

ARTICLES

THE EQUITY DOCKET

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The Supreme Court has two sides. On its ordinary docket, the Court answers questions of law after briefing and oral argument. On its extraordinary docket, the Court fields applications from litigants asking it to equitably set the status of a new law or executive action while a lawsuit is pending. Only a decade ago, the equity side was an obscure backwater of Supreme Court practice; today it is where the Court confronts some of the most contested and consequential public law disputes. This aspect of the Court's work has taken on various labels—the shadow docket, emergency docket, interim docket, to name a few. This Article proposes the “equity docket.” That term best captures what is distinctive about this growing part of the Court's business and helps us to get a normative handle on where the Court has gone right—and wrong. Any judicial practice grounded in equity will be vulnerable to the charges of arbitrariness and lack of transparency. Historically, equity was able to reform itself successfully in response to these charges. Our basic contention is that the Court has assumed a far-reaching new form of equitable jurisdiction without also accepting the historical guardrails that both limited and legitimated equity. The Article makes three contributions. First, it links the emergence of the equity docket to the Court's broader engagement with the history of federal equity in recent years—what some have called the “new equity.” Second, it argues that the Court has lost sight of important constraints that kept equity in a subsidiary position. And finally, it suggests that the Court on the equity docket has impoverished the traditional inputs of equitable decisionmaking, relying almost exclusively on hastily formed predictions about the merits. In place of the Court's current approach, we propose a model of a more objective, “filtered” conscience, drawn from the history of equity, that would give proper weight to precedent and keep the equity docket from engulfing the Court.

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“[T]he liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.”

—William Blackstone,
Commentaries on the Laws of England, 1765¹

INTRODUCTION

The Supreme Court has two sides: law and equity, the ordinary and the extraordinary. Over the last decade, the Court's equity side has grown so much that it may now be the primary means by which the Court decides the legal status of major federal laws and policies.

To those reared in our post-fusion world, these may seem to be strange claims.² There once was a benighted time, we learn, when a federal court had two metaphorical “sides,” one corresponding to the old English courts of common law and the other to the court of chancery

¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *62.

² See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (noting that “memories of the divided bench, and familiarity with its technical refinements, [have] recede[d] . . . into the past”).

with its equitable jurisdiction.³ “In effect,” one federal district judge explained in 1913, “a United States District Court, while physically but a single tribunal, acts in two different capacities, and exercises jurisdiction not only over two distinct classes of subjects, but according to two different systems of procedure.”⁴ That distinction, though, more a product of “historical accident” than thoughtful design,⁵ was (we are taught) sensibly retired when our federal system of civil procedure was simplified and modernized in 1938.⁶ Ever since, we no longer have distinct actions at law and suits in equity addressed to different “sides” of the federal court. Instead, “[t]here is one form of action—the civil action.”⁷

But old institutional arrangements often die hard—especially arrangements that count their age in centuries. Today, long after its supposed burial, one could say—with a nod to F.W. Maitland—that equity rules us from the grave in several ways.⁸ Many modern doctrines bear the trace of their legal or equitable origins, and the distinction between legal and equitable remedies in particular—informed by the historic division of common law and chancery courts—has proven remarkably durable in the Supreme Court. In just the past twenty-five years, “the Court has insisted with vigor on the historic division between law and equity.”⁹ That invigoration was recently on display in *Trump v. CASA, Inc.*, which restricted the national injunction based on the historical traditions of equity.¹⁰ And yet, while the Court has invigorated the law-equity distinction in its case law on remedies, the conventional wisdom holds that the “Court has shown no appetite . . .

³ See Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 537–38 (2016) [hereinafter Bray, *Equitable Remedies*] (“[F]or about a century and a half after the Founding, each federal court had law and equity ‘sides,’ with the same judge presiding over both.”).

⁴ Frank S. Dietrich, *The New Federal General Equity Rules*, 76 CENT. L.J. 281, 281 (1913).

⁵ Zechariah Chafee, Jr., *Foreword to SELECTED ESSAYS ON EQUITY*, at iii, iv (Edward D. Re ed., 1955) (“How 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 . . .”).

⁶ See Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53–54 (1993) (“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.”).

⁷ FED. R. CIV. P. 2.

⁸ F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 296 (1909).

⁹ Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1000 (2015) [hereinafter Bray, *New Equity*].

¹⁰ 145 S. Ct. 2540 (2025). Consider also one of the questions presented in *Trump v. Slaughter*, formulated by the Court itself: “Whether a federal court may prevent a person’s removal from public office, either through relief *at equity* or at law.” 146 S. Ct. 18, 18 (2025) (mem.) (emphasis added) (granting stay and certiorari before judgment).

for reviving old distinctions between legal and equitable courts or procedures.”¹¹ The idea of a federal court with two distinct “sides” has remained an anachronism. Fusion seems to have succeeded at least to that extent.

We show in this Article that the Supreme Court has revived a distinct and important equitable authority for itself at the level of its docket. To return to where we started: The Supreme Court has two sides. On its ordinary or “law” docket, the Court decides relatively abstract questions of law after extensive briefing and oral argument.¹² That has been the Court’s ordinary business since the passage of the Judges’ Bill in 1925.¹³ But the last ten or so years have seen the dramatic emergence of a different side of the Court—what we call the equity docket.¹⁴ The core task the Court performs on the equity docket is not to adjudicate questions of law crisply presented by petitions for certiorari. It is, rather, to hear applications asking the Court to set the interim status of some government action either by staying an injunction entered below or by issuing a writ of injunction itself.¹⁵ And the Court resolves that sort of application by employing (at least ostensibly) a multi-factor test borrowed from equity, weighing the likelihood of success, irreparable harm, the balance of the equities, and the public interest.¹⁶ In short:

¹¹ Bray, *New Equity*, *supra* note 9, at 1000.

¹² Our primary argument is that the Court, when it acts on the equity docket, resembles pre-fusion courts of equity, and further that the equity docket is extraordinary vis-à-vis the Court’s normal business. We do not argue that the Court’s modern merits docket resembles the old common law courts of England or America. Hence, the distinction between the law and equity sides of the modern Supreme Court does not map perfectly onto the historical distinction between the common law and equity courts in England. Nonetheless, we use the “law docket” as a useful shorthand to describe what has long been the Court’s ordinary business—deciding questions of law on the merits docket. It is the norm from which the equity docket departs.

¹³ See SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”); see Robert Post, *The Supreme Court’s Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, 100 NOTRE DAME L. REV. 2031 (2025) (discussing how the Judiciary Act of 1925 transformed the Supreme Court into a discretionary court and shaped public perception of the Court).

¹⁴ The commentator David French has also suggested this term. See ADVISORY OPINIONS: *Judge v. (Unethical) Lawyer*, at 13:02 (Spotify, Apr. 22, 2025).

¹⁵ The Court sometimes decides questions related to equity after briefing and oral argument. In *eBay Inc. v. MercExchange, LLC*, for instance, the Court determined the proper standard for a permanent injunction in a patent case. 547 U.S. 388, 390 (2006). Although the Court looked to “well-established principles of equity” to answer that question, *id.* at 391, *eBay* was not an “equity docket” case as we use the phrase, because it did not involve an application to the Court asking it to set the status of the parties or of a government policy while litigation was pending. The grant of certiorari is the bright line that separates the equity docket from the law docket.

¹⁶ See *Soc. Sec. Admin. v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 145 S. Ct. 1626, 1626–27 (2025); *Nken v. Holder*, 556 U.S. 418, 434 (2009). While the Court nominally applies

On the Court's equity docket, just like in the old courts of equity, litigants present a "grievance" to "motivate the chancellor" to grant extraordinary relief—with the chancellor, in this instance, being the nine-member Court itself.¹⁷

This side of the Court's activity has cycled through several labels over the past decade—the shadow docket, emergency docket, interim docket, each of which has descriptive shortcomings.¹⁸ We call it the "equity docket," because the term "equity" best captures what is distinctive about this facet of the Court's work. This label is not antiquarianism on our part; the Court itself has emphasized the connection of the "equity docket" to traditional equity. It has described its stay decisions as requiring an "equitable judgment."¹⁹ Both Justice Alito and Justice Sotomayor have referred to stays as "equitable remedies,"²⁰ and Justice Jackson has written that "[e]quity is at the heart of preliminary-injunction and stay determinations."²¹ The Court itself is insisting that its interim orders are a species of equity. This Article takes that connection seriously, probing what the history of equity can teach about this side of the Court.

Equity has long been haunted by the charge of arbitrariness. This charge received its most memorable expression in John Selden's rebuke about the "Chancellor's foot."²² Just as the length of a foot varies from

this equitable test, we argue that the Court has in fact given short shrift to the equitable factors. *See infra* Part III.

¹⁷ Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 NOTRE DAME L. REV. 1763, 1775 (2022). The Court decides many applications that do not involve either stays or writs of injunction—for instance, applications to extend the time to file a petition for certiorari. In this Article, we put aside these more humdrum requests and focus instead on applications for stays and injunctions in the public law context. These are the most salient and controversial, and they are almost universally what people mean when they refer to "emergency" or "interim" relief. For a comprehensive look at different types of applications, see Greg Goelzhauser, *The Applications Docket*, 58 GA. L. REV. 97, 113–17 (2023); Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 VA. L. REV. ONLINE 73, 80–83 (2023).

¹⁸ *See infra* Section I.C.

¹⁹ *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam).

²⁰ *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2158 (2025) (Sotomayor, J., dissenting); *Danco Lab'ys, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1076 (2023) (Alito, J., dissenting). Technically, a stay of a lower court order is not itself an equitable remedy. But the effect of a stay on the "equity docket" is usually to halt an equitable remedy from a lower court, so it functions like an equitable determination. *See infra* Section I.C.; William Baude & Samuel L. Bray, *When the Executive Has Unclean Hands*, 135 YALE L.J.F. 567, 568 n.7 (2026).

²¹ *Trump v. Orr*, 146 S. Ct. 44, 49 n.3 (2025) (Jackson, J., dissenting); *see also* YALE LAW SCHOOL, *Justice Ketanji Brown Jackson: James A. Thomas Lecture* (Vimeo, Apr. 14, 2026), <https://vimeo.com/1183042359> (on file with the New York University Law Review).

²² JOHN SELDEN, *THE TABLE TALK OF JOHN SELDEN* 43 (Frederick Pollock ed., 1927) (1689).

person to person, Selden said, deciding a case according to a chancellor's "conscience" is likewise an "uncertain measure."²³ Essentially the same critique has been leveled in recent years against the so-called "shadow" docket: that the Court's rulings, largely unconstrained by the discipline of written opinions and precedent, have turned (with an odor of partisanship) on the fast-formed hunch of a bare majority of Justices about which party should win.²⁴

Historically, equity developed strategies to respond to critiques of arbitrariness. First, the idea of equitable "conscience" grew more limited and disciplined over time. While it was once right to say that a chancellor's conscience could include personal and even religious morality, by the seventeenth century that idea of conscience had been replaced by a more restrictive and role-sensitive conception.²⁵ As Lord Nottingham famously put it in 1676: "[T]he conscience by which I am to proceed is merely *civilis et politica* [*i.e.*, civil and political], and tied to certain measures."²⁶ Conscience, for a judge acting *qua* judge, is not internal and personal; it is public and objectively civil.²⁷ To use Larissa Katz's phrase, the chancellor is the keeper of the "political conscience of the state."²⁸ In that capacity, the chancellor exercises "conscience with a filter," in the sense that the public office of judge excludes certain reasons for acting that might be acceptable in other social or institutional contexts.²⁹

²³ *Id.*

²⁴ The most prominent iteration of this critique is STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023). For a summary of the critical literature, see WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 397–98 (8th ed. 2025) [hereinafter *HART & WECHSLER*].

²⁵ See *infra* Section II.A.

²⁶ *Cook v. Fountain* (1676) 36 Eng. Rep. 984, 990; 3 Swans. 585, 600 (Ch), reprinted in 1 *LORD NOTTINGHAM'S CHANCERY CASES* 362, 371 (D.E.C. Yale ed., 1957). On the meaning of "measures" as "standards or criteria" for judgment, see Dennis R. Klinck, *Lord Nottingham's "Certain Measures,"* 28 *L. & HIST. REV.* 711, 714 (2010).

²⁷ See Sir Terence Etherton, Eldon Professor's Lecture, Northumbria University: Equity and Conscience 5 (Oct. 5, 2017), <https://www.judiciary.uk/wp-content/uploads/2017/10/sir-terence-etherton-mr-eldon-lecture-20171030.pdf> [<https://perma.cc/2CMS-5MW2>] (noting the "clear distinction between private and public conscience," and tracing it to Lord Nottingham). At the time of the lecture, Lord Etherton was the Master of the Rolls, and before that was the head of the Chancery Division.

²⁸ Larissa Katz, *Pathways to Legal Rights: The Function of Equity*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* 168, 171 (Dennis Klimchuk et al. eds., 2020) [hereinafter *Katz, Pathways*].

²⁹ Larissa Katz, *Conscience with a Filter: Comments on Equity: Conscience Goes to Market*, 21 *JERUSALEM REV. LEGAL STUD.* 22, 32 (2020) [hereinafter *Katz, Conscience with a Filter*].

Next, equity developed a series of maxims—such as “equity follows the law”—that served to limit the occasions of equitable intervention.³⁰ These principles helped to prevent courts of equity from deploying conscience in an ad hoc and freewheeling manner, while also maintaining the courts of equity as genuinely extraordinary vis-à-vis the courts of law. Finally, equity developed a system of precedent to channel the chancellor’s discretion.³¹ In all, then, equity was able to shore up its legitimacy by disciplining how decisions are made and by confining itself to an extraordinary or adjectival status. The virtue of these developments—filtered conscience, the maxims, the system of precedent—is that they allowed equitable discretion to be depersonalized and therefore less arbitrary. The meaning of equity would not change (to use Lord Eldon’s phrase) “with every succeeding judge.”³²

How might these strategies inform the Court today? As we see it, the nub of the problem is that the Court has dramatically expanded a novel jurisdiction resembling equity without also accepting the historical guardrails that protected equity from abuse and illegitimacy. To start, the Court has allowed the equity docket to swell beyond its proper confines such that it now threatens to subsume its ordinary “law” docket. Historically, the requirement of irreparable harm was the doctrinal mechanism that kept equity from trenching on the domain of common law, and the Justices today have adopted an approach to irreparable harm that essentially negates it as a meaningful limit. In addition, the Court has used the equity docket to destabilize important and long-standing precedents from its law docket, in violation of the maxim that equity should follow the law. Finally, the Justices have at times conflated their equitable roles as keepers of the political conscience of the state with their own personal (and necessarily preliminary) predictions of how they would rule on the merits if the case arose on the law docket. That approach ignores the other ingredients of equitable decisionmaking, like irreparable harm and the balance of equities. More, it makes too much turn on the hastily formed judgments of the Justices who happen to sit on the Court today.

This Article will proceed in three Parts. In Part I, we trace the history of equity and its relationship to law in the federal courts,

³⁰ See SAMUEL L. BRAY & EMILY SHERWIN, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS 459–64 (4th ed. 2024).

³¹ See JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 351–58 (2009); see also 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 18–19, at 19–22 (Boston, Hilliard, Gray & Co. 1836).

³² *Gee v. Pritchard* (1818) 36 Eng. Rep. 670, 674 (Ch).

leading up to the rise of the so-called “new equity” in the Supreme Court of recent years. We then chart the growth of the “equity docket” and explain why that facet of the Court’s business is best understood as a species of equity. In Part II, we trace the development of equitable decisionmaking over time, and in particular the defenses that equity deployed to parry the charge of arbitrariness. We also consider how courts of equity managed their relationship with courts of law. In Part III, we consider the lessons that the history of equity holds for the Court’s management of the equity docket today. Each aspect of the Court’s traditional test for stays and injunctions can be enriched by appreciating its historical and practical roots.

I

THE RISE OF THE EQUITY DOCKET

Equity is back, and this Part charts where it (supposedly) went and how it returned. We start with a brief history of equity in the United States, and the explicit return of equity in the Supreme Court in the past twenty-five years. Then we discuss the rise of the equity docket over the last decade—that is, the rise in applications for, and grants of, interim relief in the Supreme Court in major public law cases.³³ Finally, we connect the rise of interim relief in the Court to the resurgence of equity, and explain why the decision of these interim orders is fundamentally equitable—hence our suggested appellation.

A. *Fusion, Its Limits, and the Rise of the New Equity*

A simple telling of the story of law and equity in the federal courts has gone like this: Until the shockingly late date of 1938, the federal courts adhered to the antiquated division between “actions at law and suits in equity.”³⁴ The Federal Rules put an end to this division, mostly by adopting the more flexible procedures of equity and applying them

³³ Before the last decade, emergency applications for stay typically involved capital cases—so much so that the deputy clerk responsible for receiving and distributing emergency applications was informally known as the “death” clerk. See Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1016 (2024). As noted, this Article focuses on applications for interim relief in noncapital cases presenting important questions of public law.

³⁴ See, e.g., *Stanton v. United States*, 434 F.2d 1273, 1277 (5th Cir. 1970); Anthony J. Bellia, *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784–92 (2004); Ramon Feldbrin, *Procedural Categories*, 52 LOYOLA U. CHI. L.J. 707, 750 (2021); Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUDS. 1 (2002) (discussing the historical difference between law and equity).

to a unitary system of “civil actions.”³⁵ Then, in 1999, the Supreme Court started rolling back the clock, insisting in *Grupo Mexicano v. Alliance Bond Fund* that certain equitable injunctions could not be ordered in cases in which they were historically unavailable in the courts of equity.³⁶ Since then, the Court has embraced a crabbed “equitable originalism,” requiring that modern “equitable” remedies in federal courts be traced to founding-era antecedents.³⁷ This trend culminated in *Trump v. CASA, Inc.* last Term, in which the Court disparaged national injunctions as a modern innovation inconsistent with traditional equitable practice.³⁸ The twentieth century is no more. The once-obsolete division between law and equity has returned.³⁹

As this Section will show, each phase of this story is more complicated than it first appears. Progressive reformers from the mid-nineteenth to mid-twentieth centuries thought they could exchange the old division between law and equity for a modern division between “procedure” and “substance,” with complete fusion of law and equity in the former and little or no fusion in the latter. But that project was always contested and remained seriously incomplete. Many areas of procedure remain unfused, while substantive law and equitable remedies have gradually merged. And on this understanding, we can appreciate the Supreme Court’s “new equity” not as a return to the premodern, nor as a revival of dead forms, but as an attempt to refine the language of a more-or-less continuous set of practices in federal jurisprudence. Equity’s distinctive past is not dead; it’s not even past.⁴⁰

1. *The Fusion of Law and Equity and the Separation of Substance and Procedure*

From the beginning, the federal courts had an unusual approach to law and equity. Alone among American jurisdictions at the time of the Founding, the federal courts maintained a rigorous distinction

³⁵ FED. R. CIV. P. 2 (1938); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

³⁶ 527 U.S. 308, 322 (1999).

³⁷ See Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 879, 881 (2023).

³⁸ 145 S. Ct. 2540 (2025).

³⁹ Here we use “law and equity” in the usual sense, referring to the historical division, rather than the law and equity *dockets* in the Supreme Court, which we will return to below. Note that some (though not all) of the developments related to “equitable originalism” technically occurred on the ordinary law *docket*, in that they originated in cases decided after ordinary briefing and oral argument.

⁴⁰ Apologies to WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951); see also Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1054 (2021) (“After a century or so of fusion, equity refuses to be consigned to the dustbin of history.”).

between legal and equitable jurisprudence and procedure while being institutionally fused—the same judge sat as both common law judge and equitable chancellor, presiding over separate calendars for each docket.⁴¹

Early legislation kept up this distinction-within-fusion at every turn. What we now call the Rules of Decision Act directed federal courts to apply the law of the states in which they sat in common law cases only.⁴² Equitable cases were to follow the “usages which belong to courts of equity” generally, “as contradistinguished from courts of common law.”⁴³ Likewise, the Process Acts of 1789 and 1792 required adherence to state procedure, but again only in common law cases.⁴⁴ The Anti-Injunction Act of 1793 preserved this distinction by ensuring litigants could not use state common law procedure to bootstrap their way into federal equity.⁴⁵

After more and more states experimented with fusing legal and equitable remedies, these arrangements for the federal courts became difficult to maintain. Numerous times the Supreme Court stepped in to clarify that Congress’s commands to apply state law did not permit the federal courts to use equitable procedures or remedies in common law cases.⁴⁶ The early legal realists mocked any jurisdiction that maintained the distinction between law and equity as a “Yellowstone Park of common law pleading,”⁴⁷ but the Supreme Court did not waver. In 1912, it issued a revised set of Federal Equity Rules that reassured the legal profession that the distinction was here to stay.⁴⁸

⁴¹ Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152, 158 (2015).

⁴² 1 Stat. 92 (1789) (codified at 28 U.S.C. § 1652 (1948)).

⁴³ Process Act of 1792, 1 Stat. 275–79 (1792).

⁴⁴ Process Act of 1789, 1 Stat. 93–94 (1789); Process Act of 1792, 1 Stat. 275–79 (1792); see JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 542–51 (1971); PETER CHARLES HOFFER, WILLIAM JAMES HULL HOFFER & N.E.H. HULL, THE FEDERAL COURTS: AN ESSENTIAL HISTORY 64–65 (2016).

⁴⁵ Judiciary Act of 1793, ch. 22, § 5, 1 Stat. 333, 334–35 (1793), codified at 28 U.S.C. § 2283 (2018); see James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 4–5 (2013); James E. Pfander & Nassim Nazemi, *Morris v. Allen and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187, 188 (2014); Kellen Funk, *Equity’s Federalism*, 97 NOTRE DAME L. REV. 2057, 2065–67 (2022).

⁴⁶ See, e.g., *Farni v. Tesson*, 66 U.S. (1 Black) 309, 315 (1861); *Green v. Custard*, 64 U.S. (23 How.) 484, 485–86 (1859); *McFaul v. Ramsey*, 61 U.S. (20 How.) 523, 525 (1857); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669, 674 (1850); *Randon v. Toby*, 52 U.S. (11 How.) 493, 516 (1850).

⁴⁷ See *Current Topics*, 32 ALB. L.J. 161, 161 (1885); see also Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 215 (1933) (describing any attempt to preserve the distinction between law and equity as an “efficient trouble-maker”).

⁴⁸ See JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES, at v (1913) (expressing “the reasonable hope that further revision will not be necessary or sought for in the near future”).

Then came the revolutions of 1938. *Erie v. Tompkins* reinvigorated the Rules of Decision Act as a constitutional principle that the Court then extended to federal equity cases in *Guaranty Trust v. York*.⁴⁹ Meanwhile, the Federal Rules of Civil Procedure followed state codes in abolishing the distinction between common law and equitable procedure and providing for “one form of action to be known as ‘civil action.’”⁵⁰ Both of these revolutions emphasized a distinction between substance and procedure while downplaying the former distinction between law and equity.⁵¹ The Rules Enabling Act famously authorized Supreme Court rulemaking only where “[s]uch rules shall not abridge, enlarge or modify any substantive right.”⁵² And the *Erie* doctrine, as every 1L learns, launched federal courts sitting in diversity into a never-ending quest to identify and apply state substantive—but not procedural—law.⁵³

The stated aim in the procedural revolution was to fuse law and equity and abolish the distinction forever. Charles E. Clark, the lead draftsman of the Federal Rules, declared that “[t]he union of law and equity is justly considered to be the foundation principle” of modern reforms that “emphasize substantive rights, [and] not procedural forms.”⁵⁴ Once the Federal Rules were promulgated, Clark celebrated the “triumph of the one form of civil action” which “wiped out” the “annoying” separation of legal and equitable procedure.⁵⁵

For many reformers, fusion could be left there—fully accomplished in procedure without touching on substantive law. Some early proponents of the state procedure codes argued that they could “amalgamate” legal and equitable process while “altering no *rule* of law or equity.”⁵⁶ And numerous federal courts since 1938 have taken that

⁴⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99, 113 (1945). The 1948 revision of the U.S. Code codified *Guaranty Trust* by replacing the Rules of Decision Act’s reference to “trials at common law” with “civil actions.” Compare 28 U.S.C. § 725 (Revised Stat. § 721) (1940), with 28 U.S.C. § 1652 (1948).

⁵⁰ FED. R. CIV. P. 2 (1938).

⁵¹ In a case decided soon after the promulgation of the Rules, the Court defined procedure as “the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). Of course, the distinction between substance and procedure is its own conceptual quagmire. See *infra* notes 61–63 and accompanying text.

⁵² 28 U.S.C. § 2072(b); see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018 (1982) (discussing the Rules Enabling Act in detail).

⁵³ See Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 878 n.6 (2011) (describing the litany of cases first year law students can recite when grappling with *Erie* doctrine).

⁵⁴ Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 10 (1925).

⁵⁵ Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 310–11 (1938).

⁵⁶ S. CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS OF THE NEW YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 464 (1846) (statements of Henry Nicoll)

to be the achievement of the Federal Rules.⁵⁷ “The Federal Rules . . . abolished all formal distinctions between actions at law and suits in equity, but they did not abolish the difference between substantive legal and equitable rights,” declared the Fifth Circuit in one mid-century case.⁵⁸

However, many other jurists thought that fusion would start with procedure but would not end there. David Dudley Field, the promulgator of the modern state procedure codes in the mid-nineteenth century, thought there was no real distinction between legal and equitable rights and only a semantic distinction between legal and equitable remedies. “[A]bolish the distinction between the latter, and the distinction between the former perishes with it,” Field wrote in a commentary on his code.⁵⁹ Charles Clark, too, seemed to believe that procedure was the only thing holding substantive law back from evolving towards perfect fusion—or, if anything, fusion was already happening in substantive law and procedure lagged behind.⁶⁰

Regardless of whether fusion was supposed to begin or end with federal procedure, scholars and legal historians, with few exceptions, have given too much credence to the triumphalist account of fusion as an accomplished fact in the Federal Rules.⁶¹ Exchanging the fundamental division between law and equity for one between procedure and substance was an eighty-year struggle from the 1850s to the 1930s that achieved only partial success and generated a great deal of conceptual

(emphasis added). For more examples, see KELLEN R. FUNK, *LAW’S MACHINERY: REFORMING THE CRAFT OF LAWYERING IN AMERICA’S INDUSTRIAL AGE* 251–54 (2025).

⁵⁷ See, e.g., *Bradley v. United States*, 214 F.2d 5, 7 (5th Cir. 1954); *Byram v. Vaughn*, 68 F. Supp. 981, 984 (D.D.C. 1946); *Fitzpatrick v. Sun Life Assur. Co. of Can.*, 1 F.R.D. 713, 715–16 (D.N.J. 1941).

⁵⁸ *Humble Oil & Refin. Co. v. Sun Oil Co.*, 191 F.2d 705, 713 (5th Cir. 1951).

⁵⁹ Letter from David Dudley Field to the Albany L.J. (Dec. 28, 1878), reprinted in 1 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 573, 579 (A.P. Sprague, ed., N.Y., D. Appleton & Co. 1884); see also David Dudley Field, *Legal System of New York* (Nov. 12, 1886), reprinted in 1 *SPEECHES, supra*, at 338, 340; *COMM’RS ON PRAC. & PLEADINGS, FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS* 74–75 (Albany, Charles Van Benthuysen 1848) (contending that all civil suits share the same objectives and therefore may share the same form).

⁶⁰ See Clark, *supra* note 55, at 311–12; Clark, *supra* note 54, at 10 (contending that treating law and equity as separate systems privileges procedural forms over substantive rights).

⁶¹ See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288–89 (2013) (describing the Federal Rules as pursuing the procedural simplicity found in federal equity practice in contrast to the excessive technicality of the common law); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 431–32 (2003) (critiquing the merger of law and equity effectuated by the Federal Rules); Laycock, *supra* note 6, at 53–54 (contending that equity triumphed over law in their institutional merger).

confusion along the way.⁶² Just as every law student today learns that the distinction between substance and procedure is not nearly as sharp as some courts would like to think,⁶³ legal scholars should appreciate that the merger of law and equity is not as accomplished as the reformers proclaimed—in procedure or anywhere else.

Signs of law and equity's incomplete fusion are everywhere today. The starkest example is the right to a jury, which attaches only “[i]n Suits at common law.”⁶⁴ But more subtle examples abound. Traditionally, common law actions are time-bound by statutes of limitations, while equitable ones are subject to an uncodified doctrine of laches, sometimes in addition to statutes of limitations.⁶⁵ Formerly equitable domains like corporations, trusts, and guardianship require factually intensive pleadings to satisfy multifactor balancing tests or to reveal states of mind,⁶⁶ while formerly legal domains like torts and contracts employ simple pleadings incorporating a limited set of essential elements except where doctrines have been inspired or affected by equity.⁶⁷ The many remedial distinctions between

⁶² See FUNK, *supra* note 56, at 244–67 (recounting the ultimately incomplete merger of law and equity in the Field Code); Henry H. Ingersoll, *Confusion of Law and Equity*, 21 YALE L.J. 58 (1911) (demonstrating the continuing separation of law and equity, even in code states that had declared the distinction abolished); see also Samuel L. Bray, *Form and Substance in the Fusion of Law and Equity*, in DENNIS KLIMCHUK, IRIT SAMET & HENRY E. SMITH, EDs., *PHILOSOPHICAL FOUNDATIONS OF LAW AND EQUITY* 231–48 (2020) (offering a framework for assessing the completeness of fusion in modern systems); Laycock, *supra* note 6, at 53–54 (denigrating but recognizing a “segregationist” approach to law and equity that persisted long after the Federal Rules of 1938).

⁶³ E.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974) (“We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure.”).

⁶⁴ U.S. CONST. amend. VII; see, e.g., SEC v. Jarkesy, 144 S. Ct. 2117, 2128 (2024); *Chauffeurs Loc. No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472–73 (1962) (holding that the right to a jury trial applies when legal claims are incidental to equitable ones).

⁶⁵ 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, 3, 9–10, 12–13 (2014) (noting that laches is only applicable to equitable claims and discussing uncertainty over when laches supersedes statutes of limitations).

⁶⁶ See Andrew S. Gold & Henry E. Smith, *The Equity in Corporate Law*, 100 NOTRE DAME L. REV. 789, 809–15 (2025) (discussing the factually intensive showings involved in litigation surrounding the business judgment rule); Smith, *supra* note 40, at 1092–99 (noting the factual complexities surrounding misappropriation of hot news, the good-faith purchaser doctrine, and trust law); Mark J. Loewenstein, *Equity and Corporate Law*, 68 SMU L. REV. 783, 785–86 (2015) (describing the complex factual inquiry into states of mind that animate the duty of good faith in corporate law).

⁶⁷ See Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 306–10 (1991) (contrasting the rigidity of common law tort liability with the flexibility and fact-intensiveness of equity-inspired mass tort liability doctrines); Vilhelm Lundstedt, *The Relation Between Law and Equity*, 25 TUL. L. REV. 59, 62–64

“coercive relief” and “money damages”—for instance, the withholding of one when the other suffices; the immunity to one but not the other; the retrospective character of one and prospective character of the other—all reflect the traditional distinction between law and equity in all but name.⁶⁸

2. *Fusion and Public Law*

Although the fusion of law and equity has remained significantly incomplete whether one focuses on substance or procedure, one of fusion’s most important successes has involved public law remedies. This is of particular relevance to the equity docket today, since the modern equity docket is increasingly *the* forum for major public law disputes.⁶⁹ Yet the Supreme Court seems to have overlooked public law fusion in its most recent opinion on equitable remedies (delivered, incidentally, on the equity docket): last Term’s *Trump v. CASA*. Justice Barrett’s majority opinion in *CASA* starts with a history of eighteenth-century English Chancery, when “suits in equity were brought by and against individual parties,” usually in what we now call private law domains.⁷⁰ But then the narrative jumps to the twentieth century, overlooking the largely successful fusion of law and equity in public law suits against government officials.⁷¹

This gap was a significant lapse in the Court’s analysis. The United States has a long history, and indeed a well-established Founding-era

(1950) (arguing that legal rules of liability, by virtue of their goal of deterrence, necessarily prioritize predictability over just outcomes under all the facts); cf. Zechariah Chafee Jr., *Does Equity Follow the Law of Torts?*, 75 U. PA. L. REV. 1, 9–14 (1926) (noting equity’s refusal to follow common law elements for the tort of waste in granting injunctions against conduct that amounts to waste).

⁶⁸ See generally BRAY & SHERWIN, *supra* note 30, at 459–64 (describing the maxims of equity and their implications for the form and availability of equitable remedies); DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES* 375–79 (6th ed. 2025) (discussing the irreparable injury rule and the different reasons courts deny equitable remedies). These vestiges of distinctive legal and equitable traditions cannot be cleanly separated into “procedure,” where fusion is the rule, or “substance,” where distinctions are allowed to predominate, because remedial law is often inextricably both substantive and procedural. See, e.g., Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) (arguing that procedural rules about the availability of remedies alter substantive rights); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 39 (2008) (noting that some federal rules which nominally regulate procedure significantly affect the availability of remedies effectuating substantive rights). For further discussion of this point, see *infra* notes 93–98 and accompanying text.

⁶⁹ See *infra* Section I.B.

⁷⁰ *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2551 (2025).

⁷¹ *Id.* at 2552.

tradition, of public law remedies.⁷² But although these remedies may look equitable to our eyes because of their coercive nature and intensive factfinding procedures, they were traditionally deployed on the common law side of the courts. In England, these remedies were known as the “prerogative writs,” in part because the royal judges in the courts of common law used them to hold royal officers to account.⁷³ While the “prerogative” label struggled to take hold in the American republic,⁷⁴ the writs themselves were transplanted straight into the First Judiciary Act and have been on the books ever since.⁷⁵ Some, like habeas and certiorari, remain as treasured—and distinctive—institutions in federal practice today.⁷⁶ Others, like mandamus, prohibition, quo warranto, and scire facias, have largely faded into a fused practice that uses the catch-all labels of “injunctive relief” and “contempt” to capture their substantive effects.⁷⁷

This blending of prerogative (legal) and injunctive (equitable) remedies was a gradual process that had progressed well before Congress amended any jurisdictional or procedural statute encouraging

⁷² See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1336 (2020) (describing the forms of early American prerogative writs); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 1 (1983).

⁷³ See, e.g., Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 533 (1923); JOSEPH CHITTY, JR., A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 331, 338–39 (London, Joseph Butterworth & Son 1820) (describing the function of certain prerogative writs in protecting private individuals from abuses by royal officials).

⁷⁴ As Pfander and Wentzel note, the “prerogative” label stuck long after the Crown had direct involvement in dispensing royal justice. They accordingly prefer the term “administrative writs.” Pfander & Wentzel, *supra* note 72, at 1304.

⁷⁵ Judiciary Act of 1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–82 (1789); see All Writs Act, 28 U.S.C. § 1651 (authorizing federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions”).

⁷⁶ See HART & WECHSLER, *supra* note 24, at 1461–65 (discussing the history of habeas); Schmidt, *supra* note 33, at 1028–33 (noting the centrality of certiorari to the modern Supreme Court).

⁷⁷ See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 948–49 (2011) (noting that “prerogative writs played a role in nineteenth-century administrative law, including [mandamus,] prohibition, quo warranto, habeas corpus, and certiorari,” but that “[a]fter Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action”); Pfander & Wentzel, *supra* note 72, at 1330 (“By the time Congress granted general federal question jurisdiction in 1875, . . . the Supreme Court had laid the groundwork for the use of injunctions to perform the judicial review function of the administrative writs in cases supported by federal jurisdiction.”); see also Thomas P. Schmidt & Gillian E. Metzger, *Some Realism About Constitutional Remedies*, 139 HARV. L. REV. 1834, 1850 (2026) (arguing that certain prerogative writs for wrongful removals were “absorbed into the umbrella category of equitable relief”).

fusion.⁷⁸ As bankrupt railroads entered federal receivership in the 1870s, putatively private law injunctions on the equity side gradually targeted broader classes of defendants and public officials without making recourse to the prerogative writs.⁷⁹ At the turn of the century, the Court blessed equitable injunctions against executive officials alleged to have violated the Due Process Clause.⁸⁰ And in the landmark *Ex parte Young*, decided in 1908, the Court affirmed injunctive relief against a state officer to restrain a violation of the Constitution.⁸¹ Neither the Court nor the parties in *Ex parte Young* bothered to debate whether the relief should have been styled a writ of prohibition, despite the fact that prerogative writs were all over the underlying proceedings.⁸² In the subsequent eras of the labor injunction, anti-regulatory injunction, and civil rights injunction, the federal courts routinely issued coercive, prospective relief against government officials and private individuals without observing a formal distinction between legal and equitable labels.⁸³

The Federal Rules of 1938 largely codified this practice of issuing relief in the nature of the prerogative writs under the label of equitable

⁷⁸ Indeed, public law developments may have spurred Charles Clark's notion that procedure needed to catch up to fusion in substantive law rather than the other way around. See *supra* note 60 and accompanying text.

⁷⁹ See William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1155–57 (1989) (chronicling federal courts' expanding use of injunctions against strikers on railroads in receivership); Warner Fuller, *The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations—A Survey*, 7 L. & CONTEMP. PROBS. 377, 377–79 (1940) (recounting the rise of equitable receiverships for insolvent railroad companies, which insulated the companies from other courts or persons under most circumstances); Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 191, 193–94 (1936) (describing federal equitable receiverships and resulting federal labor injunctions).

⁸⁰ See *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 122–26 (1998) (describing *McAnnulty* as articulating a general theory that “justified a court’s power to restrain violations of law by federal officials”).

⁸¹ 209 U.S. 123 (1908).

⁸² As the case name implies, *Young* got to the Court on a writ of habeas corpus (legal relief), challenging his contempt (equitable relief) in the lower court. The lower court’s injunction (equitable relief) prohibited *Young* from instituting mandamus proceedings (legal relief) to enforce the contested railroad rate regulations. See Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in FEDERAL COURTS STORIES 247, 261–64 (Vicki C. Jackson & Judith Resnik eds., 2010); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997).

⁸³ See PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 147–51, 180–81 (1990) (recounting the history of the labor, anti-regulatory, and civil rights injunctions); OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 1–5 (1978) (describing the proliferation of injunctive relief in the labor, anti-Progressive, and civil rights contexts); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 52–53 (1930) (arguing that injunctions have become the “ordinary legal remedy” in the labor relations context).

injunctions. Rule 81 clarified that unless a federal statute said otherwise, the unified system of procedural rules, including multiparty joinder and coercive relief, applied “to proceedings for habeas corpus and for quo warranto.”⁸⁴ And the Rule went out of its way to abolish the distinctive labels of “scire facias and mandamus” while assuring that “[r]elief previously available through them may be obtained by appropriate action or motion under these rules,”⁸⁵ meaning, in most cases, an action for injunctive relief under Rule 65.

The Court missed this history of fusion in *CASA*, with not even a whisper of the prerogative writ tradition appearing in any of the majority or dissenting opinions.⁸⁶ Ignoring the history of fusion in public law remedies raises two immediate dangers pertinent to the equity docket. First, if the Court insists that modern remedies are constrained by *equity*’s distinct history and traditions, then it should simultaneously give attention to the *common law*’s distinct traditions, or it will end up denying remedies where litigants have unimpeachable, historically grounded rights to recovery. In a case like *CASA*, that means an analysis of equitable traditions justifying a “universal injunction” is only half complete. The next analytical step would ask whether a “universal writ of mandamus” should issue based on solid legal precedent. The Court seems to have belatedly realized this oversight, as it recently analyzed the history both of legal relief through “*quo warranto* or mandamus” and equitable relief through a preliminary injunction when assessing a federal court’s power to halt the wrongful removal of a federal officer.⁸⁷

Second, since the equity docket itself operates on state and federal officials or restrains lower courts from doing so, the Court cannot ignore fusion in public law remedies without imperiling the very processes and structures that produce cases like *CASA*. The Court in *CASA*, for instance, ordered a stay of a lower court injunction.⁸⁸ To issue a stay, the Court looks to the same equitable factors used to grant equitable injunctions.⁸⁹ Yet the Court has never established that stays are “those sorts of equitable remedies ‘traditionally accorded by courts of equity’

⁸⁴ FED. R. CIV. P. 81(a)(4).

⁸⁵ FED. R. CIV. P. 81(b); *see, e.g.*, *Mical Commc’ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1036 n.2 (10th Cir. 1993) (“Fed. R. Civ. P. 81(b) abolished writs of mandamus, and provided that relief formerly available by mandamus may now be obtained by ‘appropriate motion’ such as a motion for injunctive relief.”); *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 720 n.7 (6th Cir. 1979) (“Since the writ of mandamus has been abolished in federal practice, . . . the Act presumably contemplates injunctive relief against the Secretary.”).

⁸⁶ *See Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025).

⁸⁷ *See Trump v. Cook*, No. 25A312, 2026 WL 1855613, at *10 (U.S. June 29, 2026).

⁸⁸ 145 S. Ct. at 2562–63.

⁸⁹ *See Nken v. Holder*, 556 U.S. 418, 434 (2009); Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1964–65 (2022).

at our country's inception," the standard it used to invalidate a universal injunction in *CASA*.⁹⁰ Instead, the trail of citations for the authority to grant stays traces back to a 1942 opinion by Justice Frankfurter that loosely referenced prerogative writs without specifying which ones empowered appellate courts to stay lower court orders.⁹¹

Our point is not that stays or other equity docket processes are invalid unless they can meet *CASA*'s historical test—quite the opposite. The point is that when it comes to public law litigation, we all, including the Supreme Court, live in a post-fusion world. When the Court tries to account for its own practices, it mixes freely among legal and equitable traditions, from the Founding as well as from later eras. The problem, as we explore in the next Section, is that it is becoming increasingly difficult to guess when the Court will give litigants the benefit of fusion or hold them to more restrictive equitable or historical traditions.

3. *The Puzzles of the New Equity*

From the foregoing account, several inconsistent views of law and equity emerge from the history of fusion. According to one—the view of many federal courts—the fusion of law and equity was successfully accomplished in procedure, but not in substantive law. A second—the view of the influential Field Code—holds that fusion in procedure inevitably produces fusion in substantive law. A third—Charles Clark's view of the Federal Rules—treats fusion in procedure as catching up to substantive fusion. Our account has emphasized progress but also incompleteness in fusion both procedurally and substantively.

One way of understanding the "new equity"⁹² touched off in *Grupo Mexicano*, then, is not so much as a revival of the old distinction between law and equity but as a full-throated endorsement of the first view of fusion, one that had already gained many adherents in the federal courts. That is, the "new equity" is the same old attempt to map a distinction between "substance" and "procedure" that recognizes fusion as fully accomplished only in the latter domain. Quoting Wright and Miller's magisterial treatise on federal procedure, *Grupo Mexicano* summed this recognition up in one line: "The substantive prerequisites for obtaining an equitable remedy as well as the general availability of

⁹⁰ 145 S. Ct. at 2551.

⁹¹ See *id.* at 2550 (citing *Nken* for the stay standard). *Nken*, 556 U.S. at 433, had cited to *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10 (1942), which in turn invoked, as persuasive authority for interpreting an earlier version of the All Writs Act, a section of the District of Columbia Code which allowed the Court of Appeals for the District of Columbia "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." *Id.* at 10 n.4 (emphasis added).

⁹² Bray, *New Equity*, *supra* note 9, at 999–1000.

injunctive relief are not altered by [Federal Rule of Civil Procedure 65] and depend on traditional principles of equity jurisdiction.”⁹³ *Procedure* is fused, but *substance* is not. Any civil action may seek an injunction under the uniform procedures of Rule 65; but substantively, injunctions may issue only for purposes that traditional equity would deem appropriate.

Grupo Mexicano’s analysis raises two important puzzles for the equity docket in the Supreme Court. First is the notoriously vague line between substance and procedure. Procedural fusion with substantive distinctions between law and equity may be conceptually tidy, but, practically, it results in a mess. As generations of scholarship on the *Erie* doctrine have shown, virtually any rule can be argued simultaneously to be substantive or procedural, including statutes of limitations,⁹⁴ the right to a jury,⁹⁵ caps on damages,⁹⁶ the standard for a preliminary injunction,⁹⁷ and countless others.⁹⁸

⁹³ *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999).

⁹⁴ See *Guaranty Tr. Co. v. York*, 326 U.S. 99, 109–10 (1945) (holding that statutes of limitations are substantive for *Erie* purposes if they would completely bar recovery in state court); David H. Vernon, *Some Constitutional Problems in the Conflict of Laws and Statutes of Limitation*, 7 J. PUB. L. 120, 120–22 (1958) (observing that some states treat their statutes of limitations as substantive, while others treat them as procedural, with varying implications for conflicts of laws).

⁹⁵ See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535–39 (1958) (holding that the allocation of responsibilities between judge and jury is procedural rather than substantive for *Erie* purposes); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (holding that a jury trial is a substantive statutory right); Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 494–97 (2018) (critiquing Oregon’s recent treatment of the civil jury as procedural rather than substantive); Frank H. Easterbrook, *Substance and Due Process*, 4 SUP. CT. REV. 85, 94 (1982) (characterizing the federal right to a civil jury as a procedural right).

⁹⁶ See *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415, 428–31 (1996) (holding that New York’s standard for judicial review of jury verdict sizes is substantive for *Erie* purposes); cf. Matthew W. Light, Note, *Who’s the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 325–26, 332–34 (2001) (noting that some states view damage caps as violating the right to a jury trial, while others consider them part of the substantive law of the jurisdiction and not in conflict with the jury’s role).

⁹⁷ See *Rosen v. Siegel*, 106 F.3d 28, 32–33 (2d. Cir. 1997) (holding that the lack of a finding of irreparable harm by the district court when issuing a preliminary injunction is a procedural defect); Camilla A. Hrdy, *Erie, Remedies, and Trade Secrets*, 10 CONLAWNOW 237, 240–41 (2018) (noting that federal courts consider the preliminary injunction standard procedural for *Erie* purposes, while at least one scholar argues it is substantive); David E. Shipley, *The Preliminary Injunction Standard in Diversity: A Typical Unguided Erie Choice*, 50 GA. L. REV. 1169, 1171–72 (2016) (raising the question of whether the preliminary injunction standard is procedural or substantive for *Erie* purposes).

⁹⁸ See, e.g., Aaron-Andrew P. Bruhl, *Law and Equity on Appeal*, 124 COLUM. L. REV. 2307, 2319–24 (2024) (discussing the substantive outcomes of the goals of federal appeals, which the article treats as procedural); Claire E.M. Jervis, *Jurisdictional Immunities Revised*:

The difficulty with following the Court's logic in *Grupo Mexicano* is the same as the one jurists have confronted for the better part of a century under *Erie*: If one cannot tell in advance what falls on the substantive or procedural side of the line, one never knows when a distinctive equitable tradition will jump out like a jack-in-the-box to constrain the otherwise flexible and adaptive set of uniform procedural rules. It is no longer the *outcomes* of equity that are as variable as the chancellor's foot but the Court's decisions to invoke equitable traditions as an *input* to its decisionmaking. So long as the Court can invoke the talisman of "substance" or "procedure" to conjure or dismiss distinctive equitable traditions, the Court's deployment of equity will appear increasingly arbitrary.

The second puzzle is the source of equitable tradition. Even if the first problem could be resolved and litigants were reasonably certain that an issue fell on the substantive side of the line requiring a distinctive equitable tradition, where is that tradition to be found? The Court in *Grupo Mexicano*, and more recently in *Trump v. CASA*, answered that, "[s]ubstantially, . . . 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."⁹⁹ This proposition raises many questions the Court has left unsettled. Is it the Constitution's reference to "Law and Equity" that binds courts to eighteenth-century English Chancery¹⁰⁰ or the First Judiciary Act that does so? *CASA* put the emphasis squarely on the latter,¹⁰¹ but then why doesn't the historical reference to equitable tradition update each time Congress confers equitable jurisdiction, as it did when it granted general federal question jurisdiction in 1875,¹⁰² or again in the re-codification of the

An Analysis of the Procedure Substance Distinction in International Law, 30 EUR. J. INT'L L. 105, 107 (2019) (arguing that, in the international law context, procedure and substance describe the structure of the law, but not its true nature, and that the two are in truth highly intertwined).

⁹⁹ *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999); *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2551 (2025).

¹⁰⁰ Carlos M. Vázquez, *The Constitution as a Source of Remedial Law*, 132 YALE L.J.F. 1062, 1078–79 (2023) (arguing that Article III reflects the Founders' expectation that equitable remedies available in England at the time of ratification will continue to be available in federal court); see also Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1221 (2023) (arguing that Article III confers upon the federal courts a baseline equitable relief power commensurate with that of eighteenth-century English Chancery courts).

¹⁰¹ *CASA*, 145 S. Ct. at 2551.

¹⁰² Jack Goldsmith, *Interim Orders, the Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 114–16 (2025).

judicial code in 1948?¹⁰³ Even if federal courts confine themselves to the traditions of English Chancery in 1789, how should they account for the fact that English equity was itself an evolving jurisdiction, one whose chancellors were self-consciously aware of their powers to adapt equity as future cases might demand?¹⁰⁴

This problem is all the more vexing because, as we suggested above, the equity docket itself does not conform to the practices of English Chancery in 1789.¹⁰⁵ As other scholarship has shown, a number of the Court's agenda management procedures are twentieth-century novelties; lacking any clear statutory basis, they must seek their source, if anywhere, in an evolving uncoded tradition.¹⁰⁶ This statutory rootlessness is especially true of major procedures deployed on the equity docket, such as stays of district court decrees.¹⁰⁷

Focusing attention on the equity docket will not resolve all of these issues at once, but it can help the Court give clearer justifications for what it is doing. The fusion of law and equity has succeeded to a substantial degree in the federal courts—the equity docket itself is a clear example of that. But distinctive traditions in both law and equity continue to channel the courts' analysis of rights, remedies, and even procedure. The Court's move to articulate the features of equity that continue to exert a distinctive force is salutary, but the flimsy reduction of equity to “substantive” law will only send courts and litigants running in circles. The following Parts offer a way forward, at least for the Court's own equitable activities.

¹⁰³ For a parallel suggestion that habeas jurisdiction should be determined with reference to the context of the 1948 re-codification, see Lee Kovarsky, *Habeas and the 1948 Judicial Code*, 79 STAN. L. REV. (forthcoming 2026) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6151606 [<https://perma.cc/96PD-SBQW>].

¹⁰⁴ For recent work in this line of inquiry, see Samuel L. Bray, *How Equity Changes*, 2026 SUP. CT. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6226118 [<https://perma.cc/3T4J-LEJR>].

¹⁰⁵ See *supra* notes 88–91 and accompanying text.

¹⁰⁶ See Benjamin B. Johnson, *A History of Vacatur*, 135 YALE L.J. 761, 788–89 (2026) [hereinafter Johnson, *Vacatur*] (describing the Court's novel use of vacatur in the twentieth century); Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 799–800 (2022) [hereinafter Johnson, *Question Selection*] (arguing that the Court's question-selection power is rooted in twentieth-century practice rather than common law traditions or statute). For an article covering this topic less recently, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1705–13 (2000) (recounting various ways the Court expanded its control over its docket throughout the twentieth century); cf. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 221–22 (1991) (noting that certworthiness is defined with respect to vague criteria that are only usually dispositive instead of an external standard).

¹⁰⁷ See *supra* notes 89–91.

B. *The Growth of the Equity Docket*

The recent and explosive growth of the Court's equity docket is, as we indicated above, grounded in the fusion of certain old statutory authorities. The All Writs Act, which traces to the First Judiciary Act of 1789, empowers the federal courts, including the Supreme Court, to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹⁰⁸ That conferral of the common law prerogative writs combined with Congress's general authorization of equitable jurisdiction is the statutory basis for most of the Court's present activities on the equity docket.¹⁰⁹ These enactments empower—or have been read to empower—the Court to issue writs of injunction relating to cases pending in the lower courts, and to stay preliminary injunctions issued by lower court judges.¹¹⁰ A separate statutory provision, which traces to the Judges' Bill of 1925, authorizes the Court (or a single Justice) to stay "for a reasonable time" the "execution and enforcement" of any "final judgment or decree" that is "subject to review . . . on writ of certiorari."¹¹¹ Though a single Justice has the authority to issue a stay (and possibly issue an injunction),¹¹² in practice controversial applications are referred to the whole Court.¹¹³

For a variety of reasons, interim orders in salient cases under these old authorities have mushroomed in the last decade. During the Bush and Obama presidencies, the Solicitor General filed only eight applications to the Court for emergency (or interim) relief in sixteen

¹⁰⁸ All Writs Act, 28 U.S.C. § 1651(a); see Judiciary Act of 1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–82 (1789).

¹⁰⁹ During Reconstruction, federal question jurisdiction was conferred over "all suits of a civil nature at common law or in equity." Act of Mar. 3, 1875, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331). The 1948 re-codification replaced the reference to law and equity with the Federal Rules' chosen term "civil actions." 28 U.S.C. § 1331.

¹¹⁰ HART & WECHSLER, *supra* note 24, at 376, 380; STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE*, ch. 17.7 (11th ed. 2019). The Supreme Court does not have authority to stay non-final decisions of state courts before the highest court in the state rules on the stay motion. See *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (treating finality of judgment as a prerequisite for a stay of the state court's decision); *Malliotakis v. Williams*, 146 S. Ct. 809, 813 (2026) (Sotomayor, J., dissenting from grant of stay).

¹¹¹ 28 U.S.C. § 2101(f).

¹¹² SUP. CT. R. 23.1; SHAPIRO ET AL., *supra* note 110, ch. 17.4 (also noting the ambiguity in the Court's rules regarding the scope of an individual Justice's injunctive power).

¹¹³ See SHAPIRO ET AL., *supra* note 110, ch. 17.12, at 17–29 ("[A] referral [of an application to the whole Court] usually occurs where very important or complex questions are raised by the application."); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 836 (2021) (affirming that "non-trivial stay applications" received by Justices are typically "referred to the full Court").

years.¹¹⁴ Seven of eight were decided without any noted dissent, suggesting they were not particularly controversial.¹¹⁵ During the first Trump administration, in only four years, the Solicitor General sought emergency relief forty-one times.¹¹⁶ Indeed, the Trump administration filed more emergency applications regarding its travel ban alone than either the Bush or Obama administrations filed during their entire eight-year terms.¹¹⁷ According to numbers compiled by Professor Stephen Vladeck, the Court granted three-quarters of the applications on which it gave an “up-or-down decision.”¹¹⁸ Those interim decisions were not only more frequent; they were more controversial too. At least ten of these “shadow” docket decisions split the Court 5-4, and a large percentage had noted dissents.¹¹⁹

Notably, the Court was not only granting stays of lower court injunctions, but also sometimes issuing writs of injunction itself. Traditionally, these have been much rarer than stays, because an injunction “does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.”¹²⁰ But at the end of the Obama administration, the Court took the “unprecedented” step of “stay[ing] a regulation then under review in the lower courts”—namely, President Obama’s Clean Power Plan.¹²¹ And after Justice Amy Coney Barrett joined the Court, there was a major (if temporary) uptick in the number of writs of injunction issued by the Court. In the 2020 Term, the Court granted seven injunctions, which was more than it had granted in the prior fifteen Terms combined.¹²²

During the Biden years, the Court remained active in ruling on stay and injunction applications. The Biden administration filed nineteen applications for interim relief, and the Court granted ten (just over half)

¹¹⁴ VLADECK, *supra* note 24, at 144.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 132–35 (2019).

¹¹⁸ VLADECK, *supra* note 24, at 144.

¹¹⁹ *Id.* at 145. The exact vote counts in rulings on applications are not always disclosed.

¹²⁰ Respect Me. PAC v. McKee, 562 U.S. 996, 996 (2010) (Kennedy, J., in chambers) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). See generally SHAPIRO ET AL., *supra* note 110, ch. 17.4, at 17–9 to –10 (referencing various authorities stating that the Supreme Court should issue injunctions sparingly).

¹²¹ West Virginia v. EPA, 142 S. Ct. 2587, 2627 (2022) (Kagan, J., dissenting); see also West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.).

¹²² Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong. 5 (2021), <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [<https://perma.cc/E2FP-YFYR>] (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. of Tex. Sch. of Law).

of them.¹²³ There were also important applications that did not involve the federal government as a party. The most prominent of these—and the case that brought the “shadow” docket fully into the light of public consciousness (and controversy)—was *Whole Woman’s Health v. Jackson*.¹²⁴ In that case, the Court by a 5-4 vote allowed a Texas law to go into effect that would effectively ban abortions starting at about six weeks while delegating to private parties the right to enforce the law.¹²⁵ The case caused a firestorm, because, at the time, the Texas ban was “in clear, and indeed undisputed, conflict with *Roe* and *Casey*,”¹²⁶ and *Dobbs* was still several months in the future.¹²⁷ Justice Kagan did not pull her punches in criticizing the Court’s approach to the “shadow” docket: “[T]he majority’s decision is emblematic of too much of this Court’s shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend.”¹²⁸

After that order and the cavalcade of criticism it loosed, the Court began to experiment with different procedural approaches to its interim orders. It began, for instance, to hold oral arguments on some stay applications.¹²⁹ It began to grant certiorari before judgment to decide cases before the courts of appeals¹³⁰—something it did not do a single time between 2004 and 2019.¹³¹ And it began to explain its reasoning, though often briefly and opaquely, in more cases. In all, the rise of this extraordinary jurisdiction ushered in perhaps the most dramatic period of procedural experimentation in the Supreme Court in a century.¹³²

When it comes to interim orders in the Court, the second Trump administration has become an even more extreme version of the first. In the October 2024 Term—which began in October 2024 and ended

¹²³ Steve Vladeck, *Bonus 157: Why the Supreme Court Keeps Granting Stays to President Trump*, ONE FIRST (June 12, 2025), <https://www.stevevladeck.com/p/bonus-157-why-the-supreme-court-keeps> [https://perma.cc/X292-YBS9].

¹²⁴ 141 S. Ct. 2494 (2021).

¹²⁵ *Id.*

¹²⁶ *Id.* at 2500 (Kagan, J., dissenting).

¹²⁷ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overruling *Roe* and *Casey*).

¹²⁸ *Whole Woman’s Health*, 141 S. Ct. at 2500 (Kagan, J., dissenting).

¹²⁹ See, e.g., *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 664 (2022) (per curiam) (noting that the Court held oral argument on the stay application).

¹³⁰ See, e.g., *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 531 (2021).

¹³¹ VLADECK, *supra* note 24, at 124.

¹³² See generally Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. REFLECTION 1 (2022) (discussing some of these experiments). In 1925, the Judges’ Bill was enacted, ushering in profound changes not only to the Court’s procedures but to its self-conception. See Hartnett, *supra* note 106, at 1644–45 (describing the enactment of the Judges’ Bill of 1925, with its expansion of certiorari, as the day “the modern Supreme Court was born”).

October 2025, and therefore covered the first eight and a half months of the Trump administration—the Court ruled on a remarkable 140 emergency applications.¹³³ It granted relief in thirty-one of those cases, including in twenty-three consecutive applications from the Solicitor General.¹³⁴ All of these totals, according to Stephen Vladeck, are records “by a wide margin.”¹³⁵ To put the numbers in perspective, the Supreme Court decided only fifty-five cases on its ordinary merits or “law” docket last Term.¹³⁶

The numbers alone do not capture the whole story, because they do not reflect the qualitative importance of these cases. In an “interim” or “emergency” posture, the Court has prevented the deportation of noncitizens to a brutal megaprison in El Salvador;¹³⁷ it has allowed thousands of federal workers to be fired;¹³⁸ it has blocked the deployment of the National Guard to American cities;¹³⁹ it has allowed President Trump to fire members of—and indeed to incapacitate—several important agencies;¹⁴⁰ it has removed protected status from tens of thousands of migrants;¹⁴¹ it has allowed ICE to racially profile residents of Los Angeles as part of a massive deportation operation;¹⁴² and it has decided what religious gatherings could be held during a global pandemic;¹⁴³ among many other things.¹⁴⁴ All these cases touch sensitive nerves of public controversy. Another measure of importance is that the Court, for the first time, has clarified that decisions in this interim posture docket have precedential effect.¹⁴⁵

One former Solicitor General summed up the 2024 Term this way: “The emergency docket swallowed the Court, both in terms of workload

¹³³ Stephen I. Vladeck, *The Supreme Court's (Self-Defeating) Supremacy*, 2025 SUP. CT. REV. 333, 335 (2026).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ A.A.R.P. v. Trump, 145 S. Ct. 1034 (2025) (mem.).

¹³⁸ See, e.g., Trump v. Am. Fed'n of Gov't Emps., 145 S. Ct. 2635 (2025) (mem.).

¹³⁹ Trump v. Illinois, 146 S. Ct. 432 (2025).

¹⁴⁰ See, e.g., Trump v. Wilcox, 145 S. Ct. 1415 (2025); Trump v. Slaughter, 146 S. Ct. 18 (2025) (mem.). These firings have left several agencies without a quorum to function. See Nicholas R. Bednar & Todd Phillips, *Commission Quorums*, 78 STAN. L. REV. 1125, 1136–37 tbl. 1 (2026).

¹⁴¹ Noem v. Doe, 145 S. Ct. 1524 (2025) (mem.).

¹⁴² Noem v. Vasquez Perdomo, 146 S. Ct. 1 (2025) (mem.).

¹⁴³ See, e.g., Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

¹⁴⁴ See Vladeck, *supra* note 133, at 335–36.

¹⁴⁵ Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025) (per curiam) (“Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases.”). For further discussion of the unclear precedential effect of extraordinary docket opinions after *Boyle*, see Goldsmith, *supra* note 102, at 105–06 & nn. 113, 115.

and even practical importance.”¹⁴⁶ During the first year of the second Trump administration, in other words, the Court’s “interim” rulings were the primary mechanism by which the Court decided questions of executive power. The merits docket meanwhile became, in the words of Jack Goldsmith, “a slow and diminishingly relevant mechanism to redress contemporary executive power challenges.”¹⁴⁷ It is startling that only a decade ago this facet of the Court’s work was obscure enough to earn the “shadow” sobriquet.

C. *Why the Equity Docket Is Equitable*

It is a sign of the importance and novelty of this aspect of the Court’s work that there is so much confusion about what to call it. One thing is for sure: As Justice Barrett said in a recent interview, it is a “different animal” from the regular merits docket.¹⁴⁸ Just what rough beast is it, though? In this Section, we explain why “equity docket” is the best fit.

The first and still frequently used label is the “shadow” docket. The phrase was coined by William Baude in 2015 to describe everything the Supreme Court does other than the merits docket.¹⁴⁹ It includes not only applications for stays and writs of injunction but also certiorari decisions, summary reversals (the focus of Baude’s article), “GVRs,”¹⁵⁰ and more. The “shadow” label was meant to highlight the relative lack of transparency as compared to the merits docket.¹⁵¹ Baude also suggested that “the Court’s non-merits orders do not always live up to the high standards of procedural regularity” set by the merits docket.¹⁵² The “shadow” docket label was vaulted to greater prominence by Stephen Vladeck’s book of that name,¹⁵³ and even (for a time) migrated to the U.S. Reports.¹⁵⁴ It is still

¹⁴⁶ Ann E. Marimow, *How Trump’s Emergencies and Wins Dominated the Supreme Court Term*, WASH. POST (June 29, 2025), <https://www.washingtonpost.com/politics/2025/06/29/supreme-court-trump-emergency-docket> [https://perma.cc/4M2J-JBKM] (quoting former Solicitor General Gregory G. Garre).

¹⁴⁷ Goldsmith, *supra* note 102, at 87.

¹⁴⁸ LBJ FOUNDATION, *An Evening with Justice Amy Barrett*, at 25:50 (YouTube, Sep. 18, 2025), <https://youtu.be/lXjzKoUJGck?si=KNH5XN2eTwkaPxZ6&t=1550> (on file with the New York University Law Review).

¹⁴⁹ William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015).

¹⁵⁰ *Id.* at 22 n.69. GVR stands for “grant[], vacate[], and remand[].” *Id.*

¹⁵¹ *Id.* at 1, 3–4.

¹⁵² *Id.* at 4.

¹⁵³ VLADECK, *supra* note 24; see Schmidt, *supra* note 33 (discussing Vladeck’s book).

¹⁵⁴ E.g., *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (employing the term “shadow docket” twice); *Merrill v. Milligan*, 142 S. Ct. 879, 883, 889 (2022) (Kagan, J., dissenting from grant of applications for stays) (same).

probably the most common way to refer to this aspect of the Court's business.¹⁵⁵

A second option is the “emergency” docket. Justice Alito, in a 2021 speech, deplored the “shadow docket” as a “catchy and sinister term” that “has been used to portray the court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways.”¹⁵⁶ His proposed alternative was “emergency docket.” This term has caught on among commentators (and Justices) seeking a more value-neutral expression, like the authors of the *Hart & Wechsler* casebook.¹⁵⁷

A newer entrant is the “interim” docket (or “interim-orders” docket). Justice Kavanaugh has pushed this label,¹⁵⁸ and Jack Goldsmith, in a recent essay in the *Harvard Law Review*, advocated for the term.¹⁵⁹ The popular SCOTUSblog has a section of its website devoted to the “interim docket.”¹⁶⁰ Recently, “interim docket” was used by the Court in a majority opinion, bolstering its present favor.¹⁶¹

Each of these labels captures something real and important, but each also has descriptive shortcomings. The term “shadow” docket is broad and imprecise. It includes all sorts of routine administrative orders—GVRs, motions for extension, certiorari denials—that are not usefully lumped together with applications raising important issues of

¹⁵⁵ David Lat conducted an informal reader poll, yielding over five hundred responses, that resulted in the following unscientific ranking: (1) shadow docket (with 42.5% of readers), (2) emergency docket (15.1%), (3) short-order docket (10.3%), (4) interim-relief docket (9.6%). David Lat, *Emergency, Shadow . . . Or Half-Enchilada Docket? The Results*, ORIGINAL JURISDICTION (Aug. 19, 2025), <https://davidlat.substack.com/p/poll-results-supreme-court-scotus-emergency-shadow-preliminary-interim-relief-short-order-docket> [<https://perma.cc/GW6X-ZD7J>].

¹⁵⁶ Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket'*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> [<https://perma.cc/77Q5-KQ7P>].

¹⁵⁷ See HART & WECHSLER, *supra* note 24, at 371–99 (casebook section on “[t]he Supreme Court’s Emergency Docket”); *Labrador v. Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring in the grant of stay); *id.* at 935 (Jackson, J., dissenting from grant of stay).

¹⁵⁸ See Suzanne Monyak, *Kavanaugh Pushes New Label for Supreme Court Emergency Docket*, BLOOMBERG LAW (Sep. 4, 2025, at 15:27 ET), <https://news.bloomberglaw.com/us-law-week/kavanaugh-pushes-new-label-for-supreme-court-emergency-docket> [<https://perma.cc/L2KM-D3L4>] (documenting Justice Kavanaugh’s expressed preference for the term “interim docket” to refer to the issuing of orders in pending cases without extensive reasoning).

¹⁵⁹ Goldsmith, *supra* note 102, at 90–91.

¹⁶⁰ *Interim Docket 2025*, SCOTUSBLOG, <https://www.scotusblog.com/cases/interim-docket/2025> [<https://perma.cc/52U3-X5LV>] (last visited May 27, 2026). Note that the “emergency docket” had left a palimpsestic trace in the URL until April 2026: <https://www.scotusblog.com/case-files/emergency/emergency-docket-2025>.

¹⁶¹ *Trump v. Cook*, No. 25A312, 2026 WL 1855613, at *15 (U.S. June 29, 2026).

public law.¹⁶² Further, obscurity—the inspiration for the shadow metaphor—is no longer a major problem. Yes, the “shadow” docket was, for a time, more hidden than the merits docket, and it remains true that “shadow” docket decisions can be issued at odd hours with opinions stashed in unusual parts of the Court’s website. But the Court’s “shadow” docket has become at least as prominent in public commentary and awareness about the Court as its merits docket.¹⁶³ Finally, fairly or not, the term has become something of a partisan shibboleth, impairing its analytic usefulness.¹⁶⁴

As for “emergency” docket, it is true that sometimes applications to the Court present genuine emergencies—when a group of applicants is about to be deported, for example. And, on average, applications to the “emergency” docket are handled more quickly and urgently than cases on the merits docket.¹⁶⁵ On the other hand, not all applications to the emergency docket are genuine emergencies, and the Court quite often displays no particular haste in resolving them. The application involving President Trump’s attempt to fire Lisa Cook, for example, was filed on September 18, 2025; the Court heard oral argument on January 21, 2026, and issued a decision on June 29, 2026.¹⁶⁶ That leisurely schedule is comparable to a case on the merits docket.

The last option, “interim” docket, has the virtue of tracking the Court’s most recent self-description of its task. But it, too, can mislead. Sometimes an “interim” decision can have irrevocable effects. For instance, when the Court permits the deportation of noncitizens to third countries on the “interim” docket, it is exceedingly unlikely that

¹⁶² See Das et al., *supra* note 17, at 77–79.

¹⁶³ The “shadow” docket routinely makes the front pages. *E.g.*, Jodi Kantor & Adam Liptak, *The Shadow Papers: The Inside Story of Five Days That Remade the Supreme Court*, N.Y. TIMES, Apr. 19, 2026, at A1. One way this docket is still “shadowy” is that the Court routinely does not explain its rulings or disclose exact vote counts. In this, once again, there is a kinship to traditional equity, which was less transparent and public than the law courts. See AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877*, at 89 (2017) (noting “equity’s longstanding commitment to secrecy” in testimony); JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 109 (5th ed. 2019) (referring to Chancery as “not a court of record”). We argue below for a greater commitment to public reason-giving on the equity docket today. See *infra* notes 359–68 and accompanying text.

¹⁶⁴ See Lat, *supra* note 155 (noting the partisan divergence in use of the term); cf. Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (faulting the “dissent’s catchy but worn-out rhetoric about the ‘shadow docket’”).

¹⁶⁵ See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2571 (2025) (Kavanaugh, J., concurring) (contrasting “applications for interim” with the “slower-moving merits docket”).

¹⁶⁶ See Application for Stay, *Trump v. Cook*, No. 25A312 (U.S. Sep. 18, 2025); Oral Argument, *Trump v. Cook*, No. 25A312 (Jan. 21, 2026), https://www.supremecourt.gov/oral_arguments/audio/2025/25A312 (on file with the New York University Law Review); *Trump v. Cook*, No. 25A312, 2026 WL 1855613 (U.S. June 29, 2026).

those individuals, once deported, will ever be able to vindicate their due process rights.¹⁶⁷ Moreover, because the full legal process can take years to unfold, the “interim” status of a policy can prove to be the last word in practice.¹⁶⁸ Numerous policies of the first Trump administration, for instance, were adjudicated on the “interim” docket and then never returned to the Court again.¹⁶⁹ Justice Kavanaugh has acknowledged that “the emergency docket during the COVID-19 pandemic in essence *was* the merits docket as to certain COVID-19-related issues,” because the pandemic would end before the full legal process could play out.¹⁷⁰ More recently, the Court’s supposedly interim ruling in *Trump v. Illinois*, that President Trump had unlawfully deployed the Illinois National Guard to Chicago,¹⁷¹ effectively ended the case: The Trump administration withdrew the National Guard from Chicago in response to the Court’s ruling and moved successfully to dismiss the case as moot.¹⁷² The “interim” label is inapt in these circumstances.

All these terms, then, fall short.¹⁷³ Ours, the “equity docket,” is the most descriptively exact. First, the power to decide the status of the parties while litigation unfolds is an old and well-settled function of equity.¹⁷⁴ As the Court wrote before fusion, an injunction from a federal court “for the purpose of protecting and preserving that jurisdiction

¹⁶⁷ See *A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1367 (2025) (holding that “the District Court’s inaction . . . had the practical effect of refusing an injunction to detainees facing an imminent threat of severe, irreparable harm” if they were removed); *id.* at 1368 (noting that the “Government has represented elsewhere that it is unable to provide for the return of an individual deported in error”).

¹⁶⁸ Michael W. McConnell, *The Supreme Court’s Not-so-Sinister ‘Shadow Docket,’* WASH. POST (Apr. 24, 2026), <https://www.washingtonpost.com/opinions/2026/04/24/supreme-court-shadow-docket-isnt-so-sinister/> [<https://perma.cc/6U8H-EN5H>].

¹⁶⁹ See VLADECK, *supra* note 24, at 144–45 (noting that “the Biden administration discontinued most of the policies in question soon after coming into office,” rendering challenges to them moot and thus making the stay ruling the Court’s only involvement in these disputes).

¹⁷⁰ *Labrador v. Poe*, 144 S. Ct. 921, 933 n.5 (2024) (Kavanaugh, J., concurring in the grant of stay).

¹⁷¹ *Trump v. Illinois*, 146 S. Ct. 432 (2025).

¹⁷² Judgment in a Civil Case at 1, *Illinois v. Trump*, No. 25-cv-12174 (N.D. Ill. Apr. 21, 2026), ECF No. 152; see Jon Seidel, *Judge Tosses Lawsuit over Trump’s Push to Deploy National Guard to Chicago After His Supreme Court Loss*, WBEZ CHI. (Apr. 20, 2026), <https://www.wbez.org/government-politics/federal/2026/04/20/trump-chicago-national-guard-midway-blitz-crime> [<https://perma.cc/KN3X-69TN>].

¹⁷³ For another critique of existing terminology, see Goelzhauser, *supra* note 17, at 105–08.

¹⁷⁴ See 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 171 (Melvin M. Bigelow ed., 13th ed., Boston, 1886) (“Courts of Equity interpose to prevent the waste, or destruction, or deterioration of property *pendente lite*, or to prevent irreparable mischief.”); Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809, 847 (2025) [hereinafter Bray, *Purpose*] (quoting the same Story passage in its discussion of the origins of preliminary injunctions).

until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice.”¹⁷⁵ That, in essence, is what the Court does on its “equity” side. To borrow Bert Huang’s apt phrase, the Court “set[s] a temporary holding pattern for the parties until it rules on the merits.”¹⁷⁶ That is a close analog of what the chancellor would be asked to do in the days of the divided bench.

Further, when the Court evaluates an application on its equity docket, its task closely resembles the historic task of a court of equity. The core of the equity docket is a litigant presenting a “grievance” to the Court and asking for its extraordinary intervention. Samuel Bray and Paul Miller have described equity in these terms: To get into equity, they write, you had to present a “grievance,” or a “persuasive account of how you wanted equity to do something that was the sort of thing that equity does.”¹⁷⁷ The emphasis was “on the chancellor’s discretion, and the need for the plaintiff to motivate the chancellor to act.”¹⁷⁸ Equity generally has “triggers to permit the exercise of judicial power, along with focal considerations to guide the exercise of that power,” while maintaining “a residual discretion for equity not to act” even if a trigger is satisfied.¹⁷⁹

Again, that aptly describes the Court’s equity docket. A litigant presents a “grievance” to the Court—either the government argues that a lower court has erred in granting an injunction,¹⁸⁰ or a plaintiff prays for a writ of injunction because of some likely irreparable harm. When the Court grants a writ of injunction, of course, the factors it consults are directly drawn from equity. For stays, too, the factors that the Court considers are expressly patterned on the factors for a preliminary injunction.¹⁸¹ As the Court said in *Nken v. Holder*, there “is

¹⁷⁵ *Looney v. E. Tex. R.R. Co.*, 247 U.S. 214, 221 (1918).

¹⁷⁶ Bert I. Huang, *The Foreshadow Docket*, 124 COLUM. L. REV. 851, 869 & n.70 (2024) (book review).

¹⁷⁷ Bray & Miller, *supra* note 17, at 1775.

¹⁷⁸ *Id.* at 1772.

¹⁷⁹ *Id.* at 1796 (citation omitted). The “trigger” terminology comes from Smith, *supra* note 40, at 1084.

¹⁸⁰ We regard the vacatur of an executive policy as the functional equivalent of an injunction for these purposes.

¹⁸¹ Those factors are: “(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.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); see also *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) (applying these factors). The Court gave a somewhat different formulation of the test in *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); see *infra* note 394.

substantial overlap between [the stay factors] and the factors governing preliminary injunctions, . . . because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.”¹⁸² To be clear, the Court has not always appreciated the implications of the linkage between the equity docket and equity, as we explore in Part III. But the Court’s task is fundamentally equitable.

Given the overlap, it is not surprising that the Court has overtly described its equity docket as an equitable practice. In *Trump v. International Refugee Assistance Project*, for instance, the Court addressed a stay application after district courts had enjoined President Trump’s travel ban.¹⁸³ The Court noted that a preliminary injunction itself is an equitable decision: “Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.”¹⁸⁴ It described its own decision in similar terms: “In assessing the lower courts’ exercise of equitable discretion, we bring to bear an equitable judgment of our own.”¹⁸⁵ Later, the Court held that its “interim orders” ought to “inform how a court should exercise its equitable discretion in like cases.”¹⁸⁶ In other words, its stay decisions should be taken as precedents governing how district courts exercise their own equitable discretion to enter preliminary injunctions.

Both Justice Alito and Justice Sotomayor have described “a stay of a lower-court decision” as “an equitable remedy.”¹⁸⁷ Justice Jackson has been more emphatic: “Equity is at the heart of preliminary-injunction and stay determinations because these decisions require courts to

¹⁸² 556 U.S. at 434. Of course, one difference between a stay application and a request for an injunction is that in the former the source of the harm or “grievance” is the decision of another court, rather than the conduct of some person or official. *See id.* at 428 (“[I]nstead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself.”). That does not sever the connection to traditional equity. As John Mitford points out in his eighteenth-century treatise, one of the “general objects” of a “court of equity” is to exercise jurisdiction “where the courts of ordinary jurisdiction are made instruments of injustice.” JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, BY ENGLISH BILL 103 (Elizabeth Lynch ed., 2d ed., Dublin, 1789); *see also* STORY, *supra* note 31, § 32, at 30–31 (same); Bray & Miller, *supra* note 17, at 1781 n.56 (quoting Mitford and Story).

¹⁸³ 582 U.S. 571 (2017) (per curiam).

¹⁸⁴ *Id.* at 579.

¹⁸⁵ *Id.* at 580.

¹⁸⁶ *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (per curiam).

¹⁸⁷ *Danco Lab’ys, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1076 (2023) (Alito, J., dissenting); *Dep’t of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2158 (2025) (Sotomayor, J., dissenting) (“[S]tays are equitable remedies.”); *see also* *Danco Lab’ys, LLC v. Louisiana*, 146 S. Ct. 1192, 1196 (2026) (Alito, J., dissenting) (“Our decision to grant a stay is an exercise of equitable discretion . . .”).

decide disputes about the parties' interim status while litigation over the merits of the challengers' legal claims *is ongoing*.”¹⁸⁸ One can quibble with these descriptions: A stay is not a “remedy” in the sense of an award to the plaintiff at the end of a lawsuit, and stays were not the exclusive domain of chancery.¹⁸⁹ That said, the “functional overlap” between stays and equitable remedies is clear.¹⁹⁰ As William Baude and Samuel Bray put it, “[w]hen the executive branch seeks an immediate Supreme Court action pausing or suspending another court’s order, it is, in a sense, seeking equity.”¹⁹¹

II

THE NATURE OF EQUITABLE DECISIONMAKING

If indeed seeking equity is at the “heart” of the equity docket, what are the implications? What principles or lessons might we glean from the history of equity for the modern Court? In this Part, we turn to the nature and history of equitable decisionmaking. The discussion is organized around three themes: the place of conscience in equity, the importance of precedent, and the relationship between equity and law. This historically motivated analysis will be useful both to understand more deeply the Court’s task on the equity docket today and to furnish ideas and resources for reform.

A. *Equity and Conscience*

One through line in the history of equity is the role of conscience as a basis for adjudication.¹⁹² As Joshua Getzler puts the point, “[i]f there was a unifying principle in equity that distinguished it from the customary or common law, it was that of conscience.”¹⁹³ By the fifteenth century the Court of Chancery was already referred to as a “court of conscience.”¹⁹⁴ Early on, “conscience” in Chancery had a personal and

¹⁸⁸ *Trump v. Orr*, 146 S. Ct. 44, 49 n.3 (2025) (Jackson, J., dissenting).

¹⁸⁹ See Bray, *New Equity*, *supra* note 9, at 1033 n.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.’” (quoting Douglas Laycock, *How Remedies Became a Field: A History*, 27 *REV. LITIG.* 161, 165 (2008))).

¹⁹⁰ *Nken v. Holder*, 556 U.S. 418, 428 (2009).

¹⁹¹ Baude & Bray, *supra* note 20, at 579.

¹⁹² Etherton, *supra* note 27, at 9 (noting that “the language of conscience as a touchstone of equity has remained strong in the mouths of some equity judges”).

¹⁹³ Joshua Getzler, *Patterns of Fusion*, in *THE CLASSIFICATION OF OBLIGATIONS* 157, 176 (Peter Birks ed. 1997).

¹⁹⁴ BAKER, *supra* note 163, at 111 & n.33.

even religious flavor.¹⁹⁵ Most early chancellors were clerics,¹⁹⁶ and they may have been as concerned to tend to the consciences of the litigants before them as to hearken to their own consciences.¹⁹⁷ According to Brian Simpson, “conscience” in those earlier times “connoted what we now call the moral law as it applied to particular individuals for the avoidance of peril to the soul through mortal sin.”¹⁹⁸ In one case, a chancellor granted a remedy because, if the party failed to make restitution, he would “be damned in hell,” and “it is, as I think, well done to provide a remedy for such things according to conscience.”¹⁹⁹

One can anticipate the trouble with invoking conscience of that kind in an official tribunal. If conscience does not furnish a suitably objective rule of decision, it opens the door to arbitrary treatment by the chancellor. Peter Birks goes so far as to say that “conscience of the intuitive kind is . . . antithetical to the rule of law.”²⁰⁰ Critics of equity have long been alive to this concern. One writer in the early sixteenth century lamented the uncertainty that results from having judicial decisions turn on “the discretion and conscience of one man.”²⁰¹ After all, “diverse men, diverse conscience[s].”²⁰² This objection received its most famous expression from John Selden:

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 foot, to be the Chancellor’s 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 Chancellor’s conscience.²⁰³

¹⁹⁵ D.E.C. Yale, *Introduction*, in LORD NOTTINGHAM’S CHANCERY CASES, *supra* note 26, at xxxix (“[T]hroughout the middle ages the notion of conscience was based rather on moral than on legal or juristic grounds . . .”).

¹⁹⁶ Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 L. & HIST. REV. 245, 259–60 (1996).

¹⁹⁷ Yale, *supra* note 195, at xxxix.

¹⁹⁸ A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 398 (1975) (emphasis removed).

¹⁹⁹ YB 4 Hen. 7, fol. 5a, Hil., pl. 8 (1489) (Eng.), *translated in* 47 Eng. Rep. 643 (1905).

²⁰⁰ Peter Birks, *Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment*, 23 MELB. U.L. REV. 1, 22 (1999); *see also* DENNIS R. KLINCK, CONSCIENCE, EQUITY AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 224 (Routledge 2016) (2010) (“[C]onscience was particularly linked to the evil of arbitrariness.”).

²⁰¹ *The Replication of a Serjeant at the Laws of England*, in CHRISTOPHER ST GERMAN ON CHANCERY AND STATUTE 99, 101 (J.A. Guy ed. 1985) (spelling modernized).

²⁰² *Id.* (spelling modernized).

²⁰³ SELDEN, *supra* note 22, at 43 (spelling and grammar modernized). *See also* the complaint of a common law judge in 1695: “The Judgment and Determination of Causes in Chancery, depend upon the sole Opinion and Conscience of one single Person, whose

Indeed, this objection, blended with the close connection of Chancery to the king, nearly led to the extinction of Chancery during the Interregnum of the seventeenth century.²⁰⁴

Equity survived, but it reformed itself to answer these objections. The reforms were spearheaded by three “[g]reat [c]hancellors” of the seventeenth and eighteenth centuries: Lords Nottingham, Hardwicke, and Eldon.²⁰⁵ One step was the disciplining—or the “juridification”—of conscience. Lord Nottingham, in particular, distinguished between personal and public conscience and aligned equity firmly with the latter. In *Cook v. Fountain*, he wrote: “With such a conscience as is only *naturalis et interna*, this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures.”²⁰⁶ Chancery, in other words, is not concerned with a chancellor’s internal moral sense (his foot, as it were), but rather with “the general conscience of the realm.”²⁰⁷

Larissa Katz aptly calls the end result of this process “conscience with a filter”:

The right thing to do, that is, the content of conscience . . . varies from holder to holder not because morality changes or is subjective but because conscience has filters. These derive from the nature of the person/office that a person occupies. The question of *whose* conscience becomes salient in a conscience-centered theory of equity.²⁰⁸

In the case of equity, the relevant “office” is the office of the judge, and thus equitable “conscience” relates intimately to the question of the judicial role.²⁰⁹ In that sense, “equity is all about the nature of courts.”²¹⁰ We will return to this topic later. For now, it suffices to say that there are certain forms of personal conscience or personal

Power therein . . . is Absolute and Arbitrary,” because his “Judgment is not guided always by certain and known Rules.” ROBERT ATKYNS, *AN ENQUIRY INTO THE JURISDICTION OF THE CHANCERY IN CAUSES OF EQUITY* 31–32 (London 1695).

²⁰⁴ See LANGBEIN ET AL., *supra* note 31, at 346, 348–49.

²⁰⁵ *Id.* at 351.

²⁰⁶ *Cook v. Fountain* (1676) 36 Eng. Rep. 984, 990 (Ch).

²⁰⁷ FRANCIS BACON 292 (James Spedding, Robert Leslie Ellis & Douglas Denon Heath eds., Boston, Houghton, Mifflin & Co. 1874) (quoting Justice Fenner); see also KLINCK, *supra* note 200, at 227–28 (discussing Bacon’s quote of Fenner). Katz uses the phrase “political conscience of the state.” Katz, *Pathways*, *supra* note 28, at 171.

²⁰⁸ Katz, *Conscience with a Filter*, *supra* note 29, at 31.

²⁰⁹ *Id.* (citing JOHN GARDNER, *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* (2012)). John Gardner argues that it is the nature of adjudicative institutions to be just, and equity serves that end by allowing a judge to depart from the rigid application of a rule in pursuit of justice. See GARDNER, *supra*, at 254–59.

²¹⁰ Katz, *Conscience with a Filter*, *supra* note 29, at 31.

morality upon which it would be plainly inappropriate for a judge to rely. “Conscience without filters in the context of office leads to abuse of power, to considering factors extraneous for resolving the question at hand.”²¹¹

Another way Chancery diminished its reliance on the internal, willful conscience was by reformulating its jurisdiction to act on “conscience” in the most literal sense—with (*con*) knowledge (*scientia*). As the historian of English equity Mike MacNair has shown, many references to “conscience” in early modern Chancery had to do with those who acted with knowledge of the facts of the case—either the parties and witnesses or the judicial examiners who could use equity’s special devices of discovery to extract that knowledge.²¹² In this usage, conscience posed fewer problems of legitimation when the “Court of Conscience” confined its more dramatic powers to factual records and precise questions of facticity.²¹³

In addition to these refinements of “conscience,” a series of maxims developed that served to limit or channel equitable jurisdiction.²¹⁴ These maxims are not “rules” that determine case outcomes; they are more like “concerns, topics of interest, matters on the agenda when judges are deciding whether to give equitable remedies.”²¹⁵ We will not catalog all of them,²¹⁶ but offer a few that give a general sense and that will be relevant to our discussion of the equity docket below.

Equity acts in personam. A court of equity only acts on the parties before it. “To settle a title against the whole world,” by contrast, “was the exclusive privilege of the common law.”²¹⁷ This maxim was important for mediating the relationship between Chancery and the common law courts: It “served to minimize, at least conceptually, the

²¹¹ *Id.*

²¹² See Mike MacNair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUDS. 659, 674 (2007).

²¹³ See *id.* We are grateful to Alexander Arnold for sharing forthcoming work on this subject. See Alexander Arnold, On the Merits: Truth-Seeking, Equity, and the Emergence of the Modern Trial (2026) (unpublished manuscript).

²¹⁴ See generally BRAY & SHERWIN, *supra* note 30, at 459–63 (identifying and discussing various maxims).

²¹⁵ Bray, *Equitable Remedies*, *supra* note 3, at 582.

²¹⁶ For a more comprehensive list, see *id.* at 545. An early attempt to catalog these maxims in writing was made in the eighteenth century, see RICHARD FRANCIS, MAXIMS OF EQUITY (London, 1727), though some can be traced to earlier sources, see LANGBEIN ET AL., *supra* note 31, at 339 n.82.

²¹⁷ LANGBEIN ET AL., *supra* note 31, at 286 (quoting Franz Metzger, *The Last Phase of the Medieval Chancery*, in LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 79, 86 (Alan Harding ed. 1980)). Of course, an equitable decree operating on the parties, particularly in a multiparty proceeding, could have a “practical effect” that “was very close to that of a common-law judgment.” Edith G. Henderson, *Legal Rights to Land in the Early Chancery*, 26 AM. J. LEGAL HIST. 97, 98 (1982).

conflict between Chancery and common law that arose when Chancery abridged a defendant's common law right."²¹⁸

Equity follows the law. We will discuss this idea in greater detail below,²¹⁹ but in brief, equity does not define "legal estates, rights, interests and titles"; it just "prevent[s] a legal owner from making an unconscientious use of the legal rights."²²⁰

Those who seek equity must do equity. "No plaintiff can get an equitable remedy unless that plaintiff fulfils his or her own legal and equitable obligations arising out of the subject matter of the dispute."²²¹ Whereas remedies at law tend to be "unconditional" and entirely for one side or the other, equity is "flexible" and its remedies "discretionary."²²² A closely related maxim is the unclean hands doctrine, which "gives courts a reason to deny equitable relief to litigants who have acted inequitably in 'immediate and necessary relation to the equity' they now seek."²²³

Equity regards substance rather than form. As one judge put it, if a court of equity finds "that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance."²²⁴

Equity regards as done that which ought to be done. "Equity will treat the subject matter, as to collateral consequences, and incidents, in the same manner, as if the final acts, contemplated by the parties, had been executed, exactly as they ought to have been, not as the parties might have executed them."²²⁵ In practical terms, this can mean that "generally equity will order to be done that which ought to have been done."²²⁶

Again, these maxims are not hard-and-fast rules that can dictate case outcomes. They are more like "focal considerations" for equitable discretion.²²⁷ "They do not displace, but in fact require, prudential judgments."²²⁸

²¹⁸ LANGBEIN ET AL., *supra* note 31, at 286.

²¹⁹ See *infra* Section II.C.

²²⁰ J.D. HEYDON, M.J. LEEMING & P.G. TURNER, MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES § 3-030, at 71 (5th ed. 2015).

²²¹ *Id.* § 3-050, at 74.

²²² *Id.* at 75.

²²³ Baude & Bray, *supra* note 20, at 568.

²²⁴ HEYDON, LEEMING & TURNER, *supra* note 220, § 3-145, at 87 (quoting *Parkin v. Thorold* (1852) 71 Eng. Rep. 698, 701 (Ch)).

²²⁵ STORY, *supra* note 31, § 61, at 79.

²²⁶ HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 24, at 53 (2d ed. 1948).

²²⁷ BRAY & SHERWIN, *supra* note 30, at 464.

²²⁸ *Id.*

B. *Equity and Precedent*

So far, we have discussed a few “filters” that developed to discipline equitable conscience. The first was a refinement of the idea of conscience itself, such that equity reflected not the personal morality of the chancellor but “the political conscience of the state” or the “conscience of the realm.”²²⁹ A second was an emphasis on facts and rigorously tested factual records as the material on which conscience operates. And the third was the development of maxims, many of which had the effect of limiting the chancellor’s discretion, or at least the opportunities for exercising discretion.²³⁰ Christopher Langdell once observed that “any one who wishes to understand the English system of equity . . . must study its weakness as well as its strength.”²³¹ Many of these “filters” reflected a kind of “weakness,” in that they were self-imposed limits on a chancellor’s power or discretion, born of institutional insecurity. But a self-imposed weakness can put the legitimacy of an institution on firmer footing and so end up augmenting an institution’s power in the long run.²³²

Another “filter”—that is to say, another self-limitation in response to Selden’s gibe about the chancellor’s foot—was to develop a system of precedent that would channel the chancellor’s discretion. Langbein, Lerner, and Smith call this process “doctrinalization.”²³³ In the early years of the Court of Chancery, equity and precedent were a somewhat awkward match. This awkwardness is well expressed in an exchange between Chief Justice Vaughan of the Court of Common Pleas, a common law court, and Lord Keeper Bridgman, who presided in Chancery, reported in a case from 1670.²³⁴ The Chief Justice claims to be surprised by the “citing of precedents in matter of equity,” for “equity is an universal truth, and there can be no precedent in it.”²³⁵ Dennis

²²⁹ See *supra* notes 206–11 and accompanying text.

²³⁰ STORY, *supra* note 31, § 19, at 22 (citing certain equitable “maxims” to rebut Selden).

²³¹ C.C. LANGDELL, *A SUMMARY OF EQUITY PLEADING* 38 n.4 (Cambridge, Charles W. Sever & Co., 2d ed. 1883); see also BRAY & SHERWIN, *supra* note 30, at 459 (citing and discussing Langdell’s observation).

²³² Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 64 (2016) (“[C]onstraints that reduce power when viewed in isolation may actually serve to expand power when viewed in a broader temporal or topical frame.”); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 573 (2013) (“[S]elf-binding mechanisms may . . . ultimately serve to enhance [power] by sustaining the institution’s credibility and legitimacy.”).

²³³ LANGBEIN, LERNER & SMITH, *supra* note 31, at 351–58.

²³⁴ See KLINCK, *supra* note 200, at 255–56. A lord keeper had “less status but . . . the same legal authority” as a lord chancellor. BAKER, *supra* note 163, at 107.

²³⁵ Fry v. Porter (1670) 86 Eng. Rep. 898, 902 (Ch.).

Klinck unpacks Vaughan's reasoning: "If the precedent accurately reflects 'universal Truth', it is superfluous; if it does not, it should not be followed."²³⁶ Even in 1670, though, the Lord Keeper responds with a defense of precedent:

Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us . . . and it would be very strange, and very ill, if we should disturb and set aside what has been the course for a long series of time and ages.²³⁷

In other words, the Lord Keeper recognizes some familiar justifications for *stare decisis*: (1) the light that precedents can shed on the nature of equity (or the content of conscience), and (2) the policy against disturbing a settled line of cases. Over time, this recognition of precedent would help to "mak[e] equity more rule-bound" and less arbitrary.²³⁸

As noted above, the "great chancellors" who contributed to this process of doctrinalization were Lords Nottingham (1673–82), Hardwicke (1737–56), and Eldon (1801–06, 1807–27).²³⁹ Nottingham "settled the main contours of the law of trusts and mortgages."²⁴⁰ Hardwicke "greatly augmented the precedential base of equity" and "emphasized deference to precedent" in his opinions.²⁴¹ By the end of his chancellorship "the formative period in the history of equity" had concluded.²⁴² This process of doctrinalization was abetted by simultaneous advances in law reporting.²⁴³

William Blackstone, writing around the end of Hardwicke's chancellorship, regarded Selden's concern as essentially answered. Blackstone conceded that the chancellor's-foot charge may have been warranted "in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors . . . had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors for now about a century past."²⁴⁴ But by the mid-eighteenth century, Blackstone was able to say that equity was "governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may

²³⁶ KLINCK, *supra* note 200, at 256.

²³⁷ Fry, 86 Eng. Rep. at 902.

²³⁸ KLINCK, *supra* note 200, at 255.

²³⁹ LANGBEIN, LERNER & SMITH, *supra* note 31, at 352.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* (quoting 12 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 297 (1938)).

²⁴³ See *id.* at 353–54 (describing the development and "routinization" of chancery law reporting).

²⁴⁴ 3 WILLIAM BLACKSTONE, COMMENTARIES *433.

perhaps be liable to objection.”²⁴⁵ Indeed, Blackstone went on to declare that “the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law: but varied by different usages in the forms and mode of their proceedings.”²⁴⁶ Justice Story, in his influential nineteenth-century treatise on equity, had essentially the same view.²⁴⁷

The new attitude was summed up by Lord Eldon in 1818, in an opinion towards the end of his tenure:

The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor’s foot.²⁴⁸

Conscience had bodied forth in “fixed principles” in a way that made equity more compatible with the rule of law. Note, though, that for all the embrace of precedent in this passage, there remains some space between precedent in the common law courts and equity—the “doctrines” of equity are “*almost*” as uniform as common law, according to Lord Eldon.²⁴⁹ Chancery perhaps retains its roots as a court of conscience in that precedent must “be applied according to the circumstances of each case,”²⁵⁰ and therefore operates in a less rule-like fashion.²⁵¹ Still, though, the courts of equity had “doctrinalized” to defang the objection of arbitrariness.

So far, we have discussed one kind of horizontal precedent—prior decisions of the Court of Chancery operating as a precedent in future Chancery cases. One can understand precedent in equity to have a second dimension, though, summarized in the maxim that *equity follows the law*. As Story puts it: “Equity, in dealing with cases of

²⁴⁵ *Id.* at *432.

²⁴⁶ *Id.* at *434.

²⁴⁷ See STORY, *supra* note 31, at 21–23. Peter Hoffer suggests that both Blackstone and Story were engaged in a kind of defensive overcorrection that left too little space for the operation of conscience in equity. HOFFER, *supra* note 83, at 7–21.

²⁴⁸ *Gee v. Pritchard* (1818) 36 Eng. Rep. 670, 674 (Ch).

²⁴⁹ W.H.D. Winder, *Precedent in Equity*, 57 L.Q. REV. 245, 245 (1941).

²⁵⁰ *Gee*, 36 Eng. Rep. at 674.

²⁵¹ See Winder, *supra* note 249, at 245 (explaining that equity differs from the common law in the strictness with which it follows precedent).

an equitable nature, adopts and follows the analogies furnished by the rules of law.”²⁵² We now turn to the relationship between law and equity.

C. *Equity and Law*

For Story, who might well be regarded as a founding father of American equity,²⁵³ a key equitable maxim was that “Equity follows the law.”²⁵⁴ Story’s *Commentaries on Equity Jurisprudence* developed at least three meanings for the maxim that became highly influential in the equity deployed by the federal courts of the United States.

First, equity follows the law in the more mundane, temporal sense that a successful suit in equity normally comes after an *unsuccessful* suit at common law. Equity intervenes to correct common law process, when “by reason of its universality,” common law proceedings fail to render justice in a particular case.²⁵⁵ But at least conceptually, the failure comes first. The maxim that equity follows the law thus encapsulates the notion that equitable relief is supposed to be extraordinary.²⁵⁶ Historically, equitable pleadings captured this dimension with the rote formula alleging that “your orator is remediless in the premises at and by the strict rules of the common law.”²⁵⁷ Only once ordinary legal process has been shown to be inadequate—for instance, because money damages are an insufficient remedy—could equity then follow behind and correct the deficit.

A subsidiary meaning of this sense of the maxim is that equitable process might step outside of the law’s strict binary of winners and losers to facilitate compromise or else order a remedy that gives something to both sides. Equity follows behind the law in this sense as it whispers a reminder to adversarial litigants that alternatives to winner-take-all litigation exist. Historically, chancery courts made good use of settlement and arbitration. Complex cases would often be referred to permanent staff members known as masters, who “would attempt

²⁵² STORY, *supra* note 31, at 71.

²⁵³ See KESSLER, *supra* note 163, at 37–48 (describing the efforts of Joseph Story and James Kent to shape and to be recognized as the founding fathers of American equity).

²⁵⁴ STORY, *supra* note 31, at 22, 71.

²⁵⁵ *Id.* at 4 (citing ARISTOTLE, NICOMACHEAN ETHICS 1137b13 (Robert C. Bartlett & Susan D. Collins, trans.)).

²⁵⁶ See, e.g., GEO. TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 27 (10th ed., 1922) (“[N]o state in the Union, however widely it may depart from the practice of the English High Court of Chancery, can discard the principles upon which its extraordinary jurisdiction is founded.”).

²⁵⁷ 2 OLIVER L. BARBOUR, A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY 567 (Albany, Wm. & A. Gould & Co. 1843).

to promote settlement.”²⁵⁸ Indeed, even “common lawyers” advising clients “saw real advantages for their clients in Chancery’s procedure, with its facilities for arbitration and extra-legal compromise.”²⁵⁹ Amalia Kessler has described how “conciliation courts” employing equitable process were deployed across American history, including in the courts of the Freedmen’s Bureau after the Civil War.²⁶⁰ Although Kessler’s story is one of decline, as these approaches eventually gave way to an adversarial ideal,²⁶¹ equity continues to this day to administer remedies like account and partition that rarely or never give total victory to one side.²⁶²

Equity follows the law in a second sense in that equity defers to the common law to define primary obligations, leaving equity to follow behind and vindicate those rights with its more flexible process.²⁶³ In other words, equity does not define “legal estates, rights, interests and titles,” even as it “prevent[s] a legal owner from making an unconscientious use of the legal rights.”²⁶⁴ Equity, as Samuel Bray and Paul Miller have recently reminded us, does not create—indeed, does not really even recognize—“causes of action.”²⁶⁵ The fundamental unit of equitable litigation is instead the “grievance,”²⁶⁶ which narratively relates the failure of common law process (sense number one) to protect the rights that the common law otherwise recognizes (sense number two). In other words, one cannot go looking to equity to supply rights and liabilities that do not exist at law. If the courts of common law do not recognize a right to recovery for some category of harms—say, unintentional infliction of emotional distress—equity will not generally erase that deficit.²⁶⁷

²⁵⁸ LANGBEIN, LERNER & SMITH, *supra* note 31, at 298.

²⁵⁹ J.A. Guy, *The Development of Equitable Jurisdictions, 1450–1550*, in LAW, LITIGANTS AND THE LEGAL PROFESSION 80, 84 (E.W. Ives & A.H. Manchester eds., 1983); LANGBEIN, LERNER & SMITH, *supra* note 31, at 298.

²⁶⁰ Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQ. IN L. 423, 423–24 (2009).

²⁶¹ *Id.*; KESSLER, *supra* note 163, at 310–17.

²⁶² See generally BRAY & SHERWIN, *supra* note 30, at 459–63 (describing general principles governing equitable remedies); 1 BARBOUR, *supra* note 257, at 505–10 (account); 2 *id.* at 284–313 (partition).

²⁶³ One might say “substantive law” here to similar effect. We use the more specific deployment of “primary obligations” in keeping with HART & WECHSLER, *supra* note 24, at 811–970.

²⁶⁴ HEYDON, LEEMING & TURNER, *supra* note 220, § 3-030, at 71.

²⁶⁵ Bray & Miller, *supra* note 17, at 1770.

²⁶⁶ *Id.* at 1776–77.

²⁶⁷ See, e.g., Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. ILL. U. L. REV. 71, 87–88 (1993) (observing that

A corollary of this second sense is that equity's famous penchant for discretion and adaptability should be understood in more procedural terms, not in the declaration of rights and remedies themselves. As one treatise puts it, "equity came not to destroy the law but to fulfil[i] it."²⁶⁸ While equity developed what we might call independent "substantive" jurisdictions over trusts, guardianships, and the like,²⁶⁹ its relationship to common law has been to take legal rights as it finds them. More typically, equity, at least in its adjectival function, uses procedural remedies—including injunctions against particular pleadings or entire suits²⁷⁰—to vindicate rights that are defined in the first instance by common law (or legislation).

The third sense of "equity follows the law" was most crucial for Story, for it was his own answer to the problem of the Chancellor's foot: Equity follows the law by adhering to a system of *jurisprudence*, Story's chosen title for his *Commentaries on Equity Jurisprudence*.²⁷¹ By this, Story of course meant that equity follows precedent, as Blackstone and other theorists had sketched out above.²⁷² But for Story, "jurisprudence" was more capacious than just rigid adherence to precedent. Equity, on his account, "seeks out and guides itself by the analogies of the law."²⁷³ By adhering not just to precedent but also to the common law's method of gradual, "insensible" change, Story insisted that equity was as restrained and lawlike as the common law was.²⁷⁴

Story juxtaposed this maxim with what he believed were false notions of equity perpetuated by his contemporaries. "In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right."²⁷⁵ But, Story cautioned, "it would be a great mistake to suppose, that Equity, as administered in England and America, embraced a jurisdiction so

the remedies that might help a victim of severe emotional distress are arguably unavailable at law or in equity).

²⁶⁸ HEYDON, LEEMING & TURNER, *supra* note 220, § 3-030, at 71.

²⁶⁹ See generally EQUITY AND ADMINISTRATION (P.G. Turner ed., 2016) (examining the ways in which courts of equity have addressed a range of practical problems regarding the administration of deliberately created schemes for the management of others' affairs).

²⁷⁰ See THOMAS RAPHAEL, THE ANTI-SUIT INJUNCTION (2d ed., 2019) (analyzing the principles and case law governing antisuit injunctions); John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008) (situating *Young* in the anti-suit injunction tradition).

²⁷¹ STORY, *supra* note 31.

²⁷² See *supra* Section II.B (discussing the relationship between equity and precedent).

²⁷³ STORY, *supra* note 31, at 22.

²⁷⁴ On the common law notion of insensible change, see KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 15 (2011).

²⁷⁵ STORY, *supra* note 31, at 1.

wide and extensive, as that.”²⁷⁶ Various jurists were making that exact mistake, Story contended. They wrote of equity “in contradistinction to strict law” as though chancery were concerned only with just outcomes, and not with rules and process.²⁷⁷

That was precisely what equity was *not*, Story argued.²⁷⁸ Courts were not to be legislatures, willfully prescribing rules according to their own policies. They were to be legal institutions, following legal rules and processes in their decisionmaking. In a central passage, Story summarized the legal processes that equity followed:

Every system of laws must necessarily be defective; and cases must occur, to which the antecedent rules cannot be applied without injustice It is the office, therefore, of a judge to consider, whether the antecedent rule does apply, or ought, according to the intention of the lawgiver, to apply to a given case; . . . and if there exists no rule, applicable to all the circumstances, whether the party should be remediless, or whether the rule furnishing the closest analogy ought to be followed.²⁷⁹

Importantly, leaving a party “remediless” appeared a legitimate alternative to Story. Just as the common law writ system gave no satisfactory resolution in some cases, neither would chancery.²⁸⁰

The occasional remediless outcome, even in equity, was tolerable to Story precisely because it proved equity was, in fact, rule-bound. As much as commentators might speak of equity searching out “the spirit of the law,” Story insisted that chancellors did not have the power to rewrite an unforgiving statute and were “often compelled to stop, where the letter of the law stops.”²⁸¹ Although equitable remedies “are flexible, and may be suited to the different postures of cases,” Story insisted that equity cases, too, “have prescribed forms of proceeding.”²⁸² Even if equity did not use the particular forms of action like *trover* and *covenant*, Story demonstrated that equity came to work through regularized, largely predictable proceedings.²⁸³ If it had to innovate, it did so not by declaring new rules as if the chancellor were a legislator but

²⁷⁶ *Id.* at 2.

²⁷⁷ *Id.* at 4–7.

²⁷⁸ *Id.* at 22 (quoting 3 BLACKSTONE, COMMENTARIES *433, *440–42); *id.* at 15–16.

²⁷⁹ *Id.* at 8.

²⁸⁰ *Id.* at 15.

²⁸¹ *Id.* at 16.

²⁸² *Id.* at 27.

²⁸³ *See id.* at 53–60 (describing the origin and history of equity jurisdiction).

by gradually sharpening its analogies to rights already “acknowledged in the Municipal Jurisprudence.”²⁸⁴

In sum, the rich and varied meanings of the maxim “equity follows the law” coalesce around two key principles. First, equity is an extraordinary jurisdiction. “Extraordinary” is a label often applied to equity in passing, but the early commentaries meant it. Equitable interventions are supposed to be few, sparing, and facilitative of ordinary legal process whenever they can be. Second, we might say that the maxim stands for precedent-plus. As we noted above, precedent was an important answer to the charge of equity’s arbitrariness from the classical period up through the American Early Republic. In the hands of influential commentators like Story, the maxim that “equity follows the law” captured the demand to follow precedent *and* principle. Equity, that is, follows precedent *in the way* that common law also follows precedent: by adjusting gradually and insensibly, if at all.

III

EQUITY DOCKET REFORM; OR, HOW TO BE A GOOD CHANCELLOR

We turn now to elaborating some of the modern implications of our account. In the last Part, we described the emergence of several filters on equitable conscience that helped equity in its struggle to be accepted as a legitimate judicial practice. The “filters” included the reinforcement of equity’s extraordinary or adjectival position vis-à-vis law, the development of precedent, the settling of the maxims, and the refinement of the idea of conscience itself. We now ask what the history of equity and the idea of “filtered conscience” can teach the Supreme Court deciding applications on the equity docket today. This is a large topic that could itself be an entire treatise. But we think there are a few key takeaways that are important for the Court to internalize and that can also demonstrate the utility of our approach. To summarize briefly: The Court has abandoned a fact-sensitive—one might say conscientious—approach to irreparable harm, with the result that the equity docket has swollen out of proportion. Relatedly, the Court has abandoned the distinctly equitable components of its stay and injunction tests in favor of a merits hunch—which increases the perception of partisanship, creates confusion for lower courts, and risks hardening the Justices’ views prematurely. Finally, the Court has improperly used the equity docket to signal or even to effect important changes in the law. Equity should follow the law, not the other way around.

²⁸⁴ *Id.* at 60.

We organize these lessons in this Part around the prongs of the stay/injunction test. First, we discuss the importance of irreparable harm as a means of managing the relationship between the law and equity dockets; second, we discuss the problem of precedent (including law docket precedent) on the equity docket, which is relevant to assessing an applicant's likelihood of success on the merits; finally, we discuss the balancing of equities. Our most basic contention, though, is that Anglo-American law has several centuries of experience in thinking about equitable decisionmaking. There is no good reason to leave that resource untapped.

A. *Managing the Relationship of Law and Equity*

If there is one theme in the history of equity after the Glorious Revolution, it is that equity needs to limit itself so that it remains “extraordinary” in relation to the courts of law. To return to Langdell, what is significant about equity is not just its strength—in terms of remedies and doctrinal creativity—but also its weakness.²⁸⁵ And a critical aspect of that weakness was the doctrines of self-limitation that prevented too much encroachment on the domain of common law.

In the modern Supreme Court, the equity docket also purports to be “extraordinary” in relation to the law (or merits) docket. First, the Court has recognized that a stay is extraordinary in a literal sense: “A stay is an ‘intrusion into the *ordinary* processes of administration and judicial review,’ and accordingly ‘is not a matter of right.’”²⁸⁶ A writ of injunction, likewise, is an “extraordinary remedy.”²⁸⁷ Virtually every Justice has acknowledged this point.²⁸⁸

Additionally, the equity docket is extraordinary in relation to the big picture of the modern Court's role. For the last century, the

²⁸⁵ LANGDELL, *supra* note 231, at 38 n.4.

²⁸⁶ *Nken v. Holder*, 556 U.S. 418, 427 (2009) (emphasis added) (quoting *Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam) and *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)).

²⁸⁷ *Id.* at 428 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

²⁸⁸ See *Murthy v. Missouri*, 144 S. Ct. 7, 8 (2023) (Alito, J., dissenting, joined by Thomas and Gorsuch, JJ.) (“A stay is an ‘extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.’” (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008))); *Labrador v. Poe*, 144 S. Ct. 921, 925 (2024) (Gorsuch, J., concurring in the grant of stay) (“[B]y any measure, a great deal of caution is . . . baked into the *Nken* analysis.”); *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348 (2022) (Kagan, J., dissenting, joined by Roberts, C.J., and Breyer and Sotomayor, JJ.) (“An applicant must show more than a likelihood of prevailing on the merits in the appellate court. It must also show an exceptional need for immediate relief.”); *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring, joined by Kavanaugh, J.) (describing “relief” on the “emergency docket” as “extraordinary,” and citing *Nken*, though technically in an injunction posture).

Supreme Court's most basic function has been to answer legal questions of broad public importance. Chief Justice Taft articulated that role while lobbying for the legislation that modernized the Supreme Court's jurisdiction. When a case comes to the Supreme Court, "it is not primarily to preserve the rights of the litigants."²⁸⁹ "The Supreme Court's function," rather, is to "pass[] upon constitutional questions and other important questions of law for the public benefit."²⁹⁰ The Court's discretionary jurisdiction, which allows it to decide what legal questions it will hear through writs of certiorari, enables it to perform that function²⁹¹ by allowing the Court to conserve its energy for "legal issues of national significance."²⁹² In scholarship on federal courts, there is a familiar distinction between two "adjudicatory models": the "dispute resolution model," which emphasizes a court's role in resolving an actual dispute before it, and the "law declaration model," which emphasizes a court's role in saying what the law is.²⁹³ In the last century, the Supreme Court has come more and more to embrace the law declaration model.²⁹⁴

We do not mean to overstate this point. The Court, of course, still articulates the law in the context of particular lawsuits and so in that sense dispute resolution remains "formally dominant."²⁹⁵ But the attitude of law declaration has pervaded the Court's institutional practices, and even critics of the Court's attitude concede its pull.²⁹⁶ The Justices acknowledge it in unguarded moments. In *Trump v. United States*,

²⁸⁹ *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) (statement of Hon. William Howard Taft, Chief Justice of the United States).

²⁹⁰ *Id.*

²⁹¹ See Post, *supra* note 13 (describing how discretion allows the Supreme Court to perform its function of establishing national priorities in constitutional and legal matters); Peter G. Fish, *Judiciary Act of 1925*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 549 (Kermit L. Hall, James W. Ely Jr. & Joel B. Grossman eds., 2d ed. 2005) (observing that the Judiciary Act of 1925 transformed the Supreme Court from a forum that primarily corrected errors arising in ordinary private litigation to a constitutional tribunal that resolved public policy issues of national importance).

²⁹² FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 260 (1928).

²⁹³ Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012).

²⁹⁴ *Id.* at 668–69.

²⁹⁵ *Id.* at 668; Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1402–07 (2020).

²⁹⁶ See Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 232 (2024) ("The Supreme Court's conception of its role is increasingly one of 'law declaration' rather than dispute resolution."); Johnson, *Question Selection*, *supra* note 106, at 864 (noting "the undeniable truth that the Court no longer decides cases: It asks and answers questions").

for instance, Justice Gorsuch let slip that the Court was “writing a rule for the ages,”²⁹⁷ and the Court’s ultimate decision in the case resolved very little of the particular dispute before it.²⁹⁸

Another indicator of this attitude is that, when the Court takes a case on its “law” docket, it simply answers the legal question presented, even in a preliminary posture. Take, for instance, *Trump v. Barbara*.²⁹⁹ The technical posture of the case was an appeal via writ of certiorari from the grant of a preliminary injunction.³⁰⁰ That means that the actual question before the Court, from a dispute resolution point of view, was only whether the plaintiffs were “likely” to succeed on the merits.³⁰¹ But the Court’s substantive analysis gave little hint of that posture. Instead, it simply answered the legal question presented: “whether the Constitution guarantees citizenship to children born of parents unlawfully or temporarily present in the United States.”³⁰² The Court’s decision did not leave open the possibility that a different result might obtain at the end of the case, despite the fact that a different result would ordinarily remain a live option after a court has granted or denied a preliminary injunction.³⁰³ Everyone understands that the Court’s decision resolved finally the constitutional question of birthright citizenship. In short, law declaration is the order of the day on the law docket, even in a preliminary injunction posture.³⁰⁴

That is plainly not the case on the equity docket.³⁰⁵ And against this backdrop, one can appreciate why the equity docket is anomalous

²⁹⁷ Adam Liptak, *Split Court Hints at Some Immunity for Ex-Presidents*, N.Y. TIMES, Apr. 26, 2024, at A1. Justice Kagan, in an opinion of the Court, once noted before reciting the facts of the case that “[t]ruth be told, nothing recounted in this Part has much bearing on the rest of our decision.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408–09 (2019). Again, the Court was concerned with a general question of administrative law, not the dispute before it. *Id.* at 2408.

²⁹⁸ See *Trump v. United States*, 144 S. Ct. 2312, 2352–53 (2024) (Barrett, J., concurring in part) (noting that lower courts on remand will have to “apply” the Court’s general “standard to various allegations involving the President’s official conduct”).

²⁹⁹ *Trump v. Barbara*, No. 25-365, 2026 WL 1870543 (U.S. June 30, 2026).

³⁰⁰ *Id.* at *4.

³⁰¹ *Winter v. NRDC*, 555 U.S. 7, 20 (2008) (noting preliminary injunction standard).

³⁰² *Barbara*, 2026 WL 1870543, at *4.

³⁰³ Cf. Huang, *supra* note 176, at 857 (“[An emergency ruling] turns upon law-prediction rather than law-declaration, and this guess can be modified at any time by the issuing court.”).

³⁰⁴ There are many other examples of important legal issues resolved definitively by the Supreme Court in a preliminary posture. The most famous example may be *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see *id.* at 584 (describing the procedural history).

³⁰⁵ See, e.g., *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (per curiam) (“[O]ur interim orders are not conclusive as to the merits”); *Mirabelli v. Bonta*, 146 S. Ct. 797, 805 (2026) (Barrett, J., concurring) (“The word ‘likely’ is important, because it reflects that our assessment is preliminary.”).

for the Court. On the equity docket, the Court is not deciding questions of law definitively. Indeed, it is often not even issuing opinions. It is setting a holding pattern based on a stew of equitable factors while litigation proceeds to final judgment.³⁰⁶ The equity docket is a “pocket of dispute resolution (or dispute preservation) in a predominantly law-declaration Court.”³⁰⁷ Historically, equity was “adjectival in relation to law”;³⁰⁸ today, we submit, the equity docket is adjectival in relation to the law docket.

Hence the olden problem of equity is replicated in modern times: how to maintain the appropriate balance of law and equity? The doctrinal answer has been quite consistent in the history of equity: The extraordinary or adjectival nature of equitable relief was preserved by the requirement of irreparable harm.³⁰⁹ Put another way, equity was extraordinary because it would only intervene where courts of law failed to furnish an adequate remedy.³¹⁰ “[T]he adequacy requirement maintains the distinctiveness of equitable remedies.”³¹¹ To get into a court of equity, a plaintiff “must meet the burden of displacing the default presupposition that relief must be sought in law.”³¹² So too today, to get onto the “equity docket,” an applicant must show that it will suffer irreparable harm in the absence of extraordinary intervention from the Court.³¹³ Irreparable harm is the doctrinal gateway through which an applicant must pass to get to this distinct “side” of the Supreme Court.

³⁰⁶ See Huang, *supra* note 176, at 857.

³⁰⁷ Schmidt, *supra* note 33, at 1018 (emphasis omitted).

³⁰⁸ Bray & Miller, *supra* note 17, at 1782.

³⁰⁹ See Smith, *supra* note 40, at 1116 (“The irreparable-injury rule is best understood not as a rule, but as a marker for the toggle between law and equity . . .”).

³¹⁰ We follow Douglas Laycock in regarding these two formulations as essentially “equivalent.” DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 8 (1991) (“[W]hat makes an injury irreparable is that no other remedy can repair it.”).

³¹¹ Bray, *Equitable Remedies*, *supra* note 3, at 581.

³¹² Bray & Miller, *supra* note 17, at 1782. Douglas Laycock has argued that injunctive relief is increasingly the default remedy, particularly in public law cases, and that the irreparable injury rule has weakened to that extent. See LAYCOCK, *supra* note 310, at 4–7, 142. *But see* FUNK, *supra* note 56, at 262 (arguing that “the ‘adequacy’ of money damages remains hardwired into practice” in some respects). In this Article, we do not argue for a different approach to public law remedies across the board. Instead, we argue for strengthening the irreparable injury rule as a way to control access to the Court’s equity docket. Unlike equitable remedies in a post-fusion trial court, the equity docket in the Supreme Court is a distinct procedural path. Put another way, it is a separate equitable “side” of the Court. The irreparable injury rule is important for controlling access to that “side” of the Court, even if it has weakened as a requirement for injunctive relief generally. Correspondingly, “adequate remedy at law,” for purposes of the equity docket, should be understood as adequate remedy on the “law” (or merits) docket.

³¹³ *Nken v. Holder*, 556 U.S. 418, 434 (2009) (for stays); *Winter v. NRDC*, 555 U.S. 7, 20 (2008) (for injunctions).

In recent years, however, that gateway has broken down, which is a prime culprit for why the equity docket now threatens to swallow the Court. Recall the typical posture of a case on the equity docket: A plaintiff (or a group of plaintiffs) has challenged a new government policy in the lower courts. The lower courts either grant or decline to grant an injunction. The losing party then brings the case to the Supreme Court's equity docket, asking the Court either to stay the lower court injunction or to enter one itself.³¹⁴ Facing this scenario, the Court has adopted a more or less automatic rule that any injunction against the government is per se a form of irreparable harm.³¹⁵ The immediate origin of this rule is Chief Justice Roberts's in-chambers opinion in *Maryland v. King*, in which he declared that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."³¹⁶ The rule seems to be grounded in the presumption of constitutionality: that any time the political branches are halted by the courts from implementing a preferred policy, a kind of harm is inflicted on the constitutional order.³¹⁷

Whatever its justification, the problem with this rule is that, once irreparable harm to the government is automatic, the gate that controls access to the equity docket is blown open. The irreparable injury rule no longer imposes any constraint in cases with a government party. When the government is an applicant—as has frequently been the case during the second Trump administration—the requirement of showing irreparable harm is not an obstacle to relief, and the interim ruling amounts to nothing more than an accelerated guess about the merits. Even when a private party is an applicant, the virtually irrebuttable presumption of irreparable harm to the government means that the harms to the respective parties at best cancel out—leaving the merits, once again, driving the decision.³¹⁸ Often, the injuries to the plaintiffs come in the form of invasions of constitutional rights, which are often recognized as having a similarly abstract and automatic character.³¹⁹ As the Court once said—on the equity docket no less—“[t]he loss

³¹⁴ See *Labrador v. Poe*, 144 S. Ct. 921, 928 (2024) (Kavanaugh, J., concurring in the grant of stay) (describing how an “issue typically arises” on the equity docket).

³¹⁵ *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2562 (2025); *Trump v. Int’l Refugee Assistance Project*, 582 U.S. 571, 581–82 (2017) (per curiam).

³¹⁶ *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

³¹⁷ See VLADECK, *supra* note 24, at 133–34.

³¹⁸ See *Labrador*, 144 S. Ct. at 929 (Kavanaugh, J., concurring in the grant of stay).

³¹⁹ *Bray, Purpose*, *supra* note 174, at 829 (noting that “judges draw the inference that any violation of a constitutional right is irreparable”).

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”³²⁰

The result of the Court’s current approach to irreparable harm, then, is to make the requirement at most a speed bump—rather than a guarded gate—on the way to relief on the equity docket. The requirement is thus not performing its historic office of limiting access to the Court’s equitable jurisdiction. And that is not all. Part of the *Nken* stay test is to “assess[] the harm to the opposing party and weigh[] the public interest.”³²¹ In other words, the Court should “weigh the relative harms to the applicant and to the respondent,” at least in “close cases.”³²² The Court’s approach makes that very difficult because it pits one weighty abstraction against another, sovereign prerogatives versus fundamental rights. As Douglas Laycock and Richard Hasen put the point, the *Maryland v. King* approach “makes it unnecessary to consider the likelihood and magnitude of [any] *actual* injuries” to the parties.³²³ Instead, “it substitutes an abstract injury to sovereignty that requires no proof and that may be given substantial weight in the balancing process.”³²⁴

So how can the Court escape this trap? It begins, we think, with one of Holmes’s aphorisms: “We must think things not words.”³²⁵ To “think things” means to focus on concrete harms and interests on both sides of the ledger; to think “words” is to allow injuries to concepts like sovereignty to dominate the equitable calculus. One cannot touch an abstraction like sovereignty or a violation of a legal right. The attitude of thinking things, not words, coheres with the general emphasis on “facticity” in a court of equity.³²⁶ In short, the problem with the rule of automatic irreparable harm is not the fact that it is a rule, but rather that it is a rule that directs the Justices away from the facts.³²⁷

³²⁰ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

³²¹ *Nken v. Holder*, 556 U.S. 418, 435 (2009).

³²² *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

³²³ DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES* 377 (6th ed. 2025).

³²⁴ *Id.*

³²⁵ Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

³²⁶ See *supra* notes 212–13 and accompanying text.

³²⁷ As we discuss below, the development of precedent in courts of equity is salutary, but a doctrine clarifying the requirement of irreparable harm should not effectively demolish that requirement. Recall Lord Eldon’s admonition that a court of equity should “tak[e] care that [its doctrines] are to be applied according to the circumstances of each case.” *Gee v. Pritchard* (1818) 36 Eng. Rep. 670, 674; 2 Swans. 402, 414 (Ch). The problem with the Court’s approach to irreparable injury is precisely that it *excludes* the “circumstances of each case.”

Let's take an example. In *Trump v. J.G.G.*,³²⁸ the Court granted an application to stay an injunction entered by a district court that was meant to prohibit the government from "sending scores of Venezuelan immigrants" to a brutal prison in El Salvador "without any due process of law, under the auspices of the Alien Enemies Act."³²⁹ The harm on the side of the plaintiffs was a paradigmatic form of irreparable injury: They would be removed from the country to a place where they could be tortured. Moreover, the government took the position that it had no authority to return any person who was wrongfully removed, and El Salvador threatened to detain the plaintiffs indefinitely. In the words of Judge Wilkinson of the Fourth Circuit:

The government is asserting a right to stash away residents of this country in foreign prisons without the semblance of due process that is the foundation of our constitutional order. . . . This should be shocking not only to judges, but to the intuitive sense of liberty that Americans far removed from courthouses still hold dear.³³⁰

In other words, this governmental action was a grave affront to the political conscience of the state, and the harm could hardly be more irreparable.

The harm on the other side was . . . what exactly? When the Supreme Court did in fact grant the government its requested stay, it never explained what the irreparable harm to the government was. Nor did it contest that the plaintiffs' constitutional rights had been violated; indeed, it agreed that noncitizen "detainees are entitled to notice and opportunity to be heard 'appropriate to the nature of the case.'"³³¹ It found only that the government was "likely to succeed" on an argument that the case had been filed in the wrong venue.³³² It is black-letter law, though, that a stay is only appropriate if an applicant is likely to suffer irreparable harm, even if she is likely to succeed on the merits.³³³ Our best guess is that the Court in *J.G.G.* was just following its pattern of regarding any injunction against the

³²⁸ 145 S. Ct. 1003 (2025) (per curiam).

³²⁹ *Id.* at 1007 (Sotomayor, J., dissenting).

³³⁰ *Abrego Garcia v. Noem*, No. 25-1404, 2025 WL 1135112, at *1 (4th Cir. Apr. 17, 2025).

³³¹ 145 S. Ct. at 1006 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

³³² *Id.* (discussing how Texas, not the District of Columbia where the case was filed, was the correct venue).

³³³ *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Winter v. NRDC*, 555 U.S. 7, 21–22 (2008); see *Mirabelli v. Bonta*, 146 S. Ct. 797, 805 (2026) (Barrett, J., concurring) ("If the [applicants] were probably right but would suffer little harm . . . they would not be entitled to interim relief.").

government as a form of irreparable harm. Concretely, though, the balance of harms in this case does not strike us as close. On the one hand, brutal, real harm inflicted on the plaintiffs' bodies; on the other, the relatively abstract harm to the government of having to defend its concededly unlawful actions in one venue rather than another. That should have been a sufficient basis to deny the government immediate relief on the equity docket.³³⁴

Another recent example is *Trump v. Orr*.³³⁵ That case involved a challenge to a Trump administration policy requiring all new passports to reflect the holder's sex assigned at birth rather than their present gender identity. The lower courts enjoined the policy, and the Supreme Court stayed the injunction. The Court reasoned that the government had shown irreparable harm merely because the district court had "enjoin[ed] enforcement of an Executive Branch policy with foreign affairs implications concerning a Government document."³³⁶ That is a prime example of thinking words instead of things. To quote Laycock and Hasen, rather than consider actual harm to the government, the Court "substitute[d] an abstract injury to sovereignty that requires no proof" and gave it "substantial weight in the balancing process."³³⁷ It was, after all, the Trump administration who sought to "upend [the] settled practice" of the State Department with its new policy, so there seemed to be no plausible administrative burden from the injunction.³³⁸ On the other side, meanwhile, the district court had found that the policy caused psychological and dignitary harm to the plaintiffs.³³⁹ Even if the fact of plaintiffs' psychological and dignitary harm has no bearing on the legal validity of the policy, it should very much be relevant to gaining access to the equity docket.

³³⁴ Of course, *sometimes* an injunction against an executive policy will cause irreparable harm to the government (or to third parties in a manner relevant to the public interest analysis). Our point is simply that the analysis must be sensitive to the facts and circumstances. In more jurisprudential terms, an injury to "sovereignty" is not something that can be assessed in gross. Cf. LESLIE GREEN, *THE AUTHORITY OF THE STATE*, at vii (1988) (dismissing a state's *general* claim to authority as a "failed transcendental argument[]," while accepting that "political authority is sometimes legitimate" in particular contexts).

³³⁵ 146 S. Ct. 44 (2025) (per curiam).

³³⁶ *Id.* at 46.

³³⁷ LAYCOCK & HASEN, *supra* note 323, at 377.

³³⁸ 146 S. Ct. at 48 (Jackson, J., dissenting from the grant of the application for stay); cf. Bray, *Purpose*, *supra* note 174, at 867–68 (proposing "a presumption that the challenger should receive a preliminary injunction prohibiting the enforcement of the new legal norm against her," a presumption that would shift only "if the government can establish irreparable injury that transcends mere inability to enforce the new legal norm against the challenger").

³³⁹ *Orr*, 146 S. Ct. at 51–52 (Jackson, J., dissenting) (summarizing the district court's findings).

A final example is *Mirabelli v. Bonta*. The applicants in *Mirabelli* were parents of students in California who complained that state policy “prevent[ed] schools from telling them about their children’s efforts to engage in gender transitioning at school unless the children consent[ed] to parental notification.”³⁴⁰ The parents argued that California’s policy violated their substantive due process and free exercise rights. A district court had granted an injunction, but a Ninth Circuit panel stayed it pending appeal. The parents asked the Supreme Court to vacate the stay.

The Court granted the application, effectively reinstating the injunction.³⁴¹ The per curiam opinion devoted almost all of its analysis to the merits, finding the parents likely to succeed on their constitutional claims.³⁴² The Court devoted all of one sentence to irreparable harm: “The denial of plaintiffs’ constitutional rights during the potentially protracted appellate process constitutes irreparable harm.”³⁴³ That sentence typifies the present pathologies of the Court’s approach to irreparable harm on the equity docket. First, it is parasitic on the merits, because it makes irreparable harm turn only on whether constitutional rights were violated. And second, it is abstract, in the sense that it depends not on the facts but on a legal conclusion about the Constitution. Presumably, if the shoe were on the other foot, and it were California coming to the Court for relief on the equity docket, irreparable harm would likewise be established simply because a law had been enjoined. In this case, then, one can see clearly that irreparable harm has been robbed of its ability to do analytic work on the equity docket, and therefore to perform its vital role of mediating the relationship of law and equity.

In each of these cases, the Court loses its way on the irreparable injury prong when it loses touch with the facts. In *J.G.G. and Orr*, the effect of lower court orders was to keep the Government performing routinely as it had for years, while significant identifiable harms to the plaintiffs were matters of record evidence. *Mirabelli*, on the other hand, placed new affirmative duties on the state government, but ones that might be mitigated as the appellate process proceeds over the summer months when school is not in session. Whether or not the Court’s ultimate rulings on these orders are defensible, our point

³⁴⁰ *Mirabelli v. Bonta*, 146 S. Ct. 797, 800 (2026).

³⁴¹ *Id.* at 803.

³⁴² *Id.* at 802–03. For a critique of this merits analysis, see Richard M. Re, *Realigned: Standing and Substantive Due Process*, DIVIDED ARGUMENT (Mar. 4, 2026), <https://blog.dividedargument.com/p/realigned-standing-and-substantive> [<https://perma.cc/B83D-MFHS>].

³⁴³ *Mirabelli*, 146 S. Ct. at 803.

is they have not been defended on the factual basis that irreparable injury requires.

At times, Justices have shown the proper orientation, and those rulings should help anchor the Court's approach. During President Biden's term, for instance, the Court denied an application regarding rules for power plant emissions.³⁴⁴ Justice Kavanaugh appended a statement, joined by Justice Gorsuch, explaining that even though the applicants had "shown a strong likelihood of success on the merits," they would not need to "start compliance work" for several months and thus were "unlikely to suffer irreparable harm" before the lower court ruled.³⁴⁵ The Court properly denied relief on the equity docket in that circumstance. More recently, the Court denied a stay in a case involving speech restrictions on immigration judges by noting that "the Government has not demonstrated that it will suffer irreparable harm without a stay."³⁴⁶ Though the Court could have explained itself more fully, that denial was laudable and provides a hopeful template for a course correction.

A final problem with the Court's approach to irreparable harm is that all claims of government harm are channeled through the executive branch. The interests of "the United States" are represented in the Supreme Court by the Solicitor General.³⁴⁷ In theory, the Solicitor General is meant to represent "not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people."³⁴⁸ In reality, the Solicitor General is part of the executive branch, and in cases where the interests of Congress and the President conflict, the office almost always sides with the President.³⁴⁹

The conflation of the interests of the United States with the interest of the President permeates the equity docket. For example, in one series of cases the Supreme Court allowed President Trump to fire several appointees to independent agencies without cause despite their statutory tenure protections.³⁵⁰ The Court's cryptic order purported to reserve the question of whether the statutory tenure protections were constitutional, and instead addressed the balance of harms: "The

³⁴⁴ *West Virginia v. EPA*, 145 S. Ct. 2 (2024).

³⁴⁵ *Id.* at 2 (statement of Kavanaugh, J., respecting the denial of applications for stay).

³⁴⁶ *Margolin v. Nat'l Ass'n of Immigr. Judges*, No. 25A662, 2025 WL 3684278, at *1 (Dec. 19, 2025).

³⁴⁷ *See* 28 U.S.C. § 518(a); 28 C.F.R. § 0.20 (2025).

³⁴⁸ *United States v. Providence J. Co.*, 485 U.S. 693, 706 (1988).

³⁴⁹ *Z. Payvand Ahdout, "Neutral" Gray Briefs*, 43 *FORDHAM INT'L L.J.* 1285, 1288 (2020) ("[W]hen there is an inter-branch conflict—often taking the form of the President versus Congress—the Solicitor General almost always represents the President.").

³⁵⁰ *See Trump v. Wilcox*, 145 S. Ct. 1415 (2025); *Trump v. Boyle*, 145 S. Ct. 2653 (2025); *Trump v. Slaughter*, 146 S. Ct. 18 (2025).

stay . . . reflects our judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty.”³⁵¹

But the “Government” is not just the President; “the three branches are but ‘co-ordinate parts of one government.’”³⁵² And note how the Court’s reasoning elides the interest of *Congress*—and therefore of the government as a whole—in seeing that its limits on the President’s removal power remain in force. As Justice Kagan put it, “the interest at stake is in maintaining Congress’s idea of independent agencies: bodies of specialists balanced along partisan lines, which will make sound judgments precisely because not fully controlled by the White House.”³⁵³ In fact, the idea from *Maryland v. King* that an injunction against the government is always a form of irreparable harm was grounded ultimately on a presumption that statutes are constitutional.³⁵⁴ In *Wilcox*, the same idea was deployed, in effect, to presume a statute unconstitutional in favor of unbridled presidential power. Needless to say, this approach turns the presumption of constitutionality on its head.

B. Precedent and the Equity Docket

As we have seen, one of equity’s key strategies for responding to the charge of arbitrariness was to develop a system of precedent. In this Section, then, we adapt this lesson for the equity docket. This lesson is most relevant to the “likelihood of success” prong of the stay test, because it concerns the law against which success should be measured.

We start with the big picture. Even if a court is committed to following precedent meticulously, that effort at self-discipline will be worth little if the court is not writing and publishing opinions. For one thing, without opinions, there are no public statements of principle to which the Court can adhere in future cases. For another, the public and other officials, on whose opinions the Court’s legitimacy ultimately rests, may not *believe* the Court is following precedent without seeing some evidence. It is not only important, then, that conscience become more “juridified” over time, as we have described; it is also important that conscience be *performed* as objective and

³⁵¹ *Wilcox*, 145 S. Ct. at 1415.

³⁵² *Providence Journal*, 485 U.S. at 701 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

³⁵³ *Wilcox*, 145 S. Ct. at 1420 (Kagan, J., dissenting from the grant of the application for stay).

³⁵⁴ See VLADECK, *supra* note 24, at 133–34.

rule-bound, so that it can be seen and accepted as such. In England, the development of a more precedent-based form of equity depended on contemporaneous developments in the reporting of chancery decisions.³⁵⁵ On the equity docket, it is likewise important that the Court publish opinions explaining its resolutions of important equity docket cases. We do not advocate a hard-and-fast rule that the Court must offer reasons no matter the exigency. And we certainly do not suggest that unnecessarily broad or innovative pronouncements on questions of law be published, as the circumstances of the equity docket will generally call for minimalism and fact-sensitivity.³⁵⁶ But generally, the expectation of our legal and political culture is that the Court will offer reasons in important cases, as many disputes on the equity docket unquestionably are.³⁵⁷

With that prefatory point made, we would then distinguish two different problems of precedent that arise on the equity docket. First, there is precedent that is *internal* to the equity docket, meaning precedent about the disposition of cases on the equity docket specifically. Defining the standard applicable to stays or writs of injunction or explaining how the irreparable harm requirement applies in a particular context would count as internal precedent.³⁵⁸ Second, there is the problem of *external* precedent, which involves the relevance of “law docket” precedents on the equity docket and the relevance of equity docket precedents on the law docket.

Internal precedent is important for a simple reason: On the equity docket, the speed of decision, the lack of deliberation, and the lack of elaborate reasoning all give rise to an especial danger that the Court will be perceived to function as a “naked power organ” rather than as a “court[] of law.”³⁵⁹ Ultimately, what gives a judicial decision its “legal” quality is the fact that it is principled: It rests on “reasons that in their generality and their neutrality transcend any immediate result that is involved.”³⁶⁰ Controversial as the concept of “neutrality” is in some of its permutations, this limited form of neutrality seems

³⁵⁵ LANGBEIN, LERNER & SMITH, *supra* note 31, at 351–54.

³⁵⁶ See Schmidt, *supra* note 33, at 1018; see also *supra* notes 212–13 and accompanying text (describing the practice in the courts of chancery of limiting rulings to the facts of each case).

³⁵⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (“[O]ur contemporary understanding is such that a decision without principled justification would be no judicial act at all.”); Monaghan, *supra* note 293, at 723–24 (“That judicial tribunals must act in a reasoned manner is now deeply ingrained in our culture. On important matters, these reasons are expected to be made publicly available, and in written form.”).

³⁵⁸ *Nken* would be an example of an internal equity docket precedent.

³⁵⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

³⁶⁰ *Id.*

to us essential on the equity docket.³⁶¹ And that aspiration can only be fulfilled if the Court offers up some reasons to bind it in future equity docket cases. Those reasons then allow observers to test the Court's avowed principles of decision in cases "involving an opposing interest"³⁶²—say, an application from the Biden administration rather than the Trump administration.³⁶³

We do not take the Court to disagree with us on this point. Its statement in *Trump v. Boyle*—that "interim orders are not conclusive as to the merits" but "they inform how a court should exercise its equitable discretion in like cases"³⁶⁴—is simply a recognition of the importance of creating and following "internal" precedent. As discussed above, though, to develop its "internal" precedent properly, the Court must make explicit its reasoning not only as to the "merits guess," but also as to the rest of the equitable factors. This approach will also enable us outsiders to assess whether the Court is applying these equitable factors in a consistent and fair-minded fashion. In *Malliotakis v. Williams*, for instance, the Court recently stayed a state court injunction in an election case in a brief and entirely unreasoned order.³⁶⁵ There was a substantial question whether the Court should have denied the application under the so-called *Purcell* principle, which generally holds that federal courts

³⁶¹ Cf. *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 6 (2025) (Kavanaugh, J., concurring in the grant of the application for stay) ("Consistency and neutrality are hallmarks of good judging . . .").

³⁶² Wechsler, *supra* note 359, at 15.

³⁶³ Consider, for instance, the internal memoranda recently leaked from the 2016 case about the Clean Power Plan. See *Read the Supreme Court's Shadow Papers*, N.Y. TIMES (Apr. 18, 2026), <https://www.nytimes.com/interactive/2026/04/18/us/politics/supreme-court-shadow-docket-papers.html> [<https://perma.cc/A8PP-T5CW>] [hereinafter *Shadow Papers*]. At the time, neither the Court's order nor the dissenters offered any reasoning. See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.); *Basin Elec. Power Coop. v. EPA*, 136 S. Ct. 998 (2016) (mem.). The leaked memoranda reveal that an important consideration was the irreparable harm likely to be faced by the power industry and the applicant states. *Shadow Papers*, *supra*. There was no discussion, however, of the harm that the Obama administration would suffer by virtue of the fact that an important executive policy would be halted. As we discussed in the prior Part, a central feature of the equity docket during the Trump administration has been a *per se* rule of irreparable harm when an executive policy is halted. It may be that the Court's positions are reconcilable. But the deeper problem is that without written opinions we cannot know whether the Court is acting in a consistent and principled way, rather than as a "naked power organ." Wechsler, *supra* note 359, at 19. And the Court is less likely to feel the compunction to *be* consistent when its prior reasoning has not been made transparent.

³⁶⁴ 145 S. Ct. 2653, 2654 (2025).

³⁶⁵ *Malliotakis v. Williams*, 146 S. Ct. 809 (2026). Because the order was unreasoned, the Court did not explain how its intervention was consistent with the jurisdictional requirement of finality. Compare *id.* at 810–11 (Alito, J., concurring in grant of stay) (arguing that the finality requirement was satisfied), with *id.* at 813–15 (Sotomayor, J., dissenting from grant of stay) (forcefully contesting this point).

should not intervene to change the rules of an election too close to election day, due to the likelihood of voter confusion.³⁶⁶ But the contours of *Purcell* are hopelessly confused,³⁶⁷ partly because the idea is so often deployed in unreasoned orders (*Malliotakis* is, of course, unreasoned itself). In these circumstances, one simply cannot be confident that the Court is deciding this important case according to neutral principles. Perhaps more importantly, giving reasons is important precisely because it forces the Justices to commit to some principle larger than the immediate dispute before them. As Fred Schauer has observed, “[i]mplicit in the process is the notion that one who offers a reason for a result (or a rule) is, at least at that time, committed to the reason as well as to the less general result.”³⁶⁸

The question of “external” precedent is thornier. The question encompasses two separate problems—how the Court on its equity docket will treat precedents from its law docket, and how the Court on its law docket will treat decisions touching the merits issued on the equity docket. This set of issues has recurred often in recent years because of the Roberts Court’s frequent revisiting of important precedents.³⁶⁹ Consider, for instance, *Whole Woman’s Health v. Jackson*,³⁷⁰ which seemed to portend the demise of *Roe v. Wade*,³⁷¹ or the stay order in *Trump v. Wilcox*,³⁷² which seemed to portend the demise of *Humphrey’s Executor v. United States*.³⁷³ Bert Huang, observing this pattern, has quipped that the Court seems sometimes to be embracing a doctrine of *stare divinitatis* rather than *stare decisis*—that is to say, standing by what we plan to do in the future rather than what we have decided in the past.³⁷⁴ How should the Court navigate this tension on the equity docket? After all, the speed and lack of written justification on

³⁶⁶ See *id.* at 816–18 (Sotomayor, J., dissenting from grant of stay) (discussing *Purcell*).

³⁶⁷ Schmidt, *supra* note 33, at 1024–25.

³⁶⁸ Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 644 (1995); see also *id.* at 657 (“[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”).

³⁶⁹ See Thomas P. Schmidt, *Agenda Control and Precedent*, 72 UCLA L. REV. 1504, 1532 (2026).

³⁷⁰ 141 S. Ct. 2494 (2021).

³⁷¹ 410 U.S. 113 (1973); see Alicia Bannon, Stephen Spaulding & Harry Isaiah Black, *The Supreme Court “Shadow Docket” Explained*, BRENNAN CTR. FOR JUST. (Feb. 13, 2026), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket> [<https://perma.cc/MCV8-5RFV>] (noting that the Court has “used the shadow docket process to foreshadow how it may revisit longstanding precedent,” and citing *Jackson* as an example).

³⁷² 145 S. Ct. 1415 (2025).

³⁷³ 295 U.S. 602 (1935); see Huang, *supra* note 176, at 852 (discussing the puzzle of emergency orders from the Supreme Court “signaling that it might soon change the law”).

³⁷⁴ Huang, *supra* note 176, at 878–79.

the equity docket make it uniquely ill-suited for major renovations of American law, and the very idea of *stare divinitatis* contravenes the Supreme Court's general instruction to lower courts that they should apply the Court's precedent as it is and not anticipate where it might go.³⁷⁵

Here we would insist on the basic soundness of the historical maxim that equity follows the law. A court sitting in equity should take the law as it finds it. In Story's words, "[e]quity adopts and follows the rules of law in all cases, to which those rules may, in terms, be applicable"; it also "adopts and follows the analogies furnished by the rules of law."³⁷⁶ This maxim is not absolute;³⁷⁷ as we have seen, equity may sometimes "protect[] the law against crafty evasions and artful contrivances by not following the law exactly."³⁷⁸ But it is a useful statement of orientation: The Court should not use the equity docket as a backdoor to refashion settled legal doctrines and rights. Put in more doctrinal terms, "likelihood of success on the merits" should be understood to mean "likely to succeed under then-existing legal standards," not standards that the Court may declare in the future—even the imminent future—on its law docket.³⁷⁹

Recall the purpose of extraordinary intervention on the equity docket in the first place: to set the interim status of the parties (and perhaps the interim status of a government policy for the public) while a case plays out in the lower courts and on the law docket. The reason so many applications are denominated "emergencies" is precisely that they seek quick interventions by the Court for only that interim. This context reveals why the Court should not be vitiating precedents on

³⁷⁵ See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

³⁷⁶ STORY, *supra* note 31, § 64, at 71. As noted above, this maxim also meant that equity would intervene only when remedies at law were inadequate. That component of the maxim is served by the irreparable harm rule, which ensures that there is a compelling need for the Court to intervene on the equity docket before a case arrives in the ordinary course on the law docket. See *supra* notes 309–13 and accompanying text.

³⁷⁷ *Id.*

³⁷⁸ Smith, *supra* note 40, at 1115.

³⁷⁹ See Huang, *supra* note 176, at 876. This change would have the salutary effect of clarifying the obligations of lower court judges. Many understandably feel whipsawed between the Court's intimations on the equity docket and the Court's existing precedent. See, e.g., *President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Hum. Servs.*, 798 F. Supp. 3d 77, 105 n.9 (D. Mass. 2025) (noting that district courts "must grapple with both existing precedent and interim guidance from the Supreme Court that appears to set that precedent aside without much explanation or consensus").

the equity docket: The status quo during litigation should simply be the state of the law as it exists, particularly if the relevant precedent is long-standing. In *Wilcox*, for instance, the status quo was, and should have remained, *Humphrey's Executor*. It was hardly an “emergency” in that case for the government to operate within a framework that had prevailed for close to a century.

The contrary approach—discarding or undermining precedents on the equity docket—gives the strong impression that the Court is dispensing with precedent by fiat. The Court appears sensitive to the fact that its legitimacy suffers each time it overturns a precedent; that is why the Court seems to ration the number of precedents it is willing to overturn in any given Term.³⁸⁰ If that is true on the law docket, it is doubly true on the equity docket because of the speed and lack of reasoned explanation. There is barely even a performance of deliberation. The overturning appears to be the product of fiat, not reason.³⁸¹

We quoted Wechsler on neutrality above; we close this Section with his co-author Henry Hart:

[T]he judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.³⁸²

One theme running through the reforms of equitable decisionmaking in the last Part is depersonalization: Ideally, decisions in equity do not turn on the predilections of the person who happens to be chancellor at that moment. Depersonalization is an appropriate ideal for the equity docket too. To borrow Hart's terminology, the Justices should act more like “custodians” and less like “owners” when it comes to the equity docket. That is how best to guard the legal and political conscience of the state.

³⁸⁰ See Michael W. McConnell, *Some Realism About Precedent in the Wake of Dobbs*, in *ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION* 101, 104 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024) (“[I]t seems evident that the Court as an institution perceives a cost to overruling and therefore overrules relatively rarely.”).

³⁸¹ For an exploration of this antinomy, see generally Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946) (describing the antinomy as “inescapable”).

³⁸² Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396 (1953).

C. *The Equities and the Equity Docket*

A third set of lessons from history involves the “equities” in equity docket cases. As the Court has explained, “[b]efore issuing a stay, ‘[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.’”³⁸³ Given how clear this black-letter standard is, it is striking how often the Court or individual Justices simply refuse the task.

Consider the vaccine mandate case.³⁸⁴ There, the Supreme Court considered a temporary standard issued by the Occupational Safety and Health Administration under President Biden requiring many employers either to mandate vaccination or mask usage to protect against COVID-19. The lower courts had declined to stay the policy pending review, so the question for the Supreme Court was whether it should stay the policy itself.³⁸⁵ In keeping with the Court’s standard, the parties had contested the balance of equities: The employers challenging the regulation had claimed they would be forced to “incur billions of dollars in unrecoverable compliance costs” and could lose employees, while the government said the regulation would “save over 6,500 lives and prevent hundreds of thousands of hospitalizations.”³⁸⁶

The Court’s response: “It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes.”³⁸⁷ To put it mildly, this reasoning was odd: According to the stay standard, weighing tradeoffs was *exactly* the Court’s role. Indeed, this paragraph prompted Richard Re to ask whether the Court had “overruled equity.”³⁸⁸ Justice Kavanaugh showed a similar resistance to balancing equities in his concurrence in *Noem v. Vasquez Perdomo*, which concerned racial profiling in immigration raids in Los Angeles.³⁸⁹ After explaining why the government was entitled to a stay of a district court order enjoining the profiling policy, he wrote: “[J]udges are not appointed to make . . . policy calls. We merely ensure, in justiciable cases, that

³⁸³ *Trump v. Int’l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam) (quoting *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers)).

³⁸⁴ *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) (per curiam).

³⁸⁵ Since it had not been stayed by lower courts, this remedy was comparable to a writ of injunction.

³⁸⁶ 142 S. Ct. at 666.

³⁸⁷ *Id.*

³⁸⁸ Richard M. Re, *Did the Supreme Court Overrule Equity?*, RE’S JUDICATA (Jan. 14, 2022, at 06:01 ET), <https://richardresjudicata.wordpress.com/2022/01/14/did-the-supreme-court-overrule-equity> [<https://perma.cc/5V83-XWV3>].

³⁸⁹ 146 S. Ct. 1, 4 (2025) (Kavanaugh, J., concurring in the grant of the application for stay).

the Executive Branch acts within the confines of the Constitution and federal statutes.”³⁹⁰ We agree with Justice Kavanaugh that judges should not decide cases based on “policy” views of immigration; that would be redolent of the unfiltered and personal conscience of the early chancellors. But the idea that the Court’s *only* role is to ensure that the Executive Branch acts within legal bounds is to elide three-quarters of the black-letter test for stays.³⁹¹

In short, the *per curiam* opinion in the vaccine case and Justice Kavanaugh’s concurrence in *Vasquez Perdomo* try to sidestep the necessary task of a court sitting in equity—which is to say, the very task of the Supreme Court on the equity docket. This reticence, in a sense, is an understandable reflex; disavowals of policy-based reasoning are commonplace on the “law” docket.³⁹² But considering the equities and the public interest is simply part of the job of the equity docket. The Justices are not necessarily wrong to be uneasy about this facet of equity; the fact that equity licenses this kind of inquiry is the reason that its legitimacy has been challenged over the years. And it is why courts of equity have developed doctrines of self-limitation that serve to confine their role and the occasions of equitable intervention. Our point, though, is that the Court on the equity docket should hew to the traditions of equity that we have discussed, rather than pretend the task is something that it is not. And if that task is truly something that they find alien, they can always end (or reduce) the equity docket as a matter of docket discretion³⁹³ or transfer more cases to the law docket by granting certiorari.³⁹⁴

³⁹⁰ *Id.* at 6.

³⁹¹ See Duncan Hosie, *The End of Equity*, N.Y. REV. BOOKS (Sep. 19, 2025), <https://www.nybooks.com/online/2025/09/19/the-end-of-equity> [<https://perma.cc/LL2H-BGQE>] (critiquing the Court’s decision in *Vasquez Perdomo* for not “taking equity seriously”). In *Ohio v. EPA*, the Court similarly reduced a stay application into a merits inquiry: “Because each side has strong arguments about the harms they face and equities involved, our resolution of these stay requests ultimately turns on the merits” 144 S. Ct. 2040, 2053 (2024). That approach shears off the equitable part of the equity docket.

³⁹² See, e.g., *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1159 (2023) (plurality opinion) (arguing that a “freewheeling power” to weigh costs and benefits exceeds judicial authority).

³⁹³ Goldsmith, *supra* note 102, at 102 (noting the Court’s “massive discretion whether to grant or deny an interim order”).

³⁹⁴ A theme that has run through all of Part III is that the “merits guess” is doing too much work in the Court’s equity docket analyses. For this reason, we prefer the formulation of the stay test the Court gave in *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). Rather than insist on a *likelihood* of success, the Court there demanded only a “fair prospect” of reversal. *Id.* That appears to be a lower bar; indeed, in one equity docket case, Justice Kavanaugh indicated that *both* sides can simultaneously have a “fair prospect” of success on the merits. *Merrill v. Milligan*, 142 S. Ct. 879, 881 n.2 (2022) (Kavanaugh, J., concurring in grant of applications for stays). *But see* *Labrador v. Poe*, 144 S. Ct. 921, 929

A second point is that the Court, when balancing the harms, need not always choose a side. Sometimes the best resolution of a case on the equity docket will be a compromise that accommodates each side's claim of harm as far as possible. As Story once observed, "one of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest."³⁹⁵ This feature differed from the courts of law, which were "bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant."³⁹⁶ As noted above, the Court of Chancery, in contrast to the courts of law, would often seek to induce the parties to settle rather than sharply define winners and losers.

The Court would do well to remember this aspect of the equitable tradition on the equity docket. The purpose of relief on the equity docket is to set the interim status of some government action while litigation plays out. Sometimes the most equitable way to set that status will not be a clean win for one side or another, but rather an order that makes all parties "equally unhappy."³⁹⁷ One could see the Court's initial order in the travel ban case³⁹⁸ and its more recent order in *Noem v. Abrego Garcia* as examples of this more evenhanded approach to interim relief.³⁹⁹

Or consider Justice Breyer's proposed resolution of the border wall dispute during the first Trump administration. In that case, a district court had enjoined President Trump's attempt to fund the construction of a border wall with funds originally appropriated for an entirely different purpose.⁴⁰⁰ The Supreme Court stayed the injunction, finding that "the Government has made a sufficient showing at this

n.2 (2024) (Kavanaugh, J., concurring in the grant of stay) (expressing "doubt" that there is "any meaningful difference" between these two "formulations" of the stay standard). The "fair prospect" standard may therefore leave more room for the operation of the equitable factors.

³⁹⁵ STORY, *supra* note 31, § 28, at 28.

³⁹⁶ *Id.*

³⁹⁷ See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 368 (1992).

³⁹⁸ *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017) (per curiam) (leaving lower court injunctions "in place with respect to respondents and those similarly situated," but staying injunctions as to "foreign nationals who lack any bona fide relationship with a person or entity in the United States").

³⁹⁹ See 145 S. Ct. 1017, 1018 (2025) (declining to stay a district court's order requiring the government to "facilitate" the return of a noncitizen wrongly removed to a Salvadoran prison, but instructing the district court to "clarify its directive, with due regard for the deference owed to the Executive Branch in the conduct of foreign affairs").

⁴⁰⁰ *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2715422, at *6 (N.D. Cal. June 28, 2019).

stage that the plaintiffs have no cause of action to obtain review.”⁴⁰¹ It made no mention of irreparable harm, so its resolution seemed to turn on a prediction about the complex cause-of-action question.⁴⁰² Justice Breyer, in a separate opinion, focused on the parties’ asserted claims of actual harm and proposed a compromise: “Allowing the Government to finalize the contracts at issue, but not to begin construction.”⁴⁰³ That would enable the Court to “alleviate the most pressing harm claimed by the Government without risking irreparable harm to respondents.”⁴⁰⁴ In keeping with the traditions of equity, the Court should aspire to achieve this kind of compromise when called upon to dispense equitable relief.

Finally, when “weighing the equities,” the Court should not be shy about deploying principles under which inequitable conduct by an applicant disqualifies it from equitable relief. The most familiar of these is the unclean hands doctrine. We agree with Baude and Bray that the unclean hands doctrine should apply to government litigants that seek relief on the equity docket.⁴⁰⁵ And we agree with Justice Sotomayor that, in the *D.V.D.* case, the government’s violation of two court orders in the proceedings below, including the particular order that was the subject of the stay, was a sufficient reason to deny the government relief on the equity docket.⁴⁰⁶ “[E]ach time this Court rewards noncompliance with discretionary relief,” she wrote, “it further erodes respect for courts and for the rule of law.”⁴⁰⁷

But we think the relevant equitable principles go beyond unclean hands. One of equity’s maxims is “that he who seeks equity must do equity in the transaction in respect to which relief is sought.”⁴⁰⁸ Other episodes of the second Trump administration implicate this maxim. Indeed, it may have been operating silently in *Trump v. Cook*.⁴⁰⁹ The Governors of the Federal Reserve Board are independent and can only be fired for cause.⁴¹⁰ When the Court gave a strong hint that agency independence was contrary to Article II in its stay order in *Wilcox*, it

⁴⁰¹ *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.).

⁴⁰² See Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1122–24 (2021) (contrasting the Ninth Circuit’s finding of an implied equitable action with the Court’s skepticism toward it).

⁴⁰³ *Sierra Club*, 140 S. Ct. at 2 (Breyer, J., concurring in part and dissenting in part from grant of stay).

⁴⁰⁴ *Id.* Justice Breyer seems to have similarly proposed a compromise in the Clean Power Plan Case behind the scenes. See *Shadow Papers*, *supra* note 363.

⁴⁰⁵ See Baude & Bray, *supra* note 20.

⁴⁰⁶ See *DHS v. D.V.D.*, 145 S. Ct. 2153 (2025) (Sotomayor, J., dissenting) (describing deportations to Guatemala and South Sudan in violation of court orders).

⁴⁰⁷ *Id.* at 2159 (Sotomayor, J., dissenting).

⁴⁰⁸ *McQuiddy v. Ware*, 87 U.S. (20 Wall.) 14, 19 (1873).

⁴⁰⁹ *Trump v. Cook*, 146 S. Ct. 79 (2025) (mem.).

⁴¹⁰ 12 U.S.C. § 242.

specifically carved out the Federal Reserve, explaining dubiously⁴¹¹ that it “is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.”⁴¹² Then President Trump, after lambasting the Federal Reserve on social media for months for not lowering interest rates,⁴¹³ purported to fire Governor Lisa Cook for allegedly claiming two different homes as primary residences in mortgage applications.⁴¹⁴ Cook sued, arguing that the mortgage allegations were pretextual and that the real reason was policy disagreement.⁴¹⁵ A district court enjoined the firing, and the case went up to the Court on an emergency application.⁴¹⁶ Unlike *Wilcox*, however, the Court did not immediately grant a stay on its equity docket.⁴¹⁷ Instead, it scheduled oral argument on the application, meaning that Cook would remain a governor for at least several more months.⁴¹⁸

Why the different outcomes in *Cook* and *Wilcox*? One obvious answer is that the tenure protection at issue in *Cook* is substantively valid, while the one in *Wilcox* is not. But the Court in *Wilcox* was quite clear that it was not deciding the substantive validity of the tenure protection statute,⁴¹⁹ opting instead to base its order on the fact that “the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty.”⁴²⁰ Why wouldn’t the same be true in the *Cook* case?

Our suspicion is the Court quite properly made “an equitable judgment of [its] own.”⁴²¹ The Court had just signaled clearly to the administration that it would uphold the independence of the Federal Reserve. Then the President, after making his hostility toward the Fed as a matter of policy abundantly clear, concocted a flimsy justification

⁴¹¹ See Lev Menand, *The Unitary Executive and the Federal Reserve*, 94 FORDHAM L. REV. 2089, 2092–93 (2026) (describing the Court’s reasoning as “threadbare”).

⁴¹² *Trump v. Wilcox*, 145 S. Ct. 1415, 1417 (2025).

⁴¹³ Max Zahn, *Trump Criticizes Federal Reserve, Calls for Lower Interest Rates*, ABC News (Mar. 20, 2025), <https://abcnews.com/Business/trump-criticizes-federal-reserve-calls-lower-interest-rates/story?id=119982504> [<https://perma.cc/NX8Z-97BT>].

⁴¹⁴ *Cook v. Trump*, 804 F. Supp. 3d 14, 19–20 (D.D.C. 2025).

⁴¹⁵ Complaint ¶ 60, *Cook v. Trump*, 804 F. Supp. 3d 14 (D.D.C. 2025) (No. 1:25-cv-02903).

⁴¹⁶ *Trump v. Cook*, No. 25A312, 2026 WL 1855613, at *6–7 (U.S. June 29, 2026).

⁴¹⁷ *Trump v. Cook*, 146 S. Ct. 79 (2025) (mem.).

⁴¹⁸ Ultimately, after holding argument, the Court denied President Trump’s request for a stay and allowed Governor Cook to remain in office. *Cook*, 2026 WL 1855613, at *16.

⁴¹⁹ *Trump v. Wilcox*, 145 S. Ct. 1415, 1416 (2025).

⁴²⁰ *Id.* at 1416–17.

⁴²¹ *Trump v. Int’l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam).

to fire a Governor appointed by his Democratic predecessor.⁴²² In these circumstances, the Court could justifiably have felt that Trump did not deal with its *Wilcox* order in good faith. The administration was seeking equity when it had not done equity, because it had abused a lawful power (firing for cause) to an unlawful end (undermining the independence of the Federal Reserve). The Court did not explain its initial decision on the stay application, so this is necessarily a reconstruction. Our suggestion, though, is that the Court made a truly *equitable* judgment about what the status quo would be while the legality of a government action was under review. This decision was an appropriate resolution on the equity docket.⁴²³

Another case that should have implicated this equitable maxim was *Abbott v. League of United Latin American Citizens (LULAC)*.⁴²⁴ President Trump had cajoled the Texas Legislature into redrawing the State's electoral map for the House of Representatives, with the end goal of increasing the number of Republican seats.⁴²⁵ The new maps were challenged under the Voting Rights Act, and a three-judge district court, after a nine-day hearing, found that they relied impermissibly on race.⁴²⁶ Texas then filed an application for a stay on the Court's equity docket.⁴²⁷

The Court granted it. It found first—and devoted most of its short per curiam order to the proposition—that Texas was likely to succeed

⁴²² In its ultimate opinion on the stay application, after oral argument, the majority was alive to this concern. It would be “corrosive of the independence” of the Federal Reserve, the Court wrote, if the President could invoke “any perceived or alleged misstep (past or present)” as a “ready pretext for a Governor’s removal.” *Cook*, 2026 WL 1855613, at *10.

⁴²³ *Cf. id.* at *17 (Jackson, J., concurring) (arguing that the Government’s application could have been denied solely on the basis of “equitable factors”). In the Court’s written opinion after oral argument, the focus was on the merits rather than the equities. *See id.* at *7 (majority opinion) (“We start and stop with the first [merits] factor.”). The majority even opined definitively that tenure protections for Governors of the Federal Reserve are consistent with Article II, even though the parties had not disputed that issue. *Id.* at *14. Though we agree with the Court that there were compelling prudential reasons to settle that issue, *see id.* at *15, we are sympathetic to Justice Barrett’s objection that the Court should not “go big” on its equity docket and “set[] precedent on a series of important issues.” *Id.* at *37 (Barrett, J., dissenting). *Cook* is an unmistakable instance of the Court ambitiously fashioning “external” precedent on the equity docket. *See supra* note 358 and accompanying text (distinguishing internal and external precedent on the equity docket). If the Court wanted to opine definitively on the constitutional status of the Federal Reserve—as it had sound reasons to do—it should have transferred the case to the law docket by granting certiorari. The Court had already denied an immediate stay, so there was plenty of time for that path. *See Schmidt, supra* note 33, at 1024 n.119 (calling “law declaration” on the equity docket a kind of “role confusion”).

⁴²⁴ 146 S. Ct. 418 (2025).

⁴²⁵ *Id.* at 421–22 (Kagan, J., dissenting).

⁴²⁶ *Id.* at 420–21.

⁴²⁷ *Id.* at 419 (per curiam).

on the merits.⁴²⁸ It also found that Texas had “made a strong showing of irreparable harm.”⁴²⁹ The Court did not explain the basis of its conclusion, but presumably it was simply relying on the *Maryland v. King* principle (with its attendant pathologies).⁴³⁰ The most significant consideration for present purposes, though, is the weighing of the equities. The Court, invoking the so-called “*Purcell* principle,”⁴³¹ ruled that the district court had “improperly inserted itself into an active primary campaign, causing much confusion and upsetting the delicate federal-state balance in elections.”⁴³² This reasoning was unpersuasive on its own terms: The general election was still nearly a year in the future, and the plaintiffs and district court had moved as fast as humanly possible.⁴³³ To the extent someone had changed the ground rules close to an election, it was *Texas*, not the federal court, and in any meaningful sense the pre-2025 map was the status quo.⁴³⁴

We are interested, however, in a deeper point. Texas had exercised a formal legal power—the power to redraw electoral maps—in a manner that went against conscience, because its avowed purpose was to increase the number of Republican representatives notwithstanding the majoritarian preferences of the people of the state.⁴³⁵ Popular sovereignty is a bedrock principle of American constitutionalism.⁴³⁶ As the Supreme Court has said (quoting Hamilton), “[a] fundamental principle of our representative democracy is . . . ‘that the people should choose whom they please to govern them.’”⁴³⁷ That principle does

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ See *supra* Section III.A.

⁴³¹ This principle is named after *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). See Schmidt, *supra* note 33, at 1024–25 (calling for the *Purcell* principle to be “clarified or reformed”).

⁴³² 146 S. Ct. at 419.

⁴³³ *Id.* at 428 (Kagan, J., dissenting).

⁴³⁴ *Id.*; see also Bray, *Purpose*, *supra* note 174, at 867 (proposing “a presumption that the challenger should receive a preliminary injunction prohibiting the enforcement of the new legal norm against her”).

⁴³⁵ 146 S. Ct. at 423 (Kagan, J., dissenting) (“According to the State, its officials acted only to protect Republican incumbents in the House and to pick up another five predictably Republican seats.”).

⁴³⁶ See Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1398–99 (2018); see also Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994) (arguing that American popular sovereignty principles establish “the legal right of the polity to alter or abolish their government at any time and for any reason”).

⁴³⁷ *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., 1876)); see *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

not mesh with extreme partisan gerrymandering. When the Court confronted a partisan gerrymandering claim in 2004, all nine Justices agreed that “excessive” partisanship in redistricting was unlawful.⁴³⁸ Later, when a bare majority of the Court held partisan gerrymandering claims to be “political questions” in 2019, the Court did not actually contest that partisan gerrymandering was unlawful.⁴³⁹ Indeed, the Court conceded that partisan “gerrymandering is ‘incompatible with democratic principles,’”⁴⁴⁰ and went out of its way to say that the Court “does not condone excessive partisan gerrymandering.”⁴⁴¹

Fast forward six years, and Texas was appealing to the Supreme Court in equity to help it with that unlawful and unseemly project.⁴⁴² Strikingly, the Court’s per curiam opinion acknowledged Texas’s purpose, and Justice Alito was especially blunt: “[I]t is *indisputable*,” he wrote, “that the impetus for the adoption of the Texas map . . . was partisan advantage pure and simple.”⁴⁴³ And yet, having called that motivation “incompatible with democratic principles” and refusing to condone it not long ago, the Court assisted Texas in carrying it out while sitting in an equitable capacity. That was a mistake.⁴⁴⁴ Equity should not lend a helping hand to such a flagrant violation of the “conscience of the realm.”⁴⁴⁵ Needless to say, we would make the same point if the

⁴³⁸ Berman, *supra* note 436, at 1399; *see* Vieth v. Jubelirer, 541 U.S. 267, 293 (2004) (plurality opinion); *id.* at 306–07 (Kennedy, J., concurring); *id.* at 335–36 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 365 (Breyer, J., dissenting).

⁴³⁹ *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019).

⁴⁴⁰ *Id.* at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 576 U.S. 787, 791 (2015) (brackets omitted)).

⁴⁴¹ *Rucho*, 139 S. Ct. at 2507.

⁴⁴² *See* Emergency Application for Stay and Administrative Stay Pending Appeal, Abbott v. LULAC, No. 25A608, 146 S. Ct. 418 (2025), 2025 WL 3284555 at *19–20.

⁴⁴³ *LULAC*, 146 S. Ct. at 420 (Alito, J., concurring in the grant of the application for stay) (emphasis added).

⁴⁴⁴ To be clear, the Court held in *Rucho* that partisan gerrymandering claims present political questions and cannot be directly remedied by the courts. It would not be consistent with *Rucho* for the Court, on its equity docket, to grant a writ of injunction to prevent a partisan gerrymander, however inequitable the practice. That was not the posture of *LULAC*, however. The district court had held that Texas pursued its partisan goals through a racial gerrymander, which is both unlawful and justiciable. *See id.* at 423 (Kagan, J., dissenting). Here, our limited point is that Texas forfeited its right to seek fast-track relief on the equity docket by engaging in a practice so openly and notoriously calculated to undermine the rights of its citizens to participate equally in the political process. Even if Texas’s inequitable conduct would not be *directly* remediable, there is no reason it should not inform the Court’s decision whether to grant Texas extraordinary relief to establish the status of the parties *pendente lite*. After all, part of equity’s function is to prevent the opportunistic abuse of legal rights, precisely because legal remedies are otherwise unavailable. *See* Smith, *supra* note 40, at 1076 (“[E]quity has always had a special role in combatting opportunism . . . [and] has been an important defense against hard-to-foresee misuses of the law by the sophisticated and unscrupulous.”).

⁴⁴⁵ Bacon, *supra* note 207, at 401.

applicant were a Democratic state pursuing a partisan gerrymander for Democratic advantage. The “political conscience of the state”⁴⁴⁶ is not to be confused with the political allegiance of the person.

CONCLUSION

F.W. Maitland once observed that “[e]quity was not a self-sufficient system,” because “at every point it presupposed the existence of common law.”⁴⁴⁷ One could say the same of the equity docket: It presupposes at every point the existence of the ordinary law docket. Indeed, the Supreme Court could survive in recognizable form if its equity docket were eliminated by statute tomorrow. But a Supreme Court that did not decide cases by written opinion after briefing and argument would be an “impossibility,” at least to the modern imagination.⁴⁴⁸

As the equity docket now overwhelms the law docket, both in volume and importance, the Court would do well to remember Maitland’s admonition. The equity docket is here to stay, and it is not inherently improper for the Court to perform its new, chancellor-like role. At the same time, it is useful to situate the equity docket in the broader arc of the development of Anglo-American legal institutions. In that context, we can appreciate how equity survived as a legitimate practice by developing limits—limits that served to keep equity extraordinary in fact, and that filtered conscience into something appropriately judicial. A sound foundation for the equity docket, then, is hiding in plain sight: in the history of equity itself.

⁴⁴⁶ Katz, *Pathways*, *supra* note 28.

⁴⁴⁷ F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 19 (2d ed. 1936).

⁴⁴⁸ *Id.* (calling equity without law “a castle in the air, an impossibility”).