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INTRODUCTION

The role of equity in federal law has sparked significant recent debate. Much ink has been spilled over the appropriate role of the general equity power in federal jurisprudence.[1] Less attention has been paid to the interpretation of statutes explicitly authorizing

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1 *See, e.g.*, Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015); Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213 (2023); John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911 (2022); Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 879 (2023).

equitable remedies. Equity, by its very nature, is a shifting field.[2] In fact, equity came into being precisely because of this need for flexibility, and the role it has played throughout English and American history has been possible solely because of its ability to adapt.[3] Thus, when a statute authorizes equitable remedies but does not specify which remedies, the question of what a judge may permissibly do is not always easy.[4]

In response to this difficulty, the modern Supreme Court has applied a cautiously historical approach to statutory equitable relief, requiring historical analogues before 1789,[5] or at least before the merger of legal and equitable procedure,[6] to any equitable relief granted under a broad authorization of equitable remedies. There have been other approaches considered, but these first two have been dominant in the realm of statutory interpretation.[7]

Contrary to some interpretations, the grant of the equity power to the federal courts in 1789 did not freeze equitable relief as it stood then, nor did the 1938 merger of law and equity courts.[8] It is true that equity began as a far-reaching discretionary power. Originally, the chancellor was empowered to wade into legal disputes and dispense justice according to his own conscience.[9] The intervening centuries, however, have borne witness to a significant formalization of the equity power.[10] While American equity may still appear excessively flexible to cautious common-law judges, it has its own history, and that history limits it just as surely as precedent limits courts of law.[11]

When Justice Gorsuch wrote for the Court in *Whole Woman's Health v. Jackson* that it is the "historical practice" of equity that limits "[t]he equitable powers of federal courts," he was referring to those limits imposed by equitable tradition.[12] The problem is that the Court does not seem certain of what equity's "historical practice" was. As the equitable maxim runs, "[e]quity looks to the intent rather than to the form."[13] Equitable "precedent" has never been concerned with

2 *See infra* notes 46, 58–60 and accompanying text.

3 *See infra* Section I.A.

4 *See infra* Sections II.B–E.

5 *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

6 *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212–13 (2002).

7 *See infra* Part II.

8 *See infra* Section I.C.

9 *See infra* Section I.B.

10 *See infra* Sections I.B–C.

11 *See infra* Sections I.B–C.

12 142 S. Ct. 522, 535 (2021) (citing Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939)).

13 P.V. BAKER & P. ST. J. LANGAN, SNELL'S PRINCIPLES OF EQUITY 40 (28th ed. 1982).

justifying decisions based on careful consideration of whether a precise *form* of relief had been granted.[14] Rather, equity has always been guided by a different consideration: whether a particular case demonstrates the need for an extraordinary form of relief developed by equitable tradition.[15] If the Court is going to limit equity power based on equitable tradition, it must be clear on the traditional nature of equity.

In this Note, I will argue that the approaches to interpretation of statutorily authorized equitable remedies employed by the modern Court are based on misunderstandings of equity. In Part I, I will consider the history of equity and what it teaches us about the modern doctrines. In Part II, I will analyze the approaches of the modern Court and note some alternatives the Court has considered. In Part III, I will address the problem of interpreting statutes authorizing equitable remedies in the context of equity as a whole and offer some suggestions for how best to approach this issue going forward.

I. A SELECTED HISTORY OF EQUITY

A. The Writs

Equity has deep roots. As early as the fourth century BCE, Aristotle wrote of *epiekeia* as a necessary means of correcting overly general laws when they led to unjust results.[16] A similar concept of *aequitas* emerged in Rome, originally to protect foreigners not entitled to the benefits of Roman law and later extended to the general citizenry.[17] While these classical ideas may be quite different from our modern understanding of equity, there is a common thread: a body of law that aspires to universality must have some play in the joints in order to deliver substantial justice.

The modern concept of equity began to emerge in the mid-fourteenth century in response to the writ system of English courts.[18] Under early English law, complaints were made orally before the justices in eyre, itinerant representatives of the king's justice.[19] These oral

14 *See id.*; *infra* Section I.B.

15 *See* LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY' 193 (D.E.C. Yale ed., 1986) ("And now the matter is so settled that it is become a maxim in our books that the Chancery can only relieve in such cases where the party hath no remedy at the Common Law.").

16 *See* ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 1137b–1138a (Martin Ostwald trans., 1962) (c. 384 BCE); JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 114 (5th ed. 2019).

17 *See* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 1–2 (2d ed. 1948).

18 *See* BAKER, *supra* note 16, at 63, 111.

19 *Id.* at 60.

complaints were sufficient to initiate an action.[20] Over time, written bills of complaint emerged to serve the same procedure.[21] These procedures were limited in their availability as a matter of practicality: the itinerant justices in eyre could not sit in every county at once. Should a plaintiff wish to initiate a suit when the justices were elsewhere, he had another option. Writs could be purchased from the king's Chancery to authorize a suit in the Court of Common Pleas or before the King's Bench when the justices in eyre were not sitting in the county where the dispute arose.[22] The writ functioned as a "pass" that gained the plaintiff entry to the court in question.[23] Different purposes required different passes, and the writ system became increasingly complex as time went on.[24]

By the end of the thirteenth century, these writs were the typical mode of entry to the courts.[25] The justices in eyre were on the decline, and writs were standardized and complex, dictating both the substance of a claim and the procedure by which it could be proven.[26] If a plaintiff purchased the wrong writ, he was out of luck. The writ selected included rules for the litigation from the start of the case until its conclusion, and to pursue a different course or seek a different end, the plaintiff would have to start from scratch.[27] Even if the courts had wished to be more flexible, their hands were tied. The writs were no longer merely passes permitting a plaintiff entry. By the fourteenth century, the writs had become positive law, fixing the boundaries of the common law.[28] What began as a way to bypass the justices in eyre had calcified into what Sir John Baker has called "an immutable formulary framework."[29]

Though the Court of Common Pleas and the King's Bench were the primary means by which parties could seek justice, there still remained, as Frederic Maitland wrote, "a reserve of justice in the king."[30]

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20 *Id.*

21 *Id.*

22 *Id.* at 60–61.

23 *Id.* at 61.

24 *See id.*

25 *See id.* at 63 ("[A]s the common law administered in the two benches gradually became the ordinary law of the land, so the law of the land came to be circumscribed by the range and wording of original writs . . . .").

26 *See id.* at 61, 63 ("Formulae which had been drafted for more or less administrative purposes, to authorize the impleading of an adversary before an exceptional royal tribunal, were now seen as defining and delimiting all the rights and remedies known to the common law . . . ." *Id.* at 63.).

27 *See id.* at 63.

28 *Id.*

29 *Id.*

30 F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 3 (A.H. Chaytor & W.J. Whittaker eds., 2d rev. ed. 1936).

In response to the challenges of interacting with this rigid and unforgiving system, some plaintiffs began petitioning the king directly for justice.[31] The king's council would often intervene in these matters, but as the writ system became increasingly formulaic, the council began referring these matters to the king's Chancery, the issuer of the writs.[32] Over time, this function of Chancery developed into a court in its own right, issuing decrees in its own name and not that of the council.[33] Crucially, the chancellors did not see themselves as acting outside of the law, but rather as a corrective force within it.[34] As Maitland put it, "[e]quity had come not to destroy the law, but to fulfil it."[35]

The writ system in the formal courts forced a particular concern with procedure. Courts could not deviate from the strict rules of the writs without jeopardizing the overall fairness of the system. As Baker has written, the writs were "a map of the substantive outlines of the common law," and to deviate from the writs would be to deviate from law.[36] In other words, the Court of Common Pleas and the King's Bench were restricted by the fact that their decisions and procedures had to be universalizable. This resulted in consequences that were sometimes harsh, but those consequences were viewed as necessary to the overall legitimacy of the system.[37] Chancery was able to avoid this difficulty for two reasons. First, Chancery was a "court of conscience."[38] Unlike law judges, who were bound by the formulary framework of the writs, the chancellor was able to "delve into the facts at large," turning his inquiry wherever the circumstances merited.[39] He was then empowered to impose whatever decree "good conscience required."[40] Second, Chancery acted *in personam*.[41] A decree from the chancellor

31 *See* BAKER, *supra* note 16, at 109; MAITLAND, *supra* note 30, at 3 ("Those who can not get relief elsewhere present their petitions to the king and his council praying for some remedy.").

32 *See* MCCLINTOCK, *supra* note 17, at 3–5; BAKER, *supra* note 16, at 109 (noting that this area of early Chancery jurisdiction emerged from "that of the Council, and the chancellor was—by a kind of fiction—deemed to represent 'the king and his council in Chancery'"). This branch of Chancery jurisdiction was referred to as the "English side" or later the "equity side," as compared to the "Latin" or "common law side" where specialized petitions involving the rights of the Crown were considered. MAITLAND, *supra* note 30, at 3–4; *see also* BAKER, *supra* note 16, at 108–10.

33 *See* BAKER, *supra* note 16, at 110.

34 *See id.*

35 MAITLAND, *supra* note 30, at 17.

36 *See* BAKER, *supra* note 16, at 63.

37 *See id.* at 111 ("[B]etter to suffer a mischief than an inconvenience.").

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.* at 112.

only bound the parties to the case; it did not alter or contradict the law.[42]

B. Equitable Reasoning

Originally, Chancery operated purely as a court of conscience.[43] The chancellors, primarily clergymen in Chancery's early days, attempted to apply natural law and good conscience as best they could to the facts of a particular case.[44] Because a Chancery decree only applied to the facts of the case before the chancellor, such decisions were not treated as precedents in future cases.[45] This meant that the chancellor had the flexibility to act as each case demanded without the risk of binding himself or other parties in the future. This flexibility was necessary to ameliorate the harsh effects of the common-law writ framework, but it also enabled the chancellors to handle complex issues for which common-law courts were poorly equipped.[46]

Such extraordinary flexibility raised its own issues, though. Without a guiding framework of principles, Chancery decrees were no more than an expression of a particular chancellor's conscience.[47]

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42 *Id.*

43 *See id.* at 111 (explaining that Chancery "was a court of conscience, in which defendants could be coerced into doing whatever good conscience required, given all the circumstances of the case").

44 *See* MAITLAND, *supra* note 30, at 7–8; BAKER, *supra* note 16, at 111. Early Chancery was not particularly concerned with locating support in external sources, let alone engaging in precedential reasoning. For instance, one fifteenth-century chancellor decided a case according to natural law, citing in support his own direct knowledge of "the law of God." *See* MCCLINTOCK, *supra* note 17, at 6 n.15 (citing YB 4 Hen. 7, fol. 4b., Hil., pl. 8 (1489) (Eng.)).

45 *See* MAITLAND, *supra* note 30, at 8 (explaining that early chancellors "had not considered themselves strictly bound by precedent").

46 *See, e.g.*, MAITLAND, *supra* note 30, at 7 ("[A] system which sends every question of fact to a jury[] is not competent to deal adequately with fiduciary relationships."). The original exclusive jurisdiction of equity was limited to these specialized matters for which the Chancery was particularly well adapted. *See* 4 EDW. COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 84 (London, M. Flesher 1644) ("Three things are to be judged in Court of Conscience: Covin, Accident, and breach of confidence.").

47 The enduring formulation of this criticism is John Selden's:

> Equity is a Roguish thing, for Law we have a measure, know what to trust to, Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the Standard for the measure, we call a Chancellors Foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot. 'Tis the same thing in the Chancellors Conscience.

JOHN SELDEN, TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN ESQ. 18 (London, E. Smith 1689).

Additionally, as Chancery grew in popularity, it clashed with common-law courts jealous of their jurisdictions. In response to the first issue, Chancery began to develop "rules of equity and good conscience" to guide the chancellors, shifting the focus from the conscience of the individual chancellor to something more objective.[48] Though equity retained its flexibility, precedents became as persuasive in Chancery as they were in courts of law.[49] Similarly, the boundaries between equity and law became more rigid. In addition to the limits of equity's traditional exclusive jurisdiction, equity would not relieve in a case where common law offered an adequate remedy.[50] Just as the writs had evolved from flexible alternatives to rigid rules, equity's free-flowing approach hardened into something much closer to common law by the end of the seventeenth century.[51] Even once Chancery became more precedential, though, previous Chancery decisions functioned more as options than as requirements.[52] Equity retained greater discretion than the common law over how to act, and whether to act at all.[53]

C. Equity at the Founding

Equity reached American shores in disjointed fashion. Some colonies maintained the English divide between courts of law and equity, while others merged the powers into singular courts, and still others reserved equitable powers to the legislature.[54] Given this fractured approach to equity, there was some debate at the time of ratification over the federal equity power. In the early colonial days, equitable power

48 MAITLAND, *supra* note 30, at 8. Baker suggests that the vocabulary shift from "conscience" to "equity" is significant: "'[C]onscience' has a fluid, subjective connotation," whereas "equity" pointed at something more objective. BAKER, *supra* note 16, at 115. For evidence of this shift, see Fry v. Porter (1670) 86 Eng. Rep. 898, 902; 1 Mod. 300, 307 (describing equity as "an universal truth").

49 *See* BAKER, *supra* note 16, at 119.

50 *See* MAITLAND, *supra* note 30, at 7 (describing the traditional exclusive jurisdiction of equity as "fraud, accident, and breach of confidence" and noting that a bill in equity was "demurrable for want of equity" if common law offered an adequate remedy).

51 *See* BAKER, *supra* note 16, at 119 ("*Rigor aequitatis* set in, and equity almost lost the ability to discover new doctrines."). This hardening of equity created its own problems. In the mid-seventeenth century, Charles Dickens memorably referred to Chancery as the "most pestilent of hoary sinners . . . mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents . . . ." CHARLES DICKENS, BLEAK HOUSE 12 (Stephen Gill ed., Oxford Univ. Press 2008) (1853).

52 *See* BAKER, *supra* note 16, at 119 ("Guidelines . . . seemed more helpful than rigid rules.").

53 *See id.*

54 *See* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 49–52 (1990).

was generally exercised by royally appointed governors.[55] Over time, colonial legislatures often sought to secure this power to themselves, with mixed results.[56] Conscious of this struggle, the Anti-Federalists were apprehensive of a federal equity power that could potentially grant the new federal judiciary sovereign-like authority over the states.[57] In *Federalist No. 83*, Alexander Hamilton mounted a defense of equity grounded in the extraordinary nature of the power, arguing that "[t]he great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules."[58] Federal equity, governed by principles, "reduced to a regular system," and reserved for "special circumstances," was not a return to antirepublican royal prerogative.[59] It was a necessary consequence of a reality the colonies had long since realized: in some cases, doing justice requires an equity power.[60]

Ultimately, Hamilton's perspective prevailed. Congress codified the scope of equity in the Judiciary Act of 1789, authorizing federal jurisdiction over "suits of a civil nature at common law or in equity," but limiting suits in equity to those where a "plain, adequate and complete remedy" could not be had at law.[61] In the twentieth century, the Federal Rules of Civil Procedure merged legal and equitable procedure into "one form of action"[62] but retained distinct equitable substantive rights and remedies.[63] Over time, much of the substance of equity has been subsumed into law as well.[64] The exception to this has been the field of equitable remedies, which has remained stubbornly distinct.[65] This distinctive character has posed a problem for courts

55 *See id.* at 49–53.

56 *See* MCCLINTOCK, *supra* note 17, at 12.

57 *See* HOFFER, *supra* note 54, at 95.

58 THE FEDERALIST NO. 83, at 426 (Alexander Hamilton) (Ian Shapiro ed., 2009).

59 *Id.* at 426 n.2 (emphasis omitted).

60 *See* HOFFER, *supra* note 54, at 86–87 (explaining that equity powers had reemerged in the states due in part to the recognition that "only equity could supply complete relief").

61 Judiciary Act of 1789, ch. 20, §§ 11, 16, 1 Stat. 73, 78, 82.

62 FED. R. CIV. P. 2.

63 MCCLINTOCK, *supra* note 17, at 15.

64 *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 539–41 (2016).

65 *See, e.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 677–80 (2014) (invoking the distinction between legal and equitable remedies to consider the applicability of laches, an equitable defense); Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999) (considering whether relief was "traditionally accorded by courts of equity"); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212–13 (2002) (inquiring whether a remedy was available at equity in "the days of the divided bench" to determine whether it constituted permissible equitable relief).

seeking to grant equitable relief at a time when equity's distinct nature has faded from the popular consciousness.[66]

II. THE NEW EQUITY

A. The Federal Equity Power

There has been some recent academic interest in where the federal equity power comes from. Owen Gallogly has located the source in Article III: "[O]nce Congress creates federal courts and grants them jurisdiction in equity, those courts are immediately possessed of authority to grant equitable remedies, solely by virtue of their being vested with" the judicial power.[67] Gallogly maintains that the contemporary Court's resistance to free-handed dispensation of equitable remedies by federal courts is a modern shift away from the original and more correct perspective that federal courts have broad equitable remedial powers by "default," and only a clear statement by Congress can curtail those powers.[68] In support of this, Gallogly points to federal courts' willingness to begin issuing equitable remedies in federal question cases as soon as they were granted general federal question jurisdiction by Congress in 1875 without waiting for "specific enabling legislation."[69]

This perspective is particularly interesting in the case of statutory interpretation. If federal courts have "default" equitable remedial power under Article III, and a statute, instead of abrogating that power, explicitly authorizes equitable remedies, it's hard to see how the Court could view Congress as doing anything other than encouraging the courts to exercise their inherent equitable discretion.[70] Gallogly's perspective, however, has been criticized as directly at odds with the Supreme Court's clear and repeated statements that the Judiciary Act of 1789 is the source of federal equity power.[71]

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66 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. a (AM. L. INST. 2011) (pointing out that since "even the most basic concepts of equity have receded from contemporary professional understanding," courts face a challenge in explicating and appropriately imposing equitable remedies).

67 Gallogly, *supra* note 1, at 1278.

68 *Id.* at 1222.

69 *Id.* at 1279.

70 For examples of such authorization, see Bray, *supra* note 1, at 1013 n.76 (collecting statutes authorizing equitable relief).

71 *See* Keenan, *supra* note 1, at 903 & n.186, 905 & n.202 ("Although Article III and § 11 of the Judiciary Act both mention 'equity,' the Supreme Court has consistently cited § 11 as federal equity's source." *Id.* at 903.). Some modern Justices have argued for a more freewheeling interpretation of equitable remedial power within the bounds of the Judiciary Act. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 335–36 (1999) (Ginsburg, J., concurring in part and dissenting in part) ("The Judiciary Act

John Harrison offers another approach, suggesting that equity is best thought of as an "external" body of law, existing outside of the courts in the same way as statutes.[72] Harrison explicitly rejects the idea that federal equity power can be located in Article III.[73] Instead, he suggests, federal courts "find" principles of equity rather than "mak[ing]" them.[74] This evades the creeping positivism of Gallogly's approach and dodges the explicit conflict with Supreme Court precedent, but it creates its own problems. To explain courts' exercise of remedial power, Harrison suggests that they exercise judicial power conferred by Article III to "implement the law of remedies," a distinct and external body of law.[75] Federal courts have "assumed" that their secondhand remedial authority includes equitable remedies, and thus "[u]nwritten federal equity" is "part of the body of norms, external to the courts," that they are empowered to apply.[76]

This approach renders American equitable tradition largely irrelevant. Without any starting gun, such as the Judiciary Act of 1789 or the ratification of the Constitution, domestic equitable tradition has no greater claim on federal judges than the equity tradition of any other common-law jurisdiction. Harrison acknowledges this, noting that since the Constitution did not fix rules for equitable remedies, Founding-era equity plays less of a role than the modern Court or scholars like Gallogly believe.[77] But he maintains that since the judicial power conferred by Article III is a prerequisite for exercise of equitable remedial power, American legal tradition does play some role in shaping the permissible development of equity.[78]

Neither of these explanations is compelling, but it's easy to understand why Gallogly, Harrison, and others are casting about for a better theory of the federal equity power. The Judiciary Act of 1789 does not provide a particularly useful description of the equity power of federal courts,[79] leaving the modern Court to attempt a reconciliation of

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of 1789 gave the lower federal courts jurisdiction over 'all suits . . . in equity,'" *id.* at 335 (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78), but "[s]ince our earliest cases, we have valued the adaptable character of federal equitable power," *id.* at 336 (citing Seymour v. Freer, 75 U.S. (8 Wall.) 202, 218 (1869); and Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944))). But no member of the modern Court has endorsed Gallogly's broader theory that the federal equity power can be derived directly from Article III.

72 Harrison, *supra* note 1, at 1914.

73 *Id.*

74 *Id.*

75 *Id.* at 1916.

76 *Id.* at 1922.

77 *See id.* at 1923.

78 *See id.*

79 *See supra* text accompanying note 61. The Act granted the newly created federal courts "original cognizance" over suits in equity, Judiciary Act of 1789, ch. 20, § 11, 1 Stat.

English legal history, Founding-era debates, and its own sometimes-inconsistent equity precedent.

B. Equitable Originalism

The confusion surrounding equity has created a methodological fog that is hard to cut through in a principled way. Samuel Bray has described the resurgent interest in equity on the Court since the late 1990s as "the new equity,"[80] and identified *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*[81] as the beginning of this equity revival.[82] Riley Keenan has offered a useful framing of the modern Court's approach, dividing the "new equity" period into two phases: equitable originalism and equitable traditionalism.[83] I will offer some thoughts on those two phases and discuss two new lenses through which to consider statutorily authorized equitable remedies: equitable maximalism and rolling equity.

The first phase of the new equity was equitable originalism. Beginning with *Grupo Mexicano*, the Court set its equity jurisprudence on an aggressively historical tack. In that case, Grupo Mexicano de Desarrollo, a Mexican holding company on the verge of financial ruin, sought to restructure its debt by transferring its only substantial assets to a select number of creditors.[84] One creditor left out of this arrangement brought suit, seeking damages and a preliminary injunction to bar the holding company's disbursement of assets.[85] After the district court granted the preliminary injunction, Grupo Mexicano de Desarrollo appealed, claiming in part that an asset-freezing preliminary injunction was outside the authority of the court because such injunctions exceeded the federal courts' equity power.[86]

Faced with defining the limits of the federal equity power, the Court found that "the equity jurisdiction of the federal courts is 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, 1789."[87] Since "the Judiciary Act of 1789 did not include the power to create remedies previously unknown to

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73, 78, but did little to define that equity power beyond limiting it to suits where no "plain, adequate and complete remedy may be had at law," *id.* § 16, 1 Stat. at 82.

80 Bray, *supra* note 1, at 1009, 997–98.

81 527 U.S. 308 (1999).

82 Bray, *supra* note 1, at 1009; Keenan, *supra* note 1, at 894.

83 *See* Keenan, *supra* note 1, at 894–902.

84 *Grupo Mexicano*, 527 U.S. at 310, 312.

85 *Id.* at 312–13.

86 *Id.* at 317–18; *see also* Keenan, *supra* note 1, at 894–95 (summarizing argument).

87 *Grupo Mexicano*, 527 U.S. at 318 (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).

equity jurisprudence," the Court concluded that a remedy lacking an analogue in equity before 1789 was inappropriate.[88] As the asset-freezing preliminary injunction sought in *Grupo Mexicano* was "historically unavailable from a court of equity," the Court found that the district court lacked authority to grant it.[89] In doing so, the Court leaned on its "traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress."[90]

This is a misuse of history.[91] For one thing, as Justice Ginsburg noted in her *Grupo Mexicano* opinion, the federal equity power has always had an "adaptable character."[92] While Ginsburg's criticisms of "antiquarian inquiry"[93] into the historical availability of equitable remedies may be an overcorrection, the majority's attempt to freeze federal equity in 1789 disregards a string of early federal precedents declining to do so.[94]

For another, this approach disregards the nature of the English equity practice which supposedly forms the basis for the historical inquiry. English equity itself did not employ anything resembling the painstaking factual analogizing the *Grupo Mexicano* Court engaged in. It is true that the eighteenth-century Chancery recognized precedent as persuasive, but that is not the same thing as the strict historical analogical approach employed here.[95] Compared to English legal courts, English Chancery looked to precedent for guidance, not permission.

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88 *Id.* at 332. The Court went on to quote Joseph Story at length, leveling the ancient criticism of equity:

> If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superceding the law, and of enforcing all the rights, as well as charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised.

Id. (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 19, at 21 (Boston, Hilliard, Gray & Co. 1836)).

89 *Id.* at 333.

90 *Id.* at 329.

91 For a more sustained criticism along these lines, see Keenan, *supra* note 1, at 895–96.

92 *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part).

93 Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 233–34 (2002) (Ginsburg, J., dissenting).

94 *See, e.g.*, Riddle & Co. v. Mandeville, 9 U.S. (5 Cranch) 322, 330–31 (1809); Thomas v. Weeks, 23 F. Cas. 978, 980 (C.C.S.D.N.Y. 1827) (No. 13,914); Philips v. Crammond, 19 F. Cas. 497, 499 (C.C.D. Pa. 1810) (No. 11,092).

95 *See supra* Section I.B. For an argument that the Framers would not have objected to imposition of equitable remedies without explicit congressional authorization, see Gallogly, *supra* note 1, at 1261–62 ("[N]o commentator even intimated that the courts would

This was also the understanding of the Framers. While they recognized that equity must remain an extraordinary remedy, the chief concern of those objecting to a federal equity power was that the lack of American equitable precedent would permit courts to veer into the conscience-driven early English mode of chancery.[96] In response to this, Hamilton argued that the American judiciary would be "bound down by strict rules and precedents" in law and equity.[97] Equity, as the Framers understood it, had been "reduced to a regular system" of principles.[98]

It was this system of principles that the American judiciary inherited, not a discrete set of options circumscribed by precedent, and early federal judges treated it that way. Take, for example, the 1809 case of *Riddle & Co. v. Mandeville*, where the Supreme Court considered whether a promissory note, unassignable at law, could be treated as assigned by implication in a court of equity.[99] Complicating matters was the bankruptcy of an intermediate endorser of the note, which "defeated" the potential for a remedy at law.[100] Unlike the *Grupo Mexicano* Court, the *Riddle & Co.* Court did not proceed by seeking analogues in prior equity practice. Instead, the Court sought to determine whether there was any reason that "such an interest should not, as well as an interest in any other *chose in action*, be transferible in equity."[101] Finding none, the Court noted that "equity will of course afford a remedy"[102] in such a situation and held that "a right exists in the holder of a promissory note, at least where he cannot obtain payment at law, to sue a remote endorsor in equity."[103] In essence, the Court was concerned not with whether equity had offered this particular relief before, but with whether the plaintiffs possessed an "equitable interest."[104] Once the plaintiffs' equitable interest was established, it was

not have any power to grant equitable remedies without specific congressional authorization." *Id.* at 1262.).

96 *See* Gallogly, *supra* note 1, at 1284–89; THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Ian Shapiro ed., 2009).

97 THE FEDERALIST NO. 78, *supra* note 96, at 397.

98 THE FEDERALIST NO. 83, *supra* note 58, at 426; *see also* Letter from the Federal Farmer No. XV (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 322 (Herbert J. Storing ed., 1981) ("The word equity, in Great Britain, has in time acquired a precise meaning—chancery proceedings there are now reduced to system . . . ."). The original approach of federal courts sitting in equity reflected this understanding. Courts used English equity as a "baseline," providing "the principles that early federal judges applied to answer questions of first impression." Gallogly, *supra* note 1, at 1303.

99 *Riddle & Co.*, 9 U.S. (5 Cranch) at 328–29.

100 *Id.* at 330.

101 *Id.* at 331.

102 *Id.*

103 *Id.* at 332–33.

104 *Id.* at 331.

obvious to the Court that a right to vindicate that interest must exist in equity, even if that right had not been previously identified.

Consider also the 1810 case of *Philips v. Crammond*, where the federal circuit court for the District of Pennsylvania took up the question of whether a resulting trust arose when one member of a partnership paid for a parcel of land out of joint funds but took conveyance of the land personally.[105] The *Philips* court began with the "general principle" that a resulting trust arises when a party's fiduciary uses funds held in trust to purchase land, but takes conveyance of the land personally.[106] From this principle, the court reasoned that a resulting trust arises when a member of a partnership purchases land with jointly held funds but takes personal conveyance.[107] As in *Riddle & Co.*, the first and crucial step of the court was not to seek out prior analogues, but rather to establish the relevant principle of equity. Once that principle had been established, the *Philips* court was perfectly willing to recognize a resulting trust in a novel context. As *Riddle & Co.* and *Philips* demonstrate, early federal judges were restrained by the principles of equity, not the factual details of past equitable practice.

To restrict the federal equity power to direct analogues in 1789 and before is to disregard the heritage of English equity, the understanding of the Framers before ratification, and the practice of federal judges immediately thereafter. Equitable originalism may appear to be grounded in history, but in reality it is a distortion of history.

C. Equitable Traditionalism

The next phase, equitable traditionalism, doesn't solve the problem, but it draws nearer to the mark. This approach first emerged in *Great-West Life & Annuity Insurance Co. v. Knudson*.[108] Janette and Eric Knudson had previously settled a tort suit stemming from a car crash.[109] They were participants in a health insurance plan administered by Great-West, and Great-West sued to recover money expended on Janette's health expenses.[110] Great-West specifically sought equitable remedies: either restitution in its equitable form or an injunction requiring payment.[111] At the center of the case was the text of ERISA, which authorizes federal courts to "enjoin" insurance violations and to

105 *See* Philips v. Crammond, 19 F. Cas. 497, 499 (C.C.D. Pa. 1810) (No. 11,092).

106 *Id.*; *see also* Thomas v. Weeks, 23 F. Cas. 978, 980 (C.C.S.D.N.Y. 1827) (No. 13,914) (relying on "principles well settled in this country and in the English chancery" to determine propriety of injunction).

107 *Philips*, 19 F. Cas. at 499.

108 534 U.S. 204 (2002).

109 *Id.* at 207.

110 *Id.* at 207–08.

111 *Id.* at 208.

provide "other appropriate equitable relief."[112] Justice Scalia for the Court dispensed with the request for an injunction by noting that "an injunction to compel the payment of money past due under a contract . . . was not typically available in equity."[113] Great-West's request for restitution under the statutory authorization of "other appropriate equitable relief,"[114] however, prompted the Court to consider whether restitution was available in equity "[i]n the days of the divided bench."[115] This focal shift from 1789 to the merger of law and equity in 1938 suggests an acknowledgment on the part of the Court that equity was not frozen in time when the Judiciary Act was passed.[116]

Initially, it seems that the key difference between *Grupo Mexicano*'s pre-1789 approach and *Great-West*'s pre-1938 approach is the presence of a statute. While the Court in *Grupo Mexicano* sought to delimit the general federal equity jurisdiction, the *Great-West* Court was engaged in a narrower inquiry: what remedies are greenlit by a statute authorizing equitable remedies? Yet the Court has gone on to apply the equitable traditionalism in *Great-West* to cases involving general federal equity jurisdiction, suggesting that traditionalism has supplanted originalism in the broader realm of federal equity.[117] And there is something more complicated going on here than merely moving the goalposts from 1789 to 1938. By shifting the zone of historical inquiry from eighteenth-century Chancery to "the days of the divided bench," the Court is acknowledging that American development of equity, particularly in the area of remedies, is valid. No longer is the federal equity power pinned, immutable, to 1789. Tradition, not origin, governs, and tradition, unlike origin, can change.

It may be argued that equitable traditionalism is particularly well suited to cases of statutory interpretation. As Blackstone wrote, "terms

112 *Id.* at 209 (quoting 29 U.S.C. § 1132(a)(3) (1994)).

113 *Id.* at 210–11.

114 29 U.S.C. § 1132(a)(3)(B) (1994).

115 *Great-West*, 534 U.S. at 212.

116 The Court has continued to follow this line of reasoning in ERISA cases and has expanded it to Securities and Exchange Act cases as well. *See* Liu v. SEC, 140 S. Ct. 1936, 1942 (2020) (considering whether an SEC order "falls into 'those categories of relief that were *typically* available in equity'" (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993))); Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 142 (2016) (considering "what equitable relief was typically available in *premerger equity courts*" (emphasis added) (citing *Great-West*, 534 U.S. at 217)); US Airways, Inc. v. McCutchen, 569 U.S. 88, 94–95 (2013) (focusing on "the days of 'the divided bench,' before law and equity merged" (quoting *Mertens*, 508 U.S. at 256)); CIGNA Corp. v. Amara, 563 U.S. 421, 439 (2011) (considering "'categories of relief' that, traditionally speaking (*i.e.*, *prior to the merger of law and equity*), 'were *typically* available in equity'" (first emphasis added) (quoting Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 361 (2006))).

117 *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021) (considering cases after 1789 but before 1938 for evidence of "traditional" equity).

of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science."[118] The phrase "equitable remedy" is undoubtedly such a term of art, especially given the complexity of defining "equity" in a legal context.[119] But equity by its very nature is fluid. When Justice Ginsburg wrote of the "adaptable character" of equity in *Grupo Mexicano*, she was describing not just what American equity has done, but what it is.[120] Instead of attempting to capture equity at a particular moment in time and reason from that frame of reference, equitable traditionalism accepts equity as something that adapts and changes, and in that respect does the term of art greater justice.

If equitable originalism closes the door on the development of equitable remedies in federal court, equitable traditionalism opens it a crack. The Court, in employing equitable traditionalism, has only considered pre-1938 American cases as evidence of the development of equitable doctrine.[121] There is, however, no clear reason why the Court should stop at that year.[122] The promulgation of the Federal Rules of Civil Procedure fused legal and equitable procedure, but the substance of equity was permitted to remain separate and to develop along its own path.[123] Yet it was precisely this open-endedness that concerned Justice Scalia, writing for the Court in *Great-West*. Wary of introducing a "high degree of confusion" into the statutory term "equity," he was unwilling to permit a "rolling revision of its content."[124] The compromise, as always, was between excess discretion and rigid formalism. Freezing equity in 1789 may be destructive to the fundamental character of equity, but permitting equity to slip back into

118 1 WILLIAM BLACKSTONE, COMMENTARIES *59.

119 *See infra* Section III.A.

120 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part). Samuel Bray has applauded this characterization of equity, noting that the Justice "gets the description of equity right—not just the words but the music." Bray, *supra* note 1, at 1012.

121 *See Great-West*, 534 U.S. at 212 (referring to the "days of the divided bench" as the appropriate zone of historical inquiry); *Sereboff*, 547 U.S. at 363 ("Our case law from the days of the divided bench confirms that Mid Atlantic's claim is equitable."); *CIGNA Corp.*, 563 U.S. at 439 (considering cases prior to the merger of law and equity relevant to whether relief was available in equity); *US Airways, Inc.*, 569 U.S. at 94–95 (focusing on caselaw prior to merger of law and equity).

122 *But see* Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 142 (2016) (interpreting "days of the divided bench" to mean "the period before 1938 when courts of law and equity were separate"). This interpretation of "days of the divided bench" focuses the Court on the period prior to 1938, but it does not entirely foreclose consideration of the substantive development of equity since then.

123 *See* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 678–80 (2014); *Grupo Mexicano*, 527 U.S. at 318–19; Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949).

124 *Great-West*, 534 U.S. at 217.

something more like the early English court of conscience carries its own clear risks. The clearest lesson of the shift from equitable originalism to equitable traditionalism may be that freezing equity in time will choke the life out of it, but it also cannot be allowed to grow uninhibited. The garden must be tended; there must be a limiting principle.

D. Equitable Maximalism

One clear alternative to equitable traditionalism is the approach articulated by Justice Ginsburg's dissent in *Great-West*, which I will call equitable maximalism. In *Great-West*, the critical question was whether the brand of restitution sought by the petitioner was equitable in nature.[125] The Court sought to answer that question by determining whether the petitioner could have been granted relief of this nature in the days of the divided bench.[126] Justice Ginsburg was dismissive of this "antiquarian inquiry," pointing out that at the time ERISA was drafted, the days of the divided bench were "a fading memory."[127] Critical to her reasoning was the fact that it would be "fanciful to attribute to Members of the 93d Congress" familiarity with the distinctions between equitable and legal remedies before the merger.[128] She argued that Congress had no intention of "strap[ping ERISA] with the anachronistic rules on which the majority relies," and therefore there was no risk of the Court disregarding a legislative choice by failing to conduct a historical inquiry into the days of the divided bench.[129] Better, she believed, to ask whether relief of the "character" requested was "*typically* available in equity"[130] than to revive "recondite distinctions" that Congress almost certainly did not have in mind when drafting the statute.[131]

Justice Ginsburg's thinking was seemingly driven by her belief in the fundamental flexibility of equity. In this case and elsewhere she quoted long strings of precedent to drive home the point that equity is not a static thing but a set of doctrines that bend and adapt, especially when backed by a clear expression of legislative intent.[132] But in

125 *See id.* at 224 (Ginsburg, J., dissenting).

126 *See id.* at 212–16 (majority opinion).

127 *See id.* at 224, 233–34 (Ginsburg, J., dissenting).

128 *Id.* at 225.

129 *Id.* at 225–26.

130 *Id.* at 228 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

131 *Id.* at 228.

132 *See id.* at 228 ("Equity eschews mechanical rules; it depends on flexibility." (quoting Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)); *id.* ("[T]here is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature." (quoting Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960)); Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and

her eagerness to do justice to the "character" of equity, she suggested that all that is needed for a party to get into equity is for it to request a remedy that is substantively equitable.[133] As the majority noted, an approach that "looks only to the nature of the relief and not to the conditions that equity attached to its provision" permits a near-complete uncoupling of the remedy from its equitable heritage.[134] Viewed through that lens, it is easy to see how Justice Ginsburg reached the conclusion that the distinction between law and equity is "recondite" in this context.[135] If all that matters is whether the substance of the relief falls into the bucket of remedies given by equity courts, then "equitable" really is just a label applied to a set of remedies which may share characteristics but cannot be considered a system.

This equitable maximalism tips too far toward unchecked discretion. While equity may be flexible, it is still "equity" that is doing the flexing. There is a system here, not just a loose collection of useful remedies. Justice Scalia's response is well-taken: "Like it or not . . . that classification and distinction [between law and equity] has been specified by the statute," and "equitable remedies" must mean something more than any remedy that may claim some equitable substance.[136] Beyond that, though, the very nature of federal equity power incorporates the old restraints on equity that were inherited at the time of the Founding.[137] The equity Justice Ginsburg described is closer to the "[r]oguish thing"[138] of Selden's famous criticism than the "regular system"[139] of principles "bound down by strict rules and precedents"[140] that the Framers imported into the judiciary of their fledgling republic. Setting aside the question of whether such a change is even

dissenting in part) ("[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties." (alterations in original) (quoting Seymour v. Freer, 75 U.S. (8 Wall.) 202, 218 (1869))); *id.* ("Flexibility rather than rigidity has distinguished [federal equity jurisdiction]." (alteration in original) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944))); *id.* ("We have also recognized that equity must evolve over time, 'in order to meet the requirements of every case . . . .'" (quoting Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co., 163 U.S. 564, 601 (1896))).

133 *See Great-West*, 534 U.S. at 228 (Ginsburg, J., dissenting) ("I would look to the substance of the relief requested . . . .").

134 *Id.* at 216 (majority opinion).

135 *Id.* at 228 (Ginsburg, J., dissenting).

136 *Id.* at 217 (majority opinion); *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 258 n.8 (1993) ("'Equitable' relief must mean *something* less than *all* relief.").

137 *See supra* Section I.C.

138 SELDEN, *supra* note 47, at 18.

139 THE FEDERALIST NO. 83, *supra* note 58, at 426 n.2.

140 THE FEDERALIST NO. 78, *supra* note 96, at 397.

permissible under the Judiciary Act, the history is clear: equity unchecked will not long remain an instrument of justice.[141]

E. Rolling Equity

Mertens v. Hewitt Associates,[142] decided six years before *Grupo Mexicano*, suggests one more interpretive approach: defining the equitable relief available with reference to the year the statute was enacted. While this approach does not seem to have gained any traction, it's worth mentioning because it illustrates the difficulties in pinning down the equitable relief authorized by any given statute.

Mertens is another ERISA case. As in *Great-West*, the petitioners sought equitable relief under ERISA section 502(a)(3), with the same negative result.[143] Unlike *Great-West*, *Mertens* was not decided in the shadow of *Grupo Mexicano*, and thus the reasoning was less concerned with the particularities of history or tradition than *Great-West* would be. The Court, speaking through Justice Scalia, clarified that "'[e]quitable' relief must mean *something* less than *all* relief,"[144] prefiguring the debates between Justice Scalia and Justice Ginsburg in *Grupo Mexicano* and *Great-West*. But there was no fixation on 1789, and the "memories of the divided bench" were only brought up to make the point that they were "reced[ing] further into the past" and thus less relevant now for interpretive purposes.[145] Instead, the Court took issue with the dissent's "confident assertion that punitive damages 'were not available' in equity," pointing out that this "simply does not correspond to the state of the law when ERISA was enacted."[146] This is particularly interesting considering Justice Scalia penned both this opinion and the majority opinions in *Grupo Mexicano* and *Great-West*, in which latter cases he made it abundantly clear that the current state of equity is far less relevant than the state of equity in 1789 or in the days of the divided bench.

There are two ways to look at this. The first is that Justice Scalia and the Court simply changed their minds.[147] Perhaps, after taking a half step down a path that would require a distinct historical analysis for every equitable remedy during every year a statute authorizing equitable remedies was enacted, the Court retreated with a shudder and

141 *See supra* Sections I.B–C.

142 508 U.S. 248 (1993).

143 *Id.* at 250, 263.

144 *Id.* at 258 n.8.

145 *Id.* at 256.

146 *Id.* at 257 n.7 (quoting *id.* at 270 (White, J., dissenting)).

147 *Cf.* WALT WHITMAN, SONG OF MYSELF 180 (Ed Folsom & Christopher Merrill eds., Univ. Iowa Press 2016) (1881) ("Do I contradict myself? / Very well then I contradict myself, / (I am large, I contain multitudes.)").

carefully posted "DANGER" signs in subsequent opinions.[148] It may also have struck the Court as problematic to adopt one mode of equitable inquiry in statutory interpretation cases and another in cases where equitable relief was sought without statutory authorization. If it would be prohibitively difficult to ascertain the state of equitable remedies at the time of a statute's enactment, it would be even harder to adopt a similar time-based approach to cases lacking a convenient date.

Alternatively, it may be that Justice Scalia was describing two different things in *Mertens* and *Great-West*. In *Mertens*, the United States weighed in as an amicus curiae, suggesting that any relief traditionally obtained in courts of equity could be considered "equitable relief" for interpretive purposes.[149] Justice Scalia was clearly seeking to distinguish the definition of "equitable relief" as "whatever relief a court of equity is empowered to provide" from "equitable relief" as "those categories of relief that were *typically* available in equity" in *Mertens*.[150] Perhaps he didn't mean to imply that such typical equitable remedies were defined by those available at the enactment of ERISA, but rather that the law at the time of ERISA's enactment was settled regarding remedies typically available at equity. But this is tortured. It's best to bite the integrative bullet and treat this suggestion of rolling equity in *Mertens* as a false step on the road to *Grupo Mexicano* and equitable originalism.

III. THE PECULIAR PROBLEM OF STATUTES

A. Defining Equity

Even without examining the progression of equitable originalism and traditionalism, it's clear that interpreting a statutory authorization of equitable remedies poses some particular challenges. For one thing, equity is "notoriously" difficult to define.[151] In fact, it is near standard in modern treatises to preface any section on equity with a note on this difficulty.[152] Henry Smith has described it as "law about law, or meta-

148 *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002) ("What *will* introduce a high degree of confusion into congressional use (and lawyers' understanding) of the statutory term 'equity' is the *rolling revision of its content* contemplated by the dissents." (second emphasis added)).

149 Brief for the United States as Amicus Curiae at 9 n.12, *Mertens*, 508 U.S. 248 (No. 91-1671).

150 *Mertens*, 508 U.S. at 256.

151 Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2048 (2020) (referring to the term "equity" as "notoriously ambiguous").

152 *See, e.g.*, DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 24 (1st ed. 1973) (referring to several definitions that the word equity "may" mean and noting difficulty of identifying equitable doctrines); BAKER & LANGAN,

law."[153] Writing in 1948, ten years after the federal merger of legal and equitable procedure, Henry McClintock located two definitions:

> (a) . . . the power to meet the moral standards of justice in a particular case by a tribunal having discretion to mitigate the rigidity of the application of strict rules of law so as to adapt the relief to the circumstances of the particular case[, or]
>
> (b) . . . the system of legal materials developed and applied by the court of chancery in England and the courts succeeding to its powers in the British Empire and the United States.[154]

Samuel Bray breaks the term out further into three general categories: "1. The recognition of an exception to a general rule," "2. [a] moral reading of the law," or "3. [t]he doctrines and remedies developed by courts possessing equitable jurisdiction, especially the English Court of Chancery."[155] How, then, to interpret such a "slippery"[156] term in the context of a statute?[157]

Henry Smith's definition may be the most helpful here. Equity, simply put, is "law about law."[158] So when a statute authorizes equitable remedies, it essentially shifts the remedial conversation from the realm of tort law or contract law or whatever body of law applied initially into the realm of equity, a more rarefied but no less "lawish" area of law.

B. Interpreting Statutes

Picture a dispute with a customer service representative. When the representative reaches the limit of their ability to help, they may "escalate" the call. Someone else comes on the line, who, in theory, is in possession of a different set of tools and authorizations with which to solve your problem. The system doesn't work if every call gets

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supra note 13, at 5, 7 (acknowledging that "[s]ome attempt must be made to define the subject matter of this book," *id.* at 5, but noting that since equity must be considered with reference to "form and history as well as substance or principle," such an attempt poses challenges, *id.* at 7); PHILIP H. PETTIT, EQUITY AND THE LAW OF TRUSTS 1 (5th ed. 1984) (accepting that equity is "not really possible to define . . . successfully; it can only be described by giving an inventory of its contents or in . . . historical terms").

153 Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1054 (2021).

154 MCCLINTOCK, *supra* note 17, at 1.

155 Samuel L. Bray, A Student's Guide to the Meanings of "Equity" 1 (Apr. 7, 2021) (unpublished manuscript), https://ssrn.com/abstract=3821861 [https://perma.cc/XA4A-5ZMX].

156 *Id.*

157 The dictionary, a first stop for many modern judges, does not avail. Equity is first defined by the *Oxford English Dictionary* as "[t]he quality of being equal or fair; fairness, impartiality; evenhanded dealing." *Equity*, 5 OXFORD ENGLISH DICTIONARY 358 (2d ed. 1989). *Black's* is hardly better, listing no less than nine definitions for the word. *See Equity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

158 Smith, *supra* note 153, at 1054.

escalated, so the initial representative has to be judicious. Escalation is a sort of extraordinary remedy.

In the case of statutes authorizing equitable remedies, potential escalation is baked in. Congress has determined that certain situations may merit extraordinary remedies and has authorized judges facing those situations to grant equitable relief. This does not mean that judges are free to do whatever they want. There is no return to a court of conscience. Instead, judges are restricted by both American equitable precedent and the principles and traditions of equity. As Bray has noted, "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."[159] Equitable remedies and equitable relief are "unmistakably technical terms,"[160] and courts continue to divide remedies into legal and equitable categories "not merely from habit, but because that classification is required by law."[161] The fundamental question for the courts is which remedies qualify as equitable.[162]

Within those guardrails, though, courts must have the flexibility to solve the problem. One thread that runs through American and English equitable tradition is adaptability.[163] As "adjectival"[164] law, equity must always respond to law, which in turn does not account for equity.[165]

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159 Bray, *supra* note 1, at 1014. Although Bray does not use this phrase, he is referring to what I have called equitable maximalism above.

160 *Id.*

161 Bray, *supra* note 64, at 542.

162 *See* Bray, *supra* note 1, at 1014.

163 *See* Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 486; 1 Chan. Rep. 1, 6 ("The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."); Seymour v. Freer, 75 U.S. (8 Wall.) 202, 218 (1869) ("[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("Flexibility rather than rigidity has distinguished [federal equity jurisdiction]."); Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co., 163 U.S. 564, 601 (1896) ("[Equity must evolve over time] in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed." (quoting 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 111 (San Francisco, Bancroft-Whitney Co. 2d ed. 1892))).

164 Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1782, 1782–85 (2022).

165 *See* Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 ("And be it further enacted, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.").

Since equity functions in the background of law, it must be able to do what law cannot in order to fulfill its role in the system.[166] Recall the customer service representative. If there's no real difference between the capacity of the first representative and their superior to help you with your problem, escalation serves no purpose.

This need for flexibility is a functional argument against equitable originalism in general, but it cuts particularly keenly in the context of statutory authorizations. To halt the development of equity in 1789 and require any federal court sitting in equity to analogize strictly to eighteenth-century English precedent would cripple equity. Equity exists to step into the breach when law has failed, and if equity cannot flex and adapt to novel circumstances, it has no point.[167] What's more, federal courts have developed equity since 1789,[168] and to some degree since 1938.[169] Equity adapts. In order to remain equity, it has to.[170]

CONCLUSION

So where does this leave a judge attempting to interpret a statute authorizing an equitable remedy? Should she restrict herself to the remedies available in equity before 1789, as required by equitable originalism? Before 1938, as suggested by equitable traditionalism? At the time of the statute's enactment, as hinted at by rolling equity? Or are there hardly strictures at all, as implied by equitable maximalism? The Court has very clearly held that an authorization of equitable

166 This has been the traditional view of equity. See Baker's characterization of late-medieval chancellors as "reinforcing the law, by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment," BAKER, *supra* note 16, at 110, or Maitland's more poetic phrasing, "Equity had come not to destroy the law, but to fulfil it," MAITLAND, *supra* note 30, at 17.

167 This is likely the basis of Justice Ginsburg's criticism of "antiquarian inquiry" in *Great-West*. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 233–34 (2002) (Ginsburg, J., dissenting). If equity is so overcome by "[*r*]*igor aequitatis*" that it cannot adapt, then the categorical value of equitable remedies depreciates significantly. BAKER, *supra* note 16, at 119. Yet, as discussed above in Section II.D, equitable maximalism takes a cleaver to a problem that requires a scalpel.

168 *See, e.g.*, Riddle & Co. v. Mandeville, 9 U.S. (5 Cranch) 322, 330–31 (1809); Thomas v. Weeks, 23 F. Cas. 978, 980 (C.C.S.D.N.Y. 1827) (No. 13,914); Philips v. Crammond, 19 F. Cas. 497, 499 (C.C.D. Pa. 1810) (No. 11,092).

169 *See, e.g.*, R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500–01 (1941) (finding policy concerns relevant in determining whether an injunction is appropriate).

170 *Cf.* GILBERT K. CHESTERTON, ORTHODOXY 212 (1908) ("If you leave a thing alone you leave it to a torrent of change. If you leave a white post alone it will soon be a black post. If you particularly want it to be white you must be always painting it again; that is, you must be always having a revolution. Briefly, if you want the old white post you must have a new white post.").

remedies is not a blank check for judges to fill in as they see fit.[171] But in *Great-West*, the Court did not *restrict* interpretation of statutory equitable authorizations to those equitable remedies that existed prior to 1938. Rather, Justice Scalia reasoned that such interpretations must be bounded by a clear sense of what was "traditionally available in equity."[172] And equity, as Lionel Smith has written, "is not a single thing."[173] It is more like a "unique conceptual toolkit" for judges who seek to resolve disputes between parties that strain the seams of regular law.[174] So when a statute authorizes equitable remedies, it is importing a term that is complex and multifaceted, not a clear set of precedential boundaries. In essence, in order to abide by "traditional equitable principles"[175] when interpreting statutory grants of authority, judges must be permitted some flexibility to develop equity.

To determine the limits of that flexibility, judges should look to tradition, but not in the way equitable originalism or current equitable traditionalism suggests. Those approaches employ tradition as a razor: remedies are permissible or impermissible based on whether or not they were available at a fixed period in history. Equitable traditionalism is better than equitable originalism, but it still applies the razor of "the days of the divided bench," which oversimplifies the tradition of equity. Courts should instead use tradition like a lens, seeking out traditional focal points of equity for guidance on the implementation of its doctrines. Equity has always walked a fine line between unchecked discretion and *rigor aequitatis*.[176] Courts should hew closely to equitable precedent to avoid slipping into equitable maximalism, but they should not be afraid of using tradition to justify doctrinal development when necessary to preserve the fundamental adaptive nature of equity.

In practice, such an approach might look something like a middle ground between the equitable traditionalism of the majority in *Great-West* and the equitable maximalism of Justice Ginsburg's dissent in that case. Borrowing the facts of *Great-West*, here is a rough outline of how this careful doctrinal development might be done:

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171 *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 258 n.8 (1993) ("'Equitable' relief must mean *something* less than *all* relief."); *Great-West*, 534 U.S. at 210 (characterizing the *Mertens* standard as rejecting "a reading of the statute that would extend the relief obtainable . . . to whatever relief a court of equity is empowered to provide in the particular case at issue").

172 *Great-West*, 534 U.S. at 216. This seems to have become the general approach of the Court to the general equity power as well. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021) (affirming that federal courts are restricted by "traditional equitable principles").

173 Lionel Smith, *Equity Is Not a Single Thing*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 144, 146 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020).

174 *Id.* at 148.

175 *Whole Woman's Health*, 142 S. Ct. at 535.

176 *See* BAKER, *supra* note 16, at 119.

In his *Great-West* opinion, Justice Scalia reaffirmed the holding in *Mertens* that "'equitable relief' . . . must refer to 'those categories of relief that were *typically* available in equity.'"[177] For the Justice, the crux of the issue was whether the claim for restitution in *Great-West* was typically available in equity or not. In answer to this question, he found that in the days of the divided bench, "a plaintiff could seek restitution *in equity*" only when the assets at issue "could clearly be traced to particular funds or property in the defendant's possession."[178] Since the funds sought in restitution were "not in respondents' possession," Justice Scalia determined that the claim in *Great-West* was not equitable, and thus not authorized under ERISA.[179]

This is where the *Great-West* mode of equitable traditionalism breaks down. As Justice Scalia acknowledged, the Court had "not previously drawn this fine distinction between restitution at law and restitution in equity."[180] Yet it is this line he focused on, dividing claims for restitution into equitable and legal camps based on the practice of courts in the "days of the divided bench."[181] As discussed at length above, this is simply not how equity traditionally operates. Shackling equity to strict factual precedent strips it of its adaptability, which is the only reason it exists in the first place.

I recommend a different approach. Instead of treating "the days of the divided bench"[182] as a razor, what if the Court treated "*typically* available in equity"[183] as a lens? "Typically" need not necessarily mean "in a majority of cases with similar facts in the days of the divided bench," as Justice Scalia seems to treat it. It could be considered an invitation to seek out typicality within equitable tradition. Equity has always been a response to law. Perhaps the appropriate approach to interpretive cases such as *Great-West* is not seeking out historical analogues but seeking out traditional analogues. In other words, the question should shift from "what has equity done?"—an inquiry into history—to "is equity needed?"—an inquiry into tradition.

A pattern for this type of inquiry may be found in the early Supreme Court case of *Riddle & Co. v. Mandeville*. As discussed above, *Riddle & Co.* considered the right of a plaintiff to sue a remote endorser of a promissory note in equity.[184] The fusion of legal and

177 *Great-West*, 534 U.S. at 210 (first quoting 29 U.S.C. § 1132(a)(3)(B) (1994); and then quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

178 *Id.* at 213.

179 *Id.* at 214.

180 *Id.*

181 *Id.* at 212.

182 *Id.*

183 *Id.* at 210 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

184 *See supra* notes 99–104 and accompanying text.

equitable procedure into "one form of action"[185] renders the central issue of *Riddle & Co.* moot for modern readers, but the approach of the Court is useful. Chief Justice Marshall, writing the opinion of the Court, first noted that the core issue was "not very remote" analogically from the "familiar case of a suit in chancery by a creditor against the legatees of his debtor."[186] Next, he determined that the defendants in this suit were "ultimately bound for this money," justifying the intervention of equity.[187] Finally, he found that "the remedy at law is defeated by the bankruptcy of an intermediate endorsor,"[188] establishing that this matter was appropriate for the exercise of equitable jurisdiction within the strictures of the Judiciary Act of 1789.[189]

Three guiding questions may be drawn from the Court's approach in *Riddle & Co.* First, is this the *type* of issue that equity acts upon? To answer this question, Chief Justice Marshall did not delve into what equity had factually done, but rather sought out near analogies that established the dispute in *Riddle & Co.* as the type of dispute in which equity gave relief. Second, could equity resolve the problem? The Chief Justice noted that a "single decree" could vindicate the equitable interests of the plaintiff.[190] Third, was there no adequate remedy at law? The answer in *Riddle & Co.* was clear: the intermediate bankruptcy barred the plaintiff from legal relief.

This approach does not map perfectly on to modern questions of statutorily authorized equitable relief. But it does offer an example of how a court might prioritize the question of whether equity is needed over the question of what equity has done. First, a Court seeking to apply this approach to the facts of *Great-West* might first consider whether equity has traditionally granted restitutionary relief to plaintiffs in analogically similar positions to the petitioners in *Great-West*. This would still necessarily involve historical analysis, but it would trade in Justice Scalia's hairsplitting over traceability for a broader inquiry into the tradition of equity. To put it another way, the historical inquiry would be guided not merely by the question of what equity has done, but by *why* it did what it did.

Then the Court might ask whether restitutionary relief is well adapted to resolve this case. Again, this requires engagement with equitable tradition. The Court would need to consider the role of

185 FED. R. CIV. P. 2.

186 Riddle & Co. v. Mandeville, 9 U.S. (5 Cranch) 322, 330 (1809).

187 *Id.*

188 *Id.*

189 *See* Judiciary Act of 1789, ch. 20, §§ 11, 16, 1 Stat. 73, 78, 82 ("[S]uits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." *Id.* § 16, 1 Stat. at 82).

190 *Riddle & Co.*, 9 U.S. (5 Cranch) at 330.

equitable restitution within the broader doctrine, including what types of problems it has historically been employed to solve and how it has developed over time in response to changing demands.

Finally, the Court must consider whether an adequate remedy is available at law. Outside the statutory context, such questions will often require more to resolve than simply confirming that no direct legal relief exists. Fortunately, statutory authorization simplifies this considerably. If a statute authorizes equitable relief, Congress has already decided that equitable remedies are permissible in the context treated by the statute.

This approach does not license the free-handed equitable maximalism of Justice Ginsburg's *Great-West* dissent. To ask whether equity is needed is to consider whether equity has traditionally provided relief in cases like the one at bar, seeking similarities not in a rigid factual sense but in a deeper substantive sense. The focus should be on whether a party has an equitable obligation, unenforceable at law but identifiable in equitable tradition, that the Court should enforce. This is a far more nuanced and perhaps more judicially demanding line of inquiry than the recent approaches of the Court. It requires judges to grapple with the tradition of equity, not just its history. But it is better suited to equity's ultimate end: doing justice where law falls short.