THE ORIGINAL MEANING OF EQUITY

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ABSTRACT

Equity is seeing a new wave of attention in scholarship and practice. Yet, as this Article argues, our current understanding of equity is divided between two distinct meanings: on one side, the federal courts, guided by the Supreme Court, tend to discuss equity as the precise set of remedies known at a fixed point in the past (static equity). On the other, state courts—most prominently, in Delaware—administer equity to preserve the correct operation of law in unforeseeable situations (substantive equity). Only the latter interpretation complies with the historical and functional idea of equity.

This Article makes the first detailed argument for resolving the problem of static equity, and reinvigorating substantive equity in the federal judiciary and the broader legal community. To do so, this Article takes a highly innovative step, by connecting the federal discussion with an in-depth analysis of the legal scene where equity is employed most systematically (and most faithfully to its historical roots): Delaware law, including its corporate law. As this Article demonstrates, substantive equity is fully compatible with originalism and textualism; the "equity" mentioned in the Constitution and later federal texts is substantive, not static, equity. Federal law has always operated within the sphere of the common law, and this Article offers a new bridge between the two, exposing the members of each community to insights from the other, in a manner that promotes both the original understanding of the legal text, justice, and the rule of law.

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TABLE OF CONTENTS

INTRODUCTION

On August 11, 2020, an employee of Citibank N.A. tried to execute an interest payment—about $8 million—to creditors of Revlon, Inc., for whose loans Citibank served as an administrative agent. By accident, the employee wired the creditors, a group of hedge fund managers, the entire amount of Revlon's outstanding debt, or approximately $900 million, all from Citibank's pocket. To everyone's surprise,[1] when Citibank sued the lenders to have the money returned, the federal District Court for the Southern District of New York denied the complaint,[2] in a decision that relied extensively on a single New York case from 1991.[3] Ultimately, the Second Circuit Court of Appeals vacated the district court's judgment,[4] ruling that the assets should be returned to Citibank, in a decision that mentioned the word "equity" and its inflections 33 times, insisting on "equity and

1. *See, e.g.*, Matt Levine, Opinion, *Dystopian Future Securities Fraud*, BLOOMBERG (Jan. 5, 2021, 11:59 AM), https://www.bloomberg.com/opinion/articles/2021-01-05/dystopian-future-securities-fraud [https://perma.cc/LFJ3-L8H4] (stating, six weeks before the district court's ruling, that the hedge fund lenders' arguments for keeping the transferred money are "not *that* plausible," and predicting that "Citi will eventually win this one").

2. *See In re* Citibank August 11, 2020 Wire Transfers, 520 F. Supp. 3d 390 (S.D.N.Y. 2021).

3. Banque Worms v. BankAmerica Int'l, 570 N.E.2d 189 (N.Y. 1991).

4. *See* Citibank, N.A. v. Brigade Cap. Mgmt., LP, 49 F.4th 42 (2d Cir. 2022).

fairness,"[5] "equitable factors,"[6] and "well-settled rules of law and equity, which we are bound to apply even if doing so may require more effort than reading legal text."[7] However, while the appeal was pending, Revlon—one of the world's largest and most well-recognized cosmetics makers—went into bankruptcy, unable to negotiate an agreed-upon debt restructuring with its creditors, because it had no way to tell who the valid creditors—Citibank or the hedge fund entities—were.[8]

This Article makes a simple, but at this point in time, crucial argument: "equity," as understood by many scholars and federal judges, including on the Supreme Court—meaning static equity, fixated on the precise set of situations courts of equity were handling in the founding era,[9] or focused almost entirely on questions of remedies and other procedural-jurisdictional aspects[10]—relates at most to a subset of a broader, more important conception of equity. The latter conception, in this Article called *substantive equity*, is the equity mentioned in the Constitution,[11] which judges are required to apply, especially within the framework of originalism and textualism.[12] It is the equity that our civilization has recognized since the time of Aristotle,[13] and which continues to play a decisive role in contexts

5. *Id.* at 77.

6. *Id.* at 78.

7. *Id.* at 92 (Park, J., concurring).

8. *See id.* at 94–95. For detailed discussions of the *Citibank* case (written prior to the final appellate decision), see Elisabeth de Fontenay, *The $900 Million Mistake:* In re Citibank August 11, 2020 Wire Transfers (SDNY 16 February 2021), 16 CAP. MKTS. L.J. 307 (2021); Maytal Gilboa & Yotam Kaplan, *The Costs of Mistakes*, 122 COLUM. L. REV. F. 61 (2022); Eric Talley, *Discharging the Discharge-for-Value Defense*, 18 N.Y.U. J.L. & BUS. 147 (2021).

9. *See, e.g.*, Liu v. SEC, 591 U.S. 71, 93 (2020) (Thomas, J., dissenting) ("Disgorgement can never be awarded under [Section 21(d)(5) of the Securities Exchange Act of 1934,] 15 U.S.C. § 78u(d)(5). . . . According to our usual interpretive convention, 'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding. Because disgorgement is a creation of the 20th century, it is not properly characterized as 'equitable relief . . . .'").

10. *See, e.g.*, Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 999–1000 (2015) ("Over the last decade and a half, the Court has been . . . laying the foundation for a . . . different future for the law of remedies. In eleven different cases, from nearly as many substantive areas, the Court has deeply entrenched the 'no adequate remedy at law' requirement for equitable relief, and it has repeatedly underscored the distinction between legal and equitable remedies. . . . [I]n remedies, the Court has insisted with vigor on the historic division between law and equity.").

11. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . .").

12. *See infra* Part III.

13. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 1137b, at 315–17 (G.P. Goold ed., H. Rackham trans., Harv. Univ. Press rev. ed. 1934) (c. 384 B.C.E.) ("[L]aw is always a general statement, yet there are cases which it is not possible to cover in a general statement. . . . When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect . . . . This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.").

ranging from *Brown v. Board of Education*[14] to corporate law.[15] Most importantly, it is the more functional, fundamental understanding of what equity is and must be: a system of meta-law,[16] designed to respond to unpredictable situations, where a truncated conception of "law" would lead to plainly unjust,[17] structurally inconsistent,[18] or pro-opportunistic[19] results.

To prove this argument, this Article takes an innovative step: it branches out to Delaware law, including Delaware *corporate* law (the state's hallmark)[20]—which, until now, did not receive adequate attention in recent scholarship on equity[21]—to show, first, how equity is and should be applied in a modern legal system; and second, why the founding era's equity is no different than today's equity, in that both are *mandated* by text, but are not

14. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." (footnotes omitted)). For discussions of equity's role in *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952)—one of the lower state court decisions that, following appeal, came before the U.S. Supreme Court in the *Brown* litigation—see Joel Edan Friedlander, *The Desegregation Decrees of the Delaware Court of Chancery*, 18 DEL. L. REV. 1 (2023); Omari Scott Simmons, *Chancery's Greatest Decision: Historical Insights on Civil Rights and the Future of Shareholder Activism*, 76 WASH. & LEE L. REV. 1259, 1283 (2019) ("[When issuing the decision, Delaware Chancellor] Seitz used the broad, equitable powers of the Court of Chancery . . . .").

15. *See infra* Part II.

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

17. *See, e.g.*, Andrew Kull, *Equity's Atrophy*, 97 NOTRE DAME L. REV. 1801, 1802–04 (2022) ("[T]he most characteristic function of traditional equity was . . . the power to modify and correct applicable *legal* rules, suitable as the first-order resolution of the general run of cases, so as to do better justice between particular parties in particular circumstances. . . . What has been largely forgotten [in the federal courts] . . . is equity's residual power of intervention to correct unjust legal outcomes.").

18. *See* Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 712 & *passim* (2018) (discussing the practice of "equitable interpretation" as a response utilized by judges to deal with situations where "lay legislatures, out of ignorance, inattention, or democratic zeal, enact statutes that threaten the working structure of specific areas of law or contravene deep-rooted rule of law principles").

19. *See, e.g.*, Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* (Harv. Pub. L. Working Paper No. 15-13, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617413 [https://perma.cc/P9Z6-STCF].

20. *See, e.g.*, William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1404–05 & *passim* (2020) (stating that "corporate law is a matter of state law, and . . . states compete to sell their laws to corporations by supplying corporate charters. Delaware is widely regarded as the winner in this competition" (footnote omitted), and analyzing this competition at the international level as well, where Delaware remains the general benchmark).

21. For example, Professor Henry Smith's important 2021 article on substantive equity, Smith, *supra* note 16, only mentions the word "corporate" ten times, and the word "Delaware" once, over ninety-five pages, including one dedicated footnote, *id.* at 1098 n.184, which is still more than the majority of scholarly works in this area. For a discussion of the untenable historical divide between corporate law and other private law scholarship, see Asaf Raz, *Why Corporate Law Is Private Law*, 25 U. PA. J. BUS. L. 981 (2023).

limited to what the text says, or the precise manner in which the legal system operated at the time the text was written.[22]

The Delaware Constitution went into force in 1792, three years after the U.S. Constitution (with later constitutions adopted in 1831 and 1897, which did not modify the constitutional treatment of equity).[23] Both the federal and Delaware constitutions recognize the judiciary's power to do equity.[24] Yet in Delaware, unlike in the static equity segment of the federal community, substantive equity reigns strong. A series of Delaware Supreme Court decisions highlight equity's superior role in relation to both statutory law and private documents, such as contracts, corporate charters, and bylaws.[25]

22. *See, e.g.*, Severns v. Wilmington Med. Ctr., Inc., 421 A.2d 1334, 1348 (Del. 1980) ("[Cases describing] [t]he historic jurisdiction of the Court of Chancery . . . [do not] indicate[] that the fashioning of relief is limited to that which was available in 1776. On the contrary, the very essence of our system of equity . . . is to render the 'jurisprudence as a whole adequate to the social needs . . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age.'" (last two alterations in original) (quoting 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 67, at 89 (Spencer W. Symons ed., Bancroft-Whitney Co., 5th ed. 1941) (1881))); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819, 820 (1993) ("Delaware's Court of Chancery has never become so bound by procedural technicalities and restrictive legal doctrines that it has failed the fundamental purpose of an equity court—to provide relief suited to the circumstances when no adequate remedy is available at law. The historical roots are deep but the Delaware bloom remains fresh.").

23. *See* Du Pont v. Du Pont, 85 A.2d 724, 727–30 (Del. 1951); 1 VICTOR B. WOOLLEY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE § 56, at 35 (1906) ("Each constitution promulgated since the Constitution of 1792, vested in the Court of Chancery a portion of the judicial powers of the State and referred in doing so to the preceding constitution.").

24. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . ."); DEL. CONST. of 1792, art. VI, § 14 ("The equity jurisdiction heretofore exercised by the Judges of the Court of Common Pleas, shall be . . . vested in a Chancellor, who shall hold Courts of Chancery in the several counties of this state."); DEL. CONST. art. IV, § 10 ("The Chancellor and the Vice-Chancellor or Vice-Chancellors shall hold the Court of Chancery. . . . This court shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery."); *Du Pont*, 85 A.2d at 727–29 ("[T]he general equity jurisdiction of the Court of Chancery . . . is defined as all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies . . . . [T]he [Delaware] Constitutions of 1792, 1831 and 1897 intended to establish . . . a tribunal to administer the remedies and principles of equity. They secured them for the relief of the people. This conclusion . . . establish[es] by the Judiciary Article of the Constitution the irreducible minimum of the judiciary. It secures for the protection of the people an adequate judicial system and removes it from the vagaries of legislative whim."); Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701 (2011).

25. *See, e.g.*, Salzberg v. Sciabacucchi, 227 A.3d 102, 116–35 (Del. 2020) ("'At its core, the [Delaware General Corporation Law] is a broad enabling act which leaves latitude for substantial private ordering, *provided* the statutory parameters and judicially imposed principles of fiduciary duty are honored.' . . . 'Delaware's corporate statute . . . leaves the parties . . . with great leeway to structure their relations, *subject to* . . . the policing of director misconduct through equitable review.' . . . Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose." (emphases added) (first quoting Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996); and then quoting Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del. Ch. 2004))); Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (stating, four years after the passage of Delaware's new General Corporation Law, that "inequitable action does not become permissible simply because it is legally possible"); *Du Pont*, 85 A.2d at 727–30.

Although Delaware is constantly being called to succumb to a "contractarian" approach,[26] its top judges—including very recently[27]—insist on equity's primary, and unwaivable, position in the hierarchy of legal norms.

Similarly, the world-renowned[28] Delaware Court of Chancery (a descendant of the same English Court of Chancery mentioned in many federal static equity opinions)[29] continues to place substantive equity at the heart of its jurisprudence, as it has long done,[30] using equity to shape the outcomes of billion-dollar cases,[31] along with high-stakes policy discussions in business and broader law.[32] Even some of the more routine aspects of legal work—transcript opinions rendered from the bench at the end of judicial hearings—have recently been described by a leading Delaware practitioner as "performances of equity."[33]

This Article therefore makes a strong case for "equity," as it appears in the U.S. Constitution of 1789 and later federal texts, to be no different than

26. *See, e.g.*, Megan Wischmeier Shaner, *Corporate Resiliency and Relevancy in the Private Ordering Era*, 2022 COLUM. BUS. L. REV. 804.

27. *See In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 463 n.115 (Del. 2024) ("The statute [on which the defendants rely] offers a limited safe harbor for directors from incurable voidness for conflict transactions. It is not concerned with equitable review."); CCSB Fin. Corp. v. Totta, 302 A.3d 387, 398–402 & 400 n.64 (Del. 2023) (rejecting a defendant's attempt to escape fiduciary liability through an exculpatory provision in a corporate charter, and reaffirming the foundational equity cases of *Schnell*, 285 A.2d at 439, and *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007)).

28. *See, e.g.*, Moon, *supra* note 20.

29. *See, e.g.*, Liu v. SEC, 591 U.S. 71, 93 (2020) (Thomas, J., dissenting) ("According to our usual interpretive convention, 'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding.").

30. *See, e.g.*, Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486, 491 (Del. Ch. 1923) ("That the source of [the majority stockholders'] power is found in a statute, supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny. When the power is sought to be used, therefore, it is competent for any one who conceives himself aggrieved thereby to invoke the processes of a court of equity for protection against its oppressive exercise. When examined by such a court, if it should appear that the power is used in such a way that it violates any of those fundamental principles which it is the special province of equity to assert and protect, its restraining processes will unhesitatingly issue.").

31. *See, e.g.*, *In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816, 2020 Del. Ch. LEXIS 211, at *38, *96, *123 (Del. Ch. June 11, 2020) (noting, while denying motion to dismiss a case arising from a $40.5 billion share conversion transaction, that "[a] court must still determine whether the defendant fiduciaries acted equitably. . . . The fact that the Conversion Right appears in the certificate of incorporation does not obviate the need for equitable analysis"); *In re* Viacom Inc. S'holders Litig., Consol. C.A. No. 2019-0948, 2020 Del. Ch. LEXIS 373, at *3, *6, *65 (Del. Ch. Dec. 29, 2020) (noting, while denying motion to dismiss a case arising from an alleged fiduciary breach valued at approximately $1 billion, that "[in] courts of equity, . . . judicial review of fiduciary conduct abides").

32. *See, e.g.*, Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 949 (Del. Ch. 2013) ("[A] statutorily and contractually valid bylaw may operate inequitably in a particular scenario . . . . [F]orum selection clauses . . . [should be] den[ied] enforcement . . . to the limited extent necessary to avoid some fundamentally inequitable result . . . .").

33. Joel Edan Friedlander, *Performances of Equity: Why Court of Chancery Transcript Rulings Are Law*, 77 BUS. LAW. 51 (2021).

the equity guaranteed by the Delaware Constitution of 1792, as interpreted by the Delaware courts to this day. Both refer to substantive equity: the equity of Aristotle, of the English Court of Chancery, of ample federal court decisions,[34] of high-profile corporate law cases, and of today's cutting-edge scholarship.[35] It defies belief to argue, as static equity jurists seem to do, that equity developed as a responsive, justice-oriented meta-law for dealing with unforeseeable situations, then "froze" in 1789 into a fixed set of remedies and procedures, and then "thawed" (as early as three years later) into the same responsive, justice-oriented equity we now see in Delaware and elsewhere.[36]

Clearly, this Article does not argue that the U.S. Supreme Court is directly bound to follow all of Delaware law. Instead, the argument is that when the Constitution or other federal texts mention a common law concept, it is both logical and necessary to look to where the concept is most frequently and consistently applied to discern its original meaning (especially where, as in Delaware, that meaning directly follows from the founding-era understanding of equity). Even within an originalist-textualist methodology,[37] it is entirely possible for the law to create an ex ante, textual norm that "redirects" its readers, including the judges who apply it, to the ex post, after-the-fact dimension.[38] Equity is a conceptual "unit" or "vehicle" that is always on the move, aiming to respond to the unforeseeable situations that arise due to changes in society, technology, and the economy, or due to plain accidents, such as Citibank's unfortunate interaction with the

34. *See, e.g.*, *infra* note 77.

35. *See, e.g.*, *infra* notes 45–48, 79.

36. This point is further supported by the fact that British legal scholars—those most familiar with the form of equity which the United States inherited in the founding era—treat the static equity conception with sharp criticism. *See, e.g.*, Chaim Saiman, *The Law Wants to Be Formal*, 96 NOTRE DAME L. REV. 1067, 1097–98 (2021) (detailing the manner in which "Commonwealth observers were notably unimpressed" by the U.S. Supreme Court's decision in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), including one scholar who called "the Court's reasoning . . . 'downright insulting to judicial colleagues in kindred legal traditions'" (quoting David Capper, Essay, *The Need for* Mareva *Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2180 (2005))).

37. Note that originalism and textualism are not the same thing, *see, e.g.*, Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115 (2022); Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022), but the argument made in this Article interacts with both of these conceptions, and particularly with areas where they do intersect.

38. The practice of creating a "redirect" from text to equity is widespread, and extends to both constitutions, statutes, and contracts or other private documents. *See, e.g.*, Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, C.A. No. 7906, 2020 Del. Ch. LEXIS 381, at *8, *18 (Del. Ch. Dec. 31, 2020) (quoting a merger agreement which stated that "if a party to . . . litigation . . . prevails in part, and loses in part, the court . . . presiding over such litigation . . . shall award a reimbursement of the fees, costs and expenses incurred by such party on an equitable basis" (last three alterations in original), and then making this required equitable judgment, by declining to grant fees to any of the parties, based on case-specific considerations).

system of digital wire transfers.[39] At both the federal and state level, the Constitution and other texts refer to the vehicle, but not to every point on the road it travels.[40]

Through this original engagement with the legal scene—Delaware—where equity is most systematically applied in all of American law (and perhaps globally),[41] this Article energizes other scholarly and judicial efforts to bring substantive equity back to center stage. The *Citibank* Second Circuit decision provides one salient example,[42] as do a wide variety of federal court decisions reached through the years.[43] In the 2020 case of *Liu v. SEC*,[44] for instance, the Supreme Court majority, against Justice Thomas's dissent, upheld the use of an equitable remedy—disgorgement—that did not exist in its current form during the founding era. Substantive equity is also seeing a revival in scholarship: Professor Henry Smith's well-regarded 2021 article[45] is joined by other scholars who focus on equity's corrective role,[46] or offer it as an equally central interpretation, alongside static equity,[47] or otherwise merge the substantive equity understanding into the federal (often static) equity discussion, pulling the latter partly down from its hyper-proceduralist tree.[48]

While building upon this important wave of scholarship, this Article also moves the ball forward in a significant way, by engaging directly with the prevalent methodologies of originalism and textualism. In doing so, this

39. *See supra* text accompanying notes 1–8.

40. *Cf.* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1351 (2023) ("[S]ometimes the text requires us to engage with unwritten law. The text requires us to go beyond the text.").

41. *See, e.g.*, Moon, *supra* note 20.

42. *See supra* text accompanying notes 1–8.

43. *See infra* note 77.

44. 591 U.S. 71 (2020).

45. Smith, *supra* note 16.

46. *See infra* note 79.

47. *See, e.g.*, Samuel L. Bray, *A Student's Guide to the Meanings of "Equity"* 1, 3, 4 (Working Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821861 [https://perma.cc/Y5GG-2AU6] (discussing "three different meanings for th[e] word ['equity,']" the first two of which—"the recognition of an exception to a general rule" and "a moral reading of the law"—correspond to substantive equity, while the third—"the doctrines and remedies developed in the English courts of equity, especially the Court of Chancery"—largely corresponds to static equity). Note that, as this Article demonstrates, there should be no actual divergence here: the doctrines and remedies administered by the English courts of equity were also part of substantive, meta-law equity. The belief that equity should, in reference to some point in history, be understood as static equity is a central misconception this Article aims to correct.

48. *See, e.g.*, Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213 (2023). This Article follows Gallogly's conclusion that when Article III of the Constitution mentions equity, it recognizes an "inherent authority to grant equitable remedies, such that the federal courts are automatically possessed of that power," *id.* at 1318. In turn, this Article takes the next step, in detailing what the equity power enables and requires the federal courts to do.

Article demonstrates why static equity—only a recent phenomenon,[49] claiming that equity should remain limited to the exact set of things courts used to do in 1789, 1938,[50] or some other point in time, as proposed by the Court majority in *Grupo Mexicano*,[51] or by the dissent in *Liu v. SEC*[52]—is not and cannot be equity at all. Static equity is a contradiction in terms, which contravenes, rather than upholds, the original meaning of the Constitution and other legal documents where equity is invoked.

In sum, this Article brings together three distinct scholarly spaces: first, federal courts and remedies; second, constitutional law and history; and third, private law (including corporate law) theory, practice, and economics. While doing so, it makes a number of original contributions to the literature. The first main contribution is this Article's identification of two separate understandings of "equity"—as substantive equity and as static equity—that currently exist side-by-side in our law, with participants talking over one another to the extent they fail to recognize this distinction. The second main contribution is the weaving together of state and federal law, challenging the long-standing aversion of common law in the federal system. The concept of equity, which is a structural element of *all* law,[53] cannot be misconstrued by federal courts while being correctly applied at the state level (including, most prominently, in Delaware). The third main contribution is the practical solution this Article offers to the problem of

49. *See, e.g.*, Bray, *supra* note 10, at 999–1000 (stating, in a 2015 article, that "[o]ver the last decade and a half, . . . the Court has supported its new equity jurisprudence by appealing to history and tradition"). The temporal matrix is apparent: the Court's *new* jurisprudence supposedly turns to history to show that equity should remain frozen in time, but *actual* history, of both the Court's decisions and other equity sources, consistently shows that equity means substantive, responsive equity. To propose a correction to one of Bray's statements, *see id.* at 1020, the Court's "artificial-history approach" is not "good history" *and* not "good jurisprudence."

50. *See* Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 879, 881 (2023) ("Drawing implicitly on originalist themes, the Court held that federal courts may afford only relief that was available in England's High Court of Chancery in 1789, when the federal courts first acquired their equity powers. The Court later moderated this approach, looking instead to English and American equity practice more generally before 1938, when the Federal Rules of Civil Procedure merged law and equity in federal court." (footnote omitted)).

51. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 333 & *passim* (1999) (rejecting the argument that federal courts have the equitable power to grant the remedy of a "*Mareva* injunction," which prohibits the transfer of a debtor's assets to third parties while a legal proceeding takes place against the debtor, "[b]ecause such a remedy was historically [(in the founding era)] unavailable from a court of equity").

52. 591 U.S. 71, 93 (2020) (Thomas, J., dissenting) ("Disgorgement can never be awarded under [Section 21(d)(5) of the Securities Exchange Act of 1934,] 15 U.S.C. § 78u(d)(5). . . . According to our usual interpretive convention, 'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding. Because disgorgement is a creation of the 20th century, it is not properly characterized as 'equitable relief . . . .'").

53. *See, e.g.*, Henry E. Smith, *Property Beyond Flatland*, 10 BRIGHAM-KANNER PROP. RTS. J. 9, 56 (2021) ("We need to . . . put more . . . of the complexity of the world back into our theories. . . . [W]e have less excuse for the extreme reductionism of the flattest versions of the bundle of rights, mishmashes of property and contract, equity-less law, and the like.").

static equity: even without departing from existing federal precepts of legal interpretation (namely, originalism and textualism), a correct reading of "equity," as it appears in the Constitution and later federal texts, requires understanding it as substantive equity.

This Article proceeds as follows: Part I offers a primer, first, on the concept of equity in general (substantive equity), and then on the static equity conception that has recently appeared in the federal courts. Part II analyzes substantive equity's role at the heart of Delaware law, today's leading example of equity in action. Part III offers a roadmap for bringing substantive equity back to its traditional, correct place in federal law and the broader legal community. Instead of settling for the common predicament of "the Constitution as a conversation-stopper,"[54] this Article makes clear that the Constitution—like broader legal history and text—fully supports the dynamic, evolving jurisprudence of equity. Substantive equity is the original meaning of equity.

I. SUBSTANTIVE EQUITY AND STATIC EQUITY

A. Substantive Equity: The Obligation to Do Justice in Unforeseeable Situations, and How It Remains at the Core of Modern Law

> [A] Right in Law cannot die, no more can Equity in Chancery die.[55]

This Section introduces the concept of equity in general, meaning substantive equity, a "meta-law"[56] that preserves the correct operation of law in unforeseeable situations. To do so, the discussion here ties together several important stages in the history of equity, namely, the scholarship of Aristotle, English law in the Middle Ages, the transition from conscience-based to precedent-based equity in the sixteenth to eighteenth centuries, American law from the nineteenth century to the present, and today's scholarship on equity theory and practice. This analysis demonstrates that the idea of substantive, as opposed to static,[57] equity rests on an uninterrupted line of authority: during any time period that matters for legal interpretation today, legal texts, legal decisionmakers, and members of the public have recognized, adjudicated, and relied upon equity's substantive, corrective function.

54. Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2026 (2009).
55. Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 486; 1 Chan. Rep. 1, 6.
56. Smith, *supra* note 16 *passim*.
57. *See infra* Section I.B.

The roots of equity can be located in antiquity, and for a good reason: where there is law,[58] there will always be abuses and accidents that run afoul of the human sense of justice—or, put differently, represent a violation of a legal dictate which, for some reason, is not formulated in sufficiently clear terms in a statute, contract, or other legal norm before the fact. As Aristotle, the greatest philosopher in history,[59] wrote in the *Nicomachean Ethics*:

> [E]quity, while superior to one sort of justice, is itself just: it is not superior to justice as being generically different from it. . . . [L]aw is always a general statement, yet there are cases which it is not possible to cover in a general statement. . . . [T]he law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question. Hence, while the equitable is just, and is superior to one sort of justice, it is not superior to absolute justice, but only to the error due to its absolute statement. This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.[60]

Going forward more than a millennium and a half, to the legal system of thirteenth-century England, this understanding of equity remained equally critical for the proper functioning of law. As Frederic William Maitland, the leading historian of English law, wrote of this period in his Cambridge lectures on equity (posthumously published in 1909):

> Very often the petitioner . . . complains that for some reason or another he can not get a remedy in the ordinary course of justice and yet he is entitled to a remedy. He is poor, he is old, he is sick, his adversary is rich and powerful, will bribe or will intimidate jurors, or has by some trick or some accident acquired an advantage of which

58. For an introduction to the law of ancient Greece, see, for example, THE LAW AND THE COURTS IN ANCIENT GREECE (Edward M. Harris & Lene Rubinstein eds., 2004).

59. *See generally* ARTHUR HERMAN, THE CAVE AND THE LIGHT: PLATO VERSUS ARISTOTLE, AND THE STRUGGLE FOR THE SOUL OF WESTERN CIVILIZATION (2014).

60. ARISTOTLE, *supra* note 13, at 1137b, at 315–17. For later accounts of Aristotle's work on equity, see, for example, Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 NOTRE DAME LAW. 119 (1942); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 429–30 (2003).

> the ordinary courts with their formal procedure will not deprive him. . . . Such petitions are referred by the king to the Chancellor. Gradually in the course of the fourteenth century petitioners, instead of going to the king, will go straight to the Chancellor . . . . Now one thing that the Chancellor may do in such a case is to invent a new writ and so provide the complainant with a means of bringing an action in a court of law. But in the fourteenth century the courts of law have become very conservative and are given to quashing writs which differ in material points from those already in use. But another thing that the Chancellor can do is to send for the complainant's adversary and examine him concerning the charge that has been made against him. Gradually a procedure is established. . . . The [Chancellors] were administering the law but they were administering it in cases which escaped the meshes of the ordinary courts. The complaints that come before them are in general complaints of indubitable legal wrongs . . . of which the ordinary courts take cognizance, wrongs which they ought to redress. But then owing to one thing and another such wrongs are not always redressed by courts of law. . . . In the course of the sixteenth century we begin to learn a little about the rules that the Chancellors are administering in the field that is thus assigned to them. They are known as "the rules of equity and good conscience."[61]

The association of equity with purely personal conscience, however, gave many people pause.[62] As Maitland continued, "[i]n the second half of the sixteenth century the jurisprudence of the court is becoming settled. . . . [The Chancellors] begin to administer an established set of rules which is becoming known to the public in the shape of reports and they begin to publish rules of procedure."[63] Yet, the use of rules and principles did not freeze equity, was not identical to the more fixed reliance on similar sources in ordinary "law," and did not alter equity's mission to correct the abuses and accidents that would result from an excessively literal application of law. As Owen Gallogly recently wrote:

> [P]recedent-based equity's adherence to rules did not mean that the law of equitable remedies was totally immutable. Equity continued to evolve . . . . [T]here arose cases to which the application of those rules was uncertain because of an unprecedented set of facts or a novel legal issue that had yet to be resolved by prior case law. When

61. F.W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 4–8 (A.H. Chaytor & W.J. Whittaker eds., 1909).

62. *See, e.g.*, Gallogly, *supra* note 48, at 1245–49.

63. MAITLAND, *supra* note 61, at 9.

> Chancery decided one of these questions of first impression, it would both elaborate on the preexisting rules and create new precedent that would apply in future cases.[64]

In one of the most memorable passages in common law history, Lord Chancellor Ellesmere, sitting in a 1615 case described by a present-day author as "the wellspring of equity in modern English law,"[65] stated that:

> The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances. The Office of the Chancellor is . . . to soften and mollify the Extremity of the Law . . . .[66]

Thus, while relying more on text and precedent throughout the seventeenth and eighteenth centuries,[67] equity never departed from its Aristotelian roots.[68] This is the equity that the United States inherited in the

64. Gallogly, *supra* note 48, at 1255. Note that the normative sources (including textual ones) on which equity judges have relied then, and continue to rely today, often differ from those that characterize ordinary "law" (that is, law outside of equity). *See, e.g.*, Smith, *supra* note 16, at 1058 ("The maxims are . . . central to equity . . . . [T]he role of the maxims is orthogonal to our expectations [(under ordinary law)]: rather than serving as clumsy rules or vague standards, they are signals that meta-law reasoning is occurring . . . .").

65. GARY WATT, EQUITY STIRRING: THE STORY OF JUSTICE BEYOND LAW 67 (2009).

66. Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 486; 1 Chan. Rep. 1, 6–7 (formatting altered).

67. *See, e.g.*, Gallogly, *supra* note 48, at 1250–52.

68. *See, e.g.*, Dennis Klimchuk, *Aristotle at the Foundations of the Law of Equity*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 32 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020); Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 24–26 (1951) ("[E]quity long antedates the court of Chancery in England. . . . The avoidance of the freezing of law into inflexible rules is one of [equity's] chief purposes. . . . From the principles of equity there has been developed, over a period of centuries, a structure of equity rules which have the certainty and predictability without which no law is practicable . . . . The nature of equity, administratively, is due primarily to its development, historically, in England and the United States. Its nature as an ideal juristic theory is much older and more universal. The two phases of equity . . . are two sides of the same coin. A study of one is barren without consideration, at the same time, of the other . . . ." (footnote omitted)); John Tasioulas, *The Paradox of Equity*, 55 CAMBRIDGE L.J. 456, 461 n.10 (1996) ("It is not incongruous to relate 'equity' in the broad Aristotelian sense to 'equity' conceived as those doctrines, remedies etc. that originated in the Court of Chancery. This is because, by at least the sixteenth century, the former was invoked as providing one of the main intellectual justifications for the latter."). For statements of this fact from, or with direct reference to, the time period at which the American legal system inherited equity from the English one, see *infra* note 346; Capper, *supra* note 36, at 2169 ("[T]he federal courts inherited the principles of equity administered by the English Court of Chancery. Those principles are not immutable . . . but can be adapted to the perceived needs of later times. English courts did not grant anything resembling *Mareva* injunctions in the late eighteenth century, but that does not mean that developments along those lines would be incompatible with the said principles. If courts in England and other parts of the common law world have subsequently developed *Mareva* injunctions without significant assistance from the legislature, that would seem to create a presumption that these orders are consistent with eighteenth century equitable principles.").

late eighteenth century: the meta-law, ameliorative equity,[69] which "remedies defects in the common law,"[70] "takes notice of fraud, accident, mistake, and forgery,"[71] and "administers relief according to the true intentions of the parties."[72] These are "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries,"[73] that were "available in the English Court of Chancery at the time of the founding,"[74] and which represent "the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies."[75]

Unsurprisingly, this line of authority has continued to evolve in American law during the nineteenth and twentieth centuries—and even in the opening decades of the present one, despite the emergence of static equity in the 1990s.[76] Substantive equity lies at the foundation of an exceptionally broad group of federal court decisions through the years, from both the Supreme Court and lower courts.[77] The same holds true in state

69. *See, e.g.*, Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1780 (2022) ("[T]he primary and primordial function of equity—reflected in a surfeit of substantive equitable doctrine—is . . . corrective . . . in nature. Equity corrects for exceptional injustice or inequity, the risk of which inheres in law in virtue of its generality. . . . [E]quity ameliorates the damaging effects of opportunism on the integrity of first-order law, responding to exceptional instances of abuse or misuse of legal rights and powers.").

70. Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 257, 259 (Donald Fleming & Bernard Bailyn eds., 1971) (discussing this function while analyzing the meaning of equity in the English High Court of Chancery, between the time of the Tudors and the abolition of separate courts of equity around 1875).

71. *Id.*

72. *Id.*

73. Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 568 (1939), *quoted in* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

74. Liu v. SEC, 591 U.S. 71, 93 (2020) (Thomas, J., dissenting).

75. Du Pont v. Du Pont, 85 A.2d 724, 727 (Del. 1951).

76. *See infra* Section I.B.

77. *See, e.g.*, Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1576–77 (2024) ("[T]he phrase 'just and proper' invokes the discretion that courts have traditionally exercised when faced with requests for equitable relief. . . . Crafting 'fair' and 'appropriate' equitable relief necessitates the exercise of discretion—the hallmark of traditional equitable practice."); Delaware v. Pennsylvania, 598 U.S. 115, 129 (2023) ("[B]oth [money orders and the financial instruments litigated in this case] would . . . escheat inequitably under the . . . common[]law . . . ."); Holland v. Florida, 560 U.S. 631, 649–50 (2010) ("[W]e have . . . made clear that often the 'exercise of a court's equity powers . . . must be made on a case-by-case basis.' In emphasizing the need for 'flexibility,' for avoiding 'mechanical rules,' we have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity[.]' The 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.' Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in

law.[78] Recent scholarship has also converged on the substantive understanding of equity and its corrective role.[79] The following Section

advance, could warrant special treatment in an appropriate case." (third, fifth and sixth alterations in original) (citations omitted) (first quoting Baggett v. Bullitt, 377 U.S. 360, 375 (1964); then quoting Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946); and then quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944))); Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."); Meredith v. Winter Haven, 320 U.S. 228, 235 (1943) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."); Pepper v. Litton, 308 U.S. 295, 304–05 (1939) ("The bankruptcy courts have exercised . . . equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." (footnote omitted)); Hawes v. Oakland, 104 U.S. 450, 453–54 (1882) ("That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted . . . . [I]t is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence . . . ."); Seymour v. Freer, 75 U.S. 202, 218 (1869) ("[A] court of equity had unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."); United Airlines, Inc. v. FERC, 827 F.3d 122, 136 (D.C. Cir. 2016) ("[G]ranting a tax allowance to partnership pipelines results in inequitable returns for partners in those pipelines as compared to shareholders in corporate pipelines."); Sea-Land Servs., Inc. v. Pepper Source, 941 F.2d 519, 525 (7th Cir. 1991) ("[The plaintiff] is required to show the kind of injustice to merit the evocation of the court's essentially equitable power to prevent 'injustice.'").

78. *See infra* Part II.

79. *See, e.g.*, Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037 (2020) (arguing that equity can also be part of the legislative, rather than only the judicial, process); Anna Conley, *A Challenge to "Equitable Originalism"—The History of Injunctions as a Principle-Based Adaptable Judicial Power*, 17 N.Y.U. J.L. & LIBERTY 112, 114–15 (2023) ("Th[e] historical analysis asks whether the original meaning, history or tradition of federal equitable remedies crystallized injunctive power as it was in England in the 1780s. The answer is no. . . . [C]aselaw and treatises from the late 1700s through the early 1900s . . . illustrate the reception of equity as a principle-based system, with a focus on the adequacy of legal remedies . . . . [E]arly U.S. conceptions of equity and injunctions anticipated that they would adapt to changing circumstances. This adaptation was necessary for equity to continue to serve an ameliorative function relative to the ever-changing common law."); Keenan, *supra* note 50, at 882–83 ("[F]ederal courts have a limited power to change equitable doctrines and remedies in response to certain types of 'complex' problems. . . . [I]n complex cases, courts [should] construe Congress's grant of equity power as an implicit instruction to refashion equity's existing doctrines and remedies . . . . [T]his account . . . better tracks how the federal courts have used their equity powers throughout history."); Kull, *supra* note 17; Peterson, *supra* note 18; Sepehr Shahshahani, *When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law*, 110 CORNELL L. REV. (forthcoming 2024) (manuscript at 4–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4738245 [https://perma.cc/LZ7S-UBSP] ("[E]quity protects the law by giving courts a way to avoid a special hardship without having to distort law. In this view, the main virtue of equity is not protecting sympathetic parties in discrete cases but protecting the law against distortion. . . . [A] system without equity may not be a strict regime of good laws, nor a regime of rules hobbled by multifactor balancing tests, but rather a regime of bad laws. This insight leads to a more welcoming attitude toward equitable intervention . . . ." (footnote omitted)); Jonathan David Shaub, *Interbranch Equity*, 25 U. PA. J. CONST. L. 780, 835–36 (2023) ("[F]or 'getting into equity,' the *grievance* claimed is paramount. . . . [E]quitable

introduces and criticizes the recent phenomenon of static equity as incongruent with these facts, while further clarifying why substantive equity is both the historically mandated, and functionally correct, interpretation of equity.

B. Static Equity: The Focus on Seemingly Fixed Statute and Procedure, and How It Misconstrues the Original Meaning of Equity

> The forms of action we have buried, but they still rule us from their graves.[80]

The Constitution of the United States, enacted in 1789, is likely the most well-known legal document in modern existence. While the Constitution's text is closely read, and sometimes closely followed, a different question—which, until very recently,[81] received less attention by judges and scholars—is what happens when the Constitution relies on pre-

jurisdiction does not require a showing that a recognized legal 'right' has been violated but only that 'the interference of the judicial power is necessary to prevent a wrong.' . . . The court should recognize that the [petitioner] is petitioning for judicial recognition of its grievance with the [respondent] in light of its inability to seek relief elsewhere." (first quoting Bray & Miller, *supra* note 69, at 1763; and then quoting Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the* Zenith *Case*, 81 MICH. L. REV. 1571, 1586 (1983))).

80. MAITLAND, *supra* note 61, at 296.

81. Since 2023, a rising tide of scholarship is delving into the proper role of the common law in a federal system that, for decades, many judges and scholars had perceived to be concerned almost entirely with the Constitution and federal statutes. This literature is emerging primarily in two contexts: first, the Supreme Court's new standing doctrines, as enunciated in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021); and second, revisits of the well-known case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which stated that federal courts may not develop new common law when adjudicating questions of state common law. A selection of this literature includes William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185 (2024); Rachel Bayefsky, *Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 N.Y.U. L. REV. ONLINE 128 (2024); John F. Coyle & F. Andrew Hessick, Erie *and Forum Selection Clauses*, 2024 U. ILL. L. REV. 777; Jaden M. Lessnick & T. Hunter Mason, *An* Erie *Taking:* Tyler v. Hennepin County *and the General Common Law Revival*, 15 U.C. IRVINE L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4660783 [https://perma.cc/FZP5-LM6F]; Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism"*, 31 GEO. MASON L. REV. 893 (2024); Nathan W. Raab, *Displacement of Federal Common Law*, 58 WAKE FOREST L. REV. 709 (2023); Asaf Raz, *Taking Personhood Seriously*, 2023 COLUM. BUS. L. REV. 729, 776–81; Stephen E. Sachs, Life After *Erie*, Lecture at Harvard Law School (Nov. 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4633575 [https://perma.cc/4YHW-NL5E]; Owen B. Smitherman, *History, Public Rights, and Article III Standing*, 47 HARV. J.L. & PUB. POL'Y 167 (2024); Todd J. Zywicki, *The Supreme Court "Pulled a Brodie":* Swift *and* Erie *in a Commercial Law Perspective*, 17 N.Y.U. J.L. & LIBERTY 296 (2024). For recent articles that make this connection with a specific focus on corporate law, see Stephen E. Sachs, *Dormant Commerce and Corporate Jurisdiction*, 2023 SUP. CT. REV. 213; Caitlin B. Tully, *The Unenumerated Power*, 111 VA. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4787694 [https://perma.cc/S4UP-XF2G]. More efforts to re-engage federal jurists with the common law should be undertaken, and this Article aims to do so in the equally important context of equity.

constitutional,[82] common law concepts. These include, among others, contract (mentioned in Articles I and VI),[83] property (appearing in Article IV and the Fifth and Fourteenth Amendments),[84] and most pressingly, equity—invoked, first, in Article III's command that "[t]he judicial Power shall extend to all Cases, in Law and Equity,"[85] and once more in the Eleventh Amendment.[86] In recent decades, whenever the federal courts *did* have to grapple with this question, it has frequently been met with less than satisfactory answers.[87]

This Section introduces and discusses the phenomenon of static equity by focusing on two cases—*Grupo Mexicano*[88] and *Liu v. SEC*[89]—which together illustrate the most important aspects of static equity: a combination of, first, the emphasis on remedies and other procedural-jurisdictional matters, while minimizing equity's broader substantive, corrective function at *both* the primary behavior and remedy levels;[90] second, the belief that

82. *See, e.g.*, Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 116 (1945) (Rutledge, J., dissenting) (discussing "the common law which antedated both state and federal law"); Raz, *supra* note 81, at 779 ("[T]he Constitution itself mentions private and common law concepts . . . . The Constitution does not, however, provide information on what these concepts represent; that task is, and has always been, left to the common law. . . . In a sense, the common law has been incorporated into the Constitution, and requires federal courts to apply it according to its own, pre-existing modes of interpretation and general operation."). For a statement of this idea in regard to statutory law, see, for example, United States v. Hansen, 599 U.S. 762, 778 (2023) ("When Congress transplants a common-law term, the '"old soil"' comes with it." (quoting Taggart v. Lorenzen, 587 U.S. 554, 560 (2019) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)))).

83. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."); *id.* art. VI, cl. 1 ("All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.").

84. *Id.* art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); *id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

85. *Id.* art. III, § 2, cl. 1.

86. *Id.* amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

87. For an analysis tying together many recent cases, from different areas of law, where federal courts have adjudicated common law matters in ways that are functionally and historically inadequate, see Raz, *supra* note 81, at 776–81.

88. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999).

89. 591 U.S. 71 (2020).

90. *See, e.g.*, Alexander J. Kraszewski, *". . . No, the Other Common Law": Antitrust as Equity Jurisprudence*, 29 GEO. MASON L. REV. 1149, 1154 (2022) ("There are many ways in which antitrust can be grounded in equity, including in *the facile sense* that it is *primarily concerned with injunctions*. . . . But the operative definition for the antitrust laws is 'Equity' as it appears in Article III—the would-be source of an equity jurisprudence of federal antitrust. 'Equity,' as the Constitution is concerned with it, starts with Aristotle. Anglo-American treatises and commentators at the time of the founding largely adopted his definition; thus, it forms the basis for the hermeneutics of 'Equity' in the Constitution." (emphases added) (footnote omitted) (formatting altered)); Kull, *supra* note 17, at 1801–

those remedies and procedures should remain frozen to what they were at some previous point in time;[91] and third, the related belief that doing actual, substantive equity somehow interferes with conventions of judicial restraint that have developed elsewhere in federal law.[92]

Yet, the *Liu v. SEC* majority opinion, delivered two decades after *Grupo Mexicano*, also represents a shift from that case, in that the Court (without announcing it in so many words) relied more broadly on *substantive* equity to shape both the reasoning and the outcome. Put differently, even when trying to apply the newly-invented static equity, the federal courts cannot truly escape the original meaning of equity.

To be certain, the cases discussed in this Section are part of a broad range of static equity decisions authored by the federal courts, many of which have been usefully surveyed by Professor Samuel Bray, both in his foundational 2015 article[93] and more recently.[94] As the analysis here aims to show, the juxtapositions between *Grupo Mexicano* and *Liu v. SEC* mirror the contradictions inherent to static equity as a whole.

In *Grupo Mexicano*,[95] a fairly straightforward commercial law situation found its way to the U.S. Supreme Court. A group of creditors filed a lawsuit against a debtor corporation, for failing to meet its repayment obligations; while the lawsuit was pending, the defendant was in the process of transferring a large part of its property to third parties—large enough to frustrate the execution of any future judgment in favor of the plaintiffs, who happened to have a particularly strong case. As Justice Ginsburg summarized these facts in her dissenting opinion:

> Uncontested evidence presented to the District Court at the preliminary injunction hearing showed that petitioner Grupo Mexicano de Desarrollo, S.A. (GMD), had defaulted on its

02 ("When modern commentators refer to the significance of equity, the remedy in view is almost always the injunction. . . . If this all-important feature of the system—the judicial power *to tell people what to do*—is taken as its proper measure, the federal equity jurisdiction is plainly thriving as never before. What has virtually disappeared [from the federal equity discussion], by contrast, is equity's substantive contribution. . . . [T]he most characteristic function of traditional equity was what it did on its own authority. This was the power to modify and correct applicable *legal* rules, suitable as the first-order resolution of the general run of cases, so as to do better justice between particular parties in particular circumstances.").

91. *See* Keenan, *supra* note 50, at 881 ("Drawing implicitly on originalist themes, the Court held that federal courts may afford only relief that was available in England's High Court of Chancery in 1789, when the federal courts first acquired their equity powers. The Court later moderated this approach, looking instead to English and American equity practice more generally before 1938, when the Federal Rules of Civil Procedure merged law and equity in federal court." (footnote omitted)).

92. *See infra* text accompanying notes 113–17.

93. Bray, *supra* note 10.

94. *See, e.g.*, Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467 (2022).

95. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999).

> contractual obligations to respondents, a group of GMD noteholders (Alliance), that Alliance had satisfied all conditions precedent to its breach of contract claim, and that GMD had no plausible defense on the merits. Alliance also demonstrated that GMD had undertaken to treat Alliance's claims on the same footing as all other unsecured, unsubordinated debt, but that GMD was in fact satisfying Mexican creditors to the exclusion of Alliance. Furthermore, unchallenged evidence indicated that GMD was so rapidly disbursing its sole remaining asset that, absent provisional action by the District Court, Alliance would have been unable to collect on the money judgment for which it qualified.[96]

To prevent this mockery of justice, the plaintiffs petitioned the United States District Court for the Southern District of New York for a simple remedy: a preliminary injunction ordering the defendant *not* to transfer its sole remaining asset to anyone else, until the primary case was decided. This specific manifestation of the well-established injunction power is known across the common law world as a *Mareva* injunction, after the leading British case.[97] The District Court granted this remedy, in a careful manner that "constrained GMD only to the extent essential to the subsequent entry of an effective judgment,"[98] which was affirmed[99] by the United States Court of Appeals for the Second Circuit.[100]

Yet, when the case reached the U.S. Supreme Court, the majority opinion went to great lengths to deny that such relief can be awarded. The Court began by quoting the 1939 case of *Atlas Life Insurance*[101] for the proposition that the federal courts' equity jurisdiction "is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[102] This statement, in itself, does not say *what* those principles actually require. Critically, the Court at this point chose to overlook ample cases from the same historical period (and even the same year) as *Atlas Life Insurance*, which stated, for example, that "individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility,"[103] that "equitable

96. *Id.* at 333–34 (Ginsburg, J., dissenting) (citations omitted).
97. Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A. [1980] 1 All ER 213 (AC 1975) (Eng.). For a detailed discussion of the *Mareva* remedy, see Capper, *supra* note 36, at 2162–65.
98. *Grupo Mexicano*, 527 U.S. at 334 (Ginsburg, J., dissenting).
99. All. Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688 (2d Cir. 1998), *rev'd*, 527 U.S. 308 (1999).
100. *See Grupo Mexicano*, 527 U.S. at 312–13.
101. Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563 (1939).
102. *Id.* at 568, *quoted in Grupo Mexicano*, 527 U.S. at 318.
103. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939).

powers . . . have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done,"[104] that "[a]n appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity,"[105] and that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."[106]

Continuing to formulate a new meaning for the word "equity"—one which favors rigidity, form rather than substance, and the curtailment of district courts' discretion—the *Grupo Mexicano* Court delved into an analysis of a single type of remedy discussed in historical legal texts, the creditor's bill, which approximates the injunction requested in this case, but as the Court emphasized, is not *precisely* like it.[107] This innovative analysis, which concentrated on the fact that "a general creditor (one without a judgment) had no cognizable interest . . . in the property of his debtor, and therefore could not interfere with the debtor's use of that property,"[108] largely missed another, more primordial fact: that equity is not property law. Instead, equity is second-order law that operates in personam vis-à-vis a specific actor, requiring the actor (in this case, the defendant) not to misuse its first-order legal rights (in this case, property rights) to obstruct the correct operation of law in some way.[109]

More generally, it is always possible to pick and choose a specific aspect of a pre-existing case or other law (as the Court did with the creditor's bill), and to stress that *this* aspect does not fit with the *present* case.[110] Equity, in

104. Pepper v. Litton, 308 U.S. 295, 304–05 (1939).

105. Meredith v. Winter Haven, 320 U.S. 228, 235 (1943).

106. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). For an article from the same period, citing additional federal substantive equity decisions, and relating them to earlier founding era and English equity practice, see Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753 (1945). Specifically on historical equity's congruence with substantive equity, see *id.* at 754 n.5 ("The Federal courts . . . have always been compelled to view the[ir] 'equity jurisdiction' . . . in the light of history. But the growth of equity, as a continuous thing, has also been within their care, and they have performed the task well, from early times to date. The Supreme Court has never lagged in this regard.").

107. *See Grupo Mexicano*, 527 U.S. at 319–21 (discussing the creditor's bill as a remedy that "was used . . . to permit a judgment creditor to discover the debtor's assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances," but also "could be brought only by a creditor who had already obtained a judgment establishing the debt").

108. *Id.* at 319–20.

109. *See, e.g.*, Smith, *supra* note 19, at 33 ("[E]quity is a safety valve with its built-in limits, in being called upon to intervene only when the law is inadequate and only in a targeted *in personam* fashion.").

110. For an article similarly discussing equity as a concept that is tied to, or dependent upon, a single, outdated legal phenomenon, see Jody P. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323, 1331 (2020) ("Originating in the English Courts of

contrast, recognizes that "[c]ompartmentalizing the analysis in this way would elevate the form . . . over . . . substance. Courts of equity exist to address substance, as exemplified by the maxim that 'equity regards substance rather than form.' . . . [A party's] allegations . . . [should be] viewed holistically."[111] In *Grupo Mexicano*, the operative concept was the injunction, a remedy that undoubtedly existed long before the founding era; the lower-level idea was the injunction's specific application to prevent the dispersal of the financial assets of a debtor proven to be acting in subversion of justice.

To draw an analogy, the Court could equally have said, for example, that any *contract* dealing with subject matters not known in the founding era—such as online commerce, cars, or garbage disposal machines—can never be enforced in federal court. This result, which conflates the *box* (what the legal text mandates before the fact, namely, the structure and principles of contract law or equity) with what is placed *in* the box (how contract or equity are eventually used: what parties write in *a* contract, how a court resolves *a* case),[112] is precisely as incoherent as the one reached in this part of the *Grupo Mexicano* decision.

The most troubling feature of *Grupo Mexicano*—and the most instructive one in regard to both the motivations and errors of static equity—was the long series of assertions reflecting an antiquated, inapposite hostility toward equity, and equating it with a form of judicial activism. Among other things, the Court stated that "[t]o accord a type of relief that has never been available before . . . is to invoke a 'default rule' not of flexibility but of omnipotence,"[113] implied that equity interferes with the

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Equity during the early common law, the ex post perspective pervaded early contract law as a necessary corrective to the abusive enforcement of penal bonds. But when the industrial revolution led American courts to enforce executory agreements for the first time, . . . the ex ante perspective alone formed the foundational doctrines that emerged." (footnote omitted)).

111. IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne, 301 A.3d 596, 631 (Del. Ch. 2023) (quoting Monroe Park v. Metro. Life Ins. Co., 457 A.2d 734, 737 (Del. 1983)). For more on this point, see Ramon Feldbrin, *Procedural Categories*, 52 LOY. U. CHI. L.J. 707, 722–23 (2021) ("Equity was meant to fulfill the law, and in order to achieve this result, the Court of Chancery . . . procedure . . . allowed parties to bring forward the entire controversy rather than breaking it up into smaller units through the different writs. . . . [E]quity procedure enabled the Court of Chancery to adjudicate all possible issues between all interested parties rather than reduce the dispute to a single issue.").

112. This example is not meant to say that contract and equity are on an equal footing in the hierarchy of legal norms. Equity, as second-order law or meta-law, is an unwaivable norm that constantly exists to check the operation of first-order law (such as the use of property, or the terms of contracts and other private documents, namely, corporate charters and bylaws). *See, e.g.*, *infra* Section II.C. This example does mean that contract *law* enables the creation of individual *contracts* whose content is nowhere defined, mentioned, or even contemplated in the law that enables them (or by the lawmakers who wrote that law, or by members of the public at that time). In this regard, it is similar to how equity is a pre-existing norm that enables courts to do justice in new and unforeseeable situations.

113. *Grupo Mexicano*, 527 U.S. at 322 (citation omitted).

idea of a "government of laws, not of men"[114] and is "incompatible with the democratic and self-deprecating judgment we have long since made,"[115] and quoted Joseph Story's remark—which not accidentally begins with the word "if"—that "[i]f . . . a Court of Equity . . . did possess the unbounded jurisdiction . . . of . . . superceding the law, . . . and of freeing itself from all regard to former rules and precedents, it would be . . . the most formidable instrument of arbitrary power, that could well be devised."[116] Story's passage, as quoted by the *Grupo Mexicano* Court, ended with none other than John Selden's seventeenth-century trope about "the Chancellor's foot."[117]

These statements ignore equity's actual nature as a normative system grounded in principles and rules, no less than the law outside of equity. It is easy to blame equity for being "unpredictable," but that is only because the numerous situations and accidents—which equity, as second-order law, exists to deal with—are themselves unpredictable (likely even more so), and would lead to deeply harmful results if left unchecked by equity.[118]

Moreover, the above-quoted assertions from *Grupo Mexicano* wholly miss the long-standing distinction, explored most recently by Owen Gallogly, between "conscience-based equity" and "precedent-based equity."[119] Under conscience-based equity, which was in operation from about the twelfth to the seventeenth centuries,[120] "the Chancellor had discretion to resolve each case as he saw fit."[121] In contrast, under precedent-based equity, which remains in force across the common law world (and which the United States inherited in the eighteenth century), "Chancellors . . . proceeded only according to preestablished rules and

114. *Id.* at 321.

115. *Id.* at 332.

116. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 19, at 21 (Boston, Hilliard, Gray & Co. 1836), *quoted in Grupo Mexicano*, 527 U.S. at 332.

117. *Id.* ("A Court of Chancery might then well deserve the spirited rebuke of Selden; 'For law we have a measure, and 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. 'T is all one, as if they should make the standard for the measure 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. It is the same thing with the Chancellor's conscience.'" (quoting JOHN SELDEN, TABLE-TALK 46 (London, E. Smith 1689))), *quoted in Grupo Mexicano*, 527 U.S. at 332–33.

118. *See, e.g.*, Smith, *supra* note 16, at 1057 ("[C]omplexity is seen as the weakness of equity. . . . [E]quity's opponents have stressed its arbitrariness, epitomized by the 'Chancellor's foot.' . . . [T]his view of equity gets things exactly backwards. Equity is part of law's response to the world's inevitable complexity.").

119. Gallogly, *supra* note 48, at 1233–56.

120. *See id.* at 1237, 1250 (tracing the beginnings of conscience-based equity to "Henry II's reign (1154-89)," and discussing its end after the Glorious Revolution, when "[t]here was simply no place for conscience-based equity in the system").

121. *Id.* at 1244.

principles."[122] These rules and principles can take many shapes, from the maxims of equity[123] to the detailed judicial precedents of corporate law in present-day Delaware.[124] At the same time, they all serve the function of equity as corrective, or second-order, or meta-law.[125] The *Grupo Mexicano* Court's proclamations about omnipotence, the Chancellor's foot, and an equity that frees itself from rules and precedents[126] flatly disregard how equity has been operating for the last several centuries.

Two more structural arguments can be made against the static equity conception in the vein of *Grupo Mexicano*. These arguments involve both text and simple logic, which (plausibly) remains a normative source that judges are permitted to rely on. First, even in purely textualist terms, the existence of equity, as a concept that must differ in some way from first-order law, is recognized in the Constitution's statement that "[t]he judicial Power shall extend to all Cases, in Law *and* Equity."[127] When a court draws no distinction between law and equity—by perceiving both as being limited to the same ex ante mode of operation—the court makes the Constitution's words redundant.[128]

Second, in addition to "equity," there is another phrase in Article III that summons substantive equity. That phrase is "judicial power."[129] Under well-accepted separation of powers principles, each of the three branches of government is meant to confine itself to a distinct line of work.[130] Judging,

122. *Id.* at 1253.

123. *See, e.g.*, Smith, *supra* note 16, at 1113–30 (discussing the maxims of equity in detail).

124. *See infra* Part II.

125. *See, e.g.*, Glenn & Redden, *supra* note 106, at 758–59 ("[W]hat happens when a judge sits in equity? Today there is a vast body of case law to bind him, just as though he were sitting in a court of law, and he is bound by precedent. . . . [W]e have enough to show that the chancellors were guided by a system of law. But into these equity courts flowed cases bringing new situations, where precedent was absent and yet the judge must act." (footnote omitted)); Smith, *supra* note 16, at 1058 ("The maxims are . . . central to equity . . . . [T]he maxims . . . are signals that meta-law reasoning is occurring—a process that needs to be brought out in the open in order to understand equity in the first place."); *infra* Part II.

126. *See supra* text accompanying notes 113–17.

127. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

128. *See, e.g.*, James Fullmer, *The Outer Limits of Equity: A Proposal for Cautious Expansion*, 39 HARV. J.L. & PUB. POL'Y 557, 573 (2016) ("If equity were confined to its precedents as of 1789, it would soon become indistinguishable from the rest of common law.").

129. U.S. CONST. art. III, §§ 1–2. For further exploration of this phrase's function in the structure of legal norms, see Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 842 (2008) ("A long and well-established tradition maintains that some powers are inherent in federal courts simply because Article III denominates them 'courts' in possession of 'the judicial power.' In other words, inherent powers are those so closely intertwined with a court's identity and its business of deciding cases that a court possesses them in its own right, even in the absence of enabling legislation. . . . [T]here are limits to what Congress can do in regulating the courts' inherent power." (footnote omitted)).

130. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority.").

in contrast to legislation, is *precisely about* applying the law to varying facts, case by case. While the words of a statute are fixed, the future situations in which courts will apply the statute (and the words in the judicial opinions that will be authored while doing so) are not. By the very idea of a "court"—any court, whether federal, state, or foreign—ex post discretion is not a hurdle that interferes with the legal text, but the most important tool for giving the text, and the entirety of law, practical force. Invoking the meta-law of equity is one of the key ways in which the Constitution recognizes these facts. When the *Grupo Mexicano* Court conflated the legislative and judicial functions,[131] it disregarded not only individual justice and the structure of the common law, but also the principle of separation of powers.

At one point in *Grupo Mexicano*, the Court admitted that "[w]e do not question the proposition that equity is flexible,"[132] but immediately added that "in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief."[133] However, as this Article and the many substantive equity authorities cited here indicate, there is no actual contradiction between the two supposedly "competing" values: we can equally say that traditional equitable relief is confined within the requirement of flexibility. The remainder of this Section, which focuses on the 2020 case of *Liu v. SEC*,[134] illustrates how even static equity-oriented federal judges have gradually had to take this reality into account.

During the twenty-one years between *Grupo Mexicano* and *Liu v. SEC*, the Court appeared intent on expanding its new conception of "equity," in areas ranging from general remedies[135] to the ERISA statute, which deals with pension and employee benefits (and where the Court's static equity has impaired those benefits in a wide range of situations).[136] When *Liu v. SEC*

131. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999) ("When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy.").

132. *Id.*

133. *Id.*

134. 591 U.S. 71 (2020).

135. *See, e.g.*, Bray, *supra* note 10, at 1000 & *passim* (discussing in detail the Supreme Court's "new equity jurisprudence"); Bray, *supra* note 94.

136. *See, e.g.*, John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell*,* Mertens*, and* Great-West, 103 COLUM. L. REV. 1317, 1362–63 (2003) ("The Supreme Court's mishandling of ERISA remedy law has rendered the protections of ERISA illusory in any case in which the victim of ERISA-proscribed wrongdoing needs damages for consequential injury in order to be made whole. . . . [T]he beginnings of the Supreme Court's trail of error [are] in . . . the premise . . . that ERISA's remedy provisions are so comprehensive that any feature of remedy law not expressly detailed in the statutory text should be treated as one that Congress deliberately omitted. This confused line of reasoning treats the normal work of applying statutory terms as though it were an effort to import extrastatutory terms. In contrast to the provisions of ERISA that authorize the precise step of

came around, the Court was still speaking in the formalized language of static equity, but—certainly compared to *Grupo Mexicano*—this time it *did* equity much more substantively.

At issue in *Liu v. SEC* was an enforcement action filed by the Securities and Exchange Commission (SEC) against the defendants, who had engaged in "a scheme to defraud foreign nationals,"[137] by raising money from investors based on a "private offering memorandum . . . pledging that the bulk of any contributions would go toward the construction costs of a cancer-treatment center."[138] In reality, "[defendant] Liu spent nearly $20 million of investor money on ostensible marketing expenses and salaries, an amount far more than what the offering memorandum permitted,"[139] while "[o]nly a fraction of the funds were put toward a lease, property improvements, and a proton-therapy machine for cancer treatment."[140]

Accordingly, the SEC sought to recover the ill-gotten gains the defendants had made, based on Section 21(d)(5) of the Securities Exchange Act of 1934, which states that "the [SEC] may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."[141] Naturally, the statute does not say how "equitable relief" may manifest in a specific case; under the circumstances, the most fitting remedy was disgorgement, which consists of "'depriv[ing]' a defendant of 'the gains of . . . wrongful conduct.'"[142]

Although the word "disgorgement" does not appear in founding-era texts on equity jurisprudence, and although the field of securities law (and the types of transactions that give rise to the *specific* form of disgorgement sought in this case) did not even exist then, the *Liu v. SEC* Court, in an 8-1 decision, had little difficulty awarding this remedy, recognizing that "equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy."[143] More pointedly, the Court explicitly referred to "the chancellor's discretion to prevent unjust enrichment."[144]

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injunction, the authorization in section 502(a)(3)[, 29 U.S.C. § 1132(a)(3)] of 'other appropriate equitable relief' . . . does not describe a particular remedy. When Congress uses such conceptual language, Congress necessarily intends for the courts to interpret it—to supply the specifics. Interpreting is applying, not implying. . . . The dispute is about how to respect the text—to read one word in isolation from the text or to read that word in functional relation to the text.").

137. *Liu*, 591 U.S. at 77.

138. *Id.*

139. *Id.*

140. *Id.* at 77–78.

141. 15 U.S.C. § 78u(d)(5).

142. *Liu*, 591 U.S. at 75 (second alteration in original) (quoting SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971)).

143. *Id.* at 79.

144. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95 (2d Cir. 1978), *quoted in Liu*, 591 U.S. at 76.

At the same time, the Court continued to rely on cases from the "hard" static equity period following *Grupo Mexicano*, stating, for example, that "[t]he 'basic contours of the term ["equitable relief"] are well known' and can be discerned by consulting works on equity jurisprudence."[145] Although the Court wove these sources with other, more historical and substantive equity cases, mentioning that "[i]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong,"[146] the Court was still drawing on the (limited) font of static equity.

Justice Thomas's dissent, in comparison, fully attempted to preserve a *Grupo Mexicano*-level stasis: "[d]isgorgement can never be awarded [under the statute at issue] . . . [because] disgorgement is not a traditional equitable remedy. . . . Because disgorgement is a creation of the 20th century, it is not properly characterized as 'equitable relief,' and, hence, the District Court was not authorized to award it."[147] Justice Thomas responded to the majority's suggestion that disgorgement *did* exist in the relevant historical period, albeit under different names;[148] while doing so, he focused on specific diverging details (similar to the creditor's bill in *Grupo Mexiano*),[149] treating them as if they entirely negate a much broader legal concept.[150] Arguably, the dissenting opinion would require today's courts not just to apply a frozen array of remedies, but also to observe that those remedies were called by the same name in the founding era.

Liu v. SEC further uncovered, but did not resolve, the tension between static equity and substantive equity. After two decades of cases where the Court has often tried to minimize the substantive, meta-law considerations that had always guided it (and continue to guide many federal judges, state law judges and other participants,[151] and the rest of the common law world[152]) in the equity context, the defendants in *Liu v. SEC* committed

145. *Liu*, 591 U.S. at 79 (quoting Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002)).

146. *Id.* at 79–80 (second alteration in original) (quoting Root v. Ry. Co., 105 U.S. 189, 207 (1882)).

147. *Id.* at 93 (Thomas, J., dissenting).

148. *See id.* at 79 (majority opinion) ("[E]quity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy.").

149. *See supra* text accompanying notes 107–12.

150. *See Liu*, 591 U.S. at 94–95 (Thomas, J., dissenting) ("[A]n accounting for profits, or accounting—a distinct form of relief that the majority groups with disgorgement—has a well-accepted definition: It compels a defendant to account for, and repay to a plaintiff, those profits that belong to the plaintiff in equity. The definition of disgorgement, after today's decision, is a remedy that compels each defendant to pay his profits . . . to a third-party Government agency . . . ." (citation omitted)). Notably, the majority opinion addressed this concern at considerable length. *See id.* at 87–90 (majority opinion).

151. *See infra* Part II.

152. *See, e.g.*, Capper, *supra* note 36, at 2169 ("[T]he federal courts inherited the principles of equity administered by the English Court of Chancery. Those principles are not immutable . . . but can be adapted to the perceived needs of later times. English courts did not grant anything resembling

fraud egregious enough to merit a serious historical investigation into equity's aims, going beyond the dictionary-level analysis espoused by the dissenting opinion. At any rate, the inadequate awareness of substantive equity in other federal cases and across American legal culture—as seen, for example, in the *Citibank* district court decision,[153] and as criticized in recent scholarship[154]—leaves much to be remedied. This Article, in Part II, brings a fresh perspective from state common law into the discussion; and, in Part III, explains in detail how federal law, without diverging from the existing foundations of originalism and textualism, is ready to re-accommodate substantive equity.

Mareva injunctions in the late eighteenth century, but that does not mean that developments along those lines would be incompatible with the said principles. If courts in England and other parts of the common law world have subsequently developed *Mareva* injunctions without significant assistance from the legislature, that would seem to create a presumption that these orders are consistent with eighteenth century equitable principles."); sources cited *supra* note 68.

153. *See supra* text accompanying notes 1–8.

154. *See, e.g.*, Samuel L. Bray, *Equity: Notes on the American Reception*, *in* EQUITY AND LAW: FUSION AND FISSION 31, 38–39 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019) ("Equity has not been offered as a course in most American law schools since the 1960s. The basic terminology and conceptual content of equity are unfamiliar to generations of students. . . . American lawyers and judges have almost entirely lost the sense of equity as an alternative and exceptional mode of decision-making."); Kull, *supra* note 17, at 1805 ("For half a century, students have been going through U.S. law schools without hearing anything said about equity—other than the assurance that references to 'equity' in the older cases, having become obsolete, can be safely ignored. This lack of introduction has reduced professional awareness of basic equity doctrines, and the consequences—now that the same law students are on the bench—are visible in judicial decisions." (footnote omitted)).

II. SUBSTANTIVE EQUITY'S TRIUMPH: THE DELAWARE EXAMPLE

A. Why Delaware Should Join the Broader Equity Discussion

This Part brings a new viewpoint to the discussion on equity—a viewpoint that, so far, has been minimized in literature on both American equity[155] and the broader theory of equity:[156] it takes a deep dive into Delaware law, including its corporate law (for which the state is best known),[157] to illustrate how equity does and should operate in a modern legal system, where it continues to play a critical role in a wide range of situations—most visibly, in high-stakes corporate law disputes.[158]

The discussion in this Part is structured in a way that responds to, and carefully refutes, the three misconceptions that lie at the core of present-day *static* equity, widespread at the federal level, as discussed above.[159] First, equity is not just about remedies (or what H.L.A. Hart called "secondary rules"[160]); instead, the Delaware courts apply the "twice-tested"[161] principle, which requires the court to subject not just itself, but *the parties'* primary behavior, to the imperative that "inequitable action does not become

155. Among a few notable exceptions, Professor Douglas Laycock's 1993 article mentioned the Delaware Court of Chancery as an example for a tribunal that preserves the institutional separation between law and equity, and then offered a short discussion of equitable remedies in corporate law. *See* Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53, 57–58, 60, 72 n.112 (1993). To be certain, this Article focuses on the substantive application of equity in Delaware, and not on the separateness of its equity court. In fact, so do judges on the very same court. *See* Garfield v. Allen, 277 A.3d 296, 358 (Del. Ch. 2022) ("The adoption of Rule 2 [of the federal and Delaware rules of civil procedure] had several important consequences. In the federal system, Rule 2 both merged the separate systems of law and equity and abolished any remaining vestige of the forms of action. In Delaware, which maintained its separate court of equity, Rule 2 did not have the first effect, but it did have the second." (citation omitted)). Accordingly, the discussion of equity in this Article is fully applicable to other post-fusion jurisdictions, *see, e.g.*, P.G. Turner, *Fusion and Theories of Equity in Common Law Systems*, *in* EQUITY AND LAW: FUSION AND FISSION, *supra* note 154, at 1, 1 ("[A] major law reform beginning two centuries ago and in most jurisdictions ending by 1940 . . . [has been] that of the 'fusion' of the common law and equity. . . . Separate law and equity courts with distinct procedural rules were brought under one roof, where law and equity would be administered concurrently under uniform procedures. . . . These reforms inaugurated the form of superior court now typical in common law jurisdictions.").

156. *See supra* note 21.

157. *See, e.g.*, Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731 (2013); Moon, *supra* note 20.

158. *See infra* Section II.C.

159. *See supra* text accompanying notes 90–92.

160. H.L.A. HART, THE CONCEPT OF LAW *passim* (1961).

161. *See* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) ("[I]n every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favor of a [trust beneficiary] to the trustee's exercise of wide powers granted to him . . . ."); *see also In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1222 (Del. 2017) ("[D]irector action is 'twice-tested,' first for legal authorization, and second by equity." (quoting Sample v. Morgan, 914 A.2d 647, 672 (Del. Ch. 2007))), *quoted in* CCSB Fin. Corp. v. Totta, 302 A.3d 387, 400 n.64 (Del. 2023).

permissible simply because it is legally possible."[162] Equity is far more than the distinction between injunctions and damages, or between bench and jury trials; it is about preserving the intended, justified operation of legal norms where those norms have been, or might be, subverted.[163]

Second, equity's remedies and other modes of operation are not and cannot be frozen in time, but must "render the 'jurisprudence as a whole adequate to the social needs. . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age.'"[164] This fact is particularly relevant to the federal equity discussion, given that the Delaware Constitution of 1792 recognizes the judiciary's power to do equity, similar to the U.S. Constitution of 1789.[165] Present-day Delaware judges continue to apply the same idea of equity as in the founding era,[166] an idea that exists to serve the "fundamental purpose of an equity court—to provide relief suited to the circumstances when no adequate remedy is available at law."[167]

Third, equity is not related to judicial activism, and is not incompatible with originalism or textualism. Delaware's equity, rooted in the same English Court of Chancery system from the founding era, exemplifies how "precedent-based equity"[168] works, in a manner that is clearly limited by rules and principles, which themselves serve as "second-order law,"[169]

162. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

163. *See, e.g.*, Kull, *supra* note 17, at 1801–02 ("When modern [federal law] commentators refer to the significance of equity, the remedy in view is almost always the injunction. . . . By contrast, the most characteristic function of traditional equity was . . . the power to modify and correct applicable *legal* rules, suitable as the first-order resolution of the general run of cases, so as to do better justice between particular parties in particular circumstances.").

164. Severns v. Wilmington Med. Ctr., Inc., 421 A.2d 1334, 1348 (Del. 1980) (alterations in original) (quoting 1 POMEROY, *supra* note 22, § 67, at 89).

165. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . ."); DEL. CONST. of 1792, art. VI, § 14 ("The equity jurisdiction heretofore exercised by the Judges of the Court of Common Pleas, shall be . . . vested in a Chancellor, who shall hold Courts of Chancery in the several counties of this state."); DEL. CONST. art. IV, § 10 ("The Chancellor and the Vice-Chancellor or Vice-Chancellors shall hold the Court of Chancery. . . . This court shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery."); Du Pont v. Du Pont, 85 A.2d 724, 727–29 (Del. 1951) ("[T]he general equity jurisdiction of the Court of Chancery . . . is defined as all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies . . . . [T]he [Delaware] Constitutions of 1792, 1831 and 1897 intended to establish . . . a tribunal to administer the remedies and principles of equity. They secured them for the relief of the people. This conclusion . . . establish[es] by the Judiciary Article of the Constitution the irreducible minimum of the judiciary. It secures for the protection of the people an adequate judicial system and removes it from the vagaries of legislative whim."); Johnson, *supra* note 24.

166. *See, e.g.*, *In re* Carlisle Etcetera LLC, 114 A.3d 592, 602 (Del. Ch. 2015) ("If [a statute] . . . purport[ed] to . . . override a significant portion of this court's traditional equitable jurisdiction, then the validity of that aspect of the provision would raise serious constitutional questions.").

167. Quillen & Hanrahan, *supra* note 22, at 820.

168. Gallogly, *supra* note 48, at 1245–56.

169. *E.g.* Smith, *supra* note 19.

meant to check the operation of ordinary law. Any "unpredictability" of equity merely derives from the greater unpredictability of how people might try to abuse the law, and of the various accidents that both the law itself, and all human life, give rise to.[170]

Thus, for example, corporate directors and other managers enjoy an extremely broad latitude of action under the terms of Delaware's corporate statute, the provisions of a corporate charter, the business judgment rule, and related doctrines,[171] but that power can be put both to its intended use (promoting the purpose of the corporate entity—most often, the lawful pursuit of profit),[172] or to some *other* use. In the latter case, the Delaware courts do not hesitate to provide equitable relief.[173] Although Delaware's ex post-oriented approach to corporate law has been challenged by some on law and economics grounds,[174] Delaware persists in its well-tempered application of equity to ensure fairness and efficiency in new situations—enough so that about two-thirds of Fortune 500 companies continue to choose Delaware as their place of incorporation.[175]

Finally, this Part recognizes that readers might come to this Article from different legal communities, including federal law (whether constitutional law, remedies, or civil procedure), private law and equity scholarship, law and economics, or corporate law and Delaware jurisprudence. Accordingly, where an additional elaboration on the structure and principles of corporate law may be necessary, the discussion here provides it.

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170. *See, e.g.*, Smith, *supra* note 16, at 1057 ("[C]omplexity is seen as the weakness of equity. . . . [E]quity's opponents have stressed its arbitrariness, epitomized by the 'Chancellor's foot.' . . . [T]his view of equity gets things exactly backwards. Equity is part of law's response to the world's inevitable complexity."); *supra* text accompanying notes 1–8.

171. *See, e.g.*, Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's* Price Discrimination in the Market for Corporate Law, 86 CORNELL L. REV. 1257, 1275 (2001) ("The Delaware Model . . . provides corporate managers with the flexibility to do practically any lawful act, subject to judicial review focused on whether the managers were properly motivated and not irrational.").

172. *See, e.g.*, Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933, 964, 977 (2022).

173. *See, e.g.*, *id.*; *In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816, 2020 Del. Ch. LEXIS 211, at *38, *96, *123 (Del. Ch. June 11, 2020) (noting, while denying motion to dismiss a case arising from a $40.5 billion share conversion transaction, that "[a] court must still determine whether the defendant fiduciaries acted equitably. . . . The fact that the Conversion Right appears in the certificate of incorporation does not obviate the need for equitable analysis").

174. *See, e.g.*, William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 74–75 ("We have identified [in Delaware] a legal system dominated by notions of equity . . . . [E]quity's demands for justice in individual cases leave room for courts to roam broadly to enunciate new modes of review, or new 'rules.' All of this increases the costs for corporations attempting to comply with the uncertain body of law that has resulted."); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001); Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183 (2004).

175. *See, e.g.*, William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1693 (2021) ("Delaware . . . serve[s] as the juridical home to over 66 percent of Fortune 500 companies and roughly half of all publicly traded companies in the United States.").

B. How the Delaware Constitution Interacts with the Judiciary's Equity Power

Delaware was the first state to ratify the Constitution of the United States, on December 7, 1787.[176] During the founding era, Delaware law, like that of the other states, was based on English law. While the establishment of the United States brought a sea change in the area of public law (as illustrated by the various charges leveled against the king in the Declaration of Independence, and the safeguards accordingly provided in the Constitution and Bill of Rights), private law and many other fundamental legal concepts remained essentially unaltered from their English origins.

Equity was one of those concepts. As Judge Victor Woolley of Delaware wrote in 1906, "the whole body of equity principles, both of right and remedy, was brought hither by our ancestors, together with the common law, on their emigration from England, as a part of their heritage of liberty."[177] The Delaware Constitution, signed on June 12, 1792—less than half a decade after Delaware ratified the U.S. Constitution—stated that "[t]he equity jurisdiction heretofore exercised by the Judges of the Court of Common Pleas, shall be . . . vested in a Chancellor, who shall hold Courts of Chancery in the several counties of this state."[178] According to Woolley, "[e]ach constitution promulgated since the Constitution of 1792 [(the Constitutions of 1831 and 1897)], vested in the Court of Chancery a portion of the judicial powers of the State and referred in doing so to the preceding constitution."[179]

Delaware judges continue to emphasize the constitutional status of their equity power, while drawing a direct link between this power and the eighteenth-century understanding of equity. In the foundational 1951 case of *Du Pont*,[180] the Delaware Supreme Court ruled that:

> [T]he general equity jurisdiction of the Court of Chancery . . . is defined as all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies . . . . [There] is not an authorization to the Legislature to restrict Chancery jurisdiction to less than it was in 1792. We think the Constitutions of 1792, 1831 and 1897 intended to establish for

176. *See* Certificate of the Delaware Ratification of the Constitution (Dec. 7, 1787), DOCSTEACH, https://www.docsteach.org/documents/document/delawares-ratification-us-constitution [https://perma.cc/WDV6-ZRWZ].

177. 1 WOOLLEY, *supra* note 23, § 56, at 35.

178. DEL. CONST. of 1792, art. VI, § 14.

179. 1 WOOLLEY, *supra* note 23, § 56, at 35.

180. Du Pont v. Du Pont, 85 A.2d 724 (Del. 1951).

> the benefit of the people of the state a tribunal to administer the remedies and principles of equity. They secured them for the relief of the people. This conclusion . . . establish[es] by the Judiciary Article of the Constitution the irreducible minimum of the judiciary. It secures for the protection of the people an adequate judicial system and removes it from the vagaries of legislative whim.[181]

Likewise, in the 2015 case of *Carlisle Etcetera*,[182] the petitioner sought the dissolution of a limited liability company (LLC) whose members reached a deadlock—but, under the unique facts of the case, could not be dissolved according to the applicable statute. The Court of Chancery said that "[i]f [the statute] . . . purport[ed] to . . . override a significant portion of this court's traditional equitable jurisdiction, then the validity of that aspect of the provision would raise serious constitutional questions."[183] The court then permitted the case to go forward.[184] Thus, in regard to the basic relation between equity and the Constitution, Delaware law and federal law are quite similar.[185]

The question, then, is what *does* the equity mentioned in these sources mean? What is the "body of equity principles, both of right and remedy, . . . brought hither by our ancestors . . . on their emigration from England,"[186] the "equity jurisdiction"[187] invoked in the Delaware Constitution of 1792, or "the general equity jurisdiction of the Court of Chancery," which equals "all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies"?[188] By close analogy, what can that teach us about the "[e]quity"[189] mentioned in the federal Constitution, adopted at nearly the same time as Delaware's, and which the U.S. Supreme Court also linked to "the English Court of Chancery at the time of the separation of the two

181. *Id.* at 727–29.
182. *In re* Carlisle Etcetera LLC, 114 A.3d 592 (Del. Ch. 2015).
183. *Id.* at 602.
184. *See id.* at 607.
185. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . ."); John T. Cross, *The* Erie *Doctrine in Equity*, 60 LA. L. REV. 173, 231–32 (1999) ("[A] federal court[has the] power to 'fill in the gaps' in a federal statute by creating a body of auxiliary rules[, which] includes the authority to apply a federal law of equity, derived from historical principles of equity. . . . By extending the judicial power to include cases in equity, the framers contemplated that federal courts would continue to exercise the sorts of discretion that characterized English Chancery."); Gallogly, *supra* note 48, at 1318 ("[According to] the original understanding of '[t]he judicial Power' in 'Equity[,]' . . . those terms likely encompass an inherent authority to grant equitable remedies, such that the federal courts are automatically possessed of that power once [the courts are] created . . . ." (second alteration in original)).
186. 1 WOOLLEY, *supra* note 23, § 56, at 35.
187. DEL. CONST. of 1792, art. VI, § 14.
188. Du Pont v. Du Pont, 85 A.2d 724, 727 (Del. 1951).
189. U.S. CONST. art. III, § 2, cl. 1; *id.* amend. XI.

countries"?[190] Is it *static* equity, as employed by many (although far from all) federal judges today[191]—or is it *substantive* equity, meant to serve more functionally as "meta-law"[192] or "second-order law"?[193]

The sources quoted in the last few paragraphs give a preliminary hint. For instance, Judge Woolley wrote, in regard to "the whole body of equity principles, both of right and remedy," that "as the increasing population of the new country begot new relations, there arose controversies and contests growing out of business, and the necessities for the redress of injuries which resulted from the breach of duties . . . , that called for the use of the means to enforce observance through ancient remedies."[194] Similarly, the Delaware Supreme Court in *Du Pont* stressed "the maxim that Equity will suffer no right to be without a remedy,"[195] adding that "[w]henever there exists a legal . . . right, which is either not recognized by the law courts, or for which the remedy administered by the law courts is inadequate, incomplete or uncertain, the maxim will be applied by a Court of Equity in support of its jurisdiction to give relief."[196] The *Carlisle Etcetera* Court of Chancery referred to well-established sources (followed also by the U.S. Supreme Court)[197] when stating that "equity 'has an expansive power, to

190. Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 568 (1939), *quoted in* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

191. *See supra* Section I.B.

192. Smith, *supra* note 16.

193. Smith, *supra* note 19.

194. 1 WOOLLEY, *supra* note 23, § 56, at 35.

195. Du Pont v. Du Pont, 85 A.2d 724, 733 (Del. 1951). On the significance of this statement, see William T. Quillen, *Constitutional Equity and the Innovative Tradition*, 56 L. & CONTEMP. PROBS. 29, 41 (1993) ("[T]he court's reliance in *du Pont* on a general maxim ('equity will suffer no right to be without a remedy') to establish equity jurisdiction is important, because it tempers the bounds of the historical constitutional approach. The Delaware Court of Chancery's general equity jurisdiction is not frozen by what the High Court of Chancery of Great Britain did; it can look at what that court would have done if it had been faced with these circumstances. In short, the creative and innovative function of equity can operate through historically recognized general equitable maxims.").

196. *Du Pont*, 85 A.2d at 733 n.20. Note that in jurisdictions which do not maintain a separate court of equity (most jurisdictions today), this statement equally applies: the court of law (now fused with equity) is always required to provide the equitable adjudication that would not be available under ordinary "law" alone. *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 35 (1905) ("Law must be tempered with equity . . . . [E]quity is part of law, in the sense that it is necessary to the working of any legal system."); Smith, *supra* note 16, at 1077 n.100 ("[E]quity . . . is a type of law that . . . protect[s] the regular or formal law. . . . [T]hat is true whether or not there are separate courts of equity."); *supra* note 155. More pointedly, "[t]he dual courts of Common Law and Chancery were a historical accident that defies a logical explanation." Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1403 (2015).

197. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 321–22, 332–33 (1999) (citing 1 STORY, *supra* note 116); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 580 U.S. 328, 344 (2017) (citing HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 28, at 75 (2d ed. 1948)).

meet new exigencies'"[198] and that "the chancellors could adapt their system to meet changing needs without resorting to the fiction that they were merely interpreting and applying former rules."[199]

As the following Section demonstrates, these statements are just the tip of Delaware's substantive equity—and by extension, of how equity often is, historically has been, and certainly ought to be, understood in other legal spaces as well.

C. How the Delaware Courts Weave Substantive Equity with Ex Ante Norms to Fulfill the Law's Intention in Unforeseeable Situations

This Section analyzes a long progression of Delaware cases and additional sources, illustrating the three main characteristics that differentiate substantive (historical, functional) equity from static equity (recently endorsed by some members of the federal legal community):[200] the fact that equity deals with both primary rules of conduct, and secondary rules of remedies and procedures; the fact that, by definition, equity cannot remain frozen at some point in time; and the fact that equity does not contradict notions of judicial restraint, but rather is strongly grounded in rules and principles (which, to the extent they exhibit some degree of indeterminacy, do so only as a by-product of the *greater* indeterminacy of the abuses and accidents they are meant to correct).[201]

With important exceptions,[202] the Delaware cases surveyed in this Article—and the majority of Delaware equity cases in general—deal with matters of corporate law. To begin with, that is because more than two million corporate entities are registered in Delaware[203] (including, most notably, about two-thirds of Fortune 500 companies).[204] Moreover, the Delaware General Corporation Law prohibits corporate directors from inserting a forum selection clause into their company's constitutive

198. *In re* Carlisle Etcetera LLC, 114 A.3d 592, 603 (Del. Ch. 2015) (quoting Schoon v. Smith, 953 A.2d 196, 206 (Del. 2008) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 53, at 45 (Isaac F. Redfield ed., Boston, Little, Brown, & Co., 9th ed. 1866))).

199. MCCLINTOCK, *supra* note 197, § 4, at 10, *quoted in Carlisle Etcetera*, 114 A.3d at 603.

200. *See supra* Part I.

201. *See supra* text accompanying notes 90–92, 160–75.

202. *See supra* note 14 (discussing equity's central role in the *Brown v. Board of Education* litigation, including the case of *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952), which is one of the lower state court decisions that, following appeal, came before the U.S. Supreme Court in the *Brown* litigation).

203. *See, e.g.*, DEL. DIV. OF CORPS., 2023 ANNUAL REPORT 1 (2024), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2023-Annual-Report.pdf [https://perma.cc/5YB2-JVVK] ("In the fall of 2023, Delaware surpassed a record milestone now with more than 2 million total business entities calling the first state their corporate home.").

204. *See, e.g.*, *id.* ("[T]he First State continues to lead as the domicile of choice for Fortune 500 companies at nearly 67.6 percent."); Moon, *supra* note 175, at 1693.

documents, if such a provision would shut the Delaware courthouse doors on plaintiffs asserting corporate law claims.[205] Accordingly, the workload of the Delaware courts (both the Court of Chancery and the Supreme Court) strongly tilts in the corporate direction.

There is an additional, more fundamental reason for the nexus between corporate law and equity. The structure of corporate law offers a prime example for each of the primary justifications invoked in recent scholarship on equity theory, namely, "the problem of opportunism,"[206] equity's role as "second-order law"[207] or "meta-law,"[208] and equity's resolution of "grievances" rather than "causes of action."[209] That is because corporate law revolves around the fine balance between (on one side) creating a new legal person—the corporate entity[210]—and endowing it, mainly through its managers,[211] with an open-ended freedom of action;[212] and (on the other)

205. *See* DEL. CODE ANN. tit. 8, § 115 (2024) ("The certificate of incorporation or the bylaws may require . . . that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. 'Internal corporate claims' means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.").

206. Smith, *supra* note 19.

207. *Id.*

208. Smith, *supra* note 16.

209. Bray & Miller, *supra* note 69 *passim*.

210. *See, e.g.*, New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520, 568 n.159 (Del. Ch. 2023) ("[J]ural entities like corporations . . . have characteristics . . . such as separate legal existence[and] presumptively perpetual life . . . . Jural entities are thus never wholly creatures of contract. Nor are they a nexus of contracts. . . . [E]ntities are reified constructs. It is only because they are reified (personified) that they can move through the legal landscape."); Zachary J. Gubler, *The Neoclassical View of Corporate Fiduciary Duty Law*, 91 U. CHI. L. REV. 165, 199 (2024) ("[F]iduciary duties are owed to the corporate entity itself."); *id.* at 219 ("[T]he corporation is an entity designed to foster extremely long-term capital allocation, longer term than the market or any current shareholder . . . ."); Raz, *supra* note 81.

211. *See, e.g.*, Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1015 (1997) ("Directors of Delaware corporations can do anything they want, as long as it is not illegal, and as long as they act in good faith."); Strine, *supra* note 171, at 1275 ("The Delaware Model . . . provides corporate managers with the flexibility to do practically any lawful act, subject to judicial review focused on whether the managers were properly motivated and not irrational.").

212. *See, e.g.*, Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223, 267–77 (2021) (discussing the "open-endedness principle" as a unifying theme for corporate law); Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 273 (1976) ("The first 100 years of the corporation's history in the United States had stood for one rule above all else: The business corporation could only exercise powers or seek capital in the ways explicitly provided in its charter with the State or necessarily implied. The New Jersey—Delaware 'self-determination' provision exactly reversed this rule. . . . The corporation could conduct business in any way it chose as long as the State did not explicitly prohibit it."). While Seligman's description was intended as a criticism, today it is fairly clear that the corporation's freedom of action (as it emerged around the turn of the twentieth century) is far more benign, and beneficial, than it was once perceived to be. A present-day reader would likely be surprised by the list of corporate capacities

policing that freedom so that it is applied to its intended goal (advancing the entity's purpose),[213] and not for some other ends, such as self-interested or unlawful ones.[214] Equity tempers the extreme ease with which the corporation or its managers—due to their strong *legal* control over corporate property, contracts, and other affairs or actions—can circumvent, in ways that are entirely unforeseeable to anyone other than themselves, any ex ante rules meant to constrain them (such as shareholder voting and the market for corporate control).[215]

As the Delaware Court of Chancery said in a 1989 case, "a corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation,

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that used to be controversial. *See, e.g.*, *id.* at 269–70 (describing types of corporate actions that were becoming lawful in the United States several years before 1912, such as "merger and consolidation of corporations," "the holding of stock in other corporations," and not compelling "the directors to be residents of the chartering state"). This situation is particularly justified given that the corporate entity is bound by the requirement of lawful behavior, and its managers are constrained by equity and fiduciary duty. *See, e.g.*, *infra* notes 248, 262.

213. *See, e.g.*, Andrew S. Gold, *Purposive Loyalty*, 74 WASH. & LEE L. REV. 881 (2017); Lyman P.Q. Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 260 (D. Gordon Smith & Andrew S. Gold eds., 2018); Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523 (2020).

214. *See, e.g.*, Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 636 (2010) ("[T]he director's job demands affirmative action—to protect and to better the position of the corporation."); *id.* at 640–41 ("The statutory backbone of [Delaware corporate] law is the Delaware General Corporation Law. That statute has commonly been referred to as enabling in character and as a general matter gives directors capacious authority to pursue lawful ends by lawful means. . . . [T]he DGCL gives directors a strong hand to manage the corporation, and the primary non-ballot box legal constraint on them is the enforcement of their equitable fiduciary duties."); *id.* at 671 ("[T]he Delaware Supreme Court was giving life to the duty of loyalty in the emerging takeover defense area by implementing an equitable standard of review designed to ensure fidelity to the corporation's best interests and to smoke out director action that might have been influenced by the 'omnipresent specter that a board [confronting a hostile takeover bid] may be acting primarily in its own interests, rather than those of the corporation and its shareholders.'" (second alteration in original) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985))).

215. *See, e.g.*, Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1289, 1293 (Del. 1998) (describing the recent adoption of a "no hand" poison pill by a corporation's board of directors, an action that purported to limit the authority, particularly in a change-of-control scenario, of any *future* board of directors that would be duly elected by shareholders, and finding that such an action is invalid, because it "impermissibly circumscribes . . . the directors' ability to fulfill their . . . fiduciary duties"). On the nature of fiduciary law as an extension of equity, see, for example, Henry E. Smith, *Why Fiduciary Law Is Equitable*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 261, 261 (Andrew S. Gold & Paul B. Miller eds., 2014) ("Fiduciary law is an outgrowth of equity—perhaps the most important and characteristic branch of the tree of equity . . . ."). For recent articles explaining why fiduciary loyalty cannot be achieved by contract, and requires the mandatory protections of fiduciary law and equity, see, for example, Brian J. Broughman, Elizabeth Pollman & D. Gordon Smith, *Fiduciary Law and the Preservation of Trust in Business Relationships*, *in* FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW 302 (Paul B. Miller & Matthew Harding eds., 2020); Amir N. Licht, *Motivation, Information, Negotiation: Why Fiduciary Accountability Cannot Be Negotiable*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW, *supra* note 213, at 159.

subject however to a fiduciary obligation,"[216] emphasizing that "our model . . . must be flexible enough to recognize that the contours of a duty of loyalty will be affected by the specific factual context in which it is claimed to arise."[217] In both principle and practice, the framework of substantive equity is found in every corner of corporate law.[218] This provides the starkest proof for the argument, raised in recent scholarship, that "equity is part of the law broadly conceived"[219] and "equity . . . is a type of law that . . . protect[s] the regular or formal law."[220]

At this point, an additional comment is in order. While this Article is being written, many people throughout the United States and worldwide are being conditioned, by both the general media and a number of scholars and other participants, to resort to an outdated "political economy" perspective on Delaware (and global) corporate law. That perspective—closely associated with the term "race to the bottom"[221]—assumes that when Delaware judges decide who wins a corporate law case, they do so (or are expected to do so) with the primary motive of attracting and maintaining incorporations in the state, so that each decision is somehow meant to cater to the interests of those who have a say on where entities are incorporated (whether directors, controllers, or institutional shareholders).

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216. TW Servs., Inc. v. SWT Acquisition Corp., C.A. Nos. 10427, 10298 (Consol.), 1989 Del. Ch. LEXIS 19, at *28 n.14 (Del. Ch. Mar. 2, 1989).

217. *Id.*

218. In structural terms, corporate law has five interacting sub-categories: the law of corporate purpose, the law of corporate personhood, the legal primacy norm, share law, and corporate fiduciary law. *See* Raz, *supra* note 81, at 808–16. The link between equity and fiduciary law is especially well-recognized, *see, e.g.*, Smith, *supra* note 215, but equity is also central to each of the other fields that comprise corporate law. *See* Raz, *supra* note 213, at 538–39, 562, 564–65, 579–81 (discussing equity in relation to the law of corporate purpose); Raz, *supra* note 81, at 739 & n.48, 750–51, 768–69, 797 & n.367, 806–08 (discussing equity in relation to the law of corporate personhood); Raz, *supra* note 172, at 956–57, 984 & n.306 (discussing equity in relation to the legal primacy norm); Asaf Raz, *Share Law: Toward a New Understanding of Corporate Law*, 40 U. PA. J. INT'L L. 255, 302–11 (2018) (discussing equity in relation to share law); Raz, *supra* note 212, at 232–33, 237 & n.76, 238–39, 257, 260, 272–80 (discussing equity in relation to corporate fiduciary law). Corporate law, similar to trust law, is part of "equity's 'exclusive' or 'original' jurisdiction, where equity alone created law in an area," J.E. Penner, *Hohfeld's Equity*, *in* WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES 295, 298 (Shyamkrishna Balganesh, Ted M. Sichelman & Henry E. Smith eds., 2022).

219. Smith, *supra* note 16, at 1077.

220. *Id.* at 1077 n.100.

221. *E.g.* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974).

Yet, as recent works by Professor David Kershaw,[222] Professors Ofer Eldar and Gabriel Rauterberg,[223] and other scholars[224] have shown, the political economy perspective is misguided, or at best partial. More realistically, Delaware judges simply try to do a good job as arbiters of private disputes. Neutral adjudication inevitably means that plaintiffs win some cases and lose others, depending on the facts—that is, depending on the more primary issue (compared to the arbiter's political-economic standing) of whether or not, in the present case, the defendants have actually breached their duties.

Delaware judges clearly succeed in this mission (and many corporate decisionmakers—the potential defendants—apparently do not resist subjecting themselves to a jurisdiction governed by the rule of law), considering, among other things, the large fraction of public companies that remain incorporated in Delaware.[225] That is so although, or more likely because, Delaware maintains a level, positive law-based playing field between plaintiffs and defendants. Equity does not mean unpredictability;[226] to the contrary, it means the stability and efficiency in knowing that courts will properly respond to what is *truly* unpredictable:[227] the numerous abuses and accidents that managers' and other actors' open-ended powers make possible (just as they enable the good faith exercise of discretion).[228]

222. DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW (2018) (demonstrating that Delaware law continues, in large part, to rely on the structure and principles of corporate law as developed in England and Commonwealth jurisdictions).

223. Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 204–21 (arguing that Delaware is a non-partisan forum in the area of corporate law, providing a level playing field between shareholders and managers, which in turn contributes to Delaware remaining an attractive jurisdiction for incorporations).

224. *See, e.g.*, Fisch, *supra* note 157 (arguing that Delaware provides a fair and efficient form of corporate law and dispute resolution, so that, among other things, a federalization of corporate law is unwarranted); Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 44 DEL. J. CORP. L. 1 (2020) (arguing that the Delaware courts' expanding use of the mechanism for cleansing fiduciary actions, established in the well-known case of *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), signifies a legally, historically, and economically sound endorsement of common law principles, established outside of Delaware and before it came to prominence as a venue for incorporation).

225. *See supra* note 204.

226. *Cf.* Kahan & Kamar, *supra* note 174, at 1253–54 & *passim* (criticizing the relative uncertainty of outcomes in Delaware corporate litigation, while also arguing, from a political economy perspective, that this uncertainty helps Delaware maintain the large number of incorporations in the state).

227. *See, e.g.*, Smith, *supra* note 16, at 1057 ("[C]omplexity is seen as the weakness of equity. . . . [E]quity's opponents have stressed its arbitrariness, epitomized by the 'Chancellor's foot.' . . . [T]his view of equity gets things exactly backwards. Equity is part of law's response to the world's inevitable complexity.").

228. *See, e.g.*, Raz, *supra* note 172, at 950 ("Calls for greater certainty before the fact . . . turn corporate law on its head: the reason we have the business judgment rule, in the first place, is to promote uncertainty, risk taking, and open-ended endeavors, which often generate immense economic and social benefits. At the same time, directors and other fiduciaries do not *always* employ their broad powers in

Clearly, most fiduciaries do not breach their duties; this has no logical bearing on the need for equitable litigation in the *other* cases, where the law *has* been violated.[229]

Fiduciary duties, the requirement of legal obedience, and other mandatory building blocks of corporate law have existed long before Delaware came to prominence,[230] and the Delaware legal community continues to apply those principles within the same framework of substantive equity that has guided it since the founding era.[231] The reason for Delaware's lead in corporate law is neither a "race to the top" nor a "race to the bottom," but a race to equity. In fact, even when Delaware law evolves outside of the courts—through the legislature and the bar (as it often does following a judicial decision that illuminates some unsettled area of law)—those actors not only do not challenge, but emphasize, equity's superior position in the hierarchy of legal norms.[232]

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the good faith exercise of business judgment. Litigation is often necessary to find out whether they have done so in a specific situation. Bright-line ex ante rules cannot foreclose such litigation—no more than the corporation's business activities, or its directors' decisions (the subject of those same lawsuits), are limited by such rules. Importantly, even where Delaware corporate law has moved toward more ex ante certainty, it has done so within the overarching framework of equity and ex post judicial review, designed to respond to the exceptionally wide, unpredictable range of eventualities that corporate law not merely enables, but encourages." (footnote omitted)).

229. *See, e.g.*, Lawrence A. Hamermesh, *A Babe in the Woods: An Essay on* Kirby Lumber *and the Evolution of Corporate Law*, 45 DEL. J. CORP. L. 125, 138 (2020) ("Skepticism about the limits of shareholder litigation . . . is not the same as implacable opposition to such litigation. In Delaware's system of corporate law, representative stockholder plaintiffs, and their lawyers, are a bulwark against misappropriation and electoral manipulation by self-interested directors, officers, and controlling stockholders, and are therefore a critical promoter of efficient, wealth-creating corporate governance."); Raz, *supra* note 212, at 240 n.92 ("It is not a valid argument to simply mention that corporate law endows fiduciaries with broad management powers, or that such powers are *mostly* executed properly, while overlooking the fact that corporate litigation is meant to deal precisely with the *other* category of cases—those where the power has been improperly utilized."); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1661–63, 1686–89 (2001) (discussing situations where, despite the article's general thesis that corporate governance operates primarily through non-legally-enforceable norms, corporate litigation remains necessary and beneficial).

230. *See, e.g.*, KERSHAW, *supra* note 222.

231. *See supra* Section II.B.

232. *See, e.g.*, S.B. 313, 152d Gen. Assemb., Synopsis §§ 1–4 (Del. 2024) (enacted), https://www.legis.delaware.gov/json/BillDetail/GeneratePdfDocument?legislationId=141480&legislationTypeId=1&docTypeId=2&legislationName=SB313 [https://perma.cc/U6KT-SG3J] (amending the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, partly in response to the Delaware Court of Chancery decision in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, 311 A.3d 809 (Del. Ch. 2024), and other recent decisions; doing so in a manner that is designed to, among other things, provide greater leeway for shareholder controllers to exercise power over the corporation by means of contract, but also, according to the proposed amendment's synopsis, ensures that "the enforceability of a claim for money damages for breach of the covenant may be subject to equitable review, and related equitable limitations," and "does not affect the case law empowering a court to grant equitable relief," is "intended to promote a policy of granting [judicial] relief based on the application of equitable principles, including equitable principles relating to fiduciary duties," "does not[] exclude any equitable remedies," "does not affect the equitable disclosure obligations of directors or officers (or,

Moreover, aside from taking specific decisions that Delaware judges reach on the basis of well-established legal dictates[233] and viewing them through an intentionally deconstructive lens (for instance, by picking details such as the identity of the parties to a single case, their conduct in unrelated contexts, or their personal opinions), there is no evidence that Delaware law operates in a "political" manner, certainly in regard to debates of national or global scope.[234] For any Delaware case supposedly "favoring" some group or idea based on "politics," it is possible to identify a case where the other "camp" has won—and, in reality, both cases were decided based on common law considerations that do not map in any way onto the binary premises assumed.[235] Attempts to drown Delaware in the problem of vehemence, which has violently afflicted our society and daily lives over the last decade and a half, must fail. It is a troubling, but not irreversible, accident that most of today's public discourse stops at the headline level;[236] in any event, that is not the level on which Delaware judges perform their analysis when they equitably delve into the facts and law applicable to each case.

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as applicable, stockholders)," and "is not intended to, and does not, exclude any remedies otherwise available to any party at law or in equity").

233. For example, some commentary has tended to focus on the substantive merit of fiduciary actions that were challenged in recent Delaware cases. However, in those cases, as in others, the judicial analysis was critical of the fiduciary decision-making *process*, rather than its substance. That is precisely what Delaware corporate law has long required as a general matter. *See, e.g.*, Dalia T. Mitchell, *Proceduralism: Delaware's Legacy*, 2 U. CHI. BUS. L. REV. 333 (2023).

234. *See, e.g.*, Eldar & Rauterberg, *supra* note 223.

235. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 & *passim* (Del. 1985) (upholding the corporation's nature as an entity, and fiduciaries' power to manage the entity within equitable constraints, when stating, for example, that "the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise," in contrast with the common interpretation that *Unocal* has signaled an increased orientation toward stakeholders such as employees); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36–37 & *passim* (Del. Ch. 2013) (upholding the corporation's nature as an entity, and fiduciaries' power to manage the entity within equitable constraints, when stating, for example, that "[directors' decisions should] benefit the corporation as a whole . . . by increasing the value of the corporation . . . . [T]he duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term," in contrast with the common interpretation that *Trados* has signaled an increased orientation toward shareholders); *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 358–75, 382 (Del. Ch. 2023) (extending oversight liability, under the framework established in *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), to corporate officers rather than only directors, while denying motion to dismiss a *Caremark* lawsuit against a corporate officer, based on case-specific facts and applicable law); Segway Inc. v. Cai, C.A. No. 2022-1110, 2023 Del. Ch. LEXIS 643, at *5–10 (Del. Ch. Dec. 14, 2023) (granting motion to dismiss a *Caremark* lawsuit against a corporate officer, based on case-specific facts and applicable law).

236. *See, e.g.*, Chris William Sanchirico, Opinion, *Win or Lose on Amazon, Philly Needs to Get Smart About Attracting New Businesses*, PHILA. INQUIRER (Oct. 25, 2017, 5:00 AM), https://www.inquirer.com/philly/opinion/commentary/amazon-hq2-philadelphia-business-kenney-20171025.html [https://perma.cc/WEM3-PHJY] ("We'[r]e limiting our thinking and attention to blockbuster and celebrity: If it's not happening in the headlines, it's not happening.").

At the bottom line, both William Cary's 1974 article[237] or similar ones (accusing Delaware of being too manager-friendly), and recent commentary (accusing Delaware of being too shareholder- or even stakeholder-friendly),[238] are equally mistaken. Once we accept that the law—including corporate law—is not a switch that can be turned on and off by those subject to it, Delaware does a commendable job in both enforcing and developing that law.

Rather than simply analyzing a selection of the thousands of substantive equity opinions rendered by the Delaware courts through the years, this Section proceeds to tell a more specific, and pressing, story: that of the struggle between substantive equity and its critics, as it unfolded within Delaware corporate law, which mirrors the federal battle between historical, substantive equity and the more recent phenomenon of static equity.[239] In corporate law, the motivations of equity's minimizers do not stem from a misapplication of originalism or textualism, as in the federal case, but instead can be divided into two broad groups. First, there are defendants in litigation who, unsurprisingly, try to paint a picture of corporate law where everything is about the ex ante legal norms (the statute, the corporate charter or bylaw, the shareholder agreement, and so on), whose real-world use—or abuse—is entirely in the hands of those defendants themselves.[240]

Second, there are scholars, particularly from some (but far from all)[241] segments of the law and economics movement, who insist on a strongly

237. Cary, *supra* note 221.

238. *See, e.g.*, Carney & Shepherd, *supra* note 174; Anthony Rickey, *Guest Post: Politics as a New Differentiator Between American Business Courts: A View on the Debate Between Former Attorney General Barr and Vice Chancellor Laster*, BUS. L. PROF BLOG (Dec. 21, 2023), https://lawprofessors.typepad.com/business_law/2023/12/guest-post-politics-as-a-new-differentiator-between-american-business-courts-a-view-on-the-debate-be.html [https://perma.cc/CYN5-P4KW].

239. *See supra* Part I.

240. *See, e.g.*, Atallah v. Malone, C.A. No. 2021-1116, 2023 Del. Ch. LEXIS 207, at *2–3 (Del. Ch. July 19, 2023) ("This case involves a scenario in the shaded portion of the otherwise sunny uplands of equity. . . . [The first defendant] argues that this matter is, in essence, only his exercise of a contract right, and does not implicate equity, at all. On examination, the shade proves not so deep." (footnote omitted) (formatting altered)); *In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816, 2020 Del. Ch. LEXIS 211, at *94–96 (Del. Ch. June 11, 2020) ("[T]he defendants contend that the Company's threats cannot be viewed as coercive because the Conversion Right is written in the certificate of incorporation. . . . [T]he defendants' reliance on the presence of the Conversion Right in the certificate of incorporation fails to distinguish between the two analytical steps in Professor Berle's famous formulation [that actions by corporate managers must be tested twice, both for their legality and for being equitable] . . . . The fact that the Conversion Right appears in the certificate of incorporation . . . does not end the analysis. A court must still determine whether the defendant fiduciaries acted equitably. . . . The fact that the Conversion Right appears in the certificate of incorporation does not obviate the need for equitable analysis.").

241. *See, e.g.*, Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 41 (2018) (article written by well-regarded law and economics scholars, and advocating for the utilization of "equitable relief" through "stronger judicial oversight," which is characterized by "speed and low cost," as a solution for the potential misuse of corporate managerial power).

contractarian, pure-ex-ante worldview.[242] That approach is an incidental result of how law and economics historically developed,[243] but as this Article shows, there is no actual link between ignoring equity and promoting efficiency; the opposite is true. Delaware judges continue to enforce the (economically beneficial)[244] structure and principles of corporate law,[245] while consistently upholding the original meaning of equity. Tellingly, even where the Delaware courts deny a *specific* lawsuit by refusing to grant equitable relief, they recognize the superior power of equity as a general matter.[246]

To clearly see the distinction between ordinary "law" and equity, and how Delaware harmonizes the two, consider first the 1971 case of *Schnell v. Chris-Craft Industries, Inc.*[247] This litigation came at an important moment in the development of Delaware corporate law: four years after the

242. For detailed (and critical) surveys of such arguments, see, for example, James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257 (2015); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373 (2018); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583 (2016); Mohsen Manesh, *Equity in LLC Law?*, 44 FLA. ST. U. L. REV. 93 (2016); Mohsen Manesh & Joseph A. Grundfest, *The Corporate Contract and Shareholder Arbitration*, 98 N.Y.U. L. REV. 1106 (2023); Raz, *supra* note 212; Shaner, *supra* note 26.

243. *See, e.g.*, Saul Levmore, *The Ex-Middle Problem for Law-and-Economics*, 22 AM. L. & ECON. REV. 1, 2–6 (2020) ("Law-and-economics is driven by an *ex ante* perspective. . . . [T]he very idea of an ex-middle 'problem' for law-and-economics is jarring to scholars of contract law.").

244. *See, e.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1287 (2001) ("[E]lementary variables such as technology, education, availability of capital, and even social values such as diligence and self-restraint, are vital ingredients as well. But . . . it [is] clear . . . that the law of enterprise organization plays an important role in facilitating economic welfare.").

245. *See, e.g.*, *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 463 n.115 (Del. 2024) ("The statute [on which the defendants rely] offers a limited safe harbor for directors from incurable voidness for conflict transactions. It is not concerned with equitable review."); CCSB Fin. Corp. v. Totta, 302 A.3d 387, 398–402 & 400 n.64 (Del. 2023) (rejecting a defendant's attempt to escape fiduciary liability through an exculpatory provision in a corporate charter, and reaffirming the foundational equity cases of *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437, 439 (Del. 1971), and *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007)).

246. *See, e.g.*, Cantor Fitzgerald, L.P. v. Ainslie, 312 A.3d 674, 692 (Del. 2024) ("[I]t is conceivable that a public-policy interest or inequitable outcome could, under some circumstances, outweigh the interest in freedom of contract enshrined in [the Delaware Revised Uniform Limited Partnership Act, DEL. CODE ANN. tit. 6, ch. 17] . . . ."); Holifield v. XRI Inv. Holdings LLC, 304 A.3d 896, 924 (Del. 2023) ("[The plaintiff] argues that there are limits to private ordering and that Delaware courts retain an inherent measure of authority and equitable power with respect to limited liability companies. We agree."); Salzberg v. Sciabacucchi, 227 A.3d 102, 116–35 (Del. 2020) ("'At its core, the [Delaware General Corporation Law] is a broad enabling act which leaves latitude for substantial private ordering, *provided* the statutory parameters and judicially imposed principles of fiduciary duty are honored.' . . . 'Delaware's corporate statute . . . leaves the parties . . . with great leeway to structure their relations, *subject to* . . . the policing of director misconduct through equitable review.' . . . Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose." (emphases added) (first quoting Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996); and then quoting Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del. Ch. 2004))); *infra* text accompanying notes 313–32.

247. 285 A.2d 437 (Del. 1971).

adoption of its new and comprehensive corporate statute, the 1967 revision of the Delaware General Corporation Law.[248] At issue was a common event in the life of every corporation: the annual shareholder meeting. In this case, the meeting was originally scheduled for a certain date, but after it became clear that several dissident shareholders were attempting to engage in a proxy battle (meant to replace the current board), the present directors advanced the meeting date by more than a month, thus "cutting down on the amount of time which would otherwise have been available to plaintiffs and others for the waging of a proxy battle."[249] One thing was clear, however: the director-defendants have "seized on a relatively new section of the Delaware Corporation Law,"[250] which facially enabled them to change the meeting date. Consequently, the trial court emphasized "management's technical compliance with the law having to do with the calling of an annual meeting,"[251] and denied the plaintiffs' motion for a preliminary injunction.

On appeal, the Delaware Supreme Court took a different view. It recognized that directors can easily subvert the statutory text for their own ends, stating that "management has attempted to utilize . . . the Delaware Law for the purpose of perpetuating itself in office . . . . These are inequitable purposes, contrary to established principles of corporate democracy. The advancement by directors of the by-law date of a stockholders' meeting, for such purposes, may not be permitted to stand."[252] Most crucially, in response to the director-defendants' insistence that they had "complied strictly with the provisions of the new Delaware Corporation

248. DEL. CODE ANN. tit. 8. For a detailed discussion of the 1967 legislation by one of its key drafters, see S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976). Arsht's account begins by acknowledging "recent articles critical of the General Corporation Law, . . . [which] have alluded to sinister motives and methods in its development," *id.* at 1, but counters this criticism by citing many equity decisions from the Delaware courts—which have served then, as they do today, to check the managerial freedom of action that characterizes corporate law. Indeed, the pattern exhibited by the Delaware Supreme Court's *Schnell* decision, discussed here, was familiar well before 1971: while Delaware's 1899 general corporation law was in force, the Court of Chancery stated that "[i]t is well settled that a court of equity may disregard formalities and break through the shell of fictions in order to prevent, or undo, fraud, where the formalities and fictions have been used to accomplish a fraud." Martin v. D. B. Martin Co., 88 A. 612, 613 (Del. Ch. 1913), *quoted in* Arsht, *supra*, at 8.

249. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 430, 434 (Del. Ch.), *rev'd*, 285 A.2d 437 (Del. 1971), *quoted in Schnell Appellate Decision*, 285 A.2d at 439.

250. *Id.*, *quoted in Schnell Appellate Decision*, 285 A.2d at 439.

251. *Id.* at 437.

252. *Schnell Appellate Decision*, 285 A.2d at 439. The court added that "stockholders may not be charged with the duty of anticipating inequitable action by management, and of seeking anticipatory injunctive relief to foreclose such action, simply because the new Delaware Corporation Law makes such inequitable action legally possible." *Id.* at 439–40. This raises the question whether, in the federal context (or any other legal system), the impossibility of anticipating improper and unintended conduct—a fact that is grounded in the physical difference between the past and present (which can be known) and the future (which cannot)—is in any way reduced, or justifies any greater reliance on pre-existing text alone. *Cf. supra* Section I.B.

Law,"[253] the *Schnell* court formulated a bedrock principle, cited to this day in many high-stakes cases:[254] that "inequitable action does not become permissible simply because it is legally possible."[255]

The remedy awarded in *Schnell* was also equitable, although it represented only part of the overall equity done in the case (which operated, first and foremost, at the level of defendants' primary behavior, that was itself inequitable). As the court said, "the judgment below must be reversed and the cause remanded, with instructions to nullify the [advanced] date as a meeting date for stockholders; [and] to reinstate [the original date] as the sole date of the next annual meeting of the stockholders of the corporation."[256] In all this, the Delaware Supreme Court was applying established, constitutionally guaranteed equity principles, well known during the founding era;[257] the only new thing was the real-world situation that equity came to solve.[258]

During the more than half-century since *Schnell* was decided—a period in which Delaware took the global leadership position in corporate law, with some of the most high-profile social, economic, and technological developments passing through its courtrooms[259]—the Delaware courts had ample occasions to illustrate how equity and ex ante law are not opposites (except in the mind of those who deny equity altogether),[260] but exist on the

253. *Schnell Appellate Decision*, 285 A.2d at 439.

254. *See, e.g.*, Bäcker v. Palisades Growth Cap. II, L.P., 246 A.3d 81, 96, 110 (Del. 2021) (quoting *Schnell*'s maxim while affirming a declaratory judgment by the Court of Chancery, which voided a board of directors' action that was based on deceptive information and other inequitable conduct); *In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816, 2020 Del. Ch. LEXIS 211, at *38, *96, *123 (Del. Ch. June 11, 2020) (quoting *Schnell*'s maxim while denying motion to dismiss a lawsuit arising from a $40.5 billion share conversion transaction); Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 245, 257 n.77, 264 (Del. Ch. 2013) (quoting *Schnell*'s maxim while granting injunctive relief, in a corporate dispute involving a $4.3 billion debt transaction); *see also* Colon v. Bumble, Inc., 305 A.3d 352, 372 (Del. Ch. 2023) ("The Challenged Provisions [in the defendant corporation's charter] comply with Delaware law. Corporate action under Delaware law is always twice tested, once for legal compliance and again in equity. The plaintiff in this case mounted the first type of challenge and tested the legal validity of the Challenged Provisions. This decision provides no opportunity to express any view on situations in which a governance structure that used identity-based voting could be inequitable." (footnote omitted) (citing *Bäcker*, 246 A.3d at 97)). In case there was doubt as to whether the primacy of equity, as enunciated in *Schnell*, applies broadly or rather only in the context of interference with shareholder voting—a doubt that some language in *Coster v. UIP Companies*, 300 A.3d 656, 666–67 (Del. 2023), might have seemed to raise—it is alleviated by, for example, *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446, 463 n.115 (Del. 2024) ("The statute [on which the defendants rely] offers a limited safe harbor for directors from incurable voidness for conflict transactions. It is not concerned with equitable review.").

255. *Schnell Appellate Decision*, 285 A.2d at 439.

256. *Id.* at 440.

257. *See supra* Section II.B.

258. *See supra* text accompanying notes 37–40, 112.

259. *See, e.g.*, Raz, *supra* note 81, at 783–98 (discussing several high-stakes debates that reached the Delaware courts, from the 1980s takeover wave onward).

260. *See supra* text accompanying notes 239–46.

same continuum. Equity is meant to "protect the regular or formal law"[261] against both accidents and intentional abuses.[262] This is evident in every corner of corporate law:[263] over the last three years alone, Delaware decisions emphasizing equity have appeared in areas such as executive compensation,[264] exceptions to the rule that the recovery in a derivative action is paid to the corporate entity rather than to some or all of its shareholders,[265] new forms of attempts to "waive" fiduciary duties through private documents,[266] attorneys' fees,[267] and the avenues for cleansing a transaction between a controller and the corporation or other shareholders.[268] Two more contexts are particularly instructive, and will be explored in the remainder of this Section: the mergers and acquisitions area (especially anti-takeover defensive measures), and run-of-the-mill "strange" situations. These are both classic examples of the types of cases with which equity is designed to deal, and the types of scenarios corporate law is uniquely positioned to generate.

The basic story of mergers and acquisitions, as it developed in Delaware since the 1980s,[269] is as follows: a corporation is a legal entity,[270] normally

261. Smith, *supra* note 16, at 1077 n.100.

262. For more on equity's function as protecting the law itself (rather than only specific litigants), see Shahshahani, *supra* note 79 (manuscript at 45–46) ("[E]quity affords an outlet to a court that would otherwise distort the law in order to achieve justice or fairness in a hard case. So the prime virtue of equity is not to save a particular party from hardship but to save society at large from the court's bending the law to save that party from hardship. . . . [T]he idea of equity elaborated here is that the law *cannot* systematically incorporate certain considerations, so it allows for an external escape valve to keep doctrine pure. In this view, then, the lawlessness of equity is not a bug but an essential feature of its law-preserving function. The famous 'Chancellor's foot' criticism of equity should be reinterpreted as praise." (footnote omitted)). To restate this idea in a corporate law-specific manner, precisely because courts of equity are capable of remedying the many unforeseeable situations (both abuses and accidents) that corporate entities', managers', and other actors' broad legal powers give rise to, there can be legitimacy for the existence of those powers in the first place. Instead of a world where, for example, corporations are limited to engaging in a pre-determined list of activities, or regulatory agencies directly control every corporation that might someday commit an unlawful act, equity makes it plausible to start from a presumption that corporate law actors are *generally* motivated by good faith considerations—with the concomitant, and highly beneficial, open-ended freedom of action that has typified the corporate entity since the rise of general incorporation—and to impose a sanction only on those actors who, in fact, stray from this presumption.

263. *See supra* note 218.

264. *See, e.g.*, Garfield v. Allen, 277 A.3d 296, 346–51, 357–62 (Del. Ch. 2022).

265. *See* Goldstein v. Denner, C.A. No. 2020-1061, 2022 Del. Ch. LEXIS 125, at *40–44 (Del. Ch. June 2, 2022).

266. *See, e.g.*, New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520, 539–44 (Del. Ch. 2023); Totta v. CCSB Fin. Corp., C.A. No. 2021-0173, 2022 Del. Ch. LEXIS 127, at *34 (Del. Ch. May 31, 2022), *aff'd*, 302 A.3d 387 (Del. 2023).

267. *See, e.g.*, *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 692 (Del. Ch. 2023).

268. *See, e.g.*, *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 463 n.115 (Del. 2024).

269. *See, e.g.*, William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 263 (1992) ("The 1980s were turbulent years for corporation law. . . . [In 1977,] [n]o one realized . . . that . . . the secure ground upon which the accepted suppositions of corporation law had been premised would [soon] break apart . . . .").

270. *See, e.g.*, *supra* note 210.

managed by its board of directors[271] and the officers to whom directors delegate authority.[272] Occasionally, a person might want to acquire control of the corporation, for any number of reasons (for instance, the potential acquirer identifies some untapped value in the corporation's assets or activities). There are different ways to do this: for one, the potential acquirer might negotiate a friendly deal with the target corporation's directors, who have the statutory authority to formulate and agree to a merger.[273] Alternatively, if those parties cannot reach an agreement (or do not wish to negotiate in the first place), the potential acquirer might go directly to the target corporation's shareholders, offering to buy their shares without directors' approval, usually at a premium above market price.

So far, the story is a straightforward matter of statutory and property law (as shares are the transferable property of their owners); but at this point, the second-order law of equity, including fiduciary law,[274] comes into play. The actors discussed above might behave inequitably in several ways: on the one hand, the potential acquirer might not be a good faith actor, but rather a threat to the corporate entity and its purpose.[275] On the other hand, even if the potential acquirer *is* a good faith actor, the *directors* might act disloyally, such as with the primary motivation of protecting their board seats (which they would likely lose once the new controllers take over, and can appoint themselves and their associates as directors).[276]

Ex ante, it is entirely impossible to know which of these scenarios will transpire in a specific case. The solution fashioned by the Delaware courts was to give the directors the power to deploy defensive measures against hostile takeovers—that is, to recognize that the board "is not a passive

271. *See* DEL. CODE ANN. tit. 8, § 141(a) (2024) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . .").

272. *See id.* § 142(a)–(b) ("Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors . . . . Officers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors . . . .").

273. *See id.* §§ 251(a), 252(c).

274. *See, e.g.*, Smith, *supra* note 215, at 261–62 ("Fiduciary law is an outgrowth of equity—perhaps the most important and characteristic branch of the tree of equity . . . . [A] functional theory of equity—of equity as a decision-making mode aimed at countering opportunism—captures the character of fiduciary law. Indeed, fiduciary law is not only a historical outgrowth of equity but is at the functional core of the equitable decision-making mode. . . . The situation of someone undertaking to act on another's behalf by using discretion carries with it a great potential for opportunism. . . . Like equity generally, fiduciary law features a constrained residuum of open-endedness to deal with new and creative ways of being opportunistic.").

275. *See, e.g.*, Frederick Hsu Living Tr. v. ODN Holding Corp., C.A. No. 12108, 2017 Del. Ch. LEXIS 67, at *7–28, *59–81, *106–08, *115 (Del. Ch. Apr. 14, 2017) (denying motion to dismiss a fiduciary law case alleging that, following an acquisition, the corporation's acquirer acted to drain the corporation of assets, to the acquirer's own benefit).

276. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953–54 (Del. 1985) ("[A] Delaware corporation may deal selectively with its stockholders, provided the directors have not acted out of a sole or primary purpose to entrench themselves in office.").

instrumentality"[277] even in the shareholder-to-shareholder transactional context—but also to equitably police the use of such defensive measures, ex post, so that they do not operate to the detriment of the directors' intended beneficiaries[278] (the corporate entity or, in some cases,[279] its shareholders).

The most famous (or infamous) of these defensive measures is the "poison pill," which is, essentially, a plan announced by a corporation's directors to issue a large number of new shares to each current shareholder, *except* for the potential acquirer, thus paradoxically decreasing the latter's percentage of ownership the more shares the potential acquirer tries to buy.[280] Although it initially encountered (and continues to encounter) a strong resistance from market actors and shareholder primacy scholars,[281] the use of the poison pill was approved as lawful—in the *Schnell* sense of the word[282]—by the Delaware Supreme Court in its 1985 *Moran*[283] decision.

Reflecting the same law-equity duality explored throughout this Article—a duality which for Delaware is, to a large degree, a unity—the *Moran* court stated that "the . . . [d]irectors [in this case] receive the benefit of the business judgment rule in their adoption"[284] of the poison pill, as they did so "pursuant to [their] statutory authority."[285] The court added that "[w]hile we conclude for present purposes that the . . . [d]irectors are protected by the business judgment rule, that does not end the matter,"[286] because a future court's "response to an actual takeover bid must be judged by the [d]irectors' actions at that time, and nothing we say here relieves them of their basic fundamental duties to the corporation and its stockholders. Their use of the [pill] will be evaluated when and if the issue arises."[287]

277. *Id.* at 954.

278. *See id.* ("Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.").

279. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("[W]hen . . . the break-up of the company [became] inevitable[,] . . . [t]he duty of the board had . . . changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

280. For surveys of the nature, history, and current operation of poison pills in corporate law, see, for example, *In re* Williams Cos. S'holder Litig., Consol. C.A. No. 2020-0707, 2021 Del. Ch. LEXIS 34 (Del. Ch. Feb. 26, 2021); Lucian A. Bebchuk & Robert J. Jackson, Jr., Essay, *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549 (2014).

281. *See, e.g.*, Bebchuk & Jackson, *supra* note 280.

282. *See supra* text accompanying notes 252–58.

283. Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).

284. *Id.* at 1357.

285. *Id.*

286. *Id.*

287. *Id.* (citation omitted).

The issue indeed arose. During the years following the appearance of the poison pill, directors' legal counsel have expanded the concept to minimize, as much as possible, the odds of their clients losing control over a corporation. As described above, the legal *text*—the statute and case law—says that directors *can* do this, but only subject to equitable review. Unsurprisingly, at some point, some incarnation of the poison pill had to fail this test. In the 1998 case of *Quickturn*,[288] the new device at issue was a "no hand" poison pill, which not only included the selective share-issuance mechanism described above, but also mandated that *future* boards of directors cannot revoke the pill, for a period of at least six months after new directors are elected.[289] Thus, even a whole new board would not be able to agree to a friendly deal with an acquirer for this period of time, which would render *any* deal—whether good or bad—much less tenable in commercial terms.

In *Quickturn*, both the Court of Chancery and the Delaware Supreme Court ruled in favor of the potential acquirer, who sought to invalidate the pill. As the Supreme Court wrote, starting from statutory grounds, "[t]he ['no hand' poison pill] . . . would prevent a newly elected board of directors from *completely* discharging its fundamental management duties to the corporation and its stockholders for six months. . . . Therefore, . . . the ['no hand' poison pill] is invalid under Section 141(a) [of the Delaware General Corporation Law]."[290] Intertwined with the board's ex ante managerial power is the fact that "directors have a fiduciary duty to the corporation and its shareholders,"[291] equitably requiring that "the exact course of conduct that must be charted to properly discharge that responsibility will change in the specific context of the action the director is taking with regard to either the corporation or its shareholders."[292] The "no hand" poison pill was accordingly invalidated,[293] in a manner that closely weaves equity with ordinary "law." Many later Delaware cases have subjected poison pills to equitable review, the most notable recent example being 2021's *Williams Companies*[294] decision, where a pill was enacted outside of the takeover context, this time in an overly broad response to the phenomenon of activist shareholders.

Finally, what might represent equity's purest application in Delaware law is the manner in which the Delaware courts grapple with a variety of

288. Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998).
289. *See id.* at 1287–88.
290. *Id.* at 1291–92.
291. *Id.* at 1292.
292. *Id.*
293. *See id.* at 1292–93.
294. *In re* Williams Cos. S'holder Litig., Consol. C.A. No. 2020-0707, 2021 Del. Ch. LEXIS 34 (Del. Ch. Feb. 26, 2021).

situations that appear, at first glance, as one-time oddities, and which often stay far from the headlines, but are in fact the ultimate display of the open-endedness principle that lies at the heart of modern corporate law.[295] When such "strange" stories happen, we can rest assured that corporate law is fulfilling its mission: granting actors a wide freedom of action, while equitably supervising that action after the fact.[296] This is the exact opposite of what the contractarian strand of law and economics has long insisted on[297]—and it shows why an equity-less, pure-ex-ante worldview, whether focused on statute, contract, or any other pre-existing text, is unrealistic and inefficient (assuming "efficiency" cannot mean the one-sided transfer of value to those actors who either abuse the law, or reap a windfall from some unforeseen accident). Judges, scholars, and other participants should embrace the flow of new situations, rather than attempting to deny they have the power to respond, and provide remedy, in such cases.[298]

To start with a well-known example, the prevalence of strange cases in corporate law is illustrated by Matt Levine's column, familiar to many business lawyers and scholars, which covers a kaleidoscopic variety of such stories, often multiple times a week.[299] The discussion here, in turn, highlights two filings made in the Delaware Court of Chancery in 2019, *Shekhawat v. Kumar*[300] and *In re Heat Biologics, Inc.*[301]

In *Shekhawat*, a shareholder dispute erupted between several shareholders of a private corporation, Quinnox, Inc. As part of this conflict, the plaintiff filed a (separate and earlier) derivative action[302] in Illinois state court.[303] As the plaintiff claimed in his Delaware complaint, the

295. *See, e.g.*, Raz, *supra* note 212, at 267–77 (discussing the open-endedness principle in detail).

296. *See, e.g.*, *supra* note 262.

297. *See, e.g.*, Levmore, *supra* note 243, at 2–6 ("Law-and-economics is driven by an *ex ante* perspective. . . . [T]he very idea of an ex-middle 'problem' for law-and-economics is jarring to scholars of contract law.").

298. *See, e.g.*, Raz, *supra* note 81, at 808 ("While the early generation of law and economics (among other movements) attempted to rely on a fully ex ante worldview—which minimizes and even mocks unpredictability, the oddness of real-life situations, and the need for equity and nuance—reality does not align with this attempt. . . . This recognition—that what happens after the fact is at least as important as what we try to delineate beforehand; that we should embrace the inevitable strangeness of new situations, instead of denying the legal system the leeway to deal with them—can help shape the law, academic research about it, and public reactions to it, in a more constructive manner." (footnotes omitted)).

299. *See* Columns by Matt Levine, BLOOMBERG, https://www.bloomberg.com/opinion/authors/ARbTQlRLRjE/matthew-s-levine [https://perma.cc/BJ3D-C6AB].

300. Verified Complaint, Shekhawat v. Kumar, C.A. No. 2019-0079 (Del. Ch. Feb. 6, 2019) [hereinafter Shekhawat Verified Complaint].

301. Verified Petition for Equitable Relief, *In re* Heat Biologics, Inc., C.A. No. 2019-0741 (Del. Ch. Sept. 13, 2019) [hereinafter Heat Biologics Verified Petition for Equitable Relief].

302. On the function of the derivative action as a procedure in which another person (most often, a shareholder) undertakes to litigate on behalf and for the benefit of the corporate entity, see, for example, Raz, *supra* note 81, at 750–51, 785 n.308, 792–94.

303. *See* Shekhawat Verified Complaint, *supra* note 300, at 17.

defendants—the first two of whom were the corporation's dominant shareholders and members of its board of directors[304]—came up with an innovative tactic to resist the Illinois litigation: simply taking the plaintiff's shares away, so that he would lose standing to pursue the derivative action.[305]

According to the complaint, the defendants caused the corporation to declare a reverse share split, at a ratio of no less than 1-for-2,185,000, meaning that for every 2,185,000 "old" shares a shareholder owns, the shareholder gets one "new" share of the same corporation. As a matter of "first-order law,"[306] reverse share splits are a common and lawful corporate action.[307] In this case, however, it just so happened that the plaintiff owned 2,091,250 shares (slightly below the amount that would endow him with a single post-consolidation share), while each defendant owned a number of shares above that threshold.[308] Per the complaint, after the share consolidation, the corporation unilaterally notified the plaintiff that it no longer considered him a shareholder, and sent him a check for the purported value of his canceled shares—which, as the plaintiff claimed, was itself too low.[309]

It is unclear whether and how the plaintiff (or, indeed, anyone in a similar position) could predict this course of events, or defend himself against it, without the aid of equity. The plaintiff raised a number of equitable grievances in his Chancery complaint, including for breach of fiduciary duty,[310] which, in Delaware, also encompasses situations that other jurisdictions refer to as "shareholder oppression."[311] Eventually, the parties managed to reach an agreement (and have the court dismiss the litigation)[312]—in a case which, during the twenty-one months it was pending, received as orderly a consideration as any of the "headline" cases Chancery is most known for.

In *Heat Biologics*, an even more convoluted situation presented itself, this time in the "accident" (rather than "abuse") category of grounds for equitable intervention. The pleading in this case was not titled a

304. *See id.* at 4, 7–8.
305. *See id.* at 23–24.
306. Smith, *supra* note 19, at 60.
307. *See, e.g.*, Mira Ganor, *The Power to Issue Stock*, 46 WAKE FOREST L. REV. 701, 712–13 (2011).
308. *See* Shekhawat Verified Complaint, *supra* note 300, at 4, 7–8.
309. *See id.* at 18–23.
310. *See id.* at 30–33.
311. *See, e.g.*, Benjamin Means & Douglas K. Moll, *Against Contractual Formalism in Shareholder Oppression Law*, 57 U.C. DAVIS L. REV. 1867 (2024); Paul B. Miller, *Equity, Majoritarian Governance, and the Oppression Remedy*, *in* FIDUCIARY OBLIGATIONS IN BUSINESS 171 (Arthur B. Laby & Jacob Hale Russell eds., 2021).
312. *See* Shekhawat v. Kumar, C.A. No. 2019-0079, 2020 WL 6321675 (Del. Ch. Oct. 27, 2020).

"complaint," but instead "petition for equitable relief,"[313] which evokes the argument by Professors Samuel Bray and Paul Miller that equity deals with grievances, as opposed to more pre-defined causes of action.[314] Heat Biologics, Inc. was a small public corporation,[315] which struggled to maintain its listing on the NASDAQ stock exchange, because it was failing to meet the minimum price requirement of $1 per share.[316] Accordingly—and for reasons entirely different than those alleged in *Shekhawat*[317]—the corporation's board of directors decided to carry out a reverse share split, at a ratio of 1-for-10, which would immediately raise the share price and place it in compliance with NASDAQ rules.[318]

There was just one problem: under the Delaware statute, reverse share splits require approval by owners of a majority of the outstanding shares;[319] when the corporation tried to obtain this approval, it found that "a significant portion"[320] of its shares happened to be held by owners located in Germany, where proxy materials cannot be adequately distributed to shareholders (nor, even to the extent the materials could be distributed, did it seem likely that the statutorily required number of shareholders would participate in the meeting).[321]

In its ex parte petition to the Delaware Court of Chancery, the corporation asked the court to "deem the [corporation] to have received approval from the holders of a majority of the outstanding shares of the [corporation]'s common stock for . . . allow[ing] a reverse stock split."[322] While admitting that the "current situation is unusual,"[323] the corporation based its petition on the court's "authority to grant the requested relief pursuant to its 'historic jurisdiction to afford relief in proper cases where

313. Heat Biologics Verified Petition for Equitable Relief, *supra* note 301.

314. *See* Bray & Miller, *supra* note 69, at 1795 ("[C]ourts should . . . ask whether there is a basis for equitable intervention, or whether there is equitable jurisdiction, or whether the suit is cognizable in equity, or whether there are grounds for equitable relief, and so on.").

315. *See* Heat Biologics Verified Petition for Equitable Relief, *supra* note 301, at 1 ("A small public company, the Company's current market capitalization is approximately $19 million.").

316. *See id.* at 2–3.

317. *See supra* text accompanying notes 302–12.

318. *See* Heat Biologics Verified Petition for Equitable Relief, *supra* note 301, at 3–4.

319. *See* DEL. CODE ANN. tit. 8, § 242(a) (2024) ("[A] corporation may amend its certificate of incorporation, from time to time, so as . . . [to] subdivid[e] or combin[e] the issued shares of any class or series of a class of shares into a greater or lesser number of issued shares . . . ."); *id.* § 242(b) ("Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner: . . . [A] special or annual meeting [of the stockholders] shall be called[, and] . . . if a majority of the outstanding stock entitled to vote thereon . . . has been voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted . . . shall become effective . . . .").

320. Heat Biologics Verified Petition for Equitable Relief, *supra* note 301, at 8.

321. *See id.* at 7–16.

322. *Id.* at 1.

323. *Id.* at 18.

there is no adequate remedy at law.'"[324] Along with its petition, the corporation filed a motion to expedite.[325]

Interestingly (but not exceptionally, considering other equity cases discussed in this Section, such as *Moran*), the court denied the motion to expedite (and thus, effectively, also the primary petition).[326] The court stated that the corporation is "in a difficult situation because of the statutory requirement,"[327] adding that "[t]hese requirements exist for a reason. A reverse split . . . is not an insignificant maneuver."[328] This clarifies—contrary to the mistaken equivalence static equity jurists draw between equity and judicial activism—that equity does not mean plaintiffs always win, nor does judges' inherent equity power lead them in every case to stray from ex ante legal dictates. The court also said, however, that an earlier equity case cited by the petitioner illustrated the "court's powers to address a difficult situation,"[329] and another represented a "situation where the equities were more favorable."[330]

In all this, the court was correctly applying the equitable maxim that "equity follows the law,"[331] demonstrating equity's capacity to police its own use, while guarding against abuses and accidents in the ordinary course of law. Although the *Heat Biologics* petition was not granted, its unique facts align with broader equity theory, which recognizes equity's singular role in dealing with "situations in which intense interactions can lead to unforeseen and undesired results."[332] The very filing of the petition, and the openness with which the court handled it, exemplify both the wealth of scenarios that corporate law can generate, and the potency of Delaware's, and the common law's, tradition of substantive equity.

To recap, the sources surveyed in this Section illustrate all three characteristics that distinguish traditional, substantive equity from the recent phenomenon of static equity. First, equity is not merely about remedies or procedure; it is not just a story of injunctions and non-jury trials. It is also concerned with the primary behavior of the actors (such as corporate directors and shareholders) *subject to* the court's jurisdiction, who can themselves act in a manner that is equitable or inequitable (as, for example, in *Schnell*). Second, both equitable remedies, and the modes of

324. *Id.* (quoting *In re* N. Eur. Oil Corp., 129 A.2d 259, 261 (Del. Ch. 1957)).

325. Petitioner's Motion for Expedited Proceedings, *In re* Heat Biologics, Inc., C.A. No. 2019-0741 (Del. Ch. Sept. 13, 2019), 2019 WL 4541553.

326. Telephonic Hearing and Rulings of the Court on Petitioner's Motion to Expedite at 11, *In re* Heat Biologics, Inc., C.A. No. 2019-0741 (Del. Ch. Sept. 18, 2019).

327. *Id.* at 8.

328. *Id.* at 11.

329. *Id.* at 7.

330. *Id.* at 9.

331. *See, e.g.*, Smith, *supra* note 16, at 1115–16.

332. *Id.* at 1056.

primary inequitable behavior, do not and cannot remain frozen in time: when the poison pill was just invented (and approved by the *Moran* court), no one could conceivably write a statute or other legal text foreseeing the "no hand" pill (eventually struck down in *Quickturn*). Third, in all this, the myth of the "Chancellor's foot" is nowhere to be seen. Delaware judges, both on the Court of Chancery and the Supreme Court, take great care to follow pre-existing law—it suffices to check the average length of the "Legal Analysis" section in recent Delaware decisions—and to tailor the equitable response to the facts of each case. Equity does not mean the plaintiff always wins, but it does mean parties are heard even when they have the "strange" case that does not fit the textual mold (as in *Shekhawat* and *Heat Biologics*). This is how the equity guaranteed by Delaware's 1792 Constitution works today, and this is how the equity guaranteed by the United States' 1789 Constitution can continue operating, once the misconceptions of static equity are recognized and left behind.

III. REINVIGORATING SUBSTANTIVE EQUITY IN THE FEDERAL COURTS AND BROADER LEGAL CULTURE

This final Part ties together the two main arguments made so far in this Article: first, that the static equity conception, as developed in the federal courts (in particular the Supreme Court) since the late 1990s,[333] is an unjustified departure from the functional, historical, and textually binding idea of equity as corrective meta-law or second-order law;[334] and second, that Delaware law provides a ready-made, and practically salient, example of how substantive equity does and should work, as it has done since the founding era.[335] Accordingly, this Part argues that in order to revive substantive equity in the federal system, there is no need to reshuffle any of the well-established pillars of federal law: all the cards, from originalism and textualism, through the Constitution's text, to relevant case law, are already on the table. How to correctly arrange those cards is proposed here for the first time.

The argument begins from the premise that originalism and textualism are the interpretive *modus operandi* of the federal courts.[336] This premise might still be the subject of debate, as is the range of normative sources, or

333. *See, e.g.*, Bray, *supra* note 10, at 999–1000 (stating, in a 2015 article, that "[o]ver the last decade and a half, . . . the Court has supported its new equity jurisprudence by appealing to history and tradition").

334. *See supra* Part I.

335. *See supra* Part II.

336. *See, e.g.*, ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011) (titling the opening chapter "We Are All Originalists Now" in reference to well-known trends in current American law).

interpretive methodologies, that originalism and textualism should accommodate.[337] In any event, and however formulated at the margins, originalism and textualism fully mandate substantive equity, and reject static equity.

Under originalism (in regard to the Constitution) and textualism (in regard to statutes and other texts), the central question is what "equity" meant to certain people at a certain time,[338] either when it was included in Article III of the Constitution,[339] or when it was inserted into later texts, such as the original Judiciary Act,[340] the federal securities laws,[341] or the post-fusion rules of civil procedure.[342] Today, the prevalent approach is "original public meaning,"[343] which asks what the text would communicate to reasonable members of the public at the time the text was created (or made public).[344]

To answer this question, one may consult at least three main groups of sources: the first is philosophical thinking going back to antiquity;[345] the second is equity cases and treatises from English tradition, the founding era, and the nineteenth century, on which (to give the most consequential example) Delaware judges keep relying when they formulate their substantive equity decisions;[346] and the third is the long progression of U.S.

337. *See, e.g.*, Baude, *supra* note 40, at 1350 ("Textualism, to a first approximation, is central to the rule of law. But to a second approximation, we sometimes need to use other legal rules, unwritten law, and doing so is completely consistent with the reasons that we use legal texts." (formatting altered)).

338. *See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004) ("[T]he new originalism is focused . . . on the public meaning of the text that was adopted.").

339. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . .").

340. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 ("[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity . . . .").

341. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(5) ("[T]he [Securities and Exchange] Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.").

342. *See, e.g.*, Keenan, *supra* note 50, at 881 ("Drawing implicitly on originalist themes, the Court held that federal courts may afford only relief that was available in England's High Court of Chancery in 1789, when the federal courts first acquired their equity powers. The Court later moderated this approach, looking instead to English and American equity practice more generally before 1938, when the Federal Rules of Civil Procedure merged law and equity in federal court." (footnote omitted)).

343. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 761 (2009) ("Original public meaning is now the predominant originalist theory . . . .").

344. *See, e.g.*, Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807.

345. *See, e.g.*, ARISTOTLE, *supra* note 13, at 1137b, at 315–17; *supra* Section I.A.

346. *See supra* Part II. Another useful array of sources from this era includes dictionaries. *See, e.g.*, N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, R. Ware et al., 21st ed. 1775) (defining "Equity (in Law)" as "the Correction of the Common Law in some Part wherein that fails"; defining "Court of Equity" as "the Court of *Chancery*, in which the Rigour of the Common Law, and the Severity of other Courts, is moderated, and where Controversies are supposed to be determined according to the exact Rules of Equity and Conscience"); THOMAS DYCHE, A NEW GENERAL ENGLISH

Supreme Court and lower federal court cases, which far predate static equity (those cited in this Article go back to 1869),[347] and continue to appear today.[348]

What all of these sources share is the understanding that equity is recognized in text—the Constitution, statutes, case law, or even contracts and other private documents[349]—but the text does not supply information about how equity should be applied *in a specific future case*. The text *mandates* equity, but does not *circumscribe* equity.[350] The text cannot even try to do so, because equity, by its very nature, is associated with ex post correction. Instead, when the text mentions equity (or equity-derived concepts, such as fiduciary duty), it endows its readers—including judges—with the discretion to utilize equity as "meta-law"[351] or "second-order law,"[352] meant to ameliorate both opportunistic abuses[353] and plain accidents[354] that, if left uncorrected, would subvert the original intent and meaning of the law (including the legal text itself).

While equity judges rely on rules and principles (rather than pure conscience), as they have done since the seventeenth century, equity's rules and principles are special, in that they tell the judge (and other participants) how to correct the "ordinary" law, ex post, in new and unforeseeable situations.[355] For example, no one understands (or should understand) the granting of broad, open-ended managerial powers to corporate directors to mean that directors can use those powers *in any way whatsoever*, including, among other things, for self-dealing or entrenching themselves in office.[356]

DICTIONARY (London, C. Bathurst et al., 16th ed. 1777) (defining "Equity" as "that virtue by which we render to every one his just due, according to the several circumstances a person may be under in relation to the laws of society; it is sometimes confounded with justice, which rather seems to reward or punish, according to some stated rule or law, than according to the varying circumstances of an action, for which reason we have the court of Chancery or *Equity* to moderate the severity of the letter of the law, and to regard the controversy according to the rule of *equity* and conscience, rather than according to strict legal justice"); 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al., 6th ed. 1785) (defining "Equitable" first as "Just; due to justice," and second as "Loving justice; candid; impartial: as, *an* equitable *judge*"; defining "Equity" first as "Justice; right; honesty," second as "Impartiality," and third as "[t]he rules of decision observed by the court of Chancery, as distinct from the literal maxims of law").

347. *See* Seymour v. Freer, 75 U.S. 202, 218 (1869) ("[A] court of equity had unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties.").

348. *See, e.g.*, *supra* notes 4, 77.

349. *See, e.g.*, *supra* note 38.

350. *See, e.g.*, Bray, *supra* note 10, at 1011 n.69 ("There was a text in *Grupo Mexicano*: the Judiciary Act of 1789. But all it did was supply the word *equity*. It did not change a fundamentally historical inquiry into a textual one.").

351. Smith, *supra* note 16.

352. Smith, *supra* note 19.

353. *See, e.g.*, *id.*

354. *See, e.g.*, *supra* text accompanying notes 1–8.

355. *See supra* text accompanying notes 118–26.

356. *See supra* Section II.C.

Equally, no one should have understood Grupo Mexicano's broad *legal* powers—that is, its rights to deal with its own property—to mean that it could disperse all of this property to third parties, with the intention of rendering an ongoing legal proceeding meaningless.[357]

Put simply, federal jurists who endorse static equity are mistaking the *content* of the box for the box itself; they are conflating the historically fixed time, against which we should measure the meaning of legal text, with the belief that the meaning itself must lead to a set of historically fixed *outcomes*. At least with equity, the opposite is true. As Professor Will Baude recently said at the annual Scalia Lecture at Harvard Law School:

> We need unwritten law because our legal texts sometimes point us toward it. We need to know how to accept the invitation. . . . [D]enying [this] . . . risks leading us to close our eyes to the meaning of the constitutional text itself, because sometimes the text requires us to engage with unwritten law. The text requires us to go beyond the text.[358]

Indeed, when it comes to equity, all that federal jurists need to do is accept the invitation. This view is joined by other scholars—who, similar to Baude, take positions akin to those of the current Supreme Court majority on many legal issues, and at the same time reject the self-contradictory notion of static equity.[359]

Because static equity is only a recent innovation in the federal courts, it should not take too much effort to end this misadventure, and simply resume deciding equity cases in the manner that the Court (and lower federal courts, and state courts, and courts in other common law jurisdictions) have always done.[360] It is not difficult to envision what the post-static equity era would require in terms of day-to-day judicial work: a case like *Grupo Mexicano*, for example, would be decided in a similar manner to that offered in the dissenting opinion; and the trial court in a case like *Citibank* would not have to reach an outcome based on a (supposedly) purely textual reading of case law, but will use equitable common sense to provide the same ruling as that

357. *See supra* text accompanying notes 95–134.

358. Baude, *supra* note 40, at 1351.

359. *See, e.g.*, Bray & Miller, *supra* note 69, at 1795–96 ("[E]quity cannot be static. *Grupo Mexicano* itself recognizes that some development in equity is necessary, and this has long been the position of the Court. . . . [T]he argument that equity is adjectival[] supports the argument . . . that relief in equity has to change and adjust as the relief in law does. If law is not static, the equity that corrects and supplements it cannot be static either." (footnotes omitted)).

360. *See, e.g.*, *supra* note 77; Citibank, N.A. v. Brigade Cap. Mgmt., LP, 49 F.4th 42, 77, 78 & *passim* (2d Cir. 2022) (mentioning the word "equity" and its inflections 33 times, including references to "equity and fairness" and "equitable factors," while resolving an unforeseeable situation in which a bank had mistakenly transferred hundreds of millions of dollars to other parties, and eventually finding that those funds should be returned to their original owner).

ultimately delivered by the Second Circuit Court of Appeals. This is precisely what originalism, textualism, and related precepts of federal law require. The law, including legal text, can and does give judges the discretion to protect the law against unforeseeable abuses and accidents. Once this discretion is conferred, the judges have no counter-discretion to reject it.

CONCLUSION

In recent years, artificial intelligence (AI) has been drawing ever-increasing attention, with many people asking whether and when machines will be able to replicate (or replace) humans in a wide range of activities. A less recognized, and perhaps more troubling, fact is that the opposite is also happening: in many cases, a millennia-old legal concept—the idea of equity—is being interpreted as if it can be transformed into machine-like language, such that pre-existing legal imperatives will be able to dictate and limit the spectrum of results in every case. Just like AI is cabined to specific pools of text on which it performs its "machine learning," so do advocates of this legal approach—which this Article has called "static equity"—attempt to remove as much human discretion as possible from the workings of equity. In reality, however, equity remains today, as it was across history, *precisely about* human discretion, meant to promote just and coherent outcomes in unforeseeable situations (not predicted or resolved in, nor compatible with, any pre-existing text).

This Article has made three main contributions to the literature on equity, American law in general, and private law (including corporate law) theory and practice. First, in Part I, this Article has drawn a clearer distinction between two conceptions of equity that currently operate side-by-side in U.S. legal culture: substantive equity and static equity. Substantive equity is the general understanding of equity across human civilization, since the time of Aristotle, through the Middle Ages in England and the U.S. founding era, to the present, where it has shaped the outcomes of cases ranging from *Brown v. Board of Education*, and ample other federal litigation, to high-value corporate law disputes. Substantive equity—or simply equity—is a form of meta-law, meant to preserve the correct, intended operation of law (including statutes and other texts) in unforeseeable situations, resulting from the inherent complexity of reality and human affairs, which display instances of opportunism, threats to the law's structural consistency, and plain accidents.

Static equity, on the other hand, is a recent occurrence in the federal courts, essentially claiming that "equity" means a closed set of remedies or procedures employed by courts of equity in a specific temporal snapshot

(often 1789, when the Constitution and the first Judiciary Act took effect). This approach, which on its surface might seem appealing to proponents of originalism and textualism, in fact goes *against* the original meaning of equity, as it appears in the Constitution and later federal texts: while equity is second-order law, a "vehicle" that travels the legal landscape to respond to unforeseeable situations, textual references to equity do not and cannot pre-determine every stop that the vehicle will make. It is entirely possible for a legal text to redirect its readers to the ex post, after-the-fact dimension, endowing those readers (including judges) with some discretion—not a free-floating one, but grounded in the structure and principles of equity that have developed over the centuries—to correctly resolve the case or situation at hand. If we wish to limit ourselves to what courts of equity did in the U.S. founding era, what they did was substantive equity.

To prove this point, this Article, in Part II, has made its second main contribution—an innovative one, which so far remained undeveloped in scholarship on federal equity, or even in broader equity and private law theory: it branched out to Delaware law, including Delaware *corporate* law, where the concept of equity continues to make the most practical, day-to-day impact in all of American (and possibly global) law. Delaware should be interesting to federal judges and scholars for several reasons. First, just like in the federal system, Delaware's equity appears in the text—specifically, the Delaware Constitution of 1792, whose idea of equity survived unmodified through the constitutions of 1831 and 1897 (the latter in force today). Moreover, the way in which Delaware judges continue to utilize their equity power illustrates how equity does and should operate in a modern legal system.

Delaware's experience with equity refutes several myths or misconceptions that are currently espoused by advocates of static equity. First, equity is not just about remedies, or what H.L.A. Hart called secondary rules; it is also about primary behavior. The actors *subject to* the court's jurisdiction can themselves operate in a manner that is equitable or inequitable, and the court formulates the entire decision—not just the remedies section—accordingly.

Second, Delaware illustrates why the remedies and other aspects of equity do not and cannot remain frozen in time. The equity mentioned in the Delaware Constitution of 1792, and the equity done by Delaware judges today, are one and the same, corresponding to the very nature of equity as second-order law, which tempers the unforeseeable real-world outcomes that inevitably arise when we interact with first-order legal constructs, such as contract and property. The corporate setting is perhaps the most instructive application of equity, a fact that merits particular attention from scholars of federal law, equity theory, and private law who, so far, have not

tended to focus on corporate law. Corporations are free-acting legal persons, run by directors, officers, and others who enjoy an exceptionally broad latitude of action, under the protections of the business judgment rule and similar devices meant to promote lawful risk-taking for the entity's benefit. On the flipside, if those actors decide to operate for some goal *other* than the entity's benefit, they can easily override any ex ante mechanisms the law has put in place to constrain them (for example, shareholder voting would become effectively meaningless in the face of a "no hand" poison pill). Without equity—if we attempted to rely exclusively on the pre-existing text of statute or contract—corporate law, and by extension all law, would "run out of gas" very quickly.

Third, there was never a "Chancellor's foot" problem in Delaware; correctly applied, equity has nothing to do with judicial activism. The development of equity proceeds cautiously, on a case-by-case basis, building upon detailed precedents established by the Court of Chancery, the state's Supreme Court, and the common law tradition, while being ready to apply those precedents in a manner that responds to the new and unforeseeable facts of the specific case.

Turning to static equity, and limiting actual (substantive) equity's corrective power, thus means a transfer of value (economic or otherwise) to those actors sophisticated or dishonest enough to contravene the law's true intentions, or those who happen to reap a windfall from some unforeseeable accident. The *only* way to deal with this problem—and the one Delaware excels at—is through gradual, principles-based development of equitable responses at the case level.

In Part III, this Article has made its third main contribution, by tying together the ideas discussed above, and proposing that there is no need for a broad reshuffling of equity—or other legal conceptions, such as originalism and textualism—to reinvigorate substantive equity in the federal system. All the cards are already on the table: substantive equity *is* the original meaning of equity, as it appears in the Constitution and later legal texts. Where the Constitution, or other federal sources, mention a common law concept (equity being one example, alongside contract, property, and others), but provide no information on what the concept represents, the federal courts should—in both *Erie*, "federal common law," and other settings—refer to what the common law actually says. The place where equity is being applied most frequently, consistently, and faithfully to its historical roots is Delaware, whose equity can easily be reproduced at the federal level, by returning to the same substantive equity jurisprudence that the federal courts, including the Supreme Court, have consistently employed prior to static equity's emergence in the 1990s.

For some actors in the federal system, it might be harder to recognize the degree to which text can endow its readers (including judges) with a level of discretion, rooted in certain principles, rather than in the surface of the text itself. Yet, that is precisely what legal texts (such as the Constitution) do when they refer to equity, and judges today have no discretion to ignore or misinterpret their own equitable discretion. The Framers' and later lawmakers' choice to rely on common law concepts, including equity, is not incidental. It is part of a shared understanding of how the law does and must operate, that has existed for millennia—since the time of Aristotle—and in England, at least since the late Middle Ages. Federal jurists should bid farewell to the relatively recent aversion of common law in the federal system, which remains no more than a historical accident. Once they do so, they will easily be able to re-engage with the historically binding, principled, and beneficial idea of equity.