do so adequately.³⁷

31. See F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 20 (John Brunyate ed., 2d ed. 1936) (“The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well-established rule . . .”). For a summary of some of the academic criticism up to Maitland, see Getzler, *supra* note 30, at 163–67.

32. See Chafee, *supra* note 1, at iv; Walter W. Cook, *The Place of Equity in Our Legal System*, 3 AM. L. SCH. REV. 173, 174 (1912); Robert S. Stevens, *A Plea for the Extension of Equitable Principles and Remedies*, 41 CORNELL L.Q. 351, 351 (1956).

33. See Laycock, *supra* note 17.

34. See OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 1, 7 (1978) (arguing against the “traditional remedial hierarchy,” in which an injunction should issue only if “it can be demonstrated that other remedies are inadequate”); LAYCOCK, *supra* note 3, at 5; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292 (1976) (concluding that “the old sense of equitable remedies as ‘extraordinary’ has faded,” and suggesting that they were becoming the norm); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1065 (1979) (reviewing FISS, *supra*).

35. For more discussion of the adequacy requirement and the irreparable injury rule, see *infra* notes 161–62 and accompanying text.

36. See 6 SIR JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND*, 1483–1558, at 174 (2003) (“Since the theoretical basis of its jurisdiction was that a party sometimes required a remedy in conscience where none was available at common law, it was requisite that a plaintiff show not only a cause of action in conscience but also the absence of a remedy at law.”); ADAM SMITH, *LECTURES ON JURISPRUDENCE* 281 (Ronald L. Meek, David D. Raphael & Peter G. Stein eds., Liberty Fund 1982) (1763) (“But when one wants to have his cause tried by the Court of Chancery, he relates his story to the court, representing at the same time that the courts of common law can grant him no redress.”).

37. On the chancellor’s “presumptive deference to the common law,” see JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 287 (2009); and John H. Langbein, *Introduction to Book III*, in 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* ix (1979). Note that the adequacy requirement has traditionally not applied to areas that were exclusively equitable, such

But in a merged system, with many judges, each of whom is able to give both legal and equitable remedies, that purpose no longer holds.³⁸ Yet courts still frequently invoke the adequacy requirement. At present it has at least one practical consequence, for it requires courts to classify remedies as *equitable* or *legal*—if a plaintiff seeks one of the former, the court has to look to the adequacy of the latter.³⁹

Among remedies scholars in the United States, however, there is a rough consensus that the adequacy requirement is outdated. In its strong contemporary form, that consensus can be traced to a powerful book by Douglas Laycock, *The Death of the Irreparable Injury Rule*.⁴⁰ In meticulous detail, Laycock argues that even though judges frequently invoke the “no adequate remedy at law” requirement, it has no actual effect on their decisions, at least when they are deciding whether to issue a permanent injunction.⁴¹ When judges want to give a permanent injunction, they never find legal remedies adequate.⁴² Given the irrelevance of the adequacy requirement, the only effect it could have, Laycock says, is to confuse the real issue.⁴³ He therefore argues that it should be abolished, and his concluding chapter has a restatement that could be enacted by any legislature or adopted by any court to eliminate the requirement.⁴⁴ In that book and his subsequent work, Laycock clearly spells out one implication of his argument: we should abandon

as trusts. See Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1643 (1992) (listing “[t]raditionally equitable subjects” and noting by contrast that “[t]he irreparable injury prerequisite for equitable relief holds sway where legal and equitable jurisdiction is concurrent and a claimant may receive either a legal or an equitable remedy—for example in contracts, torts, and copyright”).

38. See LANGBEIN, LERNER & SMITH, *supra* note 37, at 287 (“Because fusion has now placed equity powers in the hands of common law judges, there is less justification for the irreparable injury rule, and evidence has mounted in recent years that the rule no longer much binds, although the courts continue to pay it lip service.”).

39. Cf. Murphy, *supra* note 14, at 1606 (“Although the inadequacy doctrine has little effect today on the choice between specific relief and damages, the doctrine remains useful when traditional understandings of the law/equity divide are relevant to the classification of a particular remedy as legal or equitable.”).

40. LAYCOCK, *supra* note 3; see also Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

41. Preliminary injunctions were a different matter: there Laycock recognizes that the irreparable injury rule has bite, partly because of a strong policy against giving relief prior to judgment. See LAYCOCK, *supra* note 3, at 110–17.

42. See LAYCOCK, *supra* note 3, at 5 (“[D]amages are never adequate unless the court wants them to be.”).

43. *Id.* at 5–7, 279–83.

44. *Id.* at 265–83; see also *id.* at viii (“I seek to complete the assimilation of equity, and to eliminate the last remnant of the conception that equity is subordinate”). Laycock’s restatement would replace the adequacy requirement with a number of more specific doctrines. Cf. Samuel L. Bray, *On Doctrines That Do Many Things*, 18 GREEN BAG 2D 141 (2015) (analyzing the choice between one multi-function doctrine and several single-function doctrines).

the distinction between legal and equitable remedies because that distinction is just a “dysfunctional proxy for a series of functional choices.”⁴⁵ It would be better to proceed directly to the underlying functional questions, asking not whether a certain power or limitation is traditional in equity, but whether it is needed now.⁴⁶

Laycock’s arguments have largely carried the day among remedies scholars.⁴⁷ There are exceptions—one or two scholars have expressed qualms about the widespread use of contempt,⁴⁸ and a handful have defended the utility of distinctively equitable defenses and presumptions.⁴⁹ But the view of most remedies scholars in the United States can be seen in the recent Restatement (Third) of Restitution and Unjust Enrichment. Some restitutionary remedies originated at law and some in equity. For this reason, the Restatement has to consider whether a plaintiff, when seeking a kind of restitution originating in equity, must first show that legal remedies would be inadequate. The Restatement gives a clear answer: *No*.⁵⁰ Indeed, it says that to require the plaintiff to make such a showing would be “antiquated” and “spurious.”⁵¹ Thus the weight of scholarly opinion over

45. Laycock, *supra* note 4, at 78.

46. *See id.* at 78–80; *see also* LAYCOCK, *supra* note 3, at 11–16.

47. *See supra* note 4.

48. *See* 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION 142 (2d ed. 1993) (“The adequacy test can be discarded, but a pessimistic presumption that disfavors coercion may prove to be a more difficult matter.”); Rendleman, *supra* note 37, at 1652 (“Laycock’s brief treatment of contempt’s dangers does not highlight coercive contempt’s risks to individual liberty . . .”). In later work, Rendleman noted that his disagreement with Laycock is exceedingly narrow. *See* Doug Rendleman, *Irreparability Resurrected: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court’s Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1343 n.*a1 (2002).

49. *See* Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer, Inc.*, 67 VAND. L. REV. EN BANC 1 (2014); Gergen, Golden & Smith, *supra* note 10, at 206; Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201 (1990). In addition, Henry Smith has explored the value of a mode of ex post decisionmaking that is associated with many doctrines of historical equity. *See* Henry E. Smith, *Property, Equity, and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW (Lisa Austin & Dennis Klimchuck eds., 2015) [hereinafter Smith, *Property, Equity, and the Rule of Law*]; Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Smith, *Why Fiduciary Law Is Equitable*].

50. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(2) (2011) (“A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law.”). *But see* Murphy, *supra* note 14, at 1603, 1620 & n.236 (noting some contrary authority).

51. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(2) cmts. a & e; *see also id.* § 4 reporter’s note e (“Adequacy of remedies at law. *See generally* Laycock, The Death of the Irreparable Injury Rule (1991).”). There is a sliver of ambiguity: the Restatement does require someone claiming opportunistic breach of contract to show that “the available damage remedy affords inadequate protection to the promisee’s contractual entitlement.” *Id.* § 39(1). Even that modest reference to inadequacy, avoiding as it does any explicit mention of law and equity, has

the last few decades has been strongly in favor of eliminating the adequacy requirement for equitable remedies. More generally, the trend in American scholarship is to think that the distinction between legal and equitable remedies *is* disappearing and *should* disappear.

III. THE NEW EQUITY CASES AND THE BOUNDARIES OF EQUITY

It is not easy to imagine anything further from the conventional scholarly wisdom than the Supreme Court's recent cases on equitable remedies. In these cases, the Court has set about answering two distinct questions:

1. *Is the requested relief equitable?*
2. *What principles shape the availability of equitable relief?*

The first question is about the boundaries of equitable remedies. It is a threshold question, and in analogy to administrative law it could be called "Equity Step Zero."⁵² If the answer to the first question is *yes*, then the second question becomes relevant. It is about the content of the law of equitable remedies. Most of the new equity cases answer one or the other of these questions, not both.⁵³ And the two lines of cases seem to be developing independently. But in both lines of cases, the Court is using an approach that is dominated by appeals to the history and tradition of equity. Although the Justices were sharply divided in

been sharply criticized. See Douglas Laycock, *Restoring Restitution to the Canon*, MICH. L. REV. 929, 947–48 (2012) (calling § 39(1) "unfortunate," as "the rule that equity will not act if there is an adequate remedy at law has been used and abused for so many disparate purposes over the years that introducing a limited version of it here will inevitably be a source of confusion and mischief"); Roberts, *supra* note 4, at 1046–60. *But see* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 reporter's note e (defending reference). In addition, the Restatement recognizes that the equitable defense of laches "applies only to a suit for equitable relief." *Id.* § 70 cmt. g. To assist in the application of laches, the Restatement therefore gives "certain generalizations" about whether a restitutionary claim is legal or equitable. See *id.* § 70 cmt. c.

52. The term comes from Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

53. The cases about the boundaries of equitable remedies are *McCutchen*, *Amara*, *Sereboff*, *Knudson*, and *Grupo Mexicano*. The cases about equitable principles are *Petrella*, *McCutchen*, *Amara*, *Geertson Seed Farms*, *Nken*, *Winter*, *Munaf*, and *eBay v. MercExchange*. The only cases in both lists are *McCutchen* and *Amara*, though in *Petrella* there is also an aside about the boundaries of equitable remedies. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 n.1 (2014). One could include even more cases. *E.g.*, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015) (accepting the recommendations of a master regarding equitable remedies in an interstate water dispute); *Brown v. Plata*, 131 S. Ct. 1910 (2011) (affirming an injunction that required the State of California to reduce the severe overcrowding in its prisons). But lines must be drawn somewhere, and the cases that are discussed in this Article are the ones that are central to the Court's developing equity jurisprudence.

the first two of the new equity cases, there has been more agreement in subsequent cases.

This Part considers the Court's cases on the first question, about the boundaries of equitable remedies. The next Part takes up the Court's answer to the second question, including the tests it has prescribed for widely used equitable remedies.

A. The Turn to the History and Tradition of Equity

When a lot of money is at stake, lawyers make creative arguments. That was certainly the case in *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*⁵⁴ In the late 1990s, a Mexican holding company was near insolvency, and it appeared to be transferring assets to escape the claims of its international bondholders. Some of those bondholders, investment funds in the United States, sued in federal court for breach of contract. They sought more than \$80 million in damages, as well as a preliminary injunction freezing certain unrelated assets that the company might need to satisfy a money judgment.⁵⁵ The lower courts issued and upheld the preliminary injunction, which the Mexican holding company then challenged in the U.S. Supreme Court. Among other points, it argued that because equity had not historically given asset-freezing injunctions before judgment, the federal courts had no authority to grant them.⁵⁶ The historical point about the absence of these injunctions appears to have been correct.⁵⁷ Nevertheless, such injunctions have in the last several decades become widely accepted in the United Kingdom and some commonwealth countries and are called “*Mareva* injunctions” or “freezing injunctions.”⁵⁸ The question for the U.S. Supreme Court in

54. 527 U.S. 308 (1999). For exposition of the case, see Burbank, *supra* note 14, at 1297–306; *see also* DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* 597–600 (2010) (discussing the history of the creditor's bill).

55. 527 U.S. at 312.

56. *See* Transcript of Oral Argument at 19–20, *Grupo Mexicano*, 527 U.S. 308 (No. 98-231).

57. A possible exception is the injunction at issue in *Georgia v. Brailsford*, 2 U.S. 415 (1793) and *Georgia v. Brailsford*, 2 U.S. 402 (1792).

58. *See* Gareth Jones, *The Rise of the Mareva Injunction*, 11 U. QUEENSLAND L.J. 133 (1980); Paul McGrath, *The Freezing Order: A Constantly Evolving Jurisdiction*, 31 CIV. JUST. Q., Jan. 2012, at 12. For a range of views on the merits of these asset-freezing injunctions, *see* R.P. MEAGHER, W.M.C. GUMMOW & J.R.F. LEHANE, *EQUITY: DOCTRINES AND REMEDIES* §§ 2185–2190, pp. 605–14 (3d ed. 1992) (censuring them); Burbank, *supra* note 14, at 1338–45 (raising concerns about “borrowing wholesale” the U.K. practice); David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161 (2005) (endorsing them, while also suggesting that the facts of *Grupo Mexicano* did not warrant one); and Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257 (1992)

Grupo Mexicano was whether it would allow federal courts to issue them.

A bitterly divided Court said *No*. Writing for himself and four other Justices, Justice Scalia concluded that because these injunctions were unknown to equity in 1789 and were not analogous to anything known to equity in 1789, they were beyond the power of federal courts unless authorized by Congress.⁵⁹ He chose this date for statutory reasons, because the Court was deciding what equitable remedies were permitted by the Judiciary Act of 1789's authorization of "suits . . . in equity."⁶⁰ He was seeking an equity that seemed almost frozen in time: the remedies that could have been given, or that were analogous to the remedies that could have been given, by the chancellor in 1789.⁶¹

Justice Ginsburg dissented, with three other Justices, from what she called the Court's "unjustifiably static conception of equity jurisdiction."⁶² Like the majority, the dissenting Justices looked to the state of equity at the founding. But instead of searching for "the specific practices and remedies of the pre-Revolutionary Chancellor,"⁶³ the dissenters looked for "the grand aims" and "*principles* of equity existing at the separation of this country from England."⁶⁴ The dissent said that

(arguing for them before *Grupo Mexicano*); see also RENDLEMAN, *supra* note 54, at 603 (suggesting that an asset-freezing injunction may be a poor substitute for the bankruptcy process).

59. 527 U.S. at 318–33.

60. *Id.* at 326 & n.3. The Court noted that Congress could authorize injunctions not otherwise known to equity. *Id.* Although Justice Scalia did not cite the language of Article III, which describes the judicial power as extending to "cases, in law and equity," the logic of his position that "equity" in the Judiciary Act of 1789 is substantially limited to equitable remedies available in 1789 could be extended to the constitutional provision.

61. Justice Scalia grounded this inquiry on the premise that "the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence." *Id.* at 332. Note, though, that many of the sources he cited to determine the remedies that were "traditionally accorded by courts of equity," *id.* at 319, were actually from the nineteenth and twentieth centuries. See *infra* note 88. Moreover, there are phrases in the opinion suggesting that the historical inquiry is broader than 1789 and that incremental change is not ruled out. See *id.* at 322 ("We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief."); *id.* at 327 (asking whether a remedy has "a basis in the traditional powers of equity courts"); *id.* at 329 (referring to the Court's "traditionally cautious approach to equitable powers, which leaves any *substantial* expansion of past practice to Congress" (emphasis added)). In these ways, the majority opinion in *Grupo Mexicano* anticipated the Court's subsequent cases. Still, in *Grupo Mexicano* the Court described itself as powerless to rework the law of equitable remedies, *id.* at 332–33, and it advanced a more fixed conception of equity than in later cases. See *id.* at 318 (stating that the federal courts substantially possess "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act" (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928))).

62. 527 U.S. at 336 (Ginsburg, J., dissenting).

63. *Id.*

64. *Id.* at 342, 336.

equity was “adaptable,” “dynamic,” and “flexible.”⁶⁵ Equity enabled federal courts, in the absence of congressional direction to the contrary, “to protect all rights and do justice to all concerned.”⁶⁶

As important as the question of asset-freezing injunctions is, the vehemence of the opinions in *Grupo Mexicano* suggests that the Justices might really have been debating something else. Perhaps the majority and dissent were rehashing their disagreement over constitutional methodology, with Justice Scalia trying to advance, and Justice Ginsburg trying to resist, a particular kind of originalist approach to equity. If so, Justice Scalia’s sally was misguided. Looking to the equity of 1789 to determine the equitable remedies available today would invite a familiar difficulty for originalism: a “pressing need to find determinate meanings at a fixed historical moment” that can leave the interpreter unable to “capture everything that was dynamic and creative.”⁶⁷ At the same time, this inquiry would lack the textual elements that are so essential to the practice and justification of originalism in constitutional law. In 1789, equity had decisions, principles, even rules.⁶⁸ But it had no *text*: no text that had been made supreme law through ratification, no text that could be formally amended, no text that could have its ambiguities “liquidated” through subsequent practice.⁶⁹ Moreover, in 1789 the equity of the nascent United States was relatively feeble and unsystematic.⁷⁰ A striking example is the recollection by James Kent that in his nine years serving as chancellor of New York “there was not a single decision, opinion, or dictum of either of my two predecessors (Ch. Livingston and Ch.

65. *Id.* at 336–37, 342 (quoting *Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 805, 807 (1869)).

66. *Id.* at 342 (quoting *Providence Rubber Co.*, 76 U.S. (9 Wall.) at 807); see Shapiro, *supra* note 14, at 22–23 (praising Justice Ginsburg’s dissent in *Knudson* as one of her major contributions to the law).

67. Jack Rakove, *Parchment Barriers and the Politics of Rights*, in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS AND LAW 1791 AND 1991, at 98, 100–01 (Michael J. Lacey & Knud Haakonssen eds., 1992).

68. There is no thorough overview of equity in this period. A brief sketch can be found in Langbein, *supra* note 37, at viii–ix. On an earlier period, see D.E.C. Yale, *Introduction to LORD NOTTINGHAM’S ‘MANUAL OF CHANCERY PRACTICE’ AND ‘PROLEGOMENA OF CHANCERY AND EQUITY’* 7–74 (D.E.C. Yale ed., 1965). Holdsworth addresses eighteenth century equity in 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 178–330 (1938).

69. There was a text in *Grupo Mexicano*: the Judiciary Act of 1789. But all it did was supply the word *equity*. It did not change a fundamentally historical inquiry into a textual one.

70. See Joseph Story, *Chancery Jurisdiction*, 11 N. AM. REV. 141 (1820), reprinted in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 148, 150–54 (William W. Story ed., Boston, Charles C. Little & James Brown 1852) (describing American equity before Chancellor Kent, and faulting it because “the doctrines of the courts depended much less upon the settled analogies of the system, than upon the character of the particular judge”).

Lansing), from 1777 to 1814, cited to me or even suggested.”⁷¹ For better or worse, a search for the equity of 1789 will inevitably be a search for English equity⁷²—again different from originalism as an approach to interpreting the Constitution. For these reasons, it is difficult to make 1789 bear the weight of being an originalist year for the enactment of equitable doctrines.

But the solution is not to turn to the “grand aims of equity” offered by the dissent. Justice Ginsburg gets the description of equity right—not just the words but the music.⁷³ Even so, it is not enough to note the flexibility and adaptability of equitable remedies. Such principles, standing apart from more specific equitable doctrines and practices, offer no guidance to lower courts.

Invoking flexibility is also insufficient to interpret *equitable* in a statute. Where Congress authorizes “equitable relief” or “equitable remedies,” the phrase expresses a limited authorization. What lies beyond the authorization cannot be, as Justice Ginsburg’s argument implies,⁷⁴ only the remedies that are inappropriate or unjust in a particular case. Then there would be no limit at all.⁷⁵ More decisively,

71. MEMOIRS AND LETTERS OF CHANCELLOR KENT 157–58 (William Kent ed., Boston, Little & Brown 1898). Confidence about the role of precedent in early American equity courts is not possible, however, for no study of the subject exists. The force of *English* equitable precedent is a distinct question, but also one that has not been explored. The diversity of views at the founding can be seen in *Post v. Neafie*, 3 Cai. 22 (N.Y. 1805), where the court decided that an equitable decree from an American court could be enforced through an action of debt, even though in England a decree of Chancery could not be. The majority sounded themes that would later appear in Justice Ginsburg’s *Grupo Mexicano* dissent. Dissenting in *Post*, Chief Justice Kent made an argument that was analogous to Justice Scalia’s argument in *Grupo Mexicano*: he appealed to “the history and peculiar jurisdiction of the court of chancery,” concluding that “we are not at liberty at this day to set aside the rule.” *Post*, 3 Cai. at 36 (Kent, C.J., dissenting).

72. In England, the “hardening” of equity had already happened, and the chancellor had developed principles and rules for the exercise of his equitable discretion. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 106–11 (4th ed. 2002); see also PHILIP HAMBURGER, LAW AND THE JUDICIAL DUTY 125–26 (2008) (describing the sixteenth-century debate over the propriety of rules in equity, and its seventeenth-century resolution in favor of such rules); D.P. Waddilove, Emmanuel College v. Evans (1626) and the History of Mortgages, 73 CAMBRIDGE L.J. 142 (2014) (illustrating the seventeenth-century formalization of equity in miniature through the redaction of a case report). Of course, the development of equity continued past the end of the eighteenth century. See Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 100–06 (1980). And one should not exaggerate the degree to which equity ever fully resembled law, as even Lord Eldon himself recognized. See LORD ELDON’S ANECDOTE BOOK 162–63 (Anthony L.J. Lincoln & Robert Lindley McEwen eds., 1960); see also BAKER, *supra*, at 110–11.

73. *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 335–37 (1999) (Ginsburg, J., dissenting).

74. See *id.* at 336–38, 342.

75. *Accord Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216–17 (2002) (Scalia, J.) (arguing that “there is no way to give” the statutory authorization of equitable remedies “meaning—indeed, there is no way to render the unmistakable limitation of the statute a

equitable has long been a technical legal term. It remains routinely used by Congress in newly passed statutes.⁷⁶ A good reason must be given before we assume that Congress has suddenly started to use a technical term in a nonstandard, lay sense.⁷⁷ By analogy, if Congress referred to “fair use” in a new copyright statute, courts would require a good reason before assuming that Congress was no longer using the phrase as a technical term. True, Congress could use a phrase such as “equitable remedy” or “equitable relief” in a sense having nothing to do with remedies originating in courts of equity, and it occasionally does.⁷⁸ But

limitation *at all*—except by adverting to the differences between law and equity to which the statute refers”).

76. *E.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 808, 127 Stat. 54, 116 (2013) (codified at 8 U.S.C. § 1375a (2012)) (amending regulation of international marriage brokers to authorize remedies, and expressly indicating that the authorization includes “equitable remedies”); National Foundation of Fitness, Sports, and Nutrition Establishment Act, Pub. L. No. 111-332, § 6, 124 Stat. 3576, 3580 (2010) (codified at 36 U.S.C. note preceding § 20101) (giving the attorney general of the United States the authority, if the named foundation were to act inconsistent with its stated purposes, to sue “for such equitable relief as may be necessary or appropriate”); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 744, 124 Stat. 1376, 1735 (2010) (codified at 7 U.S.C. § 13a-1) (authorizing a court to “impose, on a proper showing . . . , equitable remedies,” including certain kinds of restitution); Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 201, 123 Stat. 1632, 1639 (codified at 15 U.S.C. § 1639a) (protecting servicers of residential mortgages, if they fall within a statutory safe harbor, from “any injunction, stay, or other equitable relief”); Veteran’s Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 315, 122 Stat. 4145, 4167 (amending 38 U.S.C. § 4323(e) to require that “[t]he court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders”); Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2, 120 Stat. 1730, 1730 (codified at 15 U.S.C. § 1125) (authorizing injunctions “[s]ubject to the principles of equity”); Class Action Fairness Act of 2005, Pub. L. No. 109-2, §3(a), 119 Stat. 4, 6 (codified at 28 U.S.C. § 1712) (prescribing rules for the calculation of attorney’s fees when a proposed class action settlement “provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief”). Federal statutes also use other phrases, such as “equitable remedies” and “equitable powers.”

77. *See* *Lorillard v. Pons*, 434 U.S. 575, 583, 585 (1978) (treating “legal” as a term of art that should be given its established meaning unless a contrary meaning is compelled); *see also* *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2206 (2012) (recognizing that “quiet title” in a federal statute is a technical term); *Wiscart v. Dauchy*, 3 U.S. 321, 327 (1796) (Ellsworth, C.J.) (concluding that “Appeal” and “Writ of Error” are terms that “are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to controul, modify, or change, the fixed and technical sense which they have previously borne”).

78. At least one statute authorizes “equitable relief” yet the phrase does not refer to remedies at all. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §531(d)(5)(D), 122 Stat. 1651, 2163 (2008) (codified at 7 U.S.C. §1531(d)(5)(D)) (authorizing an administrator to grant “equitable relief,” which in context is essentially a waiver from an eligibility requirement for disaster relief funds). A number of statutes invoke equity to guide administrative decisions about various kinds of waivers, and in those statutes, the usual phrase is “equity and good conscience.” *E.g.*, Hubbard Act, Pub. L. No. 110-317, § 2, 122 Stat. 3526, 3527 (2008) (codified at 37 U.S.C. § 303a) (authorizing the Secretary of Defense to waive a limitation on paying military bonuses when

rarely. In most instances “equitable remedy” and “equitable relief” are unmistakably technical terms.⁷⁹

In sum, federal statutes that authorize equitable relief are enabling courts to give a particular set of remedies, not just exhorting them to give whatever remedies they think best. The question is how to draw the line between the remedies that are equitable and the ones that are not. For that question neither Justice Scalia’s majority nor Justice Ginsburg’s dissent in *Grupo Mexicano* is satisfactory.⁸⁰

B. The Construction of an Artificial History

In subsequent decisions, the Court has not taken either of the two roads offered in *Grupo Mexicano*.⁸¹ Instead, in a quartet of cases over the last decade, the Court has set about constructing an idealized history of equity. These cases—*Great-West Life & Annuity Ins. Co. v. Knudson*;⁸² *Sereboff v. Mid Atlantic Medical Services, Inc.*;⁸³ *Cigna Corp. v. Amara*;⁸⁴ and *US Airway, Inc. v. McCutchen*⁸⁵—have arisen under ERISA. That statute lays out a framework for how employers can establish pension and health care plans for employees. Among its myriad provisions, it authorizes suits to enforce the plan. These may be brought by the employer or the employee, and the court may issue an injunction or “other appropriate equitable relief.”⁸⁶

that limitation “would be against equity and good conscience”). It is usually obvious that those statutes have nothing to do with judicial remedies.

79. For illustrative statutes, see *supra* note 76. For further discussion of how *equity* or *equitable* should be interpreted in a statute, see *infra* text accompanying notes 115–20.

80. Two other important questions are raised by statutory references to “equitable relief” and “equitable remedies.” First, are there any limits on Congress’s ability to change the law of equitable remedies? Second, should federal courts use a presumption in favor of traditional equitable principles when interpreting statutes? The Supreme Court has not given a consistent answer to either question, and this Article does not try to resolve them. For brief discussion of the second question in light of the Court’s new equity cases, see *infra* note 209 and accompanying text.

81. In one of those subsequent cases, *Great-West Life Annuity Insurance Co. v. Knudson*, Justice Ginsburg dissented and portrayed the majority opinion as if it were employing Justice Scalia’s approach from *Grupo Mexicano*, only with a different date at which equitable remedies were frozen: 1938, the year the Federal Rules of Civil Procedure were adopted. See 534 U.S. at 224–25 (Ginsburg, J., dissenting); see also Resnik, *supra* note 14, at 226 (claiming that in *Knudson*, as in *Grupo Mexicano*, the majority limited equitable remedies to those it thought were “available in equity during the constitutional era”). That was a misunderstanding of the majority’s approach.

82. 534 U.S. 204 (2002).

83. 547 U.S. 356 (2006).

84. 131 S. Ct. 1866 (2011).

85. 133 S. Ct. 1537 (2013).

86. To be precise, suits under Section 502(a)(3) may be brought “by a participant, beneficiary, or fiduciary,” which will usually be, respectively, the employee, the employee’s family, or the employer. 29 U.S.C. § 1132(a)(3) (2012).

In these four cases, the Court sought to determine the remedies “typically available in equity” in the days of “the divided bench,” before law and equity merged.⁸⁷ The main sources the Court consulted were treatises, including ones as recent as Dobbs (1993) and as old as Story (1836).⁸⁸ The Court also looked to equitable decisions, typically its own decisions from the nineteenth century or the early twentieth century.⁸⁹ And the Court occasionally cited more recent decisions⁹⁰ or scholarly articles and restatements.⁹¹ But the bulk of the authorities (especially the authorities that are not current treatises and restatements) came from the middle and late nineteenth and early twentieth centuries. It is a historical investigation that the Court has said is not very difficult.⁹²

In the four cases where this approach has commanded a majority, the opinions for the Court have been written by four different Justices. One was by Justice Scalia for a narrow majority;⁹³ another was

87. *McCutchen*, 133 S. Ct. at 1540; *Amara*, 131 S. Ct. at 1878; *Sereboff*, 547 U.S. at 356; *Knudson*, 534 U.S. at 211.

88. Cited treatises include DOBBS, *supra* note 48; GEORGE E. PALMER, LAW OF RESTITUTION (1978); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA (1st ed. 1836); and SPENCER W. SYMONS, POMEROY’S EQUITY JURISPRUDENCE (5th ed. 1941). A sketch of John Norton Pomeroy’s thought and influence can be found in DAVID M. RABBAN, LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 32–35 (2013).

89. *E.g.*, *McCutchen*, 133 S. Ct. at 1546 (citing *Barnes v. Alexander*, 232 U.S. 117 (1914), and *Walker v. Brown*, 165 U.S. 654 (1897)); *Sereboff*, 547 U.S. at 357–58 (citing *Barnes* and *Walker* as well). Less common are citations to state courts and English courts. The primary discussion of English practice appeared in *Grupo Mexicano*, where Justice Scalia discussed the modern development of the *Mareva* injunction. 527 U.S. at 327–29.

90. *E.g.*, *McCutchen*, 133 S. Ct. at 1551 (citing *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997)); *Knudson*, 534 U.S. at 213 (citing *Reich v. Cont’l Cas. Co.*, 33 F.3d 754, 756 (7th Cir. 1994)).

91. *E.g.*, *McCutchen*, 133 S. Ct. 1546, 1549 (citing the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2010) and the RESTATEMENT (SECOND) OF CONTRACTS (1979)); *id.* at 1549 (citing John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974)); *Knudson*, 534 U.S. at 212–13 (citing Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 528 (1975)).

92. *Knudson*, 534 U.S. at 217 (“Rarely will there be need for any more ‘antiquarian inquiry’ . . . than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear.” (quoting *id.* at 233–34 (Ginsburg, J., dissenting))).

93. *Id.* at 206. *Knudson* was not the Court’s first decision on the meaning of “equitable relief” in ERISA. In two earlier cases, the Court had considered the phrase. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 248 (1993) (concluding that beneficiary’s claim for monetary relief against plan’s actuary was not “equitable relief”); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 134 (1985) (concluding that ERISA did not impose extra-contractual liability on fiduciaries for claim-processing mistakes). And there is a line of cases interpreting historically the Seventh Amendment’s guarantee that “the right of trial by jury shall be preserved.” *E.g.*, *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990). In hindsight, those earlier

by Chief Justice Roberts for a unanimous Court;⁹⁴ the third was by Justice Breyer for a large majority;⁹⁵ and the most recent was by Justice Kagan for a Court that was, on this point, unanimous.⁹⁶ This approach has become sufficiently settled that Justice Kagan could call it “the historical analysis our prior cases prescribe.”⁹⁷

The Justices may agree, but by the standards of historians this is a fool’s errand. Equity has a long history,⁹⁸ and in that history many conflicting things have been said about it. It was once said, for example, that equity would never enjoin a trespass.⁹⁹ Now it is widely (though inaccurately) thought that the very meaning of having a property right is that a court *will* enjoin a trespass.¹⁰⁰ Justice Holmes once said that equity does not offer “a remedy for political wrongs.”¹⁰¹ Then came

ERISA cases and Seventh Amendment cases might seem to be harbingers of the new equity, but they did not appear that way to scholars at the time. Rather, as Douglas Laycock said shortly afterwards about the Court’s interpretation of “equitable relief” in *Mertens*, “what is most striking is the [Court’s] express assumption that Congress used a technical term inaccurately because lawyers no longer know what it means.” Laycock, *supra* note 4, at 81–82. On the ambiguity of the Court’s commitment to traditional equity before the new equity cases, see *supra* notes 25–29 and accompanying text.

94. *Sereboff*, 547 U.S. at 358.

95. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1870 (2011).

96. *McCutchen*, 133 S. Ct. at 1542.

97. *Id.* at 1548.

98. For introductions to the history of equity, see generally BAKER, *supra* note 72, at 97–116; LANGBEIN, LERNER & SMITH, *supra* note 37, at 267–412. On equity in colonial America, see Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 LAW IN AMERICAN HISTORY 257, 257–84 (Donald Fleming & Bernard Bailyn eds., 1971); HAMBURGER, *supra* note 72, at 338–42.

99. A case from 1743, *Coulson v. White*, 3 Atk. 21, has been called “[t]he earliest suggestion of an injunction against trespass.” 1 JAMES BAR AMES, A SELECTION OF CASES IN EQUITY JURISDICTION WITH NOTES AND CITATIONS 487 n.1 (1904). Even when an injunction would issue against a trespass, it was far from automatic. See *Jerome v. Ross*, 7 Johns. Ch. 315, 333 (N.Y. Ch. 1823) (Kent, Ch.):

I do not know a case in which an injunction has been granted to restrain a trespasser, *merely because he was a trespasser*, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass.

cf. MCCLINTOCK, *supra* note 132, at 48 (offering the need for testimony and the lack of cross-examination in equity’s procedure as “the probable explanation for the hesitation of equity to enjoin trespasses to land”). Note that the early modern meaning of *trespass* was broader than it is today, including large swathes of what is now tort law.

100. See Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 638–39 (2008) (noting that “it remains common in modern times to equate the right to exclude with an entitlement to exclusionary or injunctive relief” and recognizing that such an equation disregards the fact that the injunction is an equitable remedy).

101. *Giles v. Harris*, 189 U.S. 475, 486 (1902).

*Baker v. Carr*¹⁰² and *Bush v. Gore*.¹⁰³ This *sic et non* could be carried on at length. The reason is not that equity is incoherent. Rather, it is that equity is an old and complex juridical tradition, and in such a tradition “the past speaks with many voices.”¹⁰⁴ But in the Court’s approach, there is little if any recognition of historical change. With no embarrassment, the Court can declare what “equity originally required” and then give as support not a reference to a proceeding in the medieval Chancery, but a citation to an American case from 1875.¹⁰⁵

There is also difficulty with the phrase “the days of the divided bench.” That phrase has now been intoned by three Justices,¹⁰⁶ and it is supposed to be the quarry the Justices are pursuing across the centuries. Yet it is not clear what the phrase actually means. England has not had separate courts of law and equity since the 1870s.¹⁰⁷ Does that mean that subsequent English cases are not from the days of the divided bench? Or think of the federal courts, which once had separate law and equity “sides,” each with its own procedures.¹⁰⁸ That separation ended with the coming of the Federal Rules of Civil Procedure in 1938.¹⁰⁹ But for equitable remedies, 1938 is not even a noteworthy year, for the Rules were understood as not changing the requirements for

102. 369 U.S. 186 (1962).

103. 531 U.S. 98 (2000).

104. Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 242 (1986). Daniel Hulsebosch has made a point about English liberty that could be applied with similar force to equity: “History lies in details rather than in summary propositions, and the details cut in many directions because there were so many people in so many places who made claims under the banner of ‘the liberties of Englishmen.’” Daniel J. Hulsebosch, *Somerset’s Case at the Bar: Securing the “Pure Air” of English Jurisdiction Within the British Empire*, 13 TEX. WESLEYAN L. REV. 699, 700 (2007).

105. See *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356, 366 (2006) (citing *Trist v. Child*, 88 U.S. 441 (1875)). There is a particular irony in citing a case from 1875 for what “equity originally required,” for that was the year the English Chancery was dissolved as an independent judicial institution. Patrick Polden, *Part III: The Courts of Law*, in 11 THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1820–1914, at 523, 757–73 (2010).

106. *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1544 (2013) (Kagan, J.); *Sereboff*, 547 U.S. at 362 (Roberts, C.J.); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (Scalia, J.); see *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878 (2011) (Breyer, J.) (seeking to determine the remedies that “traditionally speaking (*i.e.*, prior to the merger of law and equity)” were typically equitable (internal quotation marks omitted)). The phrase appears to have been used with reference to law and equity for the first time by Justice Scalia in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993).

107. The relevant legislation is the Judicature Acts of 1873 and 1875. Polden, *supra* note 105, at 757–73. It is possible that “the days of the divided bench” is an allusion to Maitland’s definition of equity, which laid stress on the fact that separate courts of equity no longer existed. See MAITLAND, *supra* note 31, at 1.

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

109. *Id.*

equitable relief.¹¹⁰ Nor is the founding the moment to look to, for most of the original states did not even have regularly sitting courts of equity.¹¹¹ Some of them later developed such courts, but by 1868 a majority of the states had unified courts of law and equity.¹¹² Is that when the “days of the divided bench” ended? Or did those days linger in the states that kept separate law and equity courts? Even today several states have not merged their courts of law and equity.¹¹³ Does that mean that they are still living in the “days of the divided bench” and that their evolving equitable doctrines are a continual source of insights into what equity means?

In short, there is no sharp-edged historical referent for the expression “the days of the divided bench.” What the Court is constructing might be called an artificial history of equity.¹¹⁴ It allows

110. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014) (recognizing that the adoption of the Federal Rules of Civil Procedure made no change in “substantive and remedial principles” (internal quotation marks omitted)); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 n.26 (1949) (“Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.”); *Bradley v. United States*, 214 F.2d 5, 7 (5th Cir. 1954) (“The federal rules of civil procedure abolished all distinctions as to form between actions at law and suits in equity, but they did not abolish the difference in substance between legal and equitable remedies.”); *Bray*, *supra* note 49, at 3–4 (describing the general rule that laches applies only to equitable claims, even after the adoption of the Federal Rules); see also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 519 (1959) (Stewart, J., dissenting) (“Certainly the Federal Rules were not intended to undermine the basic structure of equity jurisprudence, developed over the centuries and explicitly recognized in the United States Constitution.”).

111. Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832 (1980).

112. By the end of that year, nineteen of the thirty-seven states had either never created separate courts of equity or had abolished them. Massachusetts and Louisiana never had separate courts of equity. The seventeen that had merged their courts were Pennsylvania (1736); Texas (1840); New York (1848); Missouri (1849); Michigan (1850); California and Iowa (1851); Indiana (1852); Minnesota and Ohio (1853); Nevada (1861); and North Carolina, North Dakota, and South Carolina (1868). There is no general history of merger in the United States, though there are historical sketches about the law and equity courts in particular states. *E.g.*, Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 235–244 (1995).

113. Delaware, Mississippi, and Tennessee retain at least some separate courts for equity. DEL. CODE ANN. tit. 10, § 341 (2015); MISS. CONST. art. VI, §§ 152–154, 159–164; TENN. CODE ANN. § 16-11-101 (2014). New Jersey and Cook County, Illinois, have separate divisions for law and equity within a single court. ILCS S. CT. R. 135; 1B N.J. PRAC. CT. R. ANN. R 4:3-1(a) (2015 Supp.). Georgia distinguishes equity for trial and appellate jurisdiction. GA. CONST. art. VI, § 4, ¶ I; *id.* art. VI, § 6, ¶ III. Iowa has unified courts that administer what the state constitution calls “distinct and separate jurisdictions” for law and equity. IOWA CONST. art. V, § 6.

114. The more famous instance of law taking something richly diffuse and compressing it for adjudication is, of course, Lord Coke’s “artificial reason of the law.” See EDWARD COKE, PROHIBITIONS DEL ROY (1607), *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 478, 481 (Steve Sheppard ed., 2003) (recounting his statement to the king that “causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificiall reason and judgment of Law”); EDWARD COKE, INSTITUTES OF THE LAWEES OF ENGLAND, *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF

the Court to proclaim what was done “in equity”—without reference to any particular court, nation, or century. It is true that the Court has not created this equitable tradition *ex nihilo* (as is sometimes true of traditions). Yet this tradition is still an abstraction from history. It glosses, and glosses over, the real complexity of equity’s past.

The failings of this history are not the full story. In the scores of federal statutes authorizing “equitable relief,”¹¹⁵ the phrase must be interpreted. Justice Scalia’s nearly static approach has no persuasive principle; Justice Ginsburg’s alternative, no limiting one. In contrast, the artificial-history approach is a plausible interpretation of these statutes. There is no reason to imagine Congress wanting something fixed more than two centuries ago,¹¹⁶ or something so indeterminate and up for grabs that any judge could rewrite the remedial structure of the statute.¹¹⁷ Some definition is needed. Moreover, one would expect the recurring references to “equitable relief” in the U.S. Code to have something in common. References to “equitable relief” or “equitable remedies” seem like a shorthand for something accepted and conventional, something understood. In this they resemble other common statutory terms that have a legal meaning that is conventional and stable, yet not absolutely fixed at the time of enactment, such as *oath*, *insane*, and *county*.¹¹⁸ If statutory references to “equitable relief” and “equitable remedies” were not understood this way, if every occurrence of these phrases were to be given independent meaning, there would be many investigations that would each culminate in a different answer about the remedies available.¹¹⁹ Any sense that all of these Congresses were trying to refer in shorthand to something generally understood would be lost, drowned in a wave of dubiously exact historiography.¹²⁰ By contrast, an artificial history offers some

SIR EDWARD COKE 573, 701 (describing the common law as “an artificial perfection of reason, gotten by long study, observation, and experience, and not of every mans naturall reason, for, *Nemo nascitur artifex* [No one is born an artificer]).

115. See *supra* note 76

116. See *Great-West Life Ins. Co. v. Knudson*, 534 U.S. 204, 225 (2002) (Ginsburg, J., dissenting).

117. Cf. *id.* at 220–21 (majority opinion, Scalia, J.) (noting that § 502(a)(3) of ERISA limits suits brought by a fiduciary to “equitable relief” but imposes no such limitation on suits by a plan participant or beneficiary).

118. These three words are all defined in the Dictionary Act, 1 U.S.C. §§ 1–8.

119. There is a hint that the Court might have been willing to go down that path in one of the antecedents to *Knudson*. See *Mertens v. Hewitt Assocs*, 508 U.S. 248, 257 n.7 (1993) (Scalia, J.) (referring to the remedies available “when ERISA was enacted”).

120. In addition, the Court’s turn to history and tradition preserves the logic of equitable remedies, defenses, and enforcement mechanisms. See Bray, *supra* note 49, at 4–5; Samuel L. Bray, *The System of Equitable Remedies*, 63 U.C.L.A. L. REV. (forthcoming 2016).

parsimony and stability. The meaning of “equitable relief” does not fluctuate with the enacting year of every statute.¹²¹

Admittedly, the artificial-history approach is not good history. But that does not keep it from being good jurisprudence. The disjuncture between the standards of history and of law—and especially the disjuncture between history in historical scholarship and history in legal adjudication—is familiar. Elsewhere (i.e., outside of equity) it has been recognized by scholars such as Richard Bernstein, Robert Gordon, J. C. Holt, Laura Kalman, Martin Krygier, William Nelson, John Philip Reid, and Mark Tushnet.¹²² Indeed, the disjuncture between what the historian and the lawyer seek from the past has been recognized at least since Frederic Maitland, who said that “what is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts.”¹²³

121. In *Knudson*, Justice Scalia criticized the uncertainty that would come from a “rolling revision” of the meaning of equitable relief by judges. 534 U.S. at 217. Yet similar uncertainty would be present if judges were to give each reference to “equitable relief” a different meaning based on the year the statute was enacted.

122. See J.C. HOLT, *MAGNA CARTA* 4 (2d ed. 1992) (“Coke was seeking the continuous thread in English law . . . , [the] principles and judicial decisions which in his view indissolubly linked his world with the past. The modern historian seeks the opposite.”); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 167–229 (1996) (exploring the “dialogue of the deaf” between historians and lawyers, specifically in the republicanism bubble in legal scholarship in the 1980s, and describing the costs of trying to eradicate the differences between history and law); JOHN PHILIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* 3 (2005) (treating the appeals of English and American lawyers to the “ancient constitution” as an example of “forensic history,” a “subdivision of history” that is fundamentally different in aims and methods from the history of historians); Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1578 (1987) (distinguishing “ ‘lawyers’ legal history,’ written to generate data and interpretations that are of use in resolving modern legal controversies, and ‘historians’ legal history,’ written to provide and support new and interesting interpretations and bodies of data to advance exploration of the past” (quoting and summarizing W. NELSON & J. REID, *THE LITERATURE OF AMERICAN LEGAL HISTORY*, 185, 235–37, 261–87 (1985))); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1055 (1981):

Many of the criticisms that historians make of lawyers’ history are indeed irrelevant to the lawyer’s task. At least the immediate interest of historians is always in “historicizing” the past as much as possible, tamping it down firmly in departed times and places. For lawyers, this method is useful only half the time

Krygier, *supra* note 104, at 249 (“Whig interpretations may be unsuccessful history, but they are often very successful law.”); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934–35 (1996) (“Law-office history is a legal practice, not a historical one. The criteria for evaluating it, for determining what is a successful performance, must be drawn from legal practice rather than from historical practice.”).

123. Frederic William Maitland, *Why the History of English Law Is Not Written*, Inaugural Lecture at the Arts School at Cambridge (Oct 13, 1888), *reprinted in* 1 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 480, 490 (1911). The point that the *law* of historians and lawyers is different was made as early as the seventeenth century. See ROGER TWYSDEN, *CERTAIN CONSIDERATIONS UPON THE GOVERNMENT OF ENGLAND* 23 (John Mitchell Kemble ed., 1849):

It is a commonplace of the legal culture of the United States that judges and lawyers will look to the past, for the past is where the Constitution was ratified, statutes were passed, precedents were established, practice grew up, consequences happened. Historians, too, look to the past. They give free rein to all of its unruly contingency and indeterminacy; they do not have to decide cases. But for judges the imperative to decide the case is central to the use of history.¹²⁴ Judges are looking to history, but not for historical purposes.¹²⁵ They must force unruly historical events through a decisionmaking process that will have binary results, such as liability or no liability, damages or no damages, guilt or acquittal, jury trial or no jury trial, the availability of laches or no availability of laches, contempt or no contempt.¹²⁶ Judges have no leisure for prolonged investigation, a series of monographs, a revise-and-resubmit. They do have some grounds for abstaining from making a decision, but there is no such thing as Incomplete Historical Record Abstention. Pressed to use history, and pressed to decide, judges tend to emphasize the continuity of the past and the present.¹²⁷ This is another way their use of history differs sharply from historical scholarship, which tends to emphasize discontinuity.¹²⁸

The truth is, the law delivered by an historian is much differing from that comes from a lawyer, as declaring not only the fact, but the policy, reason, and matter of state in it, where the other resolves only how it stood with the law, and upon what poynt in that it was adjudged; it is not to bee denied they have much conformity in things, yet in some they differ.

124. See Helen Irving, *Constitutional Interpretation, the High Court, and the Discipline of History*, 41 *FED. L. REV.* 95, 99 (2013).

125. A comment in the Restatement (Third) aptly expresses this point, though in words that the reporter might actually have intended to be a criticism:

As posed today in American courts, the question whether restitution is legal or equitable is essentially artificial. It has a historical answer . . . but if it were not for extraneous, nonhistorical concerns, the question would scarcely be asked. Lawyers and judges who address the question are invariably trying to answer a different one: whether there is a right to jury trial of a particular issue, or whether a particular remedy is available under a statute that authorizes “equitable relief.”

RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. c (2011).

126. There are of course judicial questions that scale—how much should damages be, what should be the scope of the injunction—but the antecedent question is often a binary one.

127. See Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 *AM. J. LEG. HIST.* 275, 275–76 (1973) (finding continuity to be a theme in “lawyer’s legal history”). This emphasis on continuity reflects the affinity between judicial appeals to history and judicial appeals to custom. See John Philip Reid, *Law and History*, 27 *LOY. LA L. REV.* 193, 222 (1993).

128. The attitude toward the past in normative legal scholarship often aligns more with that of historians than with that of lawyers. See Stuart Banner, *Legal History and Legal Scholarship*, 76 *WASH. U. L.Q.* 37 (1998) (critically examining the incentives for normative legal scholarship to emphasize discontinuity with the past, and noting the contingency of this emphasis on contingency).

It should not then come as a surprise that the Court is constructing an artificial history of equity. Although the Justices range over the whole history of equity, they tend to draw from the equity of the middle-to-late nineteenth century and the early twentieth century. They do not explicitly recognize, much less justify, that tendency. Yet it is not random. The Court is gathering its equitable rules from when those rules were most systematically expounded.¹²⁹ In the United States, the era of the most systematic treatments of equity began with the first edition of Story's treatise (1836)¹³⁰ and effectively ended with the last edition of Pomeroy's equity treatise (1941)¹³¹ and the last edition of McClintock's equity handbook (1948).¹³² Between those bookends can be found most of the American treatise writing on equity.¹³³ As it chooses, however, the Court will sometimes work into its artificial history more recent cases and scholarship.¹³⁴

The effect is something like a tailor who is working with a large bolt of fabric, full of rips and tears, who knows the fabric is too big, and so decides to lop off a large ragged section at the beginning, and cuts off

129. The Court has cited no equity cases from the early centuries of Chancery, and this is not surprising given the sparseness of the printed reports and the difficulty of the historical investigation. See H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1222–25 (2008); Waddilove, *supra* note 72, at 147–48. For a sketch of the Chancery reports, see LANGBEIN, LERNER & SMITH, *supra* note 37, at 352–53. For a recent investigation of manuscript sources, see H. Tomás Gómez-Arostegui, *Equitable Infringement Remedies Before 1800*, in *THE HISTORY OF COPYRIGHT LAW: A HANDBOOK FOR CONTEMPORARY RESEARCH* (Isabella Alexander & H. Tomás Gómez-Arostegui eds., forthcoming 2015).

130. STORY, *supra* note 88.

131. SYMONS, *supra* note 88.

132. HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* (2d ed. 1948). That end date does not appear to have been driven by the adoption of the Federal Rules of Civil Procedure in 1938. In the preface to the second edition, subscribed “April, 1948,” McClintock said:

The twelve years that have passed since the publication of the first edition of this hornbook have not witnessed any great changes in the doctrines of equity or in their application. The process of the fusion of the law and equity has been advanced by the adoption by the United States Supreme Court of the Federal Rules of Civil Procedure, and a similar change is in progress in New Jersey, but these changes have as yet produced few significant changes in equity.

Id. at v.

133. There are notable exceptions, and subsequent systematic work that encompasses equitable remedies includes DOBBS, *supra* note 48; LAYCOCK, *supra* note 3; and PALMER, *supra* note 88. For a bibliographic sketch of American equity treatises, see Laycock, *supra* note 17, at 171–73. Lionel Smith has noted that in other areas, the treatise writers tried to systematize and reform the common law with an eye toward the civil law, but in the civil law countries there was no distinction between law and equity. Accordingly, Smith says, “for many decades, the textbooks on Equity did not aspire to lead, but only to follow,” and they “did not systematize, except where the judges did.” Lionel Smith, *Common Law and Equity in R3RUE*, 68 WASH. & LEE L. REV. 1185, 1191 (2011).

134. With the artificial history of the law, as with the artificial reason of the law, the need for interpretive choices is inescapable.

a piece from the end, and then trims away the rough edges in the middle, and finally takes this much-reduced cloth and patches up its holes with bits of cuttings from the floor. The tailor has a new old fabric. It is different from the original bolt of cloth, for it is smaller, tidier, and better adapted to the task at hand.

Nevertheless, even though the Court's approach is sound in terms of statutory interpretation and plausible as an artificial history, it still risks making equitable remedies hopelessly out of date, just as much as if they were fixed in 1789. Here the very artificiality of the Court's ideal history could be useful.¹³⁵ It enables a modest updating, not absolutely precluding consideration of more recent work in the equitable tradition by courts and commentators. As long as incremental updating is not excluded, the Court's approach can have the measure of stability and the capacity for change that are characteristic of a tradition.¹³⁶

IV. THE NEW EQUITY CASES AND EQUITABLE PRINCIPLES

The other line of cases in the Court's new equity jurisprudence speaks to when equitable remedies should be given. These cases announce principles, and sometimes multipart tests, for the decisionmaking of federal courts. As in the boundary-of-equity cases, the Court has self-consciously looked to the history and tradition of equity.¹³⁷

A. *The New Traditional Test for Permanent Injunctions*

The Court's most important decision in decades on the standards for a permanent injunction is *eBay v. MercExchange*.¹³⁸ What makes the influence of the *eBay* decision surprising is how accidental it appears to have been. At issue in the case was whether a certain kind of patentholder—one who does not participate in the relevant market—would get a permanent injunction against infringing products more or

135. Cf. T. S. ELIOT, *LITTLE GIDDING* ("History may be servitude, / History may be freedom.")

136. See EDWARD SHILS, *TRADITION* (1981) (analyzing stability and change in traditions); Krygier, *supra* note 104, at 251 ("[T]he very traditionality of law ensures that it *must* change."); see also W.M.C. GUMMOW, *CHANGE AND CONTINUITY: STATUTE, EQUITY, AND FEDERALISM* 48 (1999) ("The doctrines and remedies of equity are not 'frozen in time.'"). One might compare Justice Souter's historically minded, but not absolutely fixed, position on the claims allowed by the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–38 (2004).

137. The Court has not, however, shown the same explicit attention to methodology in these cases as it has in the boundary-of-equity cases.

138. 547 U.S. 388 (2006). Preliminary injunctions are governed by a different test, which is discussed below. See *infra* Part IV.B.

less automatically.¹³⁹ Writing for the Court, Justice Thomas framed the question in terms of whether traditional equitable principles applied to patent cases.¹⁴⁰ The Court's answer was unanimous: the "traditional test" for permanent injunctions applies to "disputes arising under the Patent Act."¹⁴¹

In resolving this question, the Court instructed lower courts to apply "well-established principles of equity."¹⁴² According to those principles, the Court said, "a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief," showing:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.¹⁴³

The Court modestly described its holding in *eBay* as "*only* that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles in equity, in patent disputes no less than in other cases governed by such standards."¹⁴⁴ Nevertheless, the formulation of the injunction standard in *eBay* has had extensive reach.¹⁴⁵ As is common with decisions in remedies and procedure, it has transcended the substantive context in which it arose.¹⁴⁶ It has become the leading federal authority on the requirements for a permanent injunction.¹⁴⁷

139. On remedies for patent infringement, see generally THOMAS F. COTTER, *COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS* (2013); Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. COMPETITION L. & ECON. 535 (2008); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455 (2010); John M. Golden, *Principles for Patent Remedies*, 88 TEX. L. REV. 505 (2010); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

140. 547 U.S. at 391–92, 394.

141. *Id.* at 390. The concurrences by Chief Justice Roberts and Justice Kennedy matter intensely for patent law, because they represent markedly different degrees of willingness to grant injunctive relief to patentholders not participating in the market. But here it is the similarity between the concurring opinions that is more relevant, for both invoke the history and tradition of equity.

142. *Id.* at 391.

143. *Id.*

144. *Id.* at 394 (emphasis added).

145. See Gergen, Golden & Smith, *supra* note 10.

146. Bray, *supra* note 21, at 1145.

147. Westlaw records that as of April 1, 2015, *eBay* has been cited in 1,747 federal court opinions but only fourteen state court opinions.

But why has *eBay* had so much influence in the lower federal courts if it was merely applying “the traditional four-factor test”?¹⁴⁸ Therein lies a puzzle. Before *eBay*, “[r]emedies specialists had never heard of the four-point test.”¹⁴⁹ There was a widely used four-part test for *preliminary* injunctions.¹⁵⁰ Some federal courts had employed multipart tests for permanent injunctions, but the tests varied considerably.¹⁵¹ And federal courts had often granted or denied injunctions without reference to any test. As Douglas Laycock put it, “There was no such test before, but there is now.”¹⁵²

Still, as other scholars have noted, each part of the Court’s test has deep roots in the history of equity.¹⁵³ Moreover, a nearly identical test for permanent injunctions had been used by the Kansas Supreme Court,¹⁵⁴ and a similar one had been used by courts in Tennessee.¹⁵⁵ Each part of the *eBay* test can be found in injunction tests that had been used in some lower federal courts. In a plurality of the circuits—the

148. 547 U.S. at 393.

149. Rendleman, *supra* note 4, at 76 n.71; *see also* Gergen, Golden & Smith, *supra* note 10, at 205 (“Remedies scholars have said that, before *eBay*, they were unfamiliar with any traditional four-factor test for permanent injunctions.”); Roberts, *supra* note 4, at 1037 (“It was news to remedies and injunctions scholars that the four-factor test was the required ‘traditional,’ ‘ordinarily’ applied, familiar test . . .”).

150. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 426 (4th ed. 2010); Rendleman, *supra* note 4, at 76 n.71.

151. *See infra* notes 156–59 and accompanying text.

152. LAYCOCK, *supra* note 150, at 427.

153. *See* Rachel M. Janutis, *The Supreme Court’s Unremarkable Decision in eBay Inc. v. MercExchange, L.L.C.*, 14 LEWIS & CLARK L. REV. 597, 618–624 (2010); *see also* Gergen, Golden & Smith, *supra* note 10, at 207 (“The *eBay* test does feature factors that courts have traditionally considered in deciding whether to grant injunctive relief.”).

154. *See* Nat’l Compressed Steel Corp. v. Unified Gov’t of Wyandotte Cnty./Kan. City, 38 P.3d 723, 729 (Kan. 2002):

To obtain injunctive relief, [National] must show: (1) there is a reasonable probability of irreparable future injury to National; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to National outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest.

Intriguingly, the Kansas test seems to have been taken from a test for preliminary injunctions. *Compare* Sampel v. Balbernie, 889 P.2d 804, 807 (Kan. Ct. App. 1995) (permanent injunction), *with* Wichita Wire, Inc. v. Lenox, 726 P.2d 287, 290–93 (Kan. Ct. App. 1986) (preliminary injunction). Several scholars have suggested a similar migration for the *eBay* test. *See supra* note 150 and accompanying text.

155. *See* Vintage Health Res., Inc. v. Guiangan, 309 S.W.3d 448, 467 (Tenn. Ct. App. 2009) (“When determining whether to grant injunctive relief, the trial court should consider such factors as the adequacy of other remedies, the danger that the plaintiff will suffer irreparable harm without the injunction, the benefit to the plaintiff, the harm to the defendant, and the public interest.”); *Zion Hill Baptist Church v. Taylor*, No. M2002-03105-COA-R3-CV, 2004 WL 239760, at *5 (Tenn. Ct. App. Feb. 9, 2004) (“When a trial court decides to grant an injunction, several factors are to be considered such as the danger of irreparable harm, the inadequacy of other remedies, the benefit to the plaintiff, the harm to the defendant, and the public interest.”).

First, Fifth, Seventh, Tenth, D.C., and Federal Circuits—courts had sometimes used a four-part test consisting of success on the merits, irreparable injury, balance of harms, and the public interest.¹⁵⁶ The Sixth Circuit had used a different four-part test: success on the merits, irreparable injury, no adequate remedy at law, and the public good.¹⁵⁷ The Fourth Circuit had applied a three-part test: no adequate remedy, balance of equities, and the public interest.¹⁵⁸ The Eighth Circuit had applied its own three-part test: irreparable harm, balance of equities, and the public interest.¹⁵⁹ None of the federal tests just mentioned included all four parts of what would be the *eBay* test, but each did include three parts of that test, though with variation in wording.

What was so bracing to remedies scholars was the Court's treatment of the first two parts of the test: (1) the irreparable injury rule and (2) the requirement of no adequate remedy at law.¹⁶⁰ Traditionally, these have served to maintain the line between legal and equitable remedies. They create the remedial hierarchy between legal and equitable remedies; they foster the impression that the injunction is an exceptional remedy. And most scholars,¹⁶¹ though not all

156. See *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2003); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003); *Aponte v. Calderon*, 284 F.3d 184, 191 (1st Cir. 2003); *Nichols v. Truscott*, 424 F. Supp. 2d 124, 143 (D.D.C. 2006); *Doe v. KPMG, L.L.C.*, 325 F. Supp. 2d 746, 751 (N.D. Tex 2004).

157. See *Tesmer v. Granholm*, 333 F.3d 683, 702 (6th Cir. 2003). In addition, a district court opinion worked through the *eBay* factors in order but without enumerating them as a test. *Aero-Motive Co. v. U.S. Aeromotive, Inc.*, 922 F. Supp. 29, 46–47 (W.D. Mich. 1996):

[P]laintiff has proven that it has suffered an irreparable injury and is without an adequate legal remedy. Further, the risk of harm to plaintiff is outweighed by the risk of harm to defendant. . . . It is therefore in the public interest Thus, this Court will enjoin defendant

158. See *Safeway Inc. v. CESC Plaza Ltd.*, 261 F. Supp. 2d 439, 467 (E.D. Va, 2003) (citing *Nat'l Org. for Women v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990) (“According to circuit precedent, a permanent injunction is an appropriate remedy ‘where (i) there is no adequate remedy at law, (ii) the balance of the equities favors the moving party, and (iii) the public interest is served.’”).

159. See *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 968 (8th Cir. 2005).

160. See Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L. 1, 31 (2012); Roberts, *supra* note 4, at 1034. For the same objection to *Knudson*, see Thomas, *supra* note 14, at 1073 n.59 (criticizing the decision for invoking the irreparable injury rule even though “commentators have explained that this irreparable injury rule is in fact dead in our modern times, posing no impediment to the award of equitable relief”).

161. See, e.g., 1 DOBBS, *supra* note 48, at 125; LAYCOCK, *supra* note 3, at 8–9 (“[I]rreparable injury is equivalent to no adequate remedy.”); Epstein, *supra* note 139, at 490 (“[I]rreparable injury’ and ‘inadequate’ damages, are mirror images of each other.”); James M. Fischer, *The “Right” to Injunctive Relief for Patent Infringement*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 10 n.38 (2007) (“Unfortunately, the test . . . continues the confusing practice of treating irreparable injury and inadequacy of the remedy at law as distinct factors; they are not.”); Roberts, *supra* note 4, at 1036 (referring to “the irreparable injury factor and the (strangely) separate

scholars,¹⁶² think these are actually two formulations of a single doctrine: an injury is considered irreparable *if* there is no adequate remedy at law.

This doctrine is the very one that Laycock had argued was dead, in the sense of “add[ing] nothing to the other grounds of decision in cases where [they are] invoked.”¹⁶³ To be clear, these formulations had never disappeared from what courts *said* was required before an injunction would issue. Rather, Laycock’s argument was that the irreparable injury rule and the idea of legal remedies being inadequate should be discarded and already were in effect irrelevant.¹⁶⁴ Now, after *eBay*, this reasserted doctrine is fully half of the test for permanent

inadequate-legal-remedies factor”); *see also* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (describing the irreparable injury rule and the requirement of no adequate-remedies at law as “closely related, if not identical”); *Fleet Wholesale Supply Co. v. Remington Arms Co.*, 846 F.2d 1095, 1098 (7th Cir.) (Easterbrook, J.) (“To say that the injury is *irreparable* means that the methods of repair (remedies at law) are inadequate.”); *Canadian Lumber Trade Alliance v. United States*, 30 C.I.T. 892, 896 & n. 4 (2006) (pointedly combining these parts of the *eBay* test) *aff’d*, 517 F.3d 1319 (Fed. Cir. 2008). Some have argued that to avoid confusion “irreparable injury” should be used for preliminary relief and “no adequate remedy at law” for permanent injunctions. *See* *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992) (Posner, J.) (arguing for this distinction and reading “irreparable” as meaning the injury is “not rectifiable by the entry of a final judgment”); OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 59 (2d ed. 1984).

162. *See* DAVID SCHOENBROD ET AL., *REMEDIES: PUBLIC AND PRIVATE* 81–82 (3d ed. 2002) (treating irreparable injury as a way to show there is no adequate remedy at law); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548–549 (1985) (concluding that traditionally the requirement of no adequate remedy at law was jurisdictional, whereas irreparable injury was a consideration for the court when deciding whether to exercise its jurisdiction); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 392–93 (1983) (finding that courts frequently collapse irreparable injury and the lack of an adequate remedy at law, but suggesting differences in timing and scope: adequacy is a question about the fairness of giving an injunction to a plaintiff who could instead have sought “a less onerous remedy,” such as damages; irreparable injury is a question about other proceedings, including criminal proceedings, and whether they “are likely to repair, in a rough sense, the harm plaintiff seeks to avert by injunction”); *see also* *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (finding no irreparable injury at the permanent injunction stage because in a future suit an *equitable* remedy could protect plaintiffs’ rights—a point that could not be made under the heading of “no adequate remedy at law”); *California v. Latimer*, 305 U.S. 255, 258–59 (1938) (“For we are of opinion that there was adequate opportunity to test at law the applicability and constitutionality of the Acts of Congress; and that no danger is shown of irreparable injury if that course is pursued.”). For other cases suggesting a distinction between irreparable injury and the lack of an adequate remedy at law, *see infra* note 305.

163. LAYCOCK, *supra* note 3, at 283.

164. *See id.* at 7 (“I do not argue merely that the irreparable injury rule *should be* abandoned; I argue that it *has been* abandoned in all but rhetoric.”); *id.* at 283 (“The rhetoric thrives, but the rule itself is dead.”).

injunctions, a test that the Court pointedly did not limit to patent law.¹⁶⁵

The third part of the *eBay* test, the “balance of hardships,” is also traditional in equity. It refers to an inquiry into how the injunction will affect each of the parties, including a consideration of each party’s fault.¹⁶⁶ This traditional equitable inquiry is often called “balancing the equities” or “the undue hardship defense.”¹⁶⁷ It was not described by the Court, and in the existing case law it is not “crisply formulated,”¹⁶⁸ but it generally has two main principles. The first is that a court should not grant an equitable remedy if the costs to the defendant greatly exceed the benefits to the plaintiff; the second is that a court should show this forbearance *only* if the defendant acted in good faith.¹⁶⁹ Both principles distinguish the inquiry from standard cost-benefit analysis. This inquiry has usually been seen not as an element of the plaintiff’s claim for equitable relief (as *eBay* implies), but as a defense to a claim for such relief.¹⁷⁰

The final part of the *eBay* test, the public interest, is also a long-standing concern of equity. The Court has said that “[t]he history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction.”¹⁷¹ Here, too, the

165. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (holding that when a court issues an injunction its “discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards”).

166. See Laycock, *supra* note 160, at 2–7; David Schoenbrod, *The Immortality of Equitable Balancing*, 96 VA. L. REV. IN BRIEF 17, 18–19 (2010); see also *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) (“As a general matter it may be said that ‘[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor’s discretion.’” (quoting *DAN B. DOBBS, REMEDIES* 52 (1973))). For classic examples of “balancing the equities,” see *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951); *Peters v. Archambault*, 278 N.E. 2d 729, 735–36 & n.9 (Mass. 1972) (Tauro, C.J., dissenting).

167. See Laycock, *supra* note 160, at 2–3.

168. *Id.* at 19.

169. See *id.* at 2–7; Smith, *Property, Equity, and the Rule of Law*, *supra* note 49; see also *MCCLINTOCK*, *supra* note 132, at 384 (“In suits to compel the removal of structures which encroach on the property of others, many courts refuse the injunction if the defendant acted innocently and great hardship would result to him, but grant it, regardless of the balance of the hardships, if the encroachment was willful.”); *id.* at 387 (“The relative economic hardship that the granting of the injunction will cause to the defendant is a factor to be considered in the balancing of the equities, but it ought not to lead to a refusal of an injunction unless it very greatly outweighs the injury to the plaintiff.”).

170. See Laycock, *supra* note 160, at 29–30; Rendleman, *supra* note 4, at 85. Even so, it was included in some of the injunction tests used in state and federal courts before *eBay*. See *supra* notes 154–59.

171. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). The Court usually (though certainly not always) points to the public interest as a reason for restraint, that is, as a justification for either declining to give an equitable remedy or for carefully delimiting its scope. For invocations

Court took a traditional concern of equity and then, with less support in the equity tradition, presented it as something the plaintiff must demonstrate in order to receive an injunction.¹⁷²

Therefore the critics are right that the Court seemed to stumble onto a new injunction test and that the test has its infelicities and redundancies.¹⁷³ Still, the Court's description of the test could be reformulated, with a change of article and a change of tacit emphasis, to be more correct. The test in *eBay* is not “the traditional four-factor test,” but it is “a traditional four-factor test.”¹⁷⁴ Even so, the most fundamental objection to *eBay* from scholars of remedies is not to the Court's overclaiming. It is to the Court's entrenchment of doctrinal formulations that distinguish legal and equitable remedies: the irreparable injury rule and “no adequate remedy at law” requirement.¹⁷⁵

The Court has not retreated. In a more recent case that arose under an entirely different statute, the National Environmental Policy Act, the Court invoked *eBay* as prescribing the test that “[a] plaintiff seeking a permanent injunction must satisfy.”¹⁷⁶ In that case, *Monsanto Co. v. Geertson Seed Farms*,¹⁷⁷ the Court made absolutely clear that the *eBay* test should not be limited to patent law.¹⁷⁸ Accordingly, the test has been widely applied by the lower federal courts to requests for

of the public interest, see, for example, *McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014); *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (plurality opinion); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982); *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955); *Yakus v. United States*, 321 U.S. 414, 440–41 (1944); *Hecht Co. v. Bowles*, 321 U.S. 321, 329–330 (1944); *Virginian Ry. Co. v. Sys. Fed'n. No. 40*, 300 U.S. 515, 552 (1937); see also LAYCOCK, *supra* note 3, at 223 & 234 n.80.

172. This criticism is mitigated somewhat by the Court's negative formulation: “A plaintiff must demonstrate . . . that the public interest *would not be disserved* by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (emphasis added). If there is no reason to think an injunction would affect the public interest, either for good or ill, then this part of the test is satisfied.

173. See John M. Golden, *The Supreme Court as “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 696 (2009) (noting the unexplained use of the past tense in the Court's formulation of the irreparable injury rule); LAYCOCK, *supra* note 150, at 426 (same); Laycock, *supra* note 160, at 29–30 (noting that undue hardship is a defense instead of an element of a plaintiff's claim).

174. A minority critique of *eBay* is that the content of its test is insufficiently traditional, because it reduces equity to a test that is “not exhaustive of equity's concerns” and requires four independent showings instead of traditional equitable balancing. See Gergen, Golden & Smith, *supra* note 10, at 208–214.

175. See *supra* note 161.

176. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010) (quoting *eBay*, 547 U.S. at 391).

177. *Id.*

178. *Id.* at 155–58.

permanent injunctions in a huge variety of cases,¹⁷⁹ though it is not, at least not yet, applied in every case where a plaintiff seeks an injunction from a federal court.¹⁸⁰

B. The New Traditional Tests for Preliminary Relief

The Court has also extended the *eBay* test to the law of preliminary injunctions.¹⁸¹ An initial step in this direction came in *Munaf v. Geren*,¹⁸² where lower federal courts had issued preliminary injunctions blocking the transfer of American citizens to Iraqi custody for criminal trial. Writing for the entire Court, Chief Justice Roberts rebuked the lower courts for failing to engage in the proper analysis for a preliminary injunction.¹⁸³ “We begin with the basics,” he said, and he proceeded to emphasize that a preliminary injunction is “an extraordinary and drastic remedy” that is “never awarded as of right.”¹⁸⁴ He also noted that federal courts should issue a preliminary injunction only after a showing of “likelihood of success on the merits,”¹⁸⁵ a step elided by the lower courts. Chief Justice Roberts then moved from critique of the preliminary injunction to the merits. He said that to consider the merits in this procedural posture had “long been

179. *E.g.*, *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 422–23 (2d Cir. 2013) (applying test when deciding whether to enjoin a state’s enforcement of a preempted state statute); *Curtis v. Alcoa, Inc.*, 525 F. App’x 371, 380 (6th Cir. 2013) (applying test to claim for injunction under ERISA and the Labor Management Relations Act); *Yowell v. Abbey*, 532 F. App’x 708, 710 (9th Cir. 2013) (reversing district court for failure to apply test to claim against the Bureau of Land Management); *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 706 F.3d 8, 13 (1st Cir. 2013) (per curiam) (applying test to injunction against interference with sale of assets by receiver); *United States v. City of New York*, No. 07-cv-2067 (NGG) (RLM), 2010 WL 4137536 (E.D.N.Y. Oct. 19, 2010) (applying test to Title VII claim); *see also Salinger v. Colting*, 607 F.3d 68, 78 n.7 (2d Cir. 2010) (“[A]lthough today we are not called upon to extend *eBay* beyond the context of copyright cases, we see no reason that *eBay* would not apply with equal force to an injunction in *any* type of case.”).

180. *E.g.*, *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1044 (9th Cir. 2012) (noting that the Ninth Circuit “has not yet determined whether irreparable harm must be shown in order to obtain injunctive relief in all types of cases,” and noting division in post-*eBay* cases in the circuit); *O’Sullivan v. City of Chicago*, 478 F. Supp. 2d 1034, 1043 (N.D. Ill. 2007) (declining to apply *eBay* to a request for an injunction under Title VII).

181. Or, since the *eBay* test can be seen as something borrowed from preliminary injunctions, the Court could be seen as moving the *eBay* test *back to* the law of preliminary injunctions.

182. 553 U.S. 674, 689–91 (2008).

183. *Id.*

184. *Id.* at 689–90 (internal quotation marks and citations omitted). In another part of the opinion the Court said that habeas corpus was “governed by equitable principles.” *Id.* at 693 (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)). Although the Court has in recent decades been inclined to invoke “equitable principles” to grant habeas and to deny it, there is no doubt that habeas is classically a legal remedy. *See infra* note 285 and accompanying text.

185. *Id.* at 690.

the rule” in “the ordinary practice in equity as administered in England and this country.”¹⁸⁶

Individually, none of these points in *Munaf* was remarkable. It has often been said that preliminary injunctions are extraordinary, that they are not awarded as of right, and that they require a showing of some likelihood of success on the merits.¹⁸⁷ But all of these points were elective: the Court could easily have reversed in *Munaf* without even considering the soundness of the preliminary injunction.¹⁸⁸ *Munaf* underscores the Court’s emphasis on the distinctiveness of equitable remedies and the importance of considering equity’s past.

The next step, and the most important one for extending *eBay* to preliminary injunctions, was taken five months later in *Winter v. Natural Resources Defense Council, Inc.*¹⁸⁹ A district court had granted an injunction against U.S. Navy sonar training exercises, relying on the authority of the National Environmental Policy Act.¹⁹⁰ In reaching that result, the district court concluded that the plaintiffs met the Ninth Circuit requirement of “a ‘possibility’ of irreparable harm.”¹⁹¹ The Supreme Court reversed, and the test it applied largely mirrored *eBay*—with two adaptations for preliminary injunctions. The test combined “irreparable injury” and “no adequate remedy at law,” and it added the requirement of likelihood of success on the merits.¹⁹² The Court reiterated the importance of irreparable injury and stressed that the plaintiff’s irreparable injury must be “likely” and not merely possible.¹⁹³ The Court also said that all injunctions, not just preliminary ones, are “extraordinary remed[ies] that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”¹⁹⁴ In dissent,

186. *Id.* at 691 (quoting *N.C. R.R. Co. v. Story*, 268 U.S. 288, 292 (1925)).

187. *See, e.g.*, 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (3d ed. 2010).

188. That is not to say the analysis was dicta; it was an alternative rationale.

189. 555 U.S. 7 (2008). *Winter* was written very quickly—the case was argued on October 8, 2008, and decided on November 12, 2008.

190. *Natural Res. Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 855 (C.D. Cal. 2007).

191. 555 U.S. at 17, 21 (quoting district court opinion).

192. *Id.* at 20:

A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

eBay was not cited, though the Court did cite the two cases it had relied on as authority for its *eBay* test, namely *Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

193. 555 U.S. at 22 (emphasis in original).

194. *Id.*

Justice Ginsburg praised the flexibility of equity,¹⁹⁵ as she had in her *Grupo Mexicano* dissent, and she argued that Congress had already made the policy decision when it chose to require environmental impact statements.¹⁹⁶ But unlike her dissent in *Grupo Mexicano*, her dissent here was joined by only one other Justice.¹⁹⁷ In *Winter*, the majority opinion was not such an easy target. It is one thing to emphasize equity's discretion and flexibility when the majority seems to be stopping the development of equity at 1789.¹⁹⁸ It is quite another to do so when the majority agrees that equity is discretionary and flexible and yet chooses to exercise that discretion in its own way.¹⁹⁹

Winter is not as counter to the conventional wisdom in remedies as *eBay* was, for even the critics of the irreparable injury rule have conceded that it has some value for preliminary injunctions.²⁰⁰ Nevertheless, *Winter* conflicts with that conventional wisdom in two ways. First, scholars see it as a sign of the Court's commitment to keeping and extending *eBay*.²⁰¹ Second, it is yet another case where the Court is characterizing equitable relief as exceptional—not just preliminary injunctions but also permanent injunctions.²⁰²

195. *Id.* at 43, 51 (Ginsburg, J., dissenting) (“Flexibility is a hallmark of equity jurisdiction.”).

196. *Id.* at 47–51.

197. Justice Ginsburg's dissent was joined by Justice Souter. Two other Justices concurred in the Court's reversal of the preliminary injunction while suggesting that a narrower stay from the court of appeals should have remained in place. *Id.* at 41.

198. *See supra* note 61 and accompanying text (discussing the focus on remedies in 1789 in the *Grupo Mexicano* opinion).

199. Justice Ginsburg also noted her view that the majority opinion did not displace the practice in many lower federal courts of “evaluat[ing] claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high.” 555 U.S. at 49. That suggestion has sparked a small literature. *See* Jean C. Love, *Teaching Preliminary Injunctions after Winter*, 57 ST. LOUIS U. L.J. 689 (2013); Sarah J. Morath, *A Mild Winter: The Status of Environmental Preliminary Injunctions*, 37 SEATTLE U. L. REV. 155 (2013); Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1012 (2012).

200. *See supra* note 41

201. *See* Roberts, *supra* note 4, at 1036.

202. *Winter*, 555 U.S. at 22 (reiterating “our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief”); *see also* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010) (“An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.”).

A few months after *Winter*, the Court took a similar approach in establishing rules about stays.²⁰³ In *Nken v. Holder*,²⁰⁴ the Court had to consider whether an immigration statute that tightly restricted injunctive relief also applied to stays of removal.²⁰⁵ The statute said that “no court shall *enjoin* the removal of any alien pursuant to a final order,”²⁰⁶ with a narrow exception for circumstances in which the alien could show “by clear and convincing evidence” that the order was “prohibited as a matter of law.”²⁰⁷ Once again Chief Justice Roberts wrote for the Court (though this time Justices Alito and Thomas dissented), and he read “enjoin” as encompassing injunctions but not stays.²⁰⁸ In reaching this conclusion, the Chief Justice admitted that it was unclear what, if any, effect the relevant subsection would still have because it could be circumvented easily.²⁰⁹ Nevertheless, he argued that this reading of the statute was consistent with traditional differences between injunctions and stays²¹⁰ and would allow the stay to “fulfill [its]

203. A stay pending judicial review is not exactly an equitable remedy, being neither traditionally limited to equity nor a remedy even in the broad sense of what “the court can do for you if you win” or what it “can do to you if you lose.” Laycock, *supra* note 17, at 165. Nevertheless, it is conventionally treated alongside the preliminary injunction, see LAYCOCK, *supra* note 150, at 445, and injunctions and stays have affected each other’s doctrinal development. For an example from English equity, namely the borrowing from the law of stays to reshape the law of anti-suit injunctions, see THOMAS RAPHAEL, THE ANTI-SUIT INJUNCTION 48–51 (2008).

204. 556 U.S. 418 (2009).

205. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub L. 104-208, 110 Stat. 3009-546 (amending 8 U.S.C. § 1252 (2012)).

206. 8 U.S.C. § 1252(f) (emphasis added).

207. *Id.*

208. *Nken*, 556 U.S. at 428–32.

209. *See id.* at 431–32 (noting that “the exact role of subsection (f)(2)” under the view the Court was adopting was “not easy to explain,” and then speculating without much conviction about what purpose it might serve). *Brown v. Plata*, 131 S. Ct. 1910 (2011), could be seen as another case in which the Court resisted statutory limitations on traditional equitable powers. And *eBay* itself can be seen as expressing the commitment of the Court to read federal statutes, whenever it can, as invoking—and not altering—the judicially developed law of equitable remedies. For arguments in favor of this commitment, see Bray, *supra* note 49, at 8–17 (arguing that Congress must speak clearly in order to displace traditional equitable principles); David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 657–58 (1988) (noting that balancing the equities has become a background value that legislation incorporates); *see also* Erin Morrow Hawley, *The Equitable Anti-Injunction Act*, 90 NOTRE DAME L. REV. 81, 112–21 (2014) (describing the federal courts’ reading of the Anti-Injunction Act as in harmony with background equitable principles). For a contrary perspective, see Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 489 (2010) (rejecting equitable balancing for injunctions to enforce federal statutes, and arguing that it conflicts with the separation of powers). *But see* Schoenbrod, *supra* note 166 (offering rebuttal).

210. The Court said that an injunction “is a means by which a court tells someone what to do or not to do” and “operate[s] *in personam*.” *Nken*, 556 U.S. at 428 (quoting 1 H. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1 (1909)). A stay, by contrast, “operates upon the judicial proceeding itself,” and even though it can have the same effect as a preliminary injunction, it produces this effect “by temporarily suspending the source of the authority to act—the order or

historic office.”²¹¹ Instead of the immigration statute’s very restrictive test, therefore, the Court instructed lower courts to apply “the traditional standard” for stays. That standard, distilled in earlier cases, resembles the *Winter* test.²¹² The Court said that stays were never granted as “a matter of right,”²¹³ and that when granting them the lower courts should consider irreparable injury and the public interest case by case without any resort to categorical presumptions.²¹⁴ Here, too, the Court’s work had hallmarks of the new equity jurisprudence—the turn to tradition, the emphasis on judicial discretion, and the entrenchment of the irreparable injury rule.²¹⁵

C. The New Traditional Scope of an Equitable Defense

The Court’s next case on equitable principles was *Petrella v Metro-Goldwyn-Mayer, Inc.*,²¹⁶ decided last Term. The case arose out of a dispute over the copyright to the screenplay for the movie *Raging Bull*.²¹⁷ The copyright was claimed by Metro-Goldwyn-Mayer and by Paula Petrella, the author’s daughter. She sued MGM for copyright infringement, but she waited about a decade to do so. As a result, the

judgment in question—not by directing an actor’s conduct.” *Id.* at 428–29. As a description of the practice of Chancery, however, that distinction would be overstated. When Chancery issued an order—whether the order was called a stay or an injunction (or, as it sometimes was, an “injunction for stay”)—it would characteristically operate only upon the litigants, not upon the law courts themselves. *See, e.g.*, MAITLAND, *supra* note 31, at 9 (stating that the Court of Chancery “never presumed to send to [the courts of law] such mandates as the Court of King’s Bench habitually sent to inferior courts,” a principle he illustrated by noting that an injunction “was addressed not to the judges, but to the party”).

211. *Nken*, 556 U.S. at 432.

212. *Id.* at 434:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

(quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also id.* (noting “substantial overlap between these and the factors governing preliminary injunctions”).

213. *Id.* at 427, 433; *see also id.* at 438 (Kennedy, J., concurring) (describing a “stay of removal” as “an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right”); *cf.* *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (describing “a stay of execution” as “an equitable remedy” that “is not available as a matter of right”).

214. *Nken*, 556 U.S. at 435–36 (rejecting the idea that removal is “categorically” an irreparable injury, and warning lower courts not to “simply assume” the result of the “balance of hardships” inquiry).

215. In another context involving preliminary relief—a request for a stay of judgment pending disposition of a petition for a writ of certiorari—Chief Justice Roberts also mentioned the need for a showing of irreparable injury. *See Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621, 1621 (2014) (Roberts, C.J., in chambers).

216. 134 S. Ct. 1962 (2014).

217. *Id.* at 1970–71.

lower courts denied all relief, invoking laches.²¹⁸ The Supreme Court had to decide what the scope of the laches defense would be, at least in federal copyright law.

The parties offered the Court diametrically opposed positions. Petrella argued that laches should not apply to any claims in the case because the statute of limitations was the only limit on the timing of suit.²¹⁹ MGM argued that the lower courts were right to deny all relief, legal and equitable.²²⁰ The adoption of the Federal Rules of Civil Procedure in 1938 made it passé, MGM argued, to think of laches as a distinctively equitable defense.²²¹ Each side could appeal to some lower court decisions that had treated the line between legal and equitable remedies as irrelevant for determining the scope of laches (either excluding laches for all claims or allowing it for all claims).²²²

But once again the Court turned to the history of equitable remedies. In an opinion written by Justice Ginsburg (and assigned to her by Justice Scalia), the Court kept to a traditional understanding of laches as an equitable defense. The Court held (1) that laches is available as a defense, notwithstanding the statute of limitations;²²³ (2) that laches is a defense only to claims for equitable remedies;²²⁴ (3) that laches can either knock out an equitable remedy entirely or shape its scope;²²⁵ (4) that only in extraordinary circumstances may laches bar equitable relief entirely;²²⁶ and (5) that laches is available only to

218. On laches, see 1 DOBBS, *supra* note 48, at 103–08; *see also* Bray, *supra* note 49, at 1–2 (“Laches is a defense that was developed by courts of equity, and it is typically raised in cases where a plaintiff has delayed her suit without good reason.”).

219. Brief for Petitioner, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (No. 12-1315), 2013 WL 6665055 at *14–15.

220. Brief for Respondents, *Petrella v. Metro-Goldwyn-Mayer Inc.*, 134 S. Ct. 1962 (2014) (No. 12-1315), 2013 WL 6665057 at *11.

221. *Id.* at *10, *39–42.

222. *See id.* at *39 (citing *Maksym v. Loesch*, 937 F.2d 1237, 1247–48 (7th Cir. 1991)); Brief for Petitioner, *supra* note 219 at *29–30 (citing *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001)).

223. *See Petrella*, 134 S. Ct. at 1967; *see also* Bray, *supra* note 49, at 8–18.

224. *See Petrella*, 134 S. Ct. at 1967 (holding that laches “cannot be invoked to preclude adjudication of a claim for damages” but may bar or limit “equitable relief”); *id.* at 1973–74 (rooting the distinction in the history of laches as an equitable defense); *see also* Bray, *supra* note 49, at 2–8, 17–18.

225. *See Petrella*, 134 S. Ct. at 1967 (holding that laches may “bar at the very threshold” the equitable relief the plaintiff seeks, or it may “be brought to bear at the remedial stage” to limit the equitable relief a court gives); *id.* at 1978–79 (recognizing that laches may entirely bar or merely “adjust” the scope of equitable relief); *see also* Bray, *supra* note 49, at 18.

226. *See Petrella*, 134 S. Ct. at 1967 (“As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff.”); *id.* at 1977 (requiring “extraordinary circumstances” for the “curtailment” of equitable relief “at the very outset of the litigation”); *id.* at 1978 (noting that although the plaintiff’s delay may affect the scope

shorten the statutory time period but not to extend it.²²⁷ In reaching these conclusions, the Court noted that laches had been “developed by courts of equity.”²²⁸ It insisted that the adoption of the Federal Rules of Civil Procedure did not change “the substantive and remedial principles” applied by the federal courts, including the principle that laches was available only against claims for equitable relief.²²⁹ The Court described its approach as traditional: it was “adher[ing]”²³⁰ to the “understandings, past and present, of the essentially gap-filling, not legislation-overriding, office of laches.”²³¹

In dissent, Justice Breyer, joined by the Chief Justice and Justice Kennedy, would have allowed laches to block all of Petrella’s claims for relief.²³² Although the dissenting Justices eschewed the majority’s distinction between legal and equitable remedies, they too considered laches an equitable doctrine in a certain sense, i.e., a doctrine that “avoid[s] the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances.”²³³ And they appealed to equity’s ancient past.²³⁴

And so in *Petrella* a majority of the Justices concluded that laches is an equitable defense good only against equitable claims, and all of the Justices looked to equity’s past as a guide for equity’s present.

D. Two Themes: Exceptionalism and Discretion

The Court’s exposition of equitable principles has been dominated by two themes. One is the *exceptionalism* of equitable remedies, and the other is the pervasive *discretion* that courts have when granting them. Both themes are characteristic of centuries of cases on equitable remedies. Yet the exposition of each theme is

of equitable remedies given, “extraordinary” circumstances are needed to deny equitable relief entirely); *see also* Bray, *supra* note 49, at 13–14, 17.

227. *See Petrella*, 134 S. Ct. at 1967 (calling it “undisputed” that the statute of limitations in the Copyright Act “bars relief of any kind” for violations before the statutory period); *id.* at 1971 (stating that “[n]o relief” is available for infringement before the statutory period); *see also* Bray, *supra* note 49, at 12, 14.

228. *Petrella*, 134 S. Ct. at 1973.

229. *Id.* at 1973–74; *see also* Bray, *supra* note 49, at 2–4.

230. *Petrella*, 134 S. Ct. at 1974.

231. *Id.*

232. *Id.* at 1979–86 (Breyer, J., dissenting).

233. *Id.* at 1979 (Breyer, J., dissenting).

234. *Ancient* is not elegant variation for *old*. Justice Breyer’s dissent invoked the famous discussion of equity in *The Nicomachean Ethics*. *Id.* It was the first U.S. Supreme Court opinion to do so in more than a century. *See* Beley v. Naphtaly, 169 U.S. 353, 360 (1898). On Aristotle and equity, *see infra* note 238 and accompanying text.

imperfect, both because of what the Court does say and what it does not say.

The theme of exceptionalism is evident when the Court describes the preliminary injunction and the permanent injunction as extraordinary remedies.²³⁵ In addition to these express descriptions, every test the Court has promulgated—the *eBay* test for permanent injunctions, the *Winter* test for preliminary injunctions, and the *Nken* test for stays—has included a requirement that the moving party show irreparable injury.²³⁶ Moreover, for two of these tests, the Court has specifically said that it is not enough to show merely a *possibility* of irreparable injury.²³⁷

The association between equity and exceptional circumstances is ancient. Aristotle described equity (ἐπιείκεια) as a solution to the problem of generality in lawmaking.²³⁸ Although there were no separate equitable courts in ancient Athens,²³⁹ Aristotle’s description would be invoked centuries later to justify the Court of Chancery’s existence and role.²⁴⁰ American courts and commentators have also frequently characterized equitable remedies as extraordinary or exceptional.²⁴¹

235. On permanent injunctions, see *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010); *Nken v. Holder*, 556 U.S. 418, 428, 432 (2009). On preliminary injunctions, see *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008).

236. *Nken*, 556 U.S. at 434; *Winter*, 555 U.S. at 20; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

237. *Nken*, 556 U.S. at 434–435; *Winter*, 555 U.S. at 22.

238. ARISTOTLE, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1795–96 (Jonathan Barnes ed., W.D. Ross transl., J.O. Urmson rev., 1984) (c. 384 B.C.). There is a large body of philosophical literature on Aristotelian equity. See, e.g., John Tasioulas, *Justice, Equity and Law*, in 5 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 147 (Edward Craig ed., 1998); Allan Beever, *Aristotle on Equity, Law, and Justice*, 10 LEG. THEORY 33 (2004); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFAIRS 83 (1993); see also Charles M. Gray, *The Boundaries of the Equitable Function*, 20 AM. J. LEG. HIST. 192, 218 & n.65 (1976).

239. The legal system of ancient Athens did emphasize equitable considerations, but these tended to be reflected in jury decisionmaking. See Adriaan Lanni, “*Verdict Most Just*”: *The Modes of Classical Athenian Justice*, 16 YALE J.L. & HUMAN. 277, 278 (2004) (describing how Athenian law generally gave a large place to equitable considerations yet carved out certain classes of cases to which they did not apply).

240. See MARK FORTIER, *THE CULTURE OF EQUITY IN EARLY MODERN ENGLAND* 60–76 (2005); RENDLEMAN, *supra* note 54, at 141–47; CHRISTOPHER ST. GERMAN, *DOCTOR AND STUDENT OR DIALOGUES BETWEEN A DOCTOR OF DIVINITY AND A STUDENT IN THE LAWS OF ENGLAND* 53–54 (London, Nutt & Gosling 1721); Tasioulas, *supra* note 238, at 150.

241. See, e.g., *Gunn v. Univ. Comm. to End the War in Vietn.*, 399 U.S. 383, 389 (1970) (“An injunctive order is an extraordinary writ, enforceable by the power of contempt.”); THE FEDERALIST NO. 83 (Alexander Hamilton) (“The great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules.” (qualifying footnote omitted)); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 66–67 (1984) (recognizing a narrower ground for *Younger v. Harris*, namely that “[l]acking were any of the exceptional circumstances that might have triggered equitable intervention”); Smith, *Why Fiduciary Law Is Equitable*, *supra* note 49, at 270

They have made these characterizations in connection with the “no adequate remedy at law” requirement and the remedial hierarchy,²⁴² for both imply that legal remedies are the norm. Conversely, the scholars who have sharply criticized the adequacy requirement and the remedial hierarchy have also dissented from the idea that there is anything exceptional about equitable remedies.²⁴³

There are varieties of exceptionalism, however, and it is important to be clear about exactly what kind the Court seems to be embracing. The Court has not suggested that permanent injunctions are exceptional in the sense of being rare or unusual.²⁴⁴ They are not. Federal courts grant many permanent injunctions, and there are large pockets of the law, even after *eBay*, where a plaintiff who succeeds on the merits will usually receive a permanent injunction.²⁴⁵

Instead, the Court seems to have embraced another variety of exceptionalism—that equitable remedies are departures from a norm. That norm is legal remedies. Any departure from the norm demands justification; even if it is easily made, it still must be made. To put the point differently, the Court is insisting that a trial judge who wants to give an equitable remedy must make an *explicit* finding that legal remedies are not adequate (i.e., the finding that allows a departure from the norm of legal remedies). But the Court has not made it *difficult* to make that finding.

Admittedly, it is confusing for these varieties of exceptionalism—one statistical and one more conceptual—to travel under the same name. That confusion is hard to avoid, though, since seemingly every English word that describes a departure from a norm

(“Generally, equity as a decision-making mode manifests itself as an exceptional safety valve.”); see also sources cited *supra* note 24.

242. On that hierarchy, see *supra* note 34 and accompanying text.

243. See, e.g., LAYCOCK, *supra* note 3, at 5 (“I conclude that the irreparable injury rule is dead. . . . Equally abandoned are such corollary expressions as ‘injunctions are an extraordinary remedy.’”).

244. By contrast, one opinion did describe preliminary injunctions and stays as exceptional in the sense of being rare. See, e.g., *Nken v. Holder*, 556 U.S. 418, 437 (2009) (Kennedy, J., concurring) (describing a “stay of removal” as “an extraordinary remedy that should not be granted in the ordinary case” and calling for “empirical data on the number of stays granted”).

245. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976 n.19 (suggesting that a plaintiff who proves copyright infringement “will likely gain forward-looking injunctive relief stopping the defendant’s repetition of infringing acts”); Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2141–2142 (2013) (noting that even after *eBay* “[p]racticing entities are usually able to get injunctions” against patent infringers).

can also imply infrequency.²⁴⁶ “Conceptual exceptionalism” may be as clear as it gets.

A second theme in the Court’s treatment of equitable principles is discretion.²⁴⁷ In *eBay*, for example, the Court said “[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court.”²⁴⁸ The tests that the Court has given for permanent injunctions (*eBay*), preliminary injunctions (*Winter*), and stays (*Nken*) all structure the decisionmaking of a district court, yet every part of every test involves ample discretion. Likewise, in *Petrella*, the Court recognized that lower courts have “considerable leeway” when “fashioning equitable remedies.”²⁴⁹

The Court has rejected the idea that equitable remedies are a matter of right,²⁵⁰ and it has instructed the lower courts not to rely on categorical presumptions about how the different factors should come out in a class of cases. To date, the Court has rejected presumptions

246. Consider *exceptional, extraordinary, special, unusual, remarkable, anomalous, and atypical*. The reverse is not true, for there is at least one English word for something that is rare but not necessarily a departure from a norm: *infrequent*.

247. See *Nken*, 556 U.S. at 433 (calling the issuance of a stay “an exercise of judicial discretion” the appropriateness of which “is dependent upon the circumstances of the particular case” (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926))).

248. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This embrace of discretion—in a majority opinion by Justice Thomas—suggests a more complex picture of Justice Thomas’s view of discretion than the notion that he has “quasi-religious devotion to constitutional rules over standards, born of his evident hostility to judicial discretion.” Jamal Greene, *Justice Thomas and Korematsu Redux*, BALKINIZATION (June 26, 2013), <http://balkin.blogspot.com/2013/06/justice-thomas-and-korematsu-redux.html>, archived at <http://perma.cc/X2PV-EQJG>.

249. *Petrella*, 134 S. Ct. at 1979 (citation omitted); see also *id.* at 1978–79 & n.22 (using *adjustment* or a cognate three times, in the space of about a page, to refer to decisionmaking about equitable remedies).

250. See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–58 (2010) (permanent injunctions); *Salazar v. Buono*, 559 U.S. 700, 714 (2010) (plurality opinion) (equitable relief generally); *Nken*, 556 U.S. at 427, 433 (stays); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (preliminary injunctions); *id.* at 32 (permanent injunctions); *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008) (preliminary injunctions); *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring) (permanent injunctions). In *Petrella*, the Court referred to a copyright owner’s “right to prospective injunctive relief . . . in most cases.” 134 S. Ct. at 1976. Since there is no “right” to an injunction, the most charitable reading is that the Court was using the term rather loosely, as something like a mere probability. That conclusion fits (1) the phrase “in most cases”; (2) the immediately following footnote where the Court gives the gloss that a plaintiff who proves copyright infringement “will likely gain” an injunction against further infringement, *id.* 1976 n.19; and (3) a passage later in the opinion where the Court emphasizes that the scope of equitable relief is always subject to “adjustment” based on many considerations, *id.* at 1978–79 & n.22.

about irreparable injury,²⁵¹ the balance of hardships,²⁵² the public interest,²⁵³ the ultimate question of whether an injunction should issue,²⁵⁴ and the likelihood of success on the merits.²⁵⁵

A particularly striking example of this rejection of presumptions is *eBay* itself, in which the Court effectively reversed both the district court and the appellate court for using opposite presumptions. The Court recognized what it was doing: “Just as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief.”²⁵⁶ Both concurrences in *eBay*—even though they reflected different views of the underlying patent policy questions—agreed in specifically rejecting categorical rules for equitable remedies.²⁵⁷ Similarly, in *Petrella* the Court noted considerations that would be relevant on remand,²⁵⁸ although it underscored the district court’s discretion. In short, the Court’s new equitable tests emphatically insist on, and structure, the exercise of judicial discretion in particular cases.

Discretion, too, is deeply rooted in the tradition of equity. Much of the literature on equity over the last five hundred years has centered

251. *See Nken*, 556 U.S. at 435 (rejecting a presumption that the burden of removal from the United States is irreparable injury); *see also id.* at 438 (Kennedy, J., concurring) (concluding that “there must be a particularized, irreparable harm beyond mere removal to justify a stay”).

252. *See id.* at 436 (rejecting any assumption that “[o]rordinarily, the balance of hardships will weigh heavily” in the favor of an applicant for a stay of removal); *see also Winter*, 555 U.S. at 24 (“In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” (emphasis added) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987))).

253. *See Nken*, 556 U.S. at 436 (rejecting a presumption of no harm to the public interest when a stay of removal is granted).

254. *See Geertson Seed Farms*, 561 U.S. at 157.

255. *See Munaf*, 553 U.S. at 690 (rejecting the lower court’s idea that where jurisdictional questions were difficult, a preliminary injunction could issue without a showing of “a likelihood of success on the merits”).

256. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006); *see also id.* at 393 (“[T]raditional equitable principles do not permit such broad classifications. . . . To the extent that the District Court adopted such a categorical rule, then, its analysis cannot be squared with the principles of equity”); *see also Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011) (“Although *eBay* abolishes our general rule that an injunction normally will issue when a patent is found to have been valid and infringed, it does not swing the pendulum in the opposite direction.”). For a view that this is the central theme of *eBay*, *see Tracy A. Thomas, eBay Rx*, 2 AKRON INTELL. PROP. J. 187, 187–93 (2008); *see also Shyamkrishna Balganes, The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 779–80 (2013); Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL’Y 743, 772–75 (2012). For criticism of *eBay* and an argument for a patent holder’s presumptive entitlement to injunctive relief, *see COTTER, supra* note 139, at 105–07.

257. *Compare eBay*, 547 U.S. at 395 (Roberts, C.J., concurring) (rejecting “a general rule that such injunctions should issue”), *with id.* at 395 (Kennedy, J., concurring) (noting that the Court should apply *eBay*’s test “without resort to categorical rules”).

258. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1978–79 (2014).

on this characteristic, and the arguments are predictable. Critics, such as John Selden or more recently Daniel Farber and John Yoo, have objected that equity is a cloak for arbitrary judicial policymaking.²⁵⁹ They see “the chancellor’s conscience” as mere personal whim, varying as much from one chancellor to the next as “the chancellor’s foot.”²⁶⁰ In contrast, judges granting equitable remedies have traditionally noted both the value and the limits of equitable discretion. As to value, judges have said that equitable discretion allows them to fashion equitable remedies that are appropriate to the justice of the particular case, to choose rigor or forbearance as the case demands.²⁶¹ As to limits, it has long been a commonplace that equitable discretion is bounded.²⁶² Even in equity, Chief Judge Cardozo said, “there are signposts for the traveler.”²⁶³

259. See JOHN SELDEN, EQUITY, in TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 43, 43–44 (1689); Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 526–27 (1984); John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1162–65 (1996); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* v (2012) (quoting Blackstone’s quip that law without equity is better than equity without law).

260. See SELDEN, *supra* note 259, at 43–44 (“Equity in Law, is the same that the Spirit is in Religion, what every one pleases to make it.”). *But see* BAKER, *supra* note 36, at 178 (“Good conscience was not arbitrary.”); Richard Hedlund, *The Theological Foundations of Equity’s Conscience*, 4 OXFORD J.L. & RELIGION 119 (2015) (arguing that “equity’s conscience is not subjective or capricious”).

261. *E.g.*, *Brown v. Bd. of Educ.* 349 U.S. 294, 300 (1955) (“[T]he courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.”); *United Steelworkers of Am. v. United States*, 361 U.S. 39, 71 & n.9 (1959) (Douglas, J., dissenting); *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944); *Brown v. Voss*, 715 P.2d 514, 517 (Wash. 1986) (including, among the “fundamental principles applicable to a request for an injunction,” that “[t]he trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the *particular facts, circumstances, and equities of the case before it.*”).

262. See *Heine v. Bd. of Levee Comm’rs*, 86 U.S. 655, 658 (1873) (rejecting the notion that a court of equity may “depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles”); *Lord Nottingham’s Prolegomena of Chancery and Equity*, in NOTTINGHAM, *supra* note 68, at 200 (“[T]he Lord Chancellor must order his conscience after the rules and grounds of the laws of this realm.”); BAKER, *supra* note 72, at 109–10; HAMBURGER, *supra* note 72, at 142–43 (describing “equitable discretion” in the eighteenth century as “a discernment of circumstances” sometimes “beyond reconsideration on error, but this was not to say it was necessarily beyond rules of either equity or law”); FISCHER, *supra* note 161, at 9–10 (“To note that equitable relief is a supplemental remedy or subject to judicial discretion is not to say that injunctions are second order, mercurial remedies available according to the vagaries of the court. This was the central point of Chief Justice Robert’s concurrence in *eBay*.” (footnote omitted)); Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 300 (2014) (“There are equity problems that depend on the length of the Chancellor’s foot, but the basic rules validating and invalidating ownership of property are not among them.”).

263. *Evangelical Lutheran Church of the Ascension v. Sahlem*, 172 N.E. 455, 457 (N.Y. 1930). This is true of judicial discretion generally. See *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D.

The Court's new emphasis on equitable discretion deserves a mixed assessment. First, the positive. Although this emphasis is new, in the sense of being a departure from some earlier cases that seemed quick to read statutes as eliminating that discretion,²⁶⁴ it is broadly consistent with the tradition of equity.²⁶⁵ It is also consistent with the blackletter law that equitable remedies are not of right.²⁶⁶ For example, Judge Friendly, when illustrating "the necessary leeway [that] is built into the governing equitable principles," pointed to "the discretion of the trial court to withhold a permanent injunction as unnecessary even when the plaintiff has made out all the other elements of his case."²⁶⁷ This point should not be misunderstood. It would certainly be unusual for a court to find that all of the principles for giving an injunction weigh in favor of issuance and yet not actually issue one. (Indeed, a court that did so might be reversed.²⁶⁸ Or not.²⁶⁹) Rather, the force of the "not of right" phrase is more subtle and rhetorical. It is a short-hand for a number of discrete but related ideas: the exceptionalism of equitable

Va. 1807) (Marshall, C.J.) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 777 (1982) ("A judge's discretion is not boundless and must be exercised within the applicable rules of law or equity." (internal quotation marks omitted)).

264. One case that is often read that way is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). See Farber, *supra* note 259, at 527 (reviewing several Burger Court environmental cases and noting with approval that "[i]n none of these cases has the Court reaffirmed the traditional use of equitable balancing as a means of judicial policymaking"). But see *Tenn. Valley Auth.*, 437 U.S. at 193 ("[A] federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law."); Schoenbrod, *supra* note 209, at 648 & n.102. A passage in *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001), reads *Tennessee Valley Authority* along with *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), as standing for the proposition that a statute authorizing injunctions takes away discretion not to give any relief but leaves discretion about what relief to give. See *Oakland Cannabis Buyers*, 532 U.S. at 497–98.

265. See *supra* notes 261–63.

266. See John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43, 53–55 (2011); Rendleman, *supra* note 4, at 85; cf. *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 274 (7th Cir. 1992) (Posner, J.) ("[I]njunctive relief is not granted as a matter of course, but only when the plaintiff's damages remedy is inadequate."). Note, however, that this discretion has never been characteristic of those substantive areas where equity provided all of the adjudicative rules instead of being supplementary to the law (e.g., trusts). See Smith, *supra* note 133, at 1195. In addition, some statutes mandate injunctions in certain circumstances. See LAYCOCK, *supra* note 150, at 266. But as a general rule the Court is on firm ground in saying that injunctions and other equitable remedies are not available as of right.

267. Friendly, *supra* note 263, at 778 & n.116. For a recent example, see *Signature Flight Support Corp. v. Landow Aviation Ltd.*, 442 F. App'x 776, 785 (4th Cir. 2011) (affirming where the district court first applied the *eBay* test and then, "because injunctive relief ultimately rests in the discretion of the court, the district court also considered whether the equities supported the injunction").

268. See *Brock v. Big Bear Mkt. No. 3*, 825 F.2d 1381, 1384 (9th Cir. 1987).

269. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 633–36 (1953).

remedies; the relatively high degree of discretion in the principles for granting injunctions; the distinction between rights and remedies; and the various doctrines that withhold an equitable remedy from those who have abused their legal rights (such as laches and unclean hands).

Where the Court diverges from both the tradition of equity and the contemporary practice of the lower courts is in its rejection of categorical presumptions. In many areas of the law, there are rough presumptions that in certain categories of cases an injunction will issue once a violation has been shown. As Judge Posner put it, “Although we have described the choice between legal and equitable remedies as one for case-by-case determination, the courts have sometimes picked out categories of case[s] in which injunctive relief is made the norm. The best-known example is specific performance of contracts for the sale of real property.”²⁷⁰ This feature of traditional equity has been ably explored by Mark Gergen, John Golden, and Henry Smith, who describe many of the presumptions that structure equitable discretion in property, contract, and constitutional cases.²⁷¹ If the new equity cases were read to obliterate all equitable presumptions, they would cause a sea change in the law—a change that the Court could not justify by appealing to our existing equity tradition.²⁷²

Although some of the new equity cases can easily be read as absolutely rejecting any presumptions about equitable remedies, a narrower reading is also plausible. The Court could be understood as insisting that lower courts resist any presumptions that would make the injunction decision effectively automatic.²⁷³ This reading would better comport with “well-established principles of equity.”²⁷⁴ It would conform to the Court’s recognition in *Petrella* that a plaintiff who

270. *Walgreen*, 966 F.2d at 278; see MCCLINTOCK, *supra* note 132, at 103 (noting that “[i]n many types of cases, precedents have determined that the remedy at law is either adequate or inadequate”). One critique of *eBay* is that it should have recognized a stronger analogy between real property and intellectual property. See Epstein, *supra* note 139, at 490.

271. Gergen, Golden & Smith, *supra* note 10, at 219–30.

272. For a case recognizing the tension between equitable presumptions and the Court’s recent equity cases, see *Seed Servs., Inc. v. Winsor Grain, Inc.*, 868 F. Supp. 2d 998, 1004–05 (E.D. Cal. 2012).

273. For example, perhaps the strongest rejection of presumptions in the Court’s new equity cases is *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), where the Court chided the lower courts for “invert[ing] the proper mode of analysis” by asking “whether there is a good reason why an injunction should *not* issue.” *Id.* at 157–58. Even here, though, the Court expressed a concern that federal courts were in effect making injunctions automatic: “Nor. . . could any such error be cured by a court’s *perfunctory* recognition that ‘an injunction does not automatically issue.’” *Id.* (emphasis added) (quoting district court). For an example of a strong presumption in equity, but with a narrow opening for a truly extraordinary case, see *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974).

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

establishes copyright infringement is “likely” to get an injunction.²⁷⁵ It would also embody a valuable insight: there should be no presumptions that make the decision to give an injunction automatic, for they would keep the lower courts from engaging in the case-specific and open-textured, yet structured, decisionmaking that is characteristic of equity. This is exactly how the traditional equitable presumptions work. They do not make equitable relief automatic; they are not per se rules that make it unnecessary for the judge to closely consider the facts of the case.²⁷⁶ (Nor is this point limited to equity: the presumption of innocence in criminal trials does not preclude weighing the evidence about whether a particular defendant is guilty.²⁷⁷) For these reasons, the Court should clarify that the use of traditional equitable presumptions is compatible with the case-by-case decisionmaking that it is insisting upon.

* * *

The Court’s repeated inquiries into the scope and content of “equitable relief,” and its turn to an idealized history and tradition as the authoritative source for those inquiries, represent an unexpected and striking revival of equity. It was unexpected, given decades of scholarship skeptical of equity’s past.²⁷⁸ More importantly, these cases are striking because of the doctrines they reinforce. The Court has emphasized that equitable remedies are never given as of right, may be given only when there is a showing of irreparable injury, are exceptional, and are marked by discretion—a discretion that is guided by traditional tests but exercised case by case.

275. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976 n.19 (2014).

276. Compare the approach of Judge Posner in *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273 (7th Cir. 1992). He noted that “injunctions are not granted as a matter of course, but only when the plaintiff’s damages remedy is inadequate,” while also recognizing that in certain “categories of case[s] . . . injunctive relief is the norm.” *Id.* at 274, 278. On the importance of factual particularity in equitable decisionmaking, and thus the general need “to eschew the formulation of per se rules in equity,” see Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877 (2005).

277. I am grateful to Jud Campbell for suggesting the analogy.

278. See, e.g., Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: The Background*, 44 YALE L.J. 387, 431 (1935) (commenting on differences in the form of an appeal at law and equity and concluding that “[a]rchaic nomenclature which carries with it so much of formality and tradition ought to be abandoned”); see also *supra* Part II.

V. TAKING STOCK OF THE COURT AND ITS CRITICS

The criticism of the Court's cases on equitable remedies has been intense. It has come from scholars who write in remedies, in procedure, and in the substantive domains affected by the Court's decisions.²⁷⁹ The criticism has focused on three aspects of the new equity cases: the use of history, the representation of doctrine, and the lack of justification. This Part summarizes these criticisms, evaluating what the critics have said and what the Court has done.

A. *The Use of History*

The first criticism is about the history.²⁸⁰ It is true that the Court has, at times, struggled in getting the history right, even by the standards of judicial historiography. Most glaringly, the Court has called mandamus an equitable remedy.²⁸¹ As other scholars have noted, that is a clear mistake: for centuries mandamus has been a legal remedy.²⁸² It is true that mandamus is highly discretionary, and that when deciding whether to grant it a court will take into account considerations resembling those for equitable remedies.²⁸³ Still, there is no doubt about how mandamus should be classified. Indeed, the history is so clear that the Court's description is conceivable only if one thinks that all nonmonetary remedies are in the domain of equity. But there

279. See *supra* notes 14–20 and accompanying text.

280. The leading criticism in this regard is Langbein, *supra* note 8.

281. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215 (2002) (quoting, without any reservation, the description in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) of “injunction, mandamus, and restitution” as equitable remedies); *id.* at 234 (Ginsburg, J., dissenting) (same); *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011) (same); see also *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (“Petitioners seek additional forms of equitable relief, including mandamus for the release of petitioner Powell’s back pay.”).

282. See Langbein, *supra* note 8, at 1321, 1353; Laycock, *supra* note 4, at 81. For a sketch of the history of mandamus, especially in relation to the writs of certiorari, habeas corpus, and prohibition, see S.A. de Smith, *The Prerogative Writs*, 2 CAMBRIDGE L.J. 40 (1951). Although there is at least one instance of mandamus issuing from Chancery, see *id.* at 44 n.29, by the seventeenth century it had become clear that this writ “was awarded almost exclusively out of the King’s Bench.” *Id.* at 43–44.

283. See Shapiro, *supra* note 162, at 572 (noting that even “when discretion was primarily the province of the Chancellor” there were still legal remedies—certiorari, habeas corpus, mandamus, and prohibition—that were extraordinary, highly discretionary, and not available as a matter of course). The Court once described mandamus as “a legal remedy . . . largely controlled by equitable principles.” *In re Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924); see also *In re Int’l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (“Although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles.”). Rightly or wrongly, similar things have been said about other traditionally legal remedies. See *Fay v. Noia*, 372 U.S. 391, 438 (1963) (habeas corpus); *Myers v. Hurley Motor Co.*, 273 U.S. 18, 24 (1927) (money had and received); *Kopin v. Orange Prods., Inc.*, 688 A.2d 130, 140 (N.J. Super. Ct. App. Div. 1997) (quasi-contract).

have always been nonmonetary remedies outside of equity—not only mandamus but also relief in replevin, ejectment, and habeas, as well as in declaratory judgment actions.²⁸⁴ Similarly, the Court has on occasion misdescribed the declaratory judgment and habeas as equitable remedies.²⁸⁵ It has made historical blunders in its description of restitution, as ably described by John Langbein.²⁸⁶ And in *Petrella* the Court referred to a “right to prospective injunctive relief,”²⁸⁷ though there is no such right, as the Court seemed to recognize elsewhere in the same opinion.²⁸⁸

It is indisputable, then, that the Court has made outright mistakes about the history of equity. But Langbein goes farther than merely criticizing the Court’s performance in searching for the remedies “typically available in equity.” He says that “the concept of ‘typically equitable’ has no ascertainable meaning.”²⁸⁹ If taken as a general point about equitable remedies, however, this statement is incorrect.²⁹⁰ Even though there will be boundary questions, there are remedies that were “typically available in equity.” These include, as Langbein himself notes, the injunction and the constructive trust.²⁹¹ And there are some remedies that were not typically available in equity, such as mandamus. Indeed, this very fact—i.e., that some remedies were typically available in equity and other remedies were not—is what gives bite to Langbein’s critique of the Court’s misclassification.

The Court is right to look to the history of equity. It is forced to do as much by the Seventh Amendment and the statutes authorizing

284. Conversely, there have long been monetary remedies in equity. For example, on the logic of equitable “damages in lieu of injunctions,” see Gardner, *supra* note 266, at 53–54 n.36.

285. See, e.g., *Elgin v. Dep’t of the Treasury*, 132 S. Ct. 2126, 2131 (2012) (“Petitioners sought equitable relief in the form of a declaratory judgment”); *Schlup v. Delo*, 513 U.S. 298, 299 (1995) (“[H]abeas corpus is, at its core, an equitable remedy”); see also 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2, pp. 14–15 (6th ed. 2011) (collecting habeas cases). On the classification of the declaratory judgment, see Bray, *supra* note 120. On the classification of habeas, see Smith, *supra* note 282, at 43 (“By the time of Charles II applications for *habeas corpus* . . . were usually made to the Court of King’s Bench rather than to the Chancery . . .”).

286. See Langbein, *supra* note 8, at 1351–54; Thomas, *supra* note 14, at 1074.

287. 134 S. Ct. 1962, 1976 (2014).

288. See *supra* note 250 and accompanying text.

289. Langbein, *supra* note 8, at 1353.

290. Langbein’s critique can also be read more narrowly—as only about the limitations of the “typically equitable” concept for federal trust law, or as only about the construction the Court gave to “typically equitable” in *Knudson*. In those narrower forms, the critique would not be vulnerable to the objections made here.

291. Langbein, *supra* note 8, at 1357 (noting equitable origin of the constructive trust). Other traditional equitable remedies include specific performance, equitable rescission, equitable lien, and accounting for profits. See Getzler, *supra* note 30, at 186.

equitable relief.²⁹² That is why even the dissenters in the two closely divided early cases, *Grupo Mexicano* and *Knudson*, responded with their own appeals to the history of equity²⁹³—it takes a history to beat a history. The Court is also right, when it looks to the history of equity, to avoid the extremes that were offered in *Grupo Mexicano*—Justice Scalia’s seeming insistence on remedies that were available in 1789,²⁹⁴ and Justice Ginsburg’s apparent reduction of equity to amorphous principles such as “flexibility” and “adaptability.”²⁹⁵ The middle course the Court has taken by constructing an artificial history of equity is a better way, for it is a faithful reading of the relevant statutes and is more consistent with the long tradition of equity.

The historical criticism of the Court’s new equity cases is therefore narrowly right and broadly wrong. It is right about the equity malapropisms. Yet these are actual mistakes—the Court is making statements about equity that are wrong, statements that learned scholars such as Langbein and Laycock can show are wrong. Indeed, perhaps in response to the criticism,²⁹⁶ the Court has subsequently worked more carefully; most of the errors appeared in the earliest new equity cases.²⁹⁷ The task the Court has given itself is a hard one, not an impossible or incoherent one.²⁹⁸

292. For recognition of this point even by critics of the distinction between legal and equitable remedies, see *supra* note 4. Nor are these requirements merely vestigial. Congress routinely passes statutes invoking equity, see *supra* note 76, and a recent state merger of law and equity courts was accomplished by a constitutional amendment that expressly “preserve[d] the right of trial by jury as declared in this Constitution,” ARK. CONST. amend. LXXX, § 3.

293. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 228–34 (2002) (Ginsburg, J., dissenting); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 335–37 (1999) (Ginsburg, J., dissenting).

294. See *supra* note 61 and accompanying text.

295. See *supra* Part III.A.

296. It seems clear that the Justices have been reading, though not citing, Langbein’s criticisms. Compare Langbein, *supra* note 8, at 1352–53 (discussing surcharge), with *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880–81, 1885 (2011) (same).

297. *E.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Knudson*, 534 U.S. 204; *Grupo Mexicano*, 527 U.S. 308. On a more recent misstatement, however, see *supra* note 250 (discussing *Petrella*).

298. See Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 689 (2009) (noting that in constitutional cases in the late nineteenth and early twentieth century “the federal courts applied the traditional rules of equity without difficulty: So long as the court had jurisdiction, the litigant demonstrated a risk of irreparable injury, and there was no adequate remedy available to him at law, the courts were able to fashion an appropriate equitable remedy”); Susan Harthill, *The Supreme Court Fills a Gaping Hole: CIGNA Corp. v. Amara Clarifies the Scope of Equitable Relief Under ERISA*, 45 JOHN MARSHALL L. REV. 767 (2012) (largely approving of *Amara*); Roberts, *supra* note 4, at 1039 n.69 (noting that even though “errors abound,” still “there are numerous court opinions that correctly distinguish legal restitution from equitable restitution,” and citing *Sereboff* with approval).

B. The Representation of Doctrine

Also narrowly right and broadly wrong is the second line of criticism. Remedies scholars have reacted with surprise and dismay to the *eBay* test for permanent injunctions.²⁹⁹ The dismay is understandable, for the test reflects a deeply contrary view of the value of distinguishing legal and equitable remedies. (More on that momentarily.) But the surprise is somewhat overdone. There may not have been a single federal case that had previously applied the exact *eBay* test. But every part of the *eBay* test was familiar.³⁰⁰ Some state courts had used very similar tests.³⁰¹ And when federal courts had used tests for permanent injunctions before *eBay*, they tended to be various combinations of five different elements: the four parts of the *eBay* test plus actual success on the merits.³⁰²

Two other doctrinal criticisms are often made. One is that the Court improperly treated the irreparable injury and the “no adequate remedy at law” requirement as two different things, instead of recognizing that they are the same thing.³⁰³ Here, the critics of the Court have the better of the argument. For permanent injunctions, these formulations are customarily interchangeable. It is true that some scholars have drawn distinctions between the irreparable injury rule and the adequacy requirement, but those distinctions do not justify treating these as two independent requirements for a plaintiff seeking an equitable remedy.³⁰⁴ Yet even here what the Court did was not

299. See *supra* note 17 and accompanying text.

300. See *supra* notes 153–59 and accompanying text.

301. See *supra* note 154 and accompanying text.

302. See *supra* notes 156–59 and accompanying text. Furthermore, for a test for a permanent injunction, success on the merits is a pointless inquiry, since it is obvious that one can be given only after the defendant has been found to have violated the law. It is a long time since an injunction could be given to constrain sheer cussedness.

303. See *supra* note 161 and accompanying text. There is even authority for including the public interest in the balancing of the equities, a position that would suggest parts three and four of the *eBay* test are really a single inquiry. See MCCLINTOCK, *supra* note 132, at 387–90; cf. *United States v. City of New York*, No. 07-cv-2067 (NGG) (RLM), 2010 WL 4137536, at *10 (E.D.N.Y. Oct. 19, 2010) (concluding, in a Title VII case, that because the plaintiff United States and defendant New York City were both “governmental entities, the analysis of the balance of hardships greatly overlaps with the question of whether an injunction would serve the public interest”).

304. See *supra* note 162 and accompanying text. If, as Gene Shreve has suggested, there are cases in which one formulation or the other is more felicitous, see Shreve, *supra* note 162, at 392–93, then it hardly makes sense to use both. Nor does it make sense to require both if irreparable injury is one way (but only one way) to show there is no adequate remedy at law. See SCHOENBROD ET AL., *supra* note 162, at 81–82. Perhaps two independent requirements could be supported by David Shapiro’s suggestion that the lack of an adequate remedy at law was jurisdictional while irreparable injury was a consideration for the court to weigh in deciding whether to act. See Shapiro, *supra* note 162, at 548–49. But the *eBay* test does not make this distinction; irreparable

original, for before *eBay* there were injunction tests that had presented the irreparable injury rule and the adequacy requirement as separate requirements.³⁰⁵

In addition, the concern that the Court's decision in *eBay* might obliterate a number of equitable principles is somewhat overdrawn. The scholars who raise this concern, especially Mark Gergen, John Golden, and Henry Smith,³⁰⁶ are right that the Court has been too resistant to equitable principles that take the form of presumptions. They are also right in pointing out that the Court has been silent about the traditional structure of some of the concepts it refers to, especially the "balance of hardships"³⁰⁷—and that such silence could be misinterpreted by the lower courts as eliminating the carefully developed structure of the traditional doctrine.³⁰⁸ And they are right to criticize the Court for selecting one equitable defense, which is relevant in only some cases, and presenting it as something the plaintiff must negate in every case in which an injunction is sought. Even so, there is no reason to think that all of the principles for equitable decisionmaking must be gathered

injury and the lack of an adequate remedy at law are both presented as considerations that go to whether it is necessary and proper for the court to issue an injunction.

305. See *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005); *Tesmer v. Granholm*, 333 F.3d 683, 702 (6th Cir. 2003); see also *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 381–82 (1949) (treating irreparable injury as a separate question from the lack of an adequate remedy at law); *Ind. Mfg. Co. v. Koehne*, 188 U.S. 681, 684 (1903) ("[I]t must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc."); *Gentala v. City of Tucson*, 213 F.3d 1055, 1061 (9th Cir. 2000) ("To obtain a permanent injunction, the moving party must demonstrate the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." (internal quotation marks omitted)); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989) ("Generally, to obtain a permanent injunction a party must show the absence of an adequate remedy at law and irreparable harm if the relief is not granted."); *Opat v. Ludeking*, 666 N.W.2d 597, 603 (Iowa 2003) ("An injunction is warranted when necessary to prevent irreparable injury and when the plaintiff has no adequate remedy at law."); 67A N.Y. JUR. 2D INJUNCTIONS § 167 (listing four requirements for a plaintiff seeking a permanent injunction under New York law, including "(2) that the plaintiff has no adequate remedy at law; [and] (3) that serious and irreparable injury will result if the injunction is not granted"); sources cited *supra* notes 154–55; cf. COTTER, *supra* note 139, at 102–03 (concluding that the first two elements of the *eBay* test are redundant, yet adding—"though to be fair, some courts' listings of preliminary injunction factors reflect the same redundancy").

306. See Gergen, Golden & Smith, *supra* note 10, at 205–06.

307. See *supra* text accompanying notes 166–70.

308. On that structure, see generally Laycock, *supra* note 166. The state of the doctrine in the federal courts after *eBay* needs more investigation, and it is possible that the silence of *eBay* on what the "balance of hardships" means has created confusion. But the lower courts do not appear to have shifted en masse to a fault-free cost-benefit analysis. See *FenF, L.L.C. v. SmartThingz, Inc.*, 12-CV-14770, 2014 WL 1431692, at *4 (E.D. Mich. Apr. 14, 2014); *Sealant Sys. Int'l, Inc. v. TEK Global S.R.L.*, 5:11-CV-00774-PSG, 2014 WL 1008183, at *27 (N.D. Cal. Mar. 7, 2014).

from the four corners of *eBay*.³⁰⁹ The decision itself does not say as much. And whatever the Court may have meant in *eBay*, the Court has subsequently demonstrated that the *eBay* list should not be read as exclusive. For example, in *Petrella*, the latest of the new equity decisions, the Court reaffirmed the vitality of an equitable doctrine—the laches defense—that *eBay* never mentioned.³¹⁰ And in *Petrella* the Court was more circumspect, for it specifically noted that the equitable considerations it was listing were not exhaustive.³¹¹

As with the criticisms of the Court's artificial history, the criticisms of the doctrine have merit but can be overstated. Apart from the obvious error of labeling *eBay*'s test *the* traditional one, the doctrinal conclusions the Court has drawn are generally conventional, and each one is at least a well-represented minority position in contemporary equity case law.

C. *The Need for Justification*

The third criticism is more telling. It is the lack of justification from the Court for retaining the distinction between legal and equitable remedies in contemporary American law.³¹² At every step, the Court has appealed to history and tradition as sufficient authority. In *eBay*, for example, Chief Justice Roberts invoked for equitable remedies the

309. See *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 842 (7th Cir. 2013) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–92 (2006), for the general proposition that a “court exercises [its] remedial discretion in accordance with traditional principles of equity, unless [a] statute directs otherwise”).

310. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014). Similarly, in *Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015), the Court said that a plaintiff seeking an injunction must show a “cognizable danger of recurrent violation” (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). See *id.* at 1074 (Thomas, J., dissenting) (agreeing with the majority on this point). Yet this equitable requirement was also not mentioned in *eBay*.

311. See *Petrella*, 134 S. Ct. at 1979 (recognizing that on remand the district court should consider not only the points listed by the Court but also “any other considerations that would justify adjusting injunctive relief or profits”); cf. Brief of Douglas Laycock, Mark P. Gergen & Doug Rendleman as Amici Curiae in Support of Neither Side at 26–27, *Petrella v. Metro-Goldwyn-Mayer, Inc.* (No. 12-1315) (urging the Court not to treat *eBay* as exhaustively stating equitable principles).

312. Laycock's critique of the law-and-equity distinction remains, and the Supreme Court has not attempted to rebut it. For continued scholarly support for it after *eBay*, see Laycock, *supra* note 166, at 23 n.107 (“*eBay* and *Monsanto* say that district courts must find irreparable injury, but remarkably, they say nothing about what makes an injury irreparable.”); Rendleman, *supra* note 4, at 97 (criticizing “the nonfunctional terminology of separate legal and equitable discretion”); Roberts, *supra* note 4, at 1033 (endorsing Laycock's call to “complete the assimilation of equity”).

Holmesian aphorism that “a page of history is worth a volume of logic.”³¹³ Surely, though, it is better not to have to choose.

The critics of the line between legal and equitable remedies, and of the idea of equitable exceptionalism, have never complained that those notions lack a historical pedigree. Instead, the critics have argued that those notions are merely rhetorical and serve no function in contemporary law. In Daniel Farber’s words, they are “vague generalities about the history of equitable discretion, which courts are fond of reciting.”³¹⁴

To rebut those criticisms and give a justification for its new equity cases, the Court needs to show the value of equity’s past for the present. There are possible starting points. In a growing body of work, Henry Smith has explored the problem of opportunism, and especially the misuse of legal powers and rights in ways that are hard to predict and prohibit in advance.³¹⁵ The solution he explores is “functional equity.” Although Smith does not limit that term to the doctrines that are associated with the Court of Chancery, he nevertheless insists that there is significant overlap between historical and functional equity.³¹⁶ Many traditional equitable doctrines are useful checks on opportunism. For example, the “equitable maxims, defences, and remedial doctrines . . . serve to bolster formal law in the face of misuse by opportunists.”³¹⁷ One way, then, that the Court could justify preserving equitable doctrines is their well-developed capacity for mitigating opportunism.

Another possible justification lies in the interlocking relationship of the rules that remain distinctively equitable in American law.³¹⁸ These categories of equitable rules work together and have a certain logic. First, a legal system needs remedies that order someone to do or not do something. In the United States, those are by and large equitable remedies, such as injunctions, specific performance, and accounting for profits. Second, in order to be effective, those remedies will need to be supported by managerial devices. In the United

313. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).

314. Farber, *supra* note 259, at 545.

315. See Smith, *Why Fiduciary Law Is Equitable*, *supra* note 49; Smith, *Property, Equity, and the Rule of Law*, *supra* note 49.

316. Smith, *Why Fiduciary Law Is Equitable*, *supra* note 49, at 262–63 (“The equitable style of decision-making could be found on both sides of the old law versus equity divide, but, because of its unique role, equity in the Anglo-American tradition did often, and characteristically, reflect the equitable style of decision-making.”).

317. Smith, *Property, Equity, and the Rule of Law*, *supra* note 49, at 226.

318. On the argument sketched in this paragraph, see Bray, *supra* note 49, at 4–8, and see generally Bray, *supra* note 120.

States those, too, are largely equitable—managerial devices such as contempt, modification and dissolution, and equitable helpers (such as masters and receivers).³¹⁹ Third, to mitigate the costs of those remedies and managerial devices, and the risk that they will be abused, there will need to be constraints. Here, too, there are many distinctively equitable doctrines that function as constraints on equitable remedies, including equitable defenses such as laches. These three categories work together as a system, and taking apart that system piecemeal could undermine a set of complements and compromises that simultaneously empower equity while limiting its misuse. In the new equity cases, by insisting on traditional boundaries and content for equitable remedies, the Court has—wittingly or unwittingly—preserved that system of equitable remedies.

Of course there are also lucid criticisms of the distinction between legal and equitable remedies. There has been a long line of what might be called “great anti-equity lawyers”³²⁰—a list that includes William Blackstone, Frederic Maitland, and Peter Birks in England and Zechariah Chafee and Douglas Laycock in America. These critics have argued that equity is not distinctive. Much as Karl Llewellyn famously did with canons of statutory construction,³²¹ they have found a legal parallel for each of equity’s reportedly exceptional features.³²² In the nineteenth century, the Field Codes and the English Judicature Acts fused equity and law in many respects, and ever since the critics have argued against any hint of equitable revanchism.³²³ Their arguments deserve a fuller scholarly response than is possible here. And their arguments deserve some notice by the Court as it continues to chart a contrary course.

319. See Bray, *supra* note 21, at 1123–33 & n.168.

320. The phrase is borrowed from Joshua Getzler, who said “Maitland was not a ‘great equity lawyer’, as we are often told, but perhaps the most sophisticated of the great anti-equity lawyers.” Getzler, *supra* note 30, at 166. Beyond Maitland’s scholarly writings, there is his withering assessment of Chancery in an article for the *Encyclopedia Britannica*: “A court which started with the idea of doing summary justice for the poor became a court which did a highly refined, but tardy justice, suitable only to the rich.” Frederic William Maitland, *English Law, in* ENCYCLOPAEDIA BRITANNICA 563 (1950), reprinted in FREDERIC WILLIAM MAITLAND READER 125, 129 (V.T.H. Delany ed. 1957).

321. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950).

322. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *429–42 (insisting that the only difference between law and equity was “in the forms and mode of their proceedings,” since both courts of equity and courts of law “determine[] according to the spirit of the rule, and not according to the strictness of the letter”).

323. See, e.g., Laycock, *supra* note 4, at 53–54.

VI. CONCLUSION

It has been said that “science advances funeral by funeral.”³²⁴ But sometimes an expected funeral does not happen. Sometimes the planned and widely agreed upon advance is never made. The expected demise of the line between legal and equitable remedies has not occurred. Instead, the U.S. Supreme Court’s new equity cases have preserved that line and the doctrines that constitute it, such as the rule that courts will give equitable relief only if legal relief would be inadequate.

Taken as a whole, the new equity cases are largely evolutionary. The Court has been confronted with statutes authorizing “equitable relief,” and it has had to give that term meaning. It is hard to look to the future of equity; instead the Court has looked to the present and past. The Court has pronounced somewhat novel tests for permanent and preliminary injunctions, yet each part of those tests is traditional in equity. Many themes in the new equity cases were in fact present in its earlier cases, such as the idea that the injunction is an exceptional remedy.³²⁵

Nevertheless, there have been several significant departures, even from the Court’s earlier cases, in the new equity decisions. One is the explicit attention to methodology, and the elaboration of a set of canonical or presumptive sources for defining what was done “in equity.” Another is the pervasive appeal to history and tradition. Yet another departure is the Justices’ willingness to agree on this approach—unlike in the Court’s earliest cases in the new equity jurisprudence and unlike some other bodies of case law where the Court has looked to history and tradition.

But the most significant departure in the new equity cases, and what makes them revolutionary, is not a disjuncture from the Court’s earlier cases. It is the fact that the Court is acting directly contrary to the conventional wisdom in remedies scholarship over the last four decades. In these cases, the Court has preserved the line between legal and equitable remedies, entrenched the irreparable injury rule, and stressed the exceptionalism of injunctions. These changes are already

324. That quotation is often attributed to Max Planck, though it is a paraphrase: “A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.” MAX PLANCK, *A Scientific Autobiography*, in *SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS* 33–34 (Frank Gaynor trans., 1949).

325. *See, e.g.,* *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982).

influencing how the federal courts give injunctions,³²⁶ and they may shape the law of remedies for decades to come.

Yet it is worth reflecting on the Court's frequent invocations of the tradition of equity. What do those invocations really suggest about the vitality of that tradition in the United States? One might look at the spectrum of the opinion writers in these cases and draw the conclusion that the tradition of equity must be hale and hearty. On the other hand, the very need to invoke a tradition can be a sign that it is losing its force.³²⁷ No one knows for sure which one is true here. For now, though, it seems that the chancellor rides again. And if the chancellor is back in the saddle, then his foot is back in the stirrup.

326. This is true whether one thinks of *eBay* as a “legal juggernaut” that has radically redrawn the law of the injunction in the federal courts, Gergen, Golden & Smith, *supra* note 10, at 206; or, less disruptively, as a way the Supreme Court has focused the doctrinal analysis of the lower federal courts and pushed them toward a “more thorough consideration” of the circumstances in which the injunction is given, Janutis, *supra* note 153, at 604–07.

327. See Eric Hobsbawm, *Introduction to THE INVENTION OF TRADITION* 1, 8 (Eric Hobsbawm & Terence Ranger eds., 1983) (“Where the old ways are alive, traditions need be neither revived nor invented.”).