

ARTICLES

STATUTORY INTERPRETATION, JUDICIAL DISCRETION, AND EQUITABLE DEFENSES

T. Leigh Anenson, J.D., LL.M, Ph.D.

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T. Leigh Anenson, J.D., LL.M, Ph.D.*

ABSTRACT

Equitable defenses were given up for dead after eBay v. MercExchange. But they have been resurrected. The Supreme Court is raising the dead in recent decisions. It is integrating these judge-made doctrines into federal law despite their omission from the language of the legislation. The fusion of equitable defenses into federal statutes is important because it allows judges discretion to vary statutory outcomes on a case-by-case basis. As a result, an assortment of indeterminate defenses may stand in the way of remedying statutory violations.

The Supreme Court's approach to equity exerts a decisive influence on legislative developments. There is considerable controversy surrounding the judicial use of equitable principles to deny statutory relief. Of equal concern is that courts engage in interest balancing or policy-making that may appear inconsistent with the

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federal judicial role. Also questionable is whether these elusive concepts can be adequately contained and comprehensible. Scholars have trained a precise lens on the issues of judicial authority and institutional competence involving statutory remedies. A corollary concern—one so intuitive we lose sight of it—is equitable defenses. The Court has yet to account for the recognition of equitable defenses that forfeit congressionally-created causes of action.

This Article begins to outline an approach to the interaction between written statutes and unwritten equitable defenses. Concentrating on Supreme Court cases, it examines the decisional law of eight defenses across almost as many statutory subjects over the last two centuries. The Article exposes an equity-protective principle of interpretation that favors these ancient doctrines in modern Supreme Court practice. It also identifies possible bases for this assumption. It additionally responds to potential objections to this default rule that approves equitable defenses in legislation that does not directly provide for them. Taken as a whole, the Article explains and defends the recognition of equitable defenses in statutory law.

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INTRODUCTION

Equitable defenses were given up for dead after *eBay v. MercExchange*.¹ But they have been resurrected. The Supreme Court is raising the dead in recent decisions.

The phenomenon is illustrated by the Court's recent decision in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, which resolved the question of the extent to which laches is available under the Patent Act.² Decided in 2014, the Court in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, construed the Copyright Act to include laches and equitable estoppel.³ Significantly, every member of the Court agreed to the integration of these discretionary doctrines notwithstanding the absence of any reference to them in the statutory text.⁴ In 2013, the Supreme Court in *US Airways, Inc. v. McCutchen* held that equitable defenses may prevent relief under the Employee Retirement Income Security Act (ERISA) where the statute is also silent as to the inclusion of such defenses.⁵ The Court has similarly found equitable defenses available in a variety of other federal statutes despite their omission from the language of the legislation.⁶ Litigants in those controversies were

¹ 547 U.S. 388, 391 (2006). See Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 207 (2012) (explaining that the new *eBay* test for injunctions did not account for equitable defenses).

² The Supreme Court determined that laches did not preclude damages for patent infringement if a claim was brought within the Patent Act's six-year limitations period. *SCA Hygiene Products v. First Quality Baby Products*, 137 S. Ct. 954, 959–67 (2017). It did not decide whether laches was available against equitable relief. *Id.* at 959 n.2, 963. The Federal Circuit, sitting en banc, decided 6 to 5 that laches was available to bar legal relief under the Patent Act. See *SCA Hygiene Prods. v. First Quality Baby Prods.*, 807 F.3d 1311, 1323–29 (Fed. Cir. 2015).

³ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967, 1977 (2014) (recognizing laches as a defense to equitable relief and acknowledging estoppel as a defense to legal and equitable relief). See discussion *infra* Part I.

⁴ See generally *Petrella*, 134 S. Ct. at 1962. The disagreement between the justices concerned whether laches should be available to bar legal relief. See *infra* note 72.

⁵ 133 S. Ct. 1537, 1542–43 (2013) (implicitly recognizing that the common fund and double recovery doctrines are available in defense of ERISA claims subject to the plan terms). See discussion *infra* Part I. Four justices in dissent disagreed with the majority's consideration of the common fund defense because it was not preserved below or included within the question presented to the Court. *Id.* at 1551 (Scalia, J., joined by Roberts, C.J., Thomas and Alito, JJ.).

⁶ See discussion *infra* Part I.

seeking redress for violations of the antitrust, securities, employment, patent, and tax laws, among others.⁷

The Supreme Court has not identified its authority or any underlying rationale for the retention of equitable discretion to deny statutory relief by the application of equitable defenses. These doctrines are generic in that they can apply to each and every statute in the United States Code.⁸ The Court's failure to set forth an approach to the interaction between written law and unwritten defenses contributes to lower court confusion and raises questions of legitimacy.⁹ This Article examines the unspoken assumption of equity that explains these decisions.

The meaning of equity needs clarification in federal law.¹⁰ Famous for its appeal to history and high-minded ethical ideals, equity should also be remembered

⁷ See discussion *infra* Part I.

⁸ See, e.g., T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 AM. BUS. L.J. 509, 510 (2010) [hereinafter Anenson, *Process-Based Theory*] (noting the applicability of the unclean hands defense to tort and contract law, statutory disputes, and international human rights).

⁹ See discussion *infra* Part II. Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENVTL. L. REV. 87, 135–36 (2016) [hereinafter Farber, *Judicial and Agency Discretion*] (emphasizing that mapping the basis of judicial discretion reduces errors in decisions, enhances their predictability, and increases judicial legitimacy). Many of the cases reaching the Supreme Court for decision involved circuit splits on the availability and application of equitable defenses. Moreover, in the most recent case of equitable defenses in intellectual property law, the Federal Circuit divided over the scope of laches. See *SCA Hygiene Prods. v. First Quality Baby Prods.*, 807 F.3d 1311 (Fed. Cir. 2015). For a future issue, see Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of all Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 633, 669 (2009) (noting conflict in the Circuits over the availability of equitable defenses under certain CERCLA provisions).

¹⁰ See generally Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1001 (2015) [hereinafter Bray, *New Equity*] (calling for the Supreme Court's historical approach to equitable remedies in recent cases "new" and asking for an explanation). Equitable principles got lost in the fusion and confusion following the merger of law and equity. See generally T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2010) [hereinafter Anenson, *Limiting Legal Remedies*] (discussing fusion and confusion over equitable defenses in state and federal law after the unification of law and equity). They did not die, however, for lack of enthusiasm in the courts. See Anenson, *Process-Based Theory*, *supra* note 8, at 509–10 ("From modest beginnings in ancient equity cases involving drunken promises and debauchery, the defense [of unclean hands] now applies in both state and federal court litigation of a distinctly modern vintage. Its coverage extends to entire categories of tort and contract law an ever broadening range of statutory disputes, and even to international human rights."). Indeed, they continue in a steady stream of precedents. T. Leigh Anenson & Gideon Mark, *Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies*, 62 AM. U. L. REV. 1441, 1525 (2013) ("Equity is not lost, for it continues in a steady stream of precedents, but it has ceased being understood."). But scholarship on them waned in the wake of this phenomenon, and the subsequent removal of equity as a stand-alone course in the law school curriculum. T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 AM. BUS. L.J. 455, 480

for its function and practicality. To be sure, the “fossil records” of history and the “majesty got from ethical associations,” do not provide a complete picture of equitable principles in federal statutes.¹¹ The purpose of equity, and its defenses in particular, was to stop strategic behavior.¹²

Equitable defenses have lofty goals still relevant today. They obligate litigants to follow the golden rule or prevent them from taking advantage of their own wrong.¹³ Modern trial judges, just like medieval Chancellors, invoke equitable

n.141 (2008) [hereinafter Anenson, *Treating Equity Like Law*]; T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 647 (2007) [hereinafter Anenson, *Pluralistic Model*] (“Many practicing lawyers have graduated without the benefit of a comprehensive course in equity.”); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 249–60 (2008) [hereinafter Laycock, *How Remedies Became a Field*] (recounting the law school movement away from an equity course to a remedies course in the 1970’s); see also Zechariah Chafee, Jr., *Foreword to SELECTED ARTICLES ON EQUITY* iii, iv (Edward D. Re ed., 1955) (“[T]he elimination of a separate course in equity in many of the law schools in the United States has caused much that is truly valuable in the study of equity to be either completely lost or scattered to the point of useless dilution in various courses.”); Robert S. Stevens, *A Brief on Behalf of a Course in Equity*, 8 J. LEGAL EDUC. 422, 422 (1955–1956) (criticizing the trend of law schools that do not offer a separate course in equity).

The most recent treatises to provide a comprehensive treatment of equity were published in the early twentieth century, and those books were oriented to practitioners. T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 438–39 (2008) [hereinafter Anenson, *The Triumph of Equity*] (discussing lack of contemporary American treatises on equity). The latest literature to examine equity holistically and philosophically was published in the middle of the twentieth century. T. Leigh Anenson, *Public Pensions and Fiduciary Law: A View from Equity*, 50 U. MICH. J.L. REFORM 251, 272 n.127 (2017) [hereinafter Anenson, *A View from Equity*] (citing authorities); see also Zechariah Chafee, Jr., *Foreword to SELECTED ESSAYS ON EQUITY* iii (Edward D. Re ed., 1955) [hereinafter Chafee, *SELECTED ESSAYS ON EQUITY*] (“The absence of a collection of leading articles on Equity has long been a serious lack among law books.”).

¹¹ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897), reprinted in see O.W. Holmes, *Learning and Science in O.W. HOLMES, COLLECTED LEGAL PAPERS* 139 (1920).

¹² T. Leigh Anenson & Donald O. Mayer, “Clean Hands” and the CEO: Equity as an Antidote to Excessive Compensation, 12 U. PA. J. BUS. L. 947 (2010) (advocating the use of unclean hands to prevent company executives’ unfair advantage-taking in their employment contracts); see also Henry E. Smith, *Why Fiduciary Law Is Equitable*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 262–63 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter Smith, *Fiduciary Law*] (asserting opportunism as a general theory of equity); Gergen, Golden & Smith, *supra* note 1, at 237 (explaining injunctions as correcting for party opportunism).

¹³ See Anenson, *Treating Equity Like Law*, *supra* note 10, at 461 (relating rationales of unclean hands); Anenson, *The Triumph of Equity*, *supra* note 10, at 388 (explaining rationale for estoppel as doing unto others as you would have them do unto you).

defenses to protect both litigants and courts.¹⁴ These often forgotten doctrines prevent hypocrisy and gamesmanship in the system of justice and safeguard the judiciary from becoming what the Supreme Court calls an “abettor of inequity.”¹⁵ Stated more generally, equitable defenses operate in the service of equity’s primary purpose of ensuring the integrity of the law.¹⁶

Yet, combatting opportunism is no simple task. It requires equitable doctrines to be flexible.¹⁷ It also means that judges need discretion to apply (or even update) defenses in the context of the case.¹⁸ It is this discretionary power—and its potential abuse—that is difficult to reconcile with congressional deference in the federal courts under silent statutes.

Equitable defenses are a product of private law and often associated with remedies.¹⁹ Scholars have recently called for the Supreme Court to justify its

¹⁴ Anenson, *Treating Equity Like Law*, *supra* note 10, at 461 (discussing unclean hands); Anenson, *The Triumph of Equity*, *supra* note 10, at 390–91 (discussing equitable estoppel).

¹⁵ Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945) (quoting *Bein v. Heath*, 47 U.S. 228 (1848)). See T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 62–63 (2005) [hereinafter Anenson, *The Role of Equity*] (discussing how equitable defenses prevent gamesmanship and hypocrisy at the expense of the court, the law, and other litigants).

¹⁶ Anenson, *The Role of Equity*, *supra* note 15, at 63.

¹⁷ Anenson, *A View from Equity*, *supra* note 10, at 264; Smith, *Fiduciary Law*, *supra* note 12, at 264–65; see also Anenson, *The Triumph of Equity*, *supra* note 10, at 403–06 (describing the flexibility of equity and how estoppel has no exhaustive formula); Anenson, *Pluralistic Model*, *supra* note 10, at 651 (outlining the embryonic character of equitable doctrines).

¹⁸ Anenson & Mayer, *supra* note 12, at 995 (discussing the contours of the clean hands doctrine and claiming that “[w]hat is ‘unclean,’ like what is fraud, necessitates some ambiguity to promote deterrence.”); Smith, *Fiduciary Law*, *supra* note 12, at 264–65 (emphasizing that equity cannot be too predictable because opportunists will anticipate it and evade it as well as invent new ways of engaging in such behavior). The idea is that a “certain degree of judicial discretion is effective to prevent misbehavior without undermining legitimate expectations and chilling desirable behavior.” Anenson, *A View from Equity*, *supra* note 10, at 264; Smith, *Fiduciary Law*, *supra* note 12, at 278 (explaining that the idea is to keep the law “unpredictable enough to keep opportunists guessing but without destabilizing the law” for which it is a safety valve); Gergen, Golden & Smith, *supra* note 1, at 237 (relating the same idea for equitable remedies). For articles discussing the value of discretion for equitable defenses, see, e.g., T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 37 REV. LITIG. 529, 548–54 (2018) [hereinafter Anenson, *Age of Statutes*] (discussing judicial discretion as a component of equitable defenses); Anenson, *Treating Equity Like Law*, *supra* note 10, at 461 (discussing discretion in the application and extension of equitable defenses).

¹⁹ See generally Anenson & Mark, *supra* note 10 (criticizing the Federal Circuit for failing to consider the clean hands doctrine as part of the Supreme Court’s remedies jurisprudence). Scholars that have analyzed equitable defenses have largely focused on private law, including specific subject areas such as contract.

approach to equitable remedies in federal statutes.²⁰ Academics have also been critical of judicial power to deny equitable relief for statutory violations.²¹ However, scant attention had been paid to equitable defenses that similarly result in dismissal.²² It is axiomatic that courts can alter the value of rights by the liberal or restrictive interpretation and application of defenses that negate liability. Of equal concern is that in recognizing these discretionary defenses, courts engage in interest balancing, or policy-making, that may appear inconsistent with the federal judicial role.²³

Do judges have authority to prefer equitable defenses that prevent statutory relief? If so, on what basis? Are judges competent to articulate and apply these defenses so as not to undermine the purposes of the legislation? Is the synthesis of

Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT. L. 1 (2012) [hereinafter Laycock, *Undue Hardship*]; Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 304–05 (1991) [hereinafter Sherwin, *Contract Enforcement*]; Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1225–26 (1990); see also Anenson, *The Triumph of Equity*, *supra* note 10, at 382 n.14 (listing equitable estoppel literature by subject matter).

²⁰ See Bray, *New Equity*, *supra* note 10, at 1050–51; see also Farber, *supra* note 9, at 128 (juxtaposing the Supreme Court’s approach to judicial and agency discretion under federal statutes and reconciling them). Professor Bray acknowledges that an “important” question not addressed in his research was whether courts should use a presumption in favor of traditional equitable principles when interpreting federal statutes. Bray, *New Equity*, *supra* note 10, at 1014 n.80. This Article begins to answer that question. The answer is basically yes, subject to certain caveats.

²¹ See discussion *infra* Part II; Bray, *New Equity*, *supra* note 10, at 1045 (“The criticism of the Court’s cases on equitable remedies has been intense.”); Farber, *Judicial and Agency Discretion*, *supra* note 9 (advising that “dissenters, and not a few legal scholars, have remained dissatisfied” with judicial discretion to deny injunctive relief in statutory cases).

²² There is no comprehensive treatment of equitable defenses in American law. My scholarship has aimed to fill that gap. It has concentrated on equity with a special focus on equitable defenses. See, e.g., T. LEIGH ANENSON, *JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN U.S. LAW* (forthcoming Cambridge University Press 2018). I have studied the operation of one or more defenses across state and federal statutory and common law. This is the first study of equitable defenses in federal legislation. A companion paper concentrates on how the Supreme Court supplies the substance of equitable defenses and its increasing stewardship in shaping these discretionary doctrines. Anenson, *Age of Statutes*, *supra* note 18. Both papers build from my work examining the Supreme Court’s treatment of the clean hands doctrine in patent law. See generally Anenson & Mark, *supra* note 10 (exploring the equitable defense of unclean hands in the context of the Supreme Court’s remedies jurisprudence). Other research has recently acknowledged equitable defenses in the course of studying remedial discretion in federal law. See Bray, *New Equity*, *supra* note 10, at 1002 (discussing two recent Supreme Court decisions). Otherwise, critical commentary of equitable defenses in federal law has been confined to discrete contexts. See, e.g., Vikas K. Didwania, Note, *The Defense of Laches in Copyright Infringement Claims*, 75 U. CHI. L. REV. 1227 (2008) (discussing doctrinal confusion in lower courts on the application of laches in the copyright statute and arguing that the inclusion of laches promotes the primary policy of the statute). I will rely on these important contributions, including much of my earlier work, in this Article.

²³ See discussion *infra* Part II.

equitable defenses and statutory claims consistent with the rule of law? This Article provides provisional answers to these questions while analyzing Supreme Court equity jurisprudence. It begins by offering a doctrinal account of the scope of federal equity authority to recognize equitable defenses that prevent recovery for breaches of statutory rights before turning to more theoretical matters.

The Article proceeds in three Parts. Part I asks whether the Supreme Court employs an equity-protective presumption in interpreting federal statutes. To answer that question, it details the development of equitable defenses in Supreme Court statutory cases. It analyzes decisions from the early twentieth century to the present day. Although not expressed as formal doctrine, this Part reveals that the Court assumes its ability to employ equitable defenses. This unstated technique of ascertaining statutory meaning effectively grounds the existence of equitable discretion in the tradition of equity. As a result, history measures the judicial power in equity to determine defenses left undisturbed by a statute.

Parts II and III turn to the next issue of whether the Supreme Court *should* use this power-preserving precept. They analyze its interpretative stance toward equitable defenses in light of democratic and rule of law values. Drawing on scholarly literature from the federal courts, remedies, and private law, these Parts evaluate whether federal courts have the authority and competence to fuse equitable defenses into federal legislation. For philosophical and functional reasons, it finds that courts are justified in giving weight to history in discerning the availability and scope of these discretionary doctrines. Among other grounds, these Parts find that the Supreme Court has been constrained by state and federal custom and precedent in weaving equitable defenses into the pattern of general jurisprudence consistent with other judge-made law. Moreover, the equitable defense default rule has not prevented the Court from modernizing defenses and limiting their application in deference to the legislature. The rule is translating equity's historic association with the public interest to accommodate statutory objectives.

These Parts also offer improvements in the Supreme Court's approach. They suggest that the Court should proclaim the presumption to invoke equitable defenses in order to enable a reliable rationale. Specifically, it should link the integration of equitable defenses to the language of the legislation granting federal courts power to provide equitable relief and, accordingly, harmonize its rules of construction concerning equitable discretion. The Court should additionally announce that the use of equitable defenses to bar relief is an exercise in judicial self-restraint; that is, a check on its extraordinary power to grant equitable relief. It could further explain whether (and when) acceptance of equitable defenses is directly provided by the statute itself or the exercise of delegated discretion from Congress. Alternatively, the Court could clarify that it is filling a gap in the statutory scheme with federal common law or, under certain circumstances, exercising its exclusive judicial power to protect the court under the Constitution.

The Article concludes by emphasizing that equitable defenses occupy an essential place in federal statutes. Assuming access to courts satisfies legislative ends, doctrines that foreclose that opportunity are worthy of study. Mapping the boundaries between the Supreme Court and Congress by examining the recognition of equitable defenses in legislation should enhance understanding of their legitimate role in the regulatory state.

I. THE ASSUMPTION OF EQUITABLE DEFENSES

Rarely do federal statutes expressly grant courts the power to apply equitable defenses.²⁴ The failure of the legislature to pinpoint particular equitable doctrines is not unusual. Even when Congress explicitly mentions equitable principles, it rarely specifies the precise scope of the law. To be sure, there are hundreds of federal statutory provisions providing for equitable remedies without much more elaboration.²⁵ Given the uncertainty arising from the statutory silence,²⁶ this section analyzes Supreme Court jurisprudence to determine whether federal courts have discretion to accept equitable defenses.

A case-based analysis is an essential starting point before attempting to explain or even justify the Court's actions. Referring only to the sources of, and constraints on, judicial authority and discretion concerning equitable defenses, and any underlying political and theoretical presuppositions of a particular philosophy of law, would be like an announcer of a baseball game describing the field and the rules rather than providing an account of what the players are actually doing.

This section focuses on the decisional law of eight defenses across almost as many statutory subjects over the last two centuries.²⁷ In several opinions analyzed

²⁴ The Lanham Act, which governs trademarks, is unusual. The statute provides for the defensive use of "equitable principles, including laches." 15 U.S.C. § 1115(b)(9) (2012).

²⁵ My investigation indicates there are hundreds of federal statutory provisions calling for equitable remedies. See also Bray, *New Equity*, *supra* note 10, at 1013 n.76 (listing federal statutes providing for equitable relief); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 265 (2003) (tallying seventy-seven federal statutes providing for equitable relief).

²⁶ See, e.g., Michael T. Morley, *Enforcing Equality: Statutory Injunctions, Equitable Balancing Under eBay, and the Civil Rights Act of 1964*, 2014 CHI. LEGAL F. 177, 179 ("Supreme Court doctrine concerning statutory injunctions has caused confusion among the lower courts . . .").

²⁷ *Stone v. White*, 301 U.S. 532 (1937) (equitable estoppel); *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240 (1933) (unclean hands—inequitable conduct); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (unclean hands—inequitable conduct); *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806 (1945) (unclean hands—inequitable conduct); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) (unclean hands—patent misuse); *Perma Life Mufflers, Inc. v.*

below, the Supreme Court identified equitable defenses under a wide range of federal legislation. It found them available in statutes regulating taxes, monopolies, and securities to employment discrimination and employee benefits to intellectual property. Collectively, the defenses at issue included equitable estoppel,²⁸ unclean hands²⁹ (along with its derivatives, inequitable conduct, patent misuse, and employee misconduct), laches,³⁰ *in pari delicto*,³¹ as well as the common fund and double

International Parts Corp., 392 U.S. 134 (1968) (*in pari delicto*); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) (*in pari delicto*); Pinter v. Dahl, 486 U.S. 622 (1988) (*in pari delicto*); McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) (unclean hands—employee misconduct); US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013) (common fund and double recovery); Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014) (laches and equitable estoppel).

²⁸ See 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 802 (Spencer W. Symons ed., 5th ed. 1941) (explaining that equitable estoppel is intended to promote “equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience . . .”). Lord Kenyon’s definition of equitable estoppel stands the test of time. See Anenson, *The Triumph of Equity*, *supra* note 10, at 385. Litigants “should not be permitted to ‘blow hot and cold’ with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of their private interests.” (citing Walter S. Beck, *Estoppel Against Inconsistent Position in Judicial Proceedings*, 9 BROOKLYN L. REV. 245, 245 (1940) (quoting HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 119 (4th ed. 1854) (internal quotations omitted))).

²⁹ The clean hands doctrine provides a rationale for refusing a remedy regardless of the merits of the claim, so long as the litigant dirtied his or her hands in relation to the litigation. Anenson, *Treating Equity Like Law*, *supra* note 10, at 461. The maxim “he [or she] who comes into equity must come with clean hands” developed to “protect the court against the odium that would follow its interference to enable a party to profit by his own wrong-doing.” HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 26 (2d ed. 1948). For similar expressions of the clean hands doctrine, see POMEROY, *supra* note 28, §§ 397–99; JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 99 (W.H. Lyon ed., 14th ed. [hereinafter STORY, COMMENTARIES]).

³⁰ Laches means “such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.” POMEROY, *supra* note 28, § 419, at 171–72. See 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 247–48, 103–08 (similar) (2d ed. 1993).

³¹ The doctrine of *in pari delicto* prevents parties to a common illegal scheme from profiting from their own wrongdoing. STORY, COMMENTARIES, *supra* note 29, §§ 421–22; Anenson, *Process-Based Theory*, *supra* note 8, at 566–69 (comparing defenses of *in pari delicto* and unclean hands). It bars relief only to the extent that the claimant bears equal responsibility for the wrongdoing. Anenson, *Treating Equity Like Law*, *supra* note 10, at 482. The defense preserves the dignity of the courts, expresses a moral principle, and enforces public policy. J.K. Grodecki, *In Pari Delicto Potior Est Conditio Defendentis*, 71 L. Q. REV. 254, 265–73 (1955); see also John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261, 268–82 (1947) (tracing the history of the *in pari delicto* doctrine).

recovery doctrines.³² None of the statutory provisions mention these equitable defenses. While the Court has been increasingly cognizant of its equitable defense inquiries, the cases evidence that it is still assuming the admittance of these defenses in statutory actions.

The Supreme Court has avoided larger questions of power and principle by focusing on individual equitable defenses in each statutory case. This should sound familiar. After all, courts do not write treatises, but make decisions. However, more direction in its approach is warranted. An explanation of why and how these timeless notions of equity are received into legislation would assist in their consistent application and play a role in their justification.³³ The following description tracks the Supreme Court's actions chronologically in statutory cases.

The story begins with the Supreme Court's tax refund cases accepting equitable estoppel during the Great Depression. Resistance to the repeal of equitable defenses then continues into World War II era patent decisions which allowed the clean hands doctrine. In 1937, for example, the Court in *Stone v. White*³⁴ considered whether the government could raise a defense based on special equities establishing its right to withhold a refund from the demanding taxpayer.³⁵ The government was barred by the statute of limitations from suing to collect such a tax.³⁶ Nonetheless, the Court found the defense to be comparable to an equitable recoupment.³⁷ It then observed

³² The common fund and the double recovery doctrines are designed to prevent unjust enrichment. The double recovery defense limits an insurer to recoup no more than an insured's double recovery—the amount the insured has collected for the same loss from a third party. 4 G. PALMER, LAW OF RESTITUTION § 23.16(b), at 444 (clarifying that the idea is only when an injured person has received in excess of full compensation from two sources for the same loss). The common fund defense is designed to prevent freeloading. It allows a litigant or lawyer who recovers a common fund for the benefit of others to collect reasonable attorney's fees from the fund as a whole. DOBBS, *supra* note 30, § 3.10(2), at 279 (describing the common fund rationale as those who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched).

³³ Accord Farber, *Judicial and Agency Discretion*, *supra* note 9, at 90, 135–36 (explaining that identifying governing principles of judicial discretion in seemingly disparate statutory cases takes considerable work, contributes to coherence, and enhances judicial legitimacy).

³⁴ 301 U.S. 532 (1937).

³⁵ *Id.* at 538.

³⁶ *Id.*

³⁷ *Id.* at 539. See Camilla E. Watson, *Equitable Recoupment: Revisiting an Old and Inconsistent Remedy*, 65 FORDHAM L. REV. 691, 697 (1996) (discussing equitable recoupment as a remedial defense in federal tax law which has “no statutory underpinnings”).

that the text of the tax statute did not preclude equitable defenses.³⁸ As a result, the Court declared: “The statute does not override a defense based on the estoppel of the taxpayer.”³⁹

The Supreme Court’s seminal decisions concerning the defense of unclean hands in patent law are also instructive. In a series of cases decided between 1933 and 1945, the Court recognized the equitable defense in two situations giving rise to the doctrines of inequitable conduct and patent misuse.⁴⁰ The conduct amounting to the inequitable conduct decisions involved perjury, bribery, and the manufacture and suppression of evidence by the party seeking to enforce the patent.⁴¹ Along with endorsing the dismissal of statutory infringement actions for unclean hands involving inequitable conduct in the patent process, the Court similarly foreclosed enforcement in the substantive setting when the patentee misused the monopoly privilege provided by the Patent Act.⁴² While equitable relief was requested in these cases, the Court never attempted to discern a textual basis for the defenses in the patent

³⁸ *Stone*, 301 U.S. at 538.

³⁹ *Id.* at 539. *See also* *Lewis v. Reynolds*, 284 U.S. 281 (1932) (recognizing equitable defenses in tax refund claims).

⁴⁰ *See Anenson & Mark*, *supra* note 10, at 1463 n.138 (advising that “inequitable conduct” is not a name unique to patent law and that courts use the term to describe unclean hands in non-patent related decisions).

⁴¹ *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816–20 (1945) (withholding the remedy for infringement because the patent holder had engaged in perjury and suppression of evidence in securing the patent); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 240 (1944) (precluding suit due to the manufacture and suppression of evidence regarding patentability); *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 243 (1933) (denying relief as a result of the patentee’s bribery and suppression of evidence related to the patent).

⁴² *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 494 (1942) (affirming trial court dismissal of patent infringement complaint for want of equity under the clean hands doctrine), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (concluding that a *per se* presumption of illegality for tying arrangements of patented products was no longer applicable given recent congressional amendments); *see also id.* (linking patent misuse defense to clean hands doctrine for the first time). For earlier patent misuse cases, see *Carbice Corp. v. Am. Patents Corp.*, 283 U.S. 27 (1931) and *Leitch Mfg. v. Barber Co.*, 302 U.S. 458 (1938).

statute.⁴³ The statutory language did not specify the availability of the defense of unclean hands, or its derivatives, patent misuse and inequitable conduct.⁴⁴

The real test for equitable defenses began when the Supreme Court considered their availability in a series of federal regulatory statutes providing private rights of action to vindicate important public interests. The statutory objectives are furthered only if successful plaintiffs, acting as private attorney generals, secure relief. Fault-based defenses, even those originating in equity, have the potential to frustrate the overriding aim of Congress to deter statutory violations. Do these statutes creating private causes of action to enforce legislatively proscribed wrongdoing rebut the implicit presumption that equitable defenses survive? Should they? Should the Supreme Court reorient its approach to reading the regulation against customary understandings and, rather, assume an outright ban on such defenses?

The Supreme Court initially appeared to adopt the latter approach in *Perma Life Mufflers, Inc. v. International Parts Corp.*⁴⁵ Decided in 1968, the case involved the availability of the *in pari delicto* doctrine to bar statutory relief for monetary damages despite antitrust violations.⁴⁶ Justice Black, writing for the majority, refused to recognize the equitable defense of *in pari delicto*, a narrower version of unclean hands that is available to bar both legal and equitable relief, because there was no textual basis for the defense in the antitrust acts.⁴⁷

But subsequent decisions during the latter part of the twentieth century retreated from that opinion. Assessing the availability of equitable defenses under the securities and employment laws, the Supreme Court has moved away from an absolutest approach in the recognition of equitable defenses toward a more provisional point of view in assessing equitable limitations on statutory rights.

⁴³ See Zechariah Chafee, Jr., *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 1065, 1070 (1949) [hereinafter Chafee, *Clean Hands*] (citing STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY 329 n.1 (1930)) (arguing that the clean hands doctrine is inapplicable in patent law because it is statutory law).

⁴⁴ P.J. Federico, *Commentary on the New Act*, 75 J. PAT. & TRADEMARK OFF. SOC'Y 161 (1993) (reconciling inequitable conduct under the statutory defense of unenforceability).

⁴⁵ *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968).

⁴⁶ See generally *id.*

⁴⁷ *Id.* at 138 (“There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions . . .”).

In two decisions interpreting the securities laws during the 1980's, the Supreme Court withdrew from the majority's all-or-nothing position in *Perma Life* with respect to equitable defenses. Recall that the majority opinion indicated that a plaintiff's own delinquency under the antitrust laws would never defeat his or her statutory right to sue.⁴⁸ Relying on the acceptance of the defense by several concurring opinions in *Perma Life*, the Court in both cases presumed the power to consider the defense without the overt approval of the legislature. Decided in 1985, the Supreme Court in *Bateman, Eichler, Hill Richards, Inc. v. Berner*⁴⁹ found the *in pari delicto* doctrine available to bar an action arising from violations of the antifraud provisions of the Securities Exchange Act of 1934.⁵⁰ Three years later in *Pinter v. Dahl*,⁵¹ the Supreme Court extended its ruling on the doctrine of *in pari delicto* to the unlawful sale of securities under the Securities Act of 1933.⁵² In fact, the Court found the *Bateman Eichler* test appropriate to the present action as well as to all private actions under any of the federal securities laws.⁵³ In neither case did the Court find it necessary to provide a justification for its power to incorporate *in pari delicto* in the language of the legislation.⁵⁴

The narrative continues into the next decade. Decided in 1995, the Supreme Court in *McKennon v. Nashville Banner Publishing Co.* had another opportunity to

⁴⁸ *Id.*

⁴⁹ *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985).

⁵⁰ *Id.* at 303–04, 308–11. See Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2012); Securities and Exchange Commission Rule, 17 C.F.R. § 240.10b-5 (2017). The dispute involved a tipster-tippee situation. *Bateman Eichler, Hill Richards, Inc.*, 472 U.S. at 301. Investors sued for damages alleging that a broker-dealer and corporate insider had induced them to purchase stock by divulging false and materially incomplete information on the pretext that it was accurate inside information. *Id.* at 301–03. Because the investors had violated the same laws under which recovery was sought by trading on what they believed was illegal inside information, the district court dismissed the complaint on the ground that plaintiffs were *in pari delicto*. *Id.* at 304.

⁵¹ *Pinter v. Dahl*, 486 U.S. 622 (1988).

⁵² The plaintiffs in this case sought rescission under Section 12(a) of the Securities Act of 1933 for the unlawful sale of unregistered securities. *Id.* at 623. See Securities Act of 1933 § 12(a), 15 U.S.C. § 77l (2012). The defendant alleged the action was barred by the *in pari delicto* defense because the plaintiff promoted and otherwise participated in the sale. *Pinter*, 486 U.S. at 640–41. The defendant also asserted an estoppel defense that was rejected in the lower courts, but the holdings were not challenged in the Supreme Court. *Id.* at 629 n.8.

⁵³ *Pinter*, 486 U.S. 635.

⁵⁴ See *id.* at 641 n.17 (discussing the derivation of rescission as either common law or equitable in relation to the issue of whether the plaintiff was a seller for purposes of Section 12(1) who might be held liable for contribution as to the remaining investors claims against the defendant).

address equitable defenses under the so-called private attorney general statutes.⁵⁵ The Court adjudicated the availability of the employment misconduct defense, a derivative of the unclean hands doctrine, in the employment context.⁵⁶ A unanimous Court held that an employee discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA) is barred from certain forms of relief when, after her discharge, an employer discovers evidence of wrongdoing that would have led to her discharge on lawful grounds.⁵⁷ Consistent with its philosophy since *Perma Life* and its progeny, the Court considered an equitable defense notwithstanding the absence of an explicit textual reference to it in the language of the statute.⁵⁸

Recent cases from the Supreme Court during the present century have also assumed the availability of equitable defenses. These decisions interpreted legislation regulating employment benefits and copyright protection.⁵⁹ The Court assimilated into the silent statutory law the defenses of double recovery and common fund as well as laches and equitable estoppel.⁶⁰

Decided in 2013, the Supreme Court considered the incorporation of equitable defenses into statutory relief under ERISA in *US Airways, Inc. v. McCutchen*.⁶¹ The employer brought a statutory claim for equitable relief against the employee to secure reimbursement for the medical expenses it had paid as a result of the accident under the terms of its health benefits plan.⁶² The employee defended by asserting two equitable doctrines designed to prevent unjust enrichment: double recovery and

⁵⁵ *McKennon v. Nashville Banner Publ'g*, 513 U.S. 352 (1995).

⁵⁶ *Id.* at 356.

⁵⁷ *Id.* at 361–62. The plaintiff's wrongdoing at issue in *McKennon* involved copying confidential documents during her final year of employment. *Id.* at 355.

⁵⁸ As explained *infra* in Part II.C., the Supreme Court also followed *Perma Life* in narrowing the defense. *McKennon*, 513 U.S. at 360 (“We have rejected the unclean hands defense [under the Sherman and Clayton Acts] ‘where a private suit serves important public purposes.’”) (citing *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968)).

⁵⁹ See discussion *infra* Part I.

⁶⁰ *Id.*

⁶¹ *U.S. Airways v. McCutchen*, 133 S. Ct. 1537 (2013). See ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012) (authorizing health plan administrators to seek “appropriate equitable relief . . . to enforce . . . the terms of the plan”); 29 U.S.C.S. § 1001 *et seq.* (1974).

⁶² The case arose after the employee recovered damages in a lawsuit for injuries caused by a third party. *Id.* at 1343. The employer demanded reimbursement and requested an equitable lien on the proceeds of the employee's lawsuit pursuant to the health plan.

common fund.⁶³ The Court held that equitable defenses were available to limit or deny equitable relief under the statute.⁶⁴

One of the Supreme Court's latest decisions acknowledging equitable defenses in federal regulation is *Petrella v. Metro-Goldwyn-Mayer, Inc.*⁶⁵ Decided in 2014, it declared that the equitable defenses of estoppel and laches are available to bar statutory relief under the Copyright Act.⁶⁶ The plaintiff filed a copyright infringement suit seeking monetary and injunctive relief for the violation of her 1963 screenplay of *Raging Bull*.⁶⁷ Because the plaintiff waited eighteen years after renewing the copyright to bring the lawsuit, the defendant raised the equitable defenses of laches and estoppel.⁶⁸ The lower courts barred the entire claim on the basis of laches.⁶⁹ In a six to three decision, the majority of the Court held that estoppel was available to preclude the entire lawsuit and that laches may apply to bar equitable relief but not legal relief.⁷⁰

⁶³ *Id.* at 1543–44. The double recovery doctrine limits reimbursement to the amount of the insured's "double recovery." *Id.* at 1542–43. The common fund doctrine requires the party seeking reimbursement to pay a share of the attorney's fees incurred in securing funds from the third party. *Id.*

⁶⁴ *Id.* at 1543, 1551. The main issue in the case concerned whether the equitable defenses could override the terms of the plan. The majority held that neither general nor specific principles of unjust enrichment (like the common fund and double recovery defenses) could contradict clear contract terms. *Id.* at 1551. Because the contract was silent concerning the costs of recovery, the common fund doctrine informs the interpretation of the reimbursement provisions of the plan and was properly read into the agreement. *Id.*

⁶⁵ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).

⁶⁶ *Id.* at 1967, 1977.

⁶⁷ *Id.* at 1971. The statute of limitations for copyright claims mandates commencement of suit within three years after the claim accrued. *Id.* The provision limits relief to the three year window and allows the infringer to keep outlays in developing or selling the copyrighted work. *Id.* at 1970, 1973. However, a judge-made separate accrual rule restarts the time period upon each separate accrual of the claim. *Id.* at 1969; *id.* at n.5. Due to the rolling statute of limitations, the copyright holder may sue every three years until expiration of the copyright term. *Id.* at 1969. The time period may be up to 70 years after the author's death. *Id.* at 1968. The 70-year period applies to works published on or after January 1, 1978. *Id.* (citing 17 U.S.C. § 302(a) (2012)). Pre-1978 published works, such as in *Petrella*, are protected for an initial period of 28 years, which may be extended for a renewal period of up to 67 years. *Id.* at 1968 (citing 17 U.S.C. § 304(a) (2012)).

⁶⁸ *Id.* at 1971.

⁶⁹ *Id.* at 1971–72.

⁷⁰ *Id.* at 1967. The defense of estoppel was raised but not ruled upon in the lower courts. *Id.* at 1977 n.21. See also Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1418 (2015) [hereinafter Rendleman, *Stages of Equitable Discretion*] (outlining future issues that *Petrella* did not answer with respect to laches). The Supreme Court's most recent laches decision

In summary, the corpus of cases supports the integration of equitable defenses into statutory law. The Supreme Court has recognized equitable defenses in such cases without the express approval of Congress. The Court has also invoked the equitable defense default rule notwithstanding that it operates to override congressionally-created private rights to remedy public wrongs. Furthermore, the fact that the Court assumes Congress legislates against these background principles of equity is evident across several statutes.

The Supreme Court's preference for discretionary defenses demonstrates that tradition unconsciously affects how it views legislation.⁷¹ Tradition is an unspoken assumption that purports to explain the relationship between the courts and the political branches.⁷² "It remains a powerful, if often invisible, force in determining what the law is."⁷³

Consistent with the history of equity, then, the Supreme Court's interpretative principles, at least presumptively, leave intact equitable discretion, including the power of federal courts to withhold relief on the basis of equitable defenses. Equity does not always require a court to issue a remedy when the defendant is in breach of the statute. Even when the legislature does not expressly authorize it, a court may invoke equitable defenses. In sum, the court has statutory discretion to decide whether to allow any equitable defenses at all and, if so, under what conditions.

How much equity is left in a statute? Presumably, all of it; that is, up to the limits of judicial power under the Constitution.⁷⁴ Accordingly, the rise of the

extended *Petrella* to patent law. *SCA Hygiene Products v. First Quality Baby Products*, 137 S. Ct. 954, 959 (2017).

⁷¹ See WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 49 (2002) ("Tradition often exerts a silent influence on legal reasoning. Our traditions establish 'baselines' which are background assumption that favor the status quo and place the burden of proof on any person who seeks to change the existing order.").

⁷² Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99, 110–11 (1997) [hereinafter Thomas, *Prophylactic Relief*] ("[T]he judicial equity power is well-grounded in our common-law system as a fluid and flexible power necessary to redress gaps in the law.") (citing Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (demonstrating a historical foundation for complex public law injunctions as part of the "normal" litigation tradition)).

⁷³ HUHN, *supra* note 71, at 50.

⁷⁴ Mirroring the text of the Constitution, the Judiciary Act of 1789 gave federal courts jurisdiction over "all suits . . . in equity." *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939). Similar to federal regulatory statutes, neither the Constitution nor the Act delineate the purpose or parameters of judicial power in equity. John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1431 (1998) (noting the failure to set forth a range of authority or even

regulatory state has actually enlarged the equitable jurisdiction of the federal courts. This expansion is due to an accumulation of statutory rights in conjunction with the courts implied method of interpreting such statutes in a way that preserves the equitable authority of the federal courts consistent with their pre-statutory past.

II. THE AUTHORITY OBJECTION (DEMOCRATIC VALUES)

Because equitable defenses are a condition of equitable (and sometimes legal) relief in several statutory actions, there are more opportunities for federal judges to wield equity power.⁷⁵ The Supreme Court's retention of authority to withhold equitable remedies, however, has been subject to criticism.⁷⁶ Remarkably, though, discretion to decide equitable defenses remains largely unnoticed.⁷⁷ In fact, the few scholars that have even mentioned defenses in studying the existence of remedial discretion in public law litigation did not find them controversial.⁷⁸ This is surprising because these discretionary defenses also require judges to balance interests that may

provide any restrictions on its invocation or breadth). There is an immense literature examining the equitable remedial power of the federal courts in enforcing constitutional violations. *See, e.g.*, Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 373–75 (2003) (analyzing articles).

⁷⁵ Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 513 (1984) [hereinafter Farber, *Equitable Discretion*] ("This [discretionary] approach to the issuance of injunctions originated in cases where courts were the source not only of the relief but the underlying rights as well.").

⁷⁶ *See, e.g., id.* ("It is by no means clear how to reconcile the tradition of equitable discretion with the needs of modern statutory enforcement."); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 527 (1982) (asserting that the judicial power to permit particular defendants to continue violating statutes would "constitute a remarkably direct extension of the judicial function into the process of amending legislation"); *supra* note 21.

⁷⁷ The limited exception seems to be the doctrine of "undue hardship" or "balancing the equities." Laycock, *Undue Hardship*, *supra* note 19, at 3 ("[T]here is controversy about whether a judge-made defense should limit the remedy for a statutory claim."). The doctrine was usually, although not invariably, treated as a defense rather than as a prerequisite for the plaintiff to recover equitable relief. *Id.* at 29–30; Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 85–90 (2007) [hereinafter Rendleman, *eBay*] (asserting that the Court in *eBay* should have treated the undue hardship defense as an affirmative defense rather than part of the criteria for injunctive relief).

⁷⁸ *See* Plater, *supra* note 76, at 562 (commenting that Congress rarely displaces equitable defenses like estoppel, leaving these issues to the judgement of equity courts); *see also* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 493 (2010) (challenging the balancing of interests for injunctive relief as lacking a historical basis, but noting that historical practice supports discretionary denials of relief on the basis of equitable defenses like laches).

result in dismissal.⁷⁹ After all, balancing is policy-making and may seem inconsistent with the federal judicial role.⁸⁰

The Court's results-oriented approach to remedies, especially when exercised in a way that allegedly "underenforces" statutory actions, is the primary concern for many scholars.⁸¹ The same apprehension should arise when the Supreme Court employs equity preservation principles to maintain its extraordinary equitable power to deny relief pursuant to equitable defenses. As outlined in Part I, the Court's doctrine demonstrates that federal courts favor the recognition of equitable defenses that will forfeit congressionally-created causes of action designed to effectuate important public policies. As a result, these defenses have caused considerable controversy in the specific statutory settings in which they apply.⁸²

The following analysis explores possible objections to the judicial authority to absorb equitable defenses in statutory law in light of democratic values. It analyzes whether the inclusion of these discretionary doctrines are consonant with legislative intent and the constitutional separation of responsibilities in the federal government. It also probes the legitimacy of the Court's actual use of the equity-protective precepts.

⁷⁹ Professor Schoenbrod has also noted the incongruity of this position. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 631–33, 639–40 (1988) [hereinafter Schoenbrod, *The Measure of an Injunction*] (questioning equitable defenses because judges engage in policy-making).

⁸⁰ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609–10 (1952) (Frankfurter, J., concurring) ("Balancing the equities when considering whether an injunction should issue is lawyers' jargon for choosing between conflicting public interests."); Levin, *supra* note 74, at 335 (noting scholarly reservations about equitable balancing to "weaken the implementation of public-regarding remedial legislation").

⁸¹ Scholars seem to believe there is something dubious about a doctrine that allows acknowledged statutory violations to stay in place. See Plater, *supra* note 76, at 525–26 (asserting that equitable remedial discretion is more limited when the source of the right is statutory); Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS L.J. 567, 572 (2013) [hereinafter Rendleman, *Remedies*] ("Remedies scholars would be more pleased if the distinction between right and remedy did not introduce a remedy that is narrower than the right."). Another concern is whether the tradition of equity still works. See Gergen, Golden & Smith, *supra* note 1, at 233 (explaining how equitable remedial principles are effective); Morley, *supra* note 26, at 221–22 (concluding that certain prerequisites of equitable remedies are not useful and calling for legislative reform).

⁸² See, e.g., Sachin S. Pandya, *Unpacking the Employee-Misconduct Defense*, 14 U. PA. J. BUS. L. 867, 868, 868 n.1 (2012) (citing literature criticizing the employee misconduct defense in federal employment discrimination law and challenging its legitimacy in every work law claim on the basis that it contravenes the laws restorative purposes).

A. *Legislative Intent*

Supreme Court jurisprudence indicates that the continued judicial discretion to deny equitable remedies reflects probable interpretative instructions about how statutes granting relief in equity ought to be construed. The nineteenth century decision in *Brown v. Swann*, followed in the twentieth century by *Weinberger v. Romero-Barcelo*, for example, declared that the legislature was aware of the conditions of equity jurisdiction.⁸³ Under this rationale, the equity interpretative principle reflects what Congress wants.⁸⁴ Therefore, the judicial development of equitable remedies and related doctrines can be described as delegated authority from Congress.⁸⁵ Equitable relief has been left deliberately imprecise to allow judges leeway to decide how and when they apply.⁸⁶ The same rationale should apply to equitable defenses.⁸⁷ While not reciting the remedies reservation rule, the Court's latest cases seem to connect a defense to its remedial authority expressed in the

⁸³ *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 501 (1836) (discussing the Virginia legislature); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (reversing court of appeals decision that determined there was no equitable remedial discretion in the statute to deny injunctive relief and affirming the lower court ruling that barred relief on grounds of laches). In *Romero-Barcelo*, the Supreme Court declared that “a major departure from the long tradition of equity practice should not be lightly implied.” *Id.* at 320. It further reiterated that the district judge is “not mechanically obligated to grant an injunction for every violation of law.” *Id.* at 313.

⁸⁴ Tracking court opinions, scholars have assumed this is the function of the interpretative principle. Schoenbrod, *The Measure of an Injunction*, *supra* note 79, at 657–58; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 456–57 (1989) [hereinafter Sunstein, *Interpreting Statutes*] (using term “interpretative instructions”).

⁸⁵ See Schoenbrod, *The Measure of an Injunction*, *supra* note 79, at 658–63 (finding the delegation of remedial law-making authority to the Court constitutionally compliant with the separation of powers principle); see also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123 (2010) [hereinafter Barrett, *Substantive Canons*] (explaining that textualists view statutory ambiguity as legislative delegation where policy analysis in the exercise of their interpretative discretion is acceptable).

⁸⁶ Rendleman, *eBay*, *supra* note 77, at 66.

⁸⁷ The remedial status of particular equitable defenses is beyond the scope of this Article. Because equitable defenses depend on policies specific to the subject matter at issue, their evolution in a particular field may be so pronounced that they are considered part of the substantive law. See Laycock, *How Remedies Became a Field*, *supra* note 10, at 167 (“We do not have a short and settled label for distinguishing the substantive law of remedies from the rest of substantive law.”). Chafee made this point after analyzing the doctrine of unclean hands. Chafee, *Clean Hands*, *supra* note 43, at 1065; see also DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 933 (4th ed. 2010) (asserting that unclean hands is part of patent law); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548 (1985) [hereinafter Shapiro, *Jurisdiction and Discretion*] (describing the clean hands doctrine as “so closely entwined with the merits” that the defense is only marginally relevant to the refusal of equitable relief).

statutory language.⁸⁸ If one accepts this idea, the resistance rule answers an empirical rather than a normative question of statutory construction.⁸⁹

Specifically, when drafting statutes, does Congress generally want the federal courts to determine the availability and content of equitable defenses? Scholars and judges of different ideological stripes would seem to say yes.⁹⁰ Even those with

⁸⁸ Before determining the applicability of the employee misconduct defense in *McKennon v. Nashville Banner Publishing Co.*, for instance, the Court noted that the language of the ADEA permitted legal and equitable relief. 513 U.S. 352, 361 (1995). Its opinions in *Petrella v. Metro-Goldwyn-Mayer, Inc.* and *U.S. Airways v. McCutchen*, are even stronger indicators that the Court deems its discretion to decide equitable defenses as derivative of its statutory remedial authority. For example, before assessing the viability of the equitable defenses in *McCutchen*, the Court mentioned that it had previously determined that the lawsuit was authorized by ERISA because a claim for reimbursement was the modern day equivalent of an equitable lien by agreement. *U.S. Airways v. McCutchen*, 133 S. Ct. 1537, 1542, 1546 (2013) (finding claim and remedy equitable) (citing *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006)). In *Petrella*, the Court recited the statutory grant of equitable relief and explained that the plaintiff was seeking an injunction and the restitutionary remedy of lost profits which the Court determined to be equitable. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1970–71 n.1 (2014).

⁸⁹ See Barrett, *Substantive Canons*, *supra* note 85, at 120 (“The distinction between linguistic and substantive canons is not always crisp, for canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic.”). Descriptive (linguistic or textual) canons operate like rules of syntax. See, e.g., Huhn, *supra* note 71, at 22–25 (distinguishing textual from substantive canons). Courts use them to infer the meaning of a statutory provision from its textual structure or context. *Id.*; Barrett, *Substantive Canons*, *supra* note 85, at 117. Substantive (or normative) canons are interpretative principles that are derived from the legal effect of the rule. *Id.* at 117. These interpretative guides conserve constitutional and other values by imposing a “clarity tax” on Congress. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010) [hereinafter Manning, *Clear Statement Rules*]; see also Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 11 (2008) (advancing a “stronger claim that judicial imposition of additional enactment costs on legislatures enables courts to reduce their comparative informational disadvantage” under certain circumstances). They press Congress on a point when important societal values are at stake. *Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011) (quoting *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion) (“Clear statement rules ensure Congress does not, by broad or general language, legislate on sensitive topics inadvertently or without due deliberation.”)); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018 (1989) [hereinafter Eskridge, *Public Values*].

⁹⁰ The classification and validity of interpretative conventions is subject to varying philosophies of the judicial role in statutory interpretation. See Barrett, *Substantive Canons*, *supra* note 85, at 110 (discussing debate between dynamic statutory interpreters who view courts as cooperative partners with Congress and textualists who view courts as faithful agents). For many years, intentionalism dominated as the classic approach to faithful agency. *Id.* at 112 (“The rival theories in this regard were—and remain—purposivism and textualism.”). Intentionalist judges were willing to derive Congress’s presumed intent from general statutory purposes even in the face of contrary statutory text. See *id.* (“Purposivism, the classic approach to statutory interpretation, claims that a judge should be faithful to Congress’s presumed intent rather than to the statutory text when the two appear to diverge.”) (citing cases). By considering the availability and application of equitable defenses in light of legislative goals, the Court’s assumption of equity in federal

competing philosophies of the judicial role either as “legislative agents” or “cooperative partners” in statutory interpretation accept that the language of the statute should be read in context.⁹¹ The Supreme Court’s historical approach to equitable defenses fits this description.⁹²

As will be examined in more detail in Part III, it is the method of history moderated by policy considerations evidenced in the statutory purposes.⁹³ Equitable principles expressed in a statutory provision, read in light of their history, may be the best evidence of legislative intent.⁹⁴ The clear social meaning of an enacted text providing for equitable relief was emphasized by Professor Plater: “The initial instinctive reaction of most attorneys and jurists is to assume that when Congress

legislation appears to have staunch intentionalist underpinnings. See Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 530 (1998) (defining intentionalism). But in this century, the most vigorous debaters divide into the competing factions of modern textualists and dynamists. See Barrett, *Substantive Canons*, *supra* note 85, at 114 ([T]he debate between textualists and dynamists about the strength of that norm [of legislative supremacy] is a critical one in recent scholarship.”); Mank, *supra*, at 528–42 (reviewing debate and dividing factions into intentionalists, purposiveness, textualists, and dynamicists); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003) [hereinafter Manning, *Absurdity Doctrine*] (In recent years, a strain of intent skepticism associated primarily with modern textualism has undermined the foundation of strong intentionalism . . .”).

⁹¹ Professor William Eskridge, representing the latter view, found historical support in the Supreme Court’s practice of reading statutes in the context of the field-specific norms in which the statute is situated. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1095 (2001) [hereinafter Eskridge, *All About Words*]. As he explains, historical words “can be vessels for principles or for policy inchoate until liquidation by application to a particular case.” *Id.* at 1106. Professor John Manning, who represents the former view of the judicial role, similarly endorses an approach to interpretation that is based on widely shared contextual understandings of the statutory language at issue. Manning, *Absurdity Doctrine*, *supra* note 90, at 2458–59; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001) [hereinafter Manning, *Equity of the Statute*] (explaining that textualists read statutes against established background conventions); see also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 351–52 (1994) (asserting that “[t]extualism is not simply a revival of the old plain meaning rule” and that its adherents acknowledge “that the meaning of words depends on the context in which they are used.”).

⁹² See discussion *infra* Part III; see also Anenson, *Age of Statutes*, *supra* note 18, at 534–55.

⁹³ *Id.*

⁹⁴ *Id.* Equitable defenses may be justified outside of viewing them from a remedies perspective grounded in the language of the legislation. See discussion *infra* Part III.A. Other language may be used as well. One of the issues in *SCA Hygiene Products v. First Quality Baby Products* was whether the exception to the limitations period for “unenforceability” included the equitable defense of laches. 137 S. Ct. 954, 962–63 (2017) (finding the statutory language did not encompass laches as a bar to legal relief).

authorized injunctive relief for statutory violations, it must have intended to incorporate the full discretion of equity as well. Courts *must* always be able to compromise statutory violations; they do so all the time.”⁹⁵

The acceptability of the assumption of equitable defenses as remedies might rest on other grounds; namely, the retention of equitable discretion may also be a function of the Court’s perceived role in the constitutional structure. As such, the equity-accepting edict may be seen as a normative rather than descriptive assumption about the legislative process.

B. *Separation of Powers*

Some scholars have acknowledged the remedies default rule as an illustration of statutory interpretation grounded in the separation of powers doctrine.⁹⁶ The textual and traditional techniques for implementing that value are part of a broader metarule of non-interference with the customary divisions of power in the federal government.⁹⁷ Equitable defenses, seen as part of remedial law, could be similarly explained.⁹⁸

Nevertheless, the power of federal judges to fashion remedies, unlike many of their state counterparts who may be popularly elected, is a check upon democracy by

⁹⁵ Plater, *supra* note 76, at 528–29.

⁹⁶ William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 605 (1992) [hereinafter Eskridge & Frickey, *Quasi-Constitutional Law*]; Sunstein, *Interpreting Statutes*, *supra* note 84, at 469 (grounding equity canon in the constitutional norm promoting the sound allocation of institutional responsibility).

⁹⁷ Eskridge, *Public Values*, *supra* note 89, at 1023 (describing metarule to preserve the traditional separation of responsibilities in government that include canons against federal preemption of state functions, overriding traditional executive functions, and interfering with the judicial power “to fashion creative relief in equity”). In fact, all interpretive conventions can be seen in this way. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 652 n.308 (1995) (concluding that “canons of construction of *any* type—constitutional or otherwise—can be justified in separation of powers terms as inherent or ancillary aspects of a court’s interpretative and lawmaking power under Article III[.]”); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1422 (2005) (designating canons as “buffering devices” designed to avoid “unnecessary interbranch and intergovernmental friction”).

⁹⁸ See Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer, Inc.*, 67 VAND. L. REV. EN BANC 1, 13 [hereinafter Bray, *Laches*] (considering laches in light of assumption of equitable remedies).

a branch of government not subject to popular control.⁹⁹ Even more troublesome, perhaps, in terms of an intolerable usurpation of power, is that a corollary to equity is choice. Such discretionary decision-making risks the expansion of the judicial office in relation to other equal branches of government. From a separation of powers perspective, denying relief despite a violation of statutorily proscribed conduct can be seen as the zenith of the judiciary's institutional authority.¹⁰⁰ Therefore, scholars are understandably uneasy about the ability of the judiciary to weaken substantive statutory protections in the name of adjusting remedies.¹⁰¹

The constitutionally-derived doctrine of separation of powers makes government more efficient through an effective division of labor and disperses power to reduce the risk of tyranny.¹⁰² The equity axiom can be envisioned as advancing both goals. The equity-observing exegesis of the statute's meaning enables the judicial branch leeway to perform its primary function and curbs that power through an effective arrangement of checks and balances.¹⁰³ In particular, equitable remedies

⁹⁹ See, e.g., Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 380 (1989) (“[J]udicial interpretation of statutes raises a problem of legitimacy, i.e., justification for unelected and unrepresented judges making law in a representative democracy.”).

¹⁰⁰ See, e.g., Rendleman, *Remedies*, *supra* note 81, at 579 (expressing discomfort with judicial discretion in statutory cases).

¹⁰¹ See, e.g., Eric R. Claeys, *The Conceptual Relation Between IP Rights and Infringement Remedies*, 22 GEO. MASON L. REV. 825 (2015) (critiquing the constriction of remedies as potential subterfuge for restricting rights); Tracy Thomas, *eBay Rx*, 2 AKRON INTELL. PROP. J. 187, 189–90 (2008) (questioning whether the Supreme Court right-remedy distinction facilitated its decision to restrict the remedy). For reservations regarding judicial reliance on substantive canons generally, see Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 744 (1992) (identifying concern that substantive canons are unsound because they may be judicial policymaking through the guise of statutory interpretation).

¹⁰² Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432–33 (1987). For a discussion of the competing purposes of the separation of powers doctrines, see W.B. GWYN, *THE MEANING OF SEPARATION OF POWERS* 127–28 (1965); Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–04 (1989).

¹⁰³ Modern textualists, who envision federal courts as agents of Congress, are hesitant to accept the Court's authority to employ an arguably substantive canon like the doctrine of separation of powers that lacks a textual basis in the Constitution. See Barrett, *Substantive Canons*, *supra* note 85, at 178 (asserting that only canons grounded in specific and not general constitutional values are legitimate); *id.* at 178 n.331 (“[A] canon designed to protect the constitutional separation of powers—a function that can be attributed to a host of canons—is probably stated at too great a level of generality to justify departures from a text's most natural meaning.”). The rejection of substantive canons is particularly pronounced if the interpretive presumption emphasizes only one of the Constitution's cross-cutting aims. See Manning, *Clear Statement Rules*, *supra* note 89, at 436–37 (arguing that a clear statement rule emphasizing just one of multiple constitutional aims is improper and provides no principled metric of analysis); see also *id.* at 443 n.213

and defenses provide protection against the over or under inclusiveness of statutory rules.¹⁰⁴ While scholars have lamented the inability to adequately explain the assortment of equitable principles and doctrines as a unified theory, collectively, they evince equity's primary cleansing function in preserving the integrity of the law.¹⁰⁵ Even scholars critical of equitable discretion to qualify statutory relief admit to the necessity of a judicial safety valve of some kind.¹⁰⁶ Additionally, the denial of relief through the application of defenses (or otherwise) is an exercise in judicial self-restraint. Both ideas are further developed below.

1. Aristotelian Equity

As discussed above, a quintessential area of equity jurisprudence is remedies. The need for statutory discretion at the rights implementation stage dates to Aristotle.¹⁰⁷ The Greek philosopher's idea of *epeikea* recognized that laws made by

(citing *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) and *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 431 (1977) as cases evidencing a free standing abstract notion of separation of powers not tied to the constitutional text).

¹⁰⁴ See Gergen, Golden & Smith, *supra* note 1, at 233 (explaining equitable decision-making mode); see also Anenson & Mark, *supra* note 10, at 1514 (concluding that the Federal Circuit's failure to follow Supreme Court doctrine on ensuring equitable principles are flexible made its former law of inequitable conduct over-inclusive and its new law under-inclusive); Manning, *Absurdity Doctrine*, *supra* note 90, at 2467 ("Although no one, to my knowledge, has systematically examined the origins of the many background conventions that now qualify statutes, one might surmise that many, if not most, such conventions originated as particular judicial responses to . . . the over- and under-inclusiveness of general rules.").

¹⁰⁵ Sherwin, *Contract Enforcement*, *supra* note 19, at 304–05; *The Cleansing Power of Equity*, 11 RESEARCH@SMITH 4, 5 (Fall 2010) (reviewing Anenson & Mayer, *supra* note 12); Anenson, *The Role of Equity*, *supra* note 15, at 63.

¹⁰⁶ See, e.g., Morley, *supra* note 26, at 214–15.

¹⁰⁷ The association between equity and Aristotelean philosophy in the enforcement of statutes has been recognized repeatedly both here and abroad. See, e.g., DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 143–44 (2010). The relationship has been acknowledged by judges and scholars. See, e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1979 (2014) (Breyer, J., dissenting) ("[T]he nature of the equitable,' Aristotle long ago observed, is 'a correction of law where it is defective owing to its universality.'" (citation omitted)); Gary L. McDowell, *Joseph Story's Science of Equity*, 1979 SUP. CT. REV. 507 153, 157–58 [hereinafter McDowell, *Story's Science of Equity*] (explaining Story's efforts toward regeneration of an original understanding of equity which started with Aristotle). For an extensive treatment of the historical and conceptual development of equity from Greek to Roman to English, see Max Radin, *A Juster Justice, A More Lawful Law*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY 537, 541 (Radin ed., 1935); see also Leonard J. Emmerglick, *A Century of New Equity*, 23 TEX. L. REV. 244, 254 (1944–45) (grounding equity in the *epicia* of Aristotle and in the Roman *clementia* or "clemency").

legislative enactment required remedy-tailoring discretion.¹⁰⁸ Aristotle's insight was that no lawmaker could craft laws to cover every contingency.¹⁰⁹ Without judicial discretion, attempts to lay down rules in advance could yield situations not envisaged by the rule-maker.¹¹⁰ Accordingly, allowing the decision-maker a "space of justice" is necessary to effectively administer statutes.¹¹¹ The spacious dimension to adjudicating equitable issues is a salient feature of classic equity.¹¹² It is also one that the Supreme Court accepted in its statutory task concerning equitable remedies and defenses.¹¹³

Discretionary decision-making for equitable principles has long been understood to be within the special competence of the judiciary.¹¹⁴ As a result, the fact that Congress did not mention equitable defenses or other discretionary denials of relief in a statute has not been, and should not be, taken as an implied repeal of these longstanding principles. Therefore, the equity canon and its implicit

¹⁰⁸ *Magna Moralia* and *Nicomachean Ethics*, in *THE WORKS OF ARISTOTLE* (W.D. Ross trans., Oxford at the Clarendon Press 1925); *Art of Rhetoric*, in *2 THE WORKS OF ARISTOTLE* (W. Roberts trans., ENCYCLOPEDIA BRITANNICA 1952).

¹⁰⁹ See Anenson, *The Triumph of Equity*, *supra* note 10, at 426 (explaining equitable defenses in relation to the Aristotelian idea of *epikeia*) (citing Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 NOTRE DAME L. REV. 119 (1942–43)).

¹¹⁰ See *id.*; see also William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 323–27 (1989) (explaining how judges must deal with gaps in the law); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947) (explaining that the ambiguities of language along with unanticipated situations arising after enactment of a statute compel judicial construction).

¹¹¹ JOHN GLOVER, EQUITY, RESTITUTION & FRAUD § 1.6, at 8 (2004) (using term to describe the application of equitable principles); see also William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) ("[T]he limits of human foresight, the ambiguities of language, and the high cost of legislative deliberation combine to assure that most legislation will be enacted in a seriously incomplete form, with many areas of uncertainty left to be resolved by the courts.").

¹¹² See, e.g., KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 107 (1969) ("Turning all discretion into law would destroy the individualizing element of equity and discretion."); see also Lionel Smith, *Fusion and Tradition*, in EQUITY IN COMMERCIAL LAW, at 24–25 (James Edelman & Simon Degeling eds., 2005) (discussing how equitable principles are context specific "liability conclusions"); GLOVER, *supra* note 111, at 8 (advancing the idea of a "hermetic circle" in resolving equitable issues).

¹¹³ Anenson & Mark, *supra* note 10, at 1520–21 (discussing the retention of equitable discretion in remedies and defenses); Bray, *New Equity*, *supra* note 10, at 1036 (same).

¹¹⁴ Anenson & Mark, *supra* note 10, at 1450–53, 1515; Eskridge, *Public Values*, *supra* note 89, at 1023 (discussing how interpretation to preserve the traditional separation of responsibilities in government has been understood in institutional competence terms).

background assumption of equitable defenses recognize the importance of maintaining the existing relationship between the legislature and the courts. As a practical matter, courts have been historically better equipped to deal with the intricacies involved in the implementation of the law.¹¹⁵

Judges here and abroad are intimately familiar with this perennial problem of justice. Australian High Court Justice William Gummow, writing extracurricularly, explained: “Much of the difficulty which the courts continually encounter with statutory interpretation reflects unsettling need to accommodate what one might call a socially directed rule, expressed as an abstraction, to the infinite variety of human conduct revealed by the evidence in one case after another.”¹¹⁶ The Supreme Court has echoed similar sentiments in its commitment to equitable discretion concerning remedies and defenses which focuses concern on “the fact that special circumstances, often hard to predict, could warrant special treatment in an appropriate case.”¹¹⁷ These expressions of the judicial function reflect Aristotle’s awareness that the problem of justice “is always pressing for solution.”¹¹⁸

2. Equitable Inaction

It bears emphasizing, too, that the denial of statutory remedies is a check on the extraordinary power of equity to grant relief.¹¹⁹ The invocation of equitable defenses has a similar justification.¹²⁰ In fact, long before the industrial revolution became a catalyst for government regulation, equity courts emphasized constraints on judicial behavior to aid independence and legitimacy.¹²¹ Similarly, the Supreme Court’s

¹¹⁵ See Shapiro, *Jurisdiction and Discretion*, *supra* note 87, at 548–49 (justifying judicial discretion in equitable remedies); see also Sunstein, *Interpreting Statutes*, *supra* note 84, at 482 (advocating for a canon of construction to avoid irrationality and injustice on the ground that courts are better able to focus upon concrete and unforeseeable effects of statutory provisions).

¹¹⁶ WILLIAM GUMMOW, CHANGE AND CONTINUITY: STATUTE, EQUITY, AND FEDERALISM 18 (1999) [hereinafter GUMMOW, CHANGE AND CONTINUITY].

¹¹⁷ *Holland v. Florida*, 560 U.S. 631, 650 (2010) (citing, e.g., *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (discussing equity’s flexibility to relieve hardships that accompany “hard and fast adherence” to absolute legal rules)).

¹¹⁸ Chafee, *SELECTED ESSAYS ON EQUITY*, *supra* note 10, at iii–iv.

¹¹⁹ RENDLEMAN, *supra* note 107, at 269 (discussing equitable defenses and explaining that every edition of Pomeroy maintained that the Chancellor could refrain from granting relief on the ground that the conduct violated the court’s conscience); Anenson & Mark, *supra* note 10, at 1450–51, 1522.

¹²⁰ Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 586 (2016).

¹²¹ See, e.g., Anenson & Mayer, *supra* note 12, at 975–83 (depicting pre-regulation evolution of equity); Eric A. White, Note, *Examining Presidential Power Through the Rubric of Equity*, 108 MICH. L. REV.

recurrent rhetoric has been that discretionary denials of equitable relief are not judicial creativity, but rather, self-restraint.¹²² Like other forms of passive virtues and jurisdictional ideals, judges function as geographers in marking the boundaries of their own power.¹²³ Focusing on an equitable account, then, aids and extends Professor David Shapiro's elegant endorsement of the validity of this judicial task.¹²⁴ In his broad survey of federal law, he found judicial discretion pervasive and supported by separation of powers.¹²⁵

Those sympathetic to a Holmesian image of life and the judicial role in interpreting law as more closely parallel to painting a picture, rather than doing a sum, may imagine discretionary denials of enforcement as the negative space in art.¹²⁶ The blank area that encompasses an object in an image is considered integral to a balanced composition. This portrait could conceive discretion not as an improper enlargement of the judicial function at the expense of the political branches, but as a constriction of it; namely, the refusal of relief operates as an equitable equilibrium.

In the century after independence, for instance, the reasoning process necessarily emphasized constraints on judicial power to forego fears of tyranny. In 1831, the Supreme Court in *Cathcart v. Robinson*¹²⁷ distinguished active interference versus passive power to withhold aid in equity.¹²⁸ A few years later, in *Clarke v.*

113, 122–23 (2009) (explaining how historically judges developed limiting rules to aid legitimacy in administering equitable principles).

¹²² See *infra* notes 239–40, 247–48.

¹²³ See Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1245–70 (2001) (analyzing how federal courts wielded equity powers and determined the scope of their own subject-matter jurisdiction); see also Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971 (1990) (describing judicial line drawing in setting jurisdictional boundaries); Alexander M. Bickel, *Passive Virtues*, 75 HARV. L. REV. 40 (1961) (analyzing Supreme Court's development of doctrines that limit the judicial function).

¹²⁴ Shapiro, *Jurisdiction and Discretion*, *supra* note 87, at 547–49.

¹²⁵ *Id.* (discussing discretion to decline equitable relief as well as discretion to determine its own jurisdiction).

¹²⁶ Letter from Oliver Wendell Holmes to Lewis Einstein (July 23, 1906), in *THE ESSENTIAL HOLMES* 58 (Richard A. Posner ed., Univ. Chicago Press 1996).

¹²⁷ 30 U.S. (5 Pet.) 264 (1831).

¹²⁸ *Id.* at 275. Chief Justice Marshall declared that the Court's ability to withhold aid was "well settled." *Id.*

White,¹²⁹ the Court similarly characterized the operation of equitable defenses as passive.¹³⁰

Describing the denial of rights as mere inaction was obviously important for equitable principles in the nineteenth century.¹³¹ This is apparent despite that fact that in an era of found law, formalism, and judicial fictions, equity exhibited an almost radical form of realism.¹³² Judges did not pretend, for noble or other reasons, that equitable principles were fixed and certain.¹³³ Like today, there was candid recognition that the resolution of equity cases called for judicial discretion.¹³⁴ Equity's advantage was an open appraisal of the judicial role in reaching largely ad hoc outcomes.¹³⁵ As such, equity is as much a state of mind as a source of law.

The twentieth century conception of judges as law-makers rather than law-finders did not change the significance of judicial justifications of discretion.¹³⁶ Repositioning equity from the heaven of legal concepts into the realm of human experience likely made an explanation apposite. In certain decisions at least, the Court depicted the judicial role in invoking equitable defenses as submissive.¹³⁷ In fact, when Congress replaced the Supreme Court as the primary rule-maker in federal

¹²⁹ 37 U.S. 178 (1838).

¹³⁰ *Id.* at 192.

¹³¹ See McDowell, *Story's Science of Equity*, *supra* note 107, at 156 (explaining that Story wrote his commentaries to cultivate equity as a science that was "completely fenced in by principle" in response to the codification movement where inherited English equity was "epitomized as obnoxious").

¹³² See generally Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 263 (1975) (tracing the rise of legal formalism in the middle of the nineteenth century).

¹³³ See generally Bloom, *supra* note 123 (discussing the malleable legal invention of jurisdiction which bears a false rigid front); Shapiro, *Jurisdiction and Discretion*, *supra* note 87, at 547–49 (outlining general agreement that equitable concepts define an area of discretionary authority not to proceed).

¹³⁴ Anenson & Mark, *supra* note 10, at 1510–12, 1520 (citing Supreme Court cases expressing the discretionary nature of equity and equitable defenses). This is not to say that individualized equitable inquiries were not affected. See Horwitz, *supra* note 132, at 263 (discussing equitable jurisdiction over mortgages).

¹³⁵ Horwitz, *supra* note 132, at 263; see, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (declaring that "breadth and flexibility are inherent in equitable remedies").

¹³⁶ See, e.g., *Hecht v. Bowles*, 321 U.S. 321, 329–30 (1944) (explaining equity's qualities of mercy and practicality that allow for a nice adjustment to reconcile the public interest and private need).

¹³⁷ See, e.g., *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387–88 (1944) (Frankfurter, J., and Roberts, J., dissenting) (explaining rejection of relief as "The abstention which equity exercises . . . under the shorthand phrase of the 'clean hands doctrine' . . .").

law, the need for explanations intensified.¹³⁸ Judicial denials of statutory relief could readily be seen as incompatible with the primacy of the legislature in determining the enforcement of statutes.¹³⁹ Thus, the understanding of equitable defenses as doctrines of abstention has continued with their inclusion in statutory actions. In *Munaf v. Geren*, for example, the Supreme Court described *habeas corpus* derived from the clean hands doctrine “as part of an extraordinary power in equity to deny and not grant relief.”¹⁴⁰

In this vein, the Supreme Court should continue to acknowledge that equitable defenses are a form of equitable inaction. The Court has not done so in one of its latest cases recognizing equitable defenses in *Petrella*, or, for that matter, in any of its decisions analyzed in Part I. Federal judicial performance has come under constant attack in the twenty-first century.¹⁴¹ With public recognition that court decisions impact political affairs, judicial self-restraint in equity or otherwise has become an important professional value.¹⁴² Therefore, despite changes in the intellectual climate and social context in which decisions are made from earlier times, older jurisprudential attitudes in equity should persist. Acknowledging these doctrines as judicial self-restraint would serve an actual, as well as a symbolic, function. The acknowledgment would show that courts remain sensitive to the fact that, like other officials, they are accountable to their constituents (lawyers and their clients) and to other branches of government.¹⁴³ Such deference would also deflect

¹³⁸ Recall that the Supreme Court, in *Erie* and its progeny broadly proclaimed that there was no general federal judge-made law whether derived from common law or equity. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”). For a modern take on this landmark case, see Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 931–37 (2013) (discussing unwritten law as customary law with judges bound by tradition and reason).

¹³⁹ See Resnik, *supra* note 25, at 231–34 (criticizing the Court’s equity jurisprudence as disabling rights created by Congress); *supra* notes 72, 76–77 and accompanying text.

¹⁴⁰ See *Munaf v. Geren*, 553 U.S. 674, 693 (2008). There is considerable controversy surrounding the legal or equitable nature of *habeas corpus*. See Anenson, *Age of Statutes*, *supra* note 18, at 566 n.170.

¹⁴¹ See Levin, *supra* note 74, at 360 (“Ours is hardly an era of boundless confidence in the wisdom of federal judges. Caution, if not outright mistrust, is the order of the day.”); cf. Eskridge, *Public Values*, *supra* note 89, at 1015 (“While we do not think we are naive about the limitations and foibles of judges, courts command our respect more than do legislatures and executive agencies.”).

¹⁴² G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 155 (1976); see Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. 595, 598 (2008) (“American legal culture has long worried over undue judicial power . . .”).

¹⁴³ See David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (commenting that professions of judicial modesty reminds judges they are not legislators); see generally CASS R.

the degree of tension between the statutory text and equitable powers as well as the acknowledged ability of these decisions to influence the course of policy.¹⁴⁴

Reading the statutory language in a way that favors the status quo minimizes interference with federal judicial authority in areas of its equitable jurisdiction.¹⁴⁵ Inquiring into the historical circumstances in which equity developed in England and America to give meaning to statutory implementation preserves the allocation of roles and powers of government actors.¹⁴⁶ The allowance of judicial discretion, even to deny relief for statutory violations, demonstrates a commitment to the institutional arrangements that were worked out long ago. Accordingly, the inclusion of equitable defenses supports Professor David Shapiro's suggestion that "close questions of construction should be resolved in favor of continuity and against change."¹⁴⁷ Shapiro endorsed canons of statutory construction and other background

SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (defending minimalist jurisprudence).

¹⁴⁴ *But see* Schacter, *supra* note 97, at 655–56 (rejecting the idea that a vocabulary of restraint serves any useful purpose regarding the judicial role in statutory interpretation); *see generally* Zeppos, *supra* note 99 (critically appraising calls for candor in the judicial updating of statutes).

¹⁴⁵ *See* Bray, *Laches*, *supra* note 98, at 16 (positing the idea of jurisdiction stripping as a reason for the preference for equitable defenses in federal regulation) (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953)). Some have rationalized the power-preserving precept to issue equitable remedies as protecting against unconstitutional congressional intrusions into the judicial domain. *See, e.g.*, *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385 (1946) (Stone, C.J., concurring) (declaring the court's residual power to determine its own injunction)); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 399 n.111 (1983) (characterizing Stone's concurrence invoking *Hecht* as authority for federal judicial independence as opposed to federal judicial deference to Congress); Comment, *The Statutory Injunction as an Enforcement Weapon of Federal Agencies*, 57 YALE L.J. 1023, 1027 n.17 (1948) (explaining opinion to mean that a limitation on equitable discretion may be an unconstitutional restriction of judicial power); *cf.* Plater, *supra* note 76 n.151, at 561 (expressing skepticism that *NLRB v. Cheney Cal. Lumber Co.* is indicative of remedial power versus remedy-tailoring discretion). For a general justification of power protective presumptions, *see* Stephenson, *supra* note 89, at 38–39 (describing standard argument supporting substantive canons on grounds of advancing judicial modesty and inter-branch relations); Tyler, *supra* note 97, at 1426–27 (maintaining that "legislation should not be read loosely to impact long settled divisions of power among the branches").

¹⁴⁶ *See generally* Kroger, *supra* note 74 (examining extent to which equitable remedial powers can be justified by reference to the history of equity).

¹⁴⁷ David Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) [hereinafter Shapiro, *Statutory Interpretation*].

assumptions as representing this judicial philosophy.¹⁴⁸ He argued that the status quo as an ideology is sound because it probably best reflects what statutes mean to achieve, respects existing rights, and retains the relationship between the judiciary and the political branches of government.¹⁴⁹

Based on the course of dealing between the branches, presumptive activity related to equitable defenses can even be seen as improving the law-making process.¹⁵⁰ While the Court has yet to explicate a universal equity assumption,¹⁵¹ support for the equitable relief rule and associated assumption of remedial defenses is underscored by congressional reliance interests. Supreme Court opinions favoring equitable discretion in federal law have spanned at least seventy years of statutory innovation.¹⁵² As discussed previously, authority for the same interpretative stance

¹⁴⁸ *Id.* at 925–36. Shapiro’s study of background assumptions and other canons of construction did not include equitable principles.

¹⁴⁹ *Id.* at 941–45.

¹⁵⁰ The demand for legislative clarity, so the argument goes, also fosters a greater level of transparency and accountability in the legislative process. Stephenson, *supra* note 89, at 39; see Sunstein, *Interpreting Statutes*, *supra* note 84, at 458–59 (urging acceptance of canons that promote superior lawmaking); see also Schoenbrod, *The Measure of an Injunction*, *supra* note 79, at 657–58 (indicating that the equity canon is based on legislative intent as a result of consistent court practice that Congress has not banned).

¹⁵¹ The Supreme Court has recognized an equity conservation canon in cases involving equitable tolling. See *Holland v. Florida*, 560 U.S. 631, 660 (2010) (Scalia, J., dissenting) (noting that the presumption of equitable discretion to toll the statutory limitations period applied especially “to actions that are traditionally governed by equitable principles”).

¹⁵² Notwithstanding its early origins in interpreting state statutes, remedies scholars conceive the Court as announcing the equity-favoring method of statutory construction under federal legislation in 1942. See, e.g., RENDLEMAN, *supra* note 107, at 152 (explaining that *Hecht v. Bowles* is widely cited for a federal court’s equitable discretion); Levin, *supra* note 74, at 310 (“*Hecht* has spawned a series of decisions treating this presumption as a kind of judicially enforced clear statement rule.”) (internal quotation omitted). In its widely cited opinion in *Hecht v. Bowles*, the Court explained that the statutory language allowing equitable relief must be examined against the “requirements of equity practice with a background of several hundred years of history.” 321 U.S. 321, 328–29. A number of Supreme Court decisions since *Hecht* invoke the history preserving presumption in the context of requests for injunctions and other forms of equitable relief. See, e.g., *Miller v. French*, 530 U.S. 327 (2000) (injunctive relief); *Porter v. Warner Holding Co.* 328 U.S. 395, 398 (1946) (determining that the statute authorized a judicial order of restitution to disgorge profits because “[t]he great principles of equity, securing complete justice, should not be yielded to light inferences” (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836))). The Court reinvigorated the default rule for remedies in its watershed decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). The Supreme Court’s ruling in *eBay* confirmed the historical view that the trial judge’s decision to grant or deny an injunction is a discretionary one. *Id.* at 391 (“A major departure from the long tradition of equity practice should not be lightly implied.”) (internal quotations omitted)). A longer pedigree of this interpretative practice would be unusual given the absence of federal legislation. Accordingly, it is now black letter law that the methodology of the Supreme Court establishes a remedial floor grounded in the tradition of equity. Anenson & Mark, *supra* note 10, at 1450–53 (concluding that

under state statutes extends to the prior century.¹⁵³ The Supreme Court has explained: “Past practice does not, by itself, create power, but ‘long-continued’ practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent”¹⁵⁴ In other words, established judicial practice becomes part of the interpretative environment in which Congress acts.¹⁵⁵

Due to the procedural values associated with the constitutional structure, these ancient protective doctrines have not been deprived of vitality by virtue of their inclusion in legislation.¹⁵⁶ For the reasons stated above, the derivation of the rule and its deployment to determine the existence of equitable discretion in the potential application of equitable defenses, can be seen as a legitimate judicial function. Consequently, the equity-saving scruple guiding the Court’s statutory interpretation appears to enhance rather than undermine the structural concerns imposed under the United States Constitution. The assumption of equity may be justified under principles of precedent, as a matter of legislative intent, and as facilitating interbranch comity grounded in the doctrine of separation of powers.

equitable remedial discretion is a permanent feature of the public law landscape); *cf.* Bray, *New Equity*, *supra* note 10, at 1036, 1042 (acknowledging discretion in the Court’s remedies cases but claiming it is new).

¹⁵³ See *Brown v. Swann*, 35 U.S. (10 Pet.) 497 (1836) (using assumption of equity in the interpretation of a state statute); see also discussion *supra* Part II.A.

¹⁵⁴ *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)) (alterations in original); see *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (“We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.”); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 486 (1991) (noting that the Court presumes “that Congress legislates with knowledge of our basic rules of statutory construction”).

¹⁵⁵ See, e.g., Frank H. Easterbrook, *The Case of Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999) (explaining that legislatures pass statutes against deeply embedded “norms of interpretation and defense,” which frame the social understanding of such statutes, just as rules of grammar and diction do); Antonin Scalia, *Assorted Canard of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990) (supporting settled canons as “acquir[ing] a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language. . . .”) (alteration added); see also Barrett, *Substantive Canons*, *supra* note 85, at 160–61 (describing, without subscribing to the position, how textualists convert long-standing potentially illegitimate substantive canons into linguistic canons).

¹⁵⁶ Equity’s long pedigree also suggests that the preference for equitable discretion is consistent with constitutional limits on judicial power. See Barrett, *Substantive Canons*, *supra* note 85, at 128 (observing that the historical acceptance of certain canons of construction does not settle legitimacy, but does suggest they are consistent with constitutional limits on judicial power).

C. *The Assumption of Equity in Practice*

The previous section evaluated the authority of the federal courts to recognize and apply equitable defenses in principle. Equally problematic to democratic ideals is the interpretation and application of equitable defenses in practice. Like any technique, assumptions can be misused depending on the extent a court relies on them to replace an obvious meaning of a statutory provision.¹⁵⁷ Most scholars avoid a comprehensive assessment of the strength of particular presumptions and the relative vigor of their invocation across federal statutes.¹⁵⁸ The issue of statutory clarity is unquestionably a matter of degree that is difficult to define.¹⁵⁹ It is also, to some extent, endemic to statutory interpretation in general and not simply canonical construction in particular.¹⁶⁰

Even so, scholars disfavor super-strong presumptions that prefer one value over another because of the possibility that the statutory purpose will be thwarted.¹⁶¹ Counter-majoritarian concerns arise if judges ignore typical interpretative sources to find their own power to deny statutory relief.¹⁶² These presumptions are “yes but”

¹⁵⁷ Even scholars who generally support clear statement rules do not like superstrong ones. See, e.g., Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1591 (2000) (writing in support of clear statements rules but emphasizing that canons are simply one source of statutory meaning, similar to legislative history or judicial precedents).

¹⁵⁸ See Young, *supra* note 157, at 1577 (recognizing that “statutory clarity is . . . a question of degree” which is outside the scope of the essay).

¹⁵⁹ *Id.*; Zeppos, *supra* note 99, at 387–93 (criticizing the idea of limited candid dynamic interpretation by discussing the indeterminacy of statutes and the various ways in which a judge may be perceived to have leeway under legislation); see also Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 12 (1996) (analyzing the Supreme Court’s invocation of the avoidance canon and concluding that it “has neither determined how much ambiguity is required to apply the canon, nor has it suggested guidelines, factors or circumstances to include in an ambiguity analysis.”); cf. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship to other laws, thereby finds *less* often the triggering requirement for *Chevron* deference exists.”) (emphasis in original).

¹⁶⁰ See Barrett, *Substantive Canons*, *supra* note 85, at 119, 177–78 (commenting that often the purpose of a canon of construction is in the eye of the beholder).

¹⁶¹ See Shapiro, *Statutory Interpretation*, *supra* note 147, at 925–26 (discussing how “legislative purpose can be thwarted by excessive devotion to the status quo”).

¹⁶² See, e.g., Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 96, at 636–40 (discussing ordinary and superstrong presumptions as countermajoritarian to the extent “they permit the Court to override probable congressional preferences in statutory interpretation in favor of norms and values favored by the Court.”); see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT*

propositions.¹⁶³ Courts should not harden them into absolute rules. Rather than an iron insistence on equity everywhere and at all times, the Supreme Court should remain aware of any limitations the legislation, fairly interpreted, may place on the existence and exercise of equitable discretion.

As analyzed in Part I, the equity-pushing precept appears fairly strong in the Court's defense jurisprudence.¹⁶⁴ Like the retention of discretion in its remedies decisions,¹⁶⁵ the Supreme Court's inclination toward equitable defenses is robust. Since *Perma Life Mufflers, Inc. v. International Parts Corp.*, it has usually chosen to impose restrictions on their use rather than deny their application altogether.¹⁶⁶ This is true despite the fact that adding defenses can be perceived as construing statutory provisions as if additional words appeared within them and contradicting statutory enforcement.

AT THE BAR OF POLITICS 16–17 (1962) (first describing the judicial legitimacy concern as the “countermajoritarian difficulty”).

¹⁶³ See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 CHI. L. REV. 671, 677 (1999) [hereinafter Eskridge, *Norms, Empiricism, and Canons*].

¹⁶⁴ See discussion *supra* Part I.

¹⁶⁵ In several decisions concerning equitable relief, the Court found discretion to exist despite the language of the legislation mandating that courts “shall” provide relief and in contexts with exceptional congressional oversight. See *Holland v. Florida*, 560 U.S. 631, 646 (2010) (emphasizing that the Court “will not construe a statute to displace a courts traditional equitable authority absent the ‘clearest command’” or by necessary and inescapable inference (citing *Miller v. French*, 530 U.S. 327 (2000)); *Califano v. Yamasaki*, 442 U.S. 682, 694 n.9 (1979) (“The word ‘shall,’ particularly with reference to an equitable decision, does not eliminate all discretion”); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to [provide relief] under any and all circumstances”). Nevertheless, despite declarations that equitable discretion would only yield to a clear statement, the Supreme Court has found it removed by implication. In particular, the Court has observed that federal courts lacked power to deny equitable relief if the refusal would undermine the purposes of the legislation. *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 496 (2001) (finding congressional priorities clearly expressed to abrogate traditional equitable discretion); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193–94 (1978) (finding no judicial discretion to deny equitable relief because the purpose of the statute would be thwarted). The Court has also suggested that equitable discretion can be removed by the legislative language and history, see *Morley*, *supra* note 26, at 190–91, 183 (citing cases), although those rulings have been less frequent. See *Holland*, 560 U.S. at 646–47 (2010) (distinguishing two cases where the presumption was rebutted); see also *Goldstein*, *supra* note 78, at 515 (explaining there has not been very many times that the Supreme Court decided that it lacks discretion to deny statutory relief). The presumption may not be perfectly weighted, but scholars have found the Court’s cases fall into a fairly consistent pattern. Levin, *supra* note 74, at 340.

¹⁶⁶ See discussion *supra* Part I; Anenson, *Age of Statutes*, *supra* note 18, at 563.

However, the Court has been constrained in supplying the substance of equitable defenses by external sources of custom and internal sources of precedent in alignment with statutory purposes.¹⁶⁷ Significantly, the Court's more recent cases have also narrowed equitable defenses either by limiting their application to certain relief,¹⁶⁸ plaintiff classes,¹⁶⁹ or through heightened criteria like exceptionalism.¹⁷⁰ Furthermore, if the defense still survives under any appellate court imposed parameters, the district judge will also consider statutory goals in determining whether to apply the defense either as an express or implicit requirement in the

¹⁶⁷ Anenson, *Age of Statutes*, *supra* note 18, at 553–55 (describing the Supreme Court's method of making equitable defenses); discussion *supra* Part III; accord Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 10–17 (2015) [hereinafter Nelson, *Federal Common Law*] (discussing the “different senses in which judges might ‘make’ the common law”); *id.* at 45–48 (arguing that reliance on general American jurisprudence to fill vacuums left by federal law gives judges less discretion than finding that the issue falls within the domain of the statute where judges may resort to unfettered policy analysis).

¹⁶⁸ Anenson, *Age of Statutes*, *supra* note 18, at 546. In *McKennon v. Nashville Banner Publishing Co.*, the Supreme Court restricted the defense by reference to the remedy. 513 U.S. 352, 361–63. The Court declared that the unclean hands doctrine is applicable to bar reinstatement and front pay. *Id.* at 362. It also held that the defense may bar back pay for the time after the employer in fact discovered the employee's misconduct. *Id.* The Court ruled, however, that the defense is not generally available to negate back pay from the date of the unlawful discharge to the date when the misconduct was discovered. *Id.* It decided that an absolute rule barring any recovery of back pay would undermine the statutory objective of requiring employers to examine their motives and penalizing them when they arise from age discrimination. *Id.* *Petrella* and *SCA Hygiene* also precluded the use of laches for damages. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1971 (2014) (copyright law); *SCA Hygiene Products v. First Quality Baby Products*, 137 S. Ct. 954, 967 (2017) (patent law).

¹⁶⁹ Anenson, *Age of Statutes*, *supra* note 18, at 546. The Supreme Court in *Bateman, Eichler, Hill Richards, Inc. v. Berner*, for example, provided guidance for the application of the defense on the issue of equal fault. 472 U.S. 299, 312 (1985). The Court concluded that securities professionals like insiders and broker-dealers usually bear more responsibility for violating the securities laws than investors for trading on inside information. *Id.* at 312–13. In *Pinter v. Dahl*, the Supreme Court further clarified that the *in pari delicto* defense is not available against plaintiffs who act primarily as investors rather than promoters in light of statutory policy. 486 U.S. 622, 638–39 (1988).

¹⁷⁰ Anenson, *Age of Statutes*, *supra* note 18, at 546. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Court required exceptional circumstances for the application of laches to bar relief and provided examples of exceptional cases from lower court decisions. 134 S. Ct. 1962, 1978 (2014) (explaining these cases are “illustrative”). Given that only a fraction of the defendant's income was at stake due to the delay, the Supreme Court concluded that this was not such an extraordinary case. *Id.* at 1978. The plaintiff in *Petrella* was seeking disgorgement of unjust gains as well as an injunction against future infringement. *Id.* The Court determined that disgorgement was equitable. *Id.* at 1967 n.1. Similarly, in *McKennon*, it emphasized that the trial court can deviate from the general rule of employee misconduct by considering any “extraordinary equitable circumstances that affect the legitimate interests of either party.” 513 U.S. at 362 (1995).

exercise of its traditional discretion.¹⁷¹ Thus, even if equitable defenses are available, the district judge can still choose to deny them and grant statutory relief. The Court's new emphasis on equitable defenses as adjustment, rather than eradication, mechanisms in *Petrella v. Metro-Goldwyn-Mayer, Inc.* is further evidence of this trend.¹⁷² In that case, the Court distinguished between applying laches at the outset of the litigation to bar relief and accounting for delay at the remedial stage in adjusting relief.¹⁷³ The former situation limited laches to exceptional circumstances while the latter provided a non-exclusive list of factors to assist district courts in making that decision.¹⁷⁴ Accordingly, the Court should not be seen as elevating its common law function over statutes by preferring the former values over the latter to defeat principles of accountability. At both appellate and trial court levels, an equitable analysis subordinates private law to public right.

The Supreme Court has remained true to the discretionary character of the defenses while putting a brake on any untoward equitable adventurism. The Court is providing appellate oversight to restrict equitable defenses while paradoxically preserving their discretionary character.¹⁷⁵ An expansive attitude of the inclusion of

¹⁷¹ *Pinter v. Dahl*, 486 U.S. 622, 633–36 (1988) (extending the two-part test of equal fault and public policy for the application of *in pari delicto* to all securities cases; see Anenson, *Age of Statutes*, *supra* note 18, at 550–52 (summarizing cases retaining residual discretion of equitable defenses); see also Anenson & Mark, *supra* note 10, at 1520 (listing federal and state cases finding public policy exception to doctrine of unclean hands).

¹⁷² *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1978–79 (2014); see also Anenson & Mark, *supra* note 10, at 1496–1502 (suggesting that Supreme Court doctrine may support using the defense of inequitable conduct as an adjustment mechanism to refuse enforcement on a patent claim by claim basis rather than as a complete ban on the entire case).

¹⁷³ *Petrella*, 134 S. Ct. at 1978–79.

¹⁷⁴ *Id.* at 1979 (citing *Haas v. Leo Feist, Inc.*, 234 F. 105, 107–08 (S.D.N.Y. 1916)). The Court emphasized that the factors were to help examine detrimental reliance on the delay, but also explained that reliance or its absence “is not the *sine qua non* for adjustment of injunctive relief or profits.” *Id.* at 1978 n.22. Courts sitting in equity often articulated a hard and soft version of delay-based inequity. However, to the extent the Court labels the adjustment version “laches” may be confusing. See RODERICK PITT MEAGHER ET AL., MEAGHER GUMMOW & LEHANE’S EQUITY: DOCTRINES AND REMEDIES 804–05 (4th ed. 2002) (explaining that the word is used in different senses in the cases and has an ambulatory connotation); *cf. id.* at 801 (commenting on the novelty of delay short of laches denying equitable relief).

¹⁷⁵ See Anenson, *Age of Statutes*, *supra* note 18, at 556 (describing the Supreme Court’s developing supervisory role as no longer eschewing formulas, providing more direction than resolving defenses under the case specific facts, and articulating parameters for equitable defenses that allow for exceptions enlightened by prevailing precedent); *id.* at 19 (explaining the Court’s commitment to trial court discretion by allowing for escape valves that direct district judges to case specific considerations informed by existing decisional law and by preserving the judges’ residual discretion not to apply the defense).

equitable defenses has corresponded with a more restrictive view of their application. Therefore, the manner in which the federal courts are using their discretion makes the initial determination that such authority exists more acceptable.¹⁷⁶ From a remedies perspective, it presents additional support for Professor Tracy Thomas' position that neither the image of an omnipotent judge nor that of an activist policymaker adequately explains the actual remedial practice that is used by the courts in a more traditional and tailored way to address public law problems.¹⁷⁷

Moreover, to the extent the Court exhibits excessive devotion to equitable discretion in contravention of clear statutory direction (or the lower courts consistently abuse their discretion in the application of equitable defenses), Congress can always amend or abolish such well-settled principles if it chooses.¹⁷⁸ Over several decades, for instance, the Court attempted to draw fault lines between legitimate protection against contributory infringement and illegitimate patent misuse before Congress amended the Patent Act to resolve the matter.¹⁷⁹ The assumption of equity builds barriers to legislative action without barring those actions entirely.

III. THE COMPETENCE OBJECTION (RULE OF LAW VALUES)

In addition to the inevitable issues of authority that arise in exhuming discretionary defenses, which allow a judge to refuse to remedy statutory violations, there are also matters of judicial competence. Judges should recognize equitable doctrines consistent with rule of law values. These potential problems can be examined on the basis of clarity, consistency, and certainty.

¹⁷⁶ Even Professor Plater, who mentioned that legislation left courts free to apply equitable defenses undisturbed, determined that statutory declarations of the public interest affect these doctrines in some way. Plater, *supra* note 76, at 562–63.

¹⁷⁷ Thomas, *Prophylactic Relief*, *supra* note 72, at 100 (analyzing equitable relief).

¹⁷⁸ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (determining that the rate of congressional reversal of Supreme Court statutory interpretation decisions is higher than previously thought); see also Young, *supra* note 157, at 1596–97 (explaining the avoidance canon as imposing only “soft limits” on the legislature because Congress can reverse the ruling by speaking more clearly).

¹⁷⁹ *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 199 (1980). Congress amended the Patent Act to expressly limit both the doctrines of patent misuse and contributory infringement and identified a basic dividing line between them. *Id.* at 213. Finding the text of the amendment ambiguous, the majority in *Dawson* relied on the decisional history involving the interplay between the doctrines leading up to the legislation as well as legislative history. *Id.*

A. *Clarity*

A common critique of canons of statutory construction dating to Llewellyn is that they obscure analysis and rationalize results reached on other grounds.¹⁸⁰ There are similar criticisms of the Supreme Court's canonical construction concerning the scope of judicial discretion for statutory remedies. For instance, while Professor Dan Farber's rejection of the clear statement rule focused on equitable remedies in environmental statutes, his larger concern was that vague assumptions of equitable authority should not be an excuse for imprecise thinking and exploitation.¹⁸¹

If used correctly and consistently, however, canons limit appellate discretion similar to the way that equitable maxims constrain trial court discretion.¹⁸² As mentioned previously, they provide predictability and put Congress and citizens on notice as to the meaning of the law.¹⁸³ Yet given the general complaints about covert canons, the Supreme Court's invisible assumption of discretionary defenses makes an already opaque subject even more abstruse.¹⁸⁴ Thus, it would be helpful for the Court to expressly identify the assumption of equitable defenses in future cases to

¹⁸⁰ See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); see also Eskridge, *All About Words*, *supra* note 91, at 1100 (discussing Karl Llewellyn's "nasty list" showing every canon to have a counter-canon negating it). Llewellyn, however, largely assessed linguistic as opposed to substantive canons. Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 96, at 595. His canons have also been challenged on the basis that they are not well known or truly conflicting. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 26–27 (1997); Shapiro, *Statutory Interpretation*, *supra* note 147, at 924–25; Sunstein, *Interpreting Statutes*, *supra* note 84, at 441 (finding canons neither inconsistent nor indeterminate).

¹⁸¹ See Farber, *Equitable Discretion*, *supra* note 75, at 515 ("The focus should always be on Congressional intent . . . unclouded by the equitable mystique."); see also Rendleman, *Stages of Equitable Discretion*, *supra* note 70, at 1427 (noting that the stakes are higher in environmental litigation where it is an injunction or nothing rather than leaving the plaintiff to damages).

¹⁸² *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) (regarding equitable maxims as "rules of construction"); see also MCCLINTOCK, *supra* note 29, § 24, at 52 (maxims of equity are "memory aids" as principles to exercise discretion).

¹⁸³ See discussion *supra* Part II. See, e.g., Eskridge, *Norms, Empiricism, and Canons*, *supra* note 163, at 678–82 (justifying canons on grounds that they make law more predictable and objective).

¹⁸⁴ See Eskridge, *All About Words*, *supra* note 91, at 1088 (supporting evolution of canons so long as they are open and public-regarding); see also HUHNS, *supra* note 71, at 62–63 ("The disclosure of the true reasons for a decision performs a valuable function: the state premises of the law will over time be empirically tested."); RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 204–07 (1985) (discussing the value of candor in the judicial process).

avoid criticism of a canon's clandestine operation.¹⁸⁵ Articulating the interpretative principle would enhance candor in deciding equitable defenses, facilitate the operation of political checks,¹⁸⁶ and deflect criticism that judges are using such principles in a political manner.¹⁸⁷ Explicit recognition to include and apply equitable defenses would also provide horizontal continuity concerning interpretation across statutes as well as vertical coherence as an equity portal to the past.¹⁸⁸

As analyzed in Part II, the remedies canon captures the Court's own use of interpretative presumptions concerning equitable defenses. Where appropriate, the Court should link the tradition-tilting tenet to refuse statutory relief for equitable defenses to its asserted power to decide equitable remedies.¹⁸⁹ Although still not reciting the remedies rule of interpretation, the Court's recent decisions have been more sensitive in tying textually granted remedies to remedial defenses.¹⁹⁰ To be sure, the latest cases show that the search for a textual gateway to delegated discretion may be increasingly important. The pro-delegation presumption provides the Court with discretion to decide whether equitable defenses apply at all and sets forth strictures for their application. In determining to admit equitable defenses in

¹⁸⁵ Eskridge, *Norms, Empiricism, and Canons*, *supra* note 163, at 678 (listing rule of law aspirations for canons to be objective, consistent, and transparent).

¹⁸⁶ Young, *supra* note 157, at 1608 (maintaining that "clear statement rules may prompt the 'sober second thought' for legislatures in enacting statutes that implicate those values) (quoting Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978)).

¹⁸⁷ See, e.g., Young, *supra* note 157, at 1599. Cynics of the current stance of the Supreme Court, in limiting liability under statutory enactments, should be concerned with the recognition and application of equitable defenses that would fit this trend. See Resnik, *supra* note 24, at 225 (concluding that Congress should not look to the federal courts to enforce national policies).

¹⁸⁸ See Eskridge, *Public Values*, *supra* note 89, at 1037–40 (advising that the Supreme Court often presumptively interprets the language or phraseology in two similar federal laws consistently with one another and explains the rule of interpretation by reference to the traditional legal process idea of imputed legislative intent); *id.* at 1039 (explaining that "there is no statutory rule that forces different statutory schemes to be harmonious," but that the *in pari materia* rule alleviates disharmonies); *supra* note 24 and accompanying text. Consistency should be in the method of interpretation. See *infra* Part III.B. and accompanying text.

¹⁸⁹ See *California v. Am. Stores Co.*, 495 U.S. 271, 295–96 (1990) (equating statutory divestiture to equitable rescission under the Clayton Act and cautioning in dicta that such remedy may be barred by equitable defenses such as laches or unclean hands); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (explaining unclean hands as part of judicial discretion to award equitable relief).

¹⁹⁰ See discussion *supra* Part II.

federal legislation, federal courts exercise their traditional, textually expressed discretionary remedial powers.

In fact, the clear statement rule with respect to remedies can be considered a remnant of the equity of the statute doctrine.¹⁹¹ While the doctrine's demise has been announced by scholars here and abroad, it may have simply been relocated in interpreting provisions for equitable relief.¹⁹² When equity is *in* the statute, the words carry with them a method of analysis. The Supreme Court has consistently defined equitable defenses according to their historical descriptions and rationales as well as confined them to their customary contexts.¹⁹³ But it has also subjugated them to case

¹⁹¹ GUMMOW, CHANGE AND CONTINUITY, *supra* note 116, at 20 (commenting that interpretive presumptions are a remnant of the Equity of the Statute doctrine); *see also* Barrett, *Substantive Canons*, *supra* note 85, at 127 (explaining that the Equity of the Statute doctrine was inherited from the English common law).

¹⁹² Scholars have noted the rise and fall of the Equity of the Statute doctrine allowing for policy analysis in statutory interpretation. Manning, *Equity of the Statute*, *supra* note 90, at 125; *cf.* Andrew Burrows, *The Relationship Between Common Law and Statute in the Law of Obligations*, 128 L. Q. REV. 232, 241 (2012) (“[T]he mediaeval idea of the ‘equity of the statute’ fell out of favour in the 18th century.”) (English context); *see also* PETER W. YOUNG ET AL., ON EQUITY 254 (2009) (surmising that the legacy of the Equity of the Statute doctrine is purposive construction); Frederick J. de Sloovere, *The Equity and Reason of a Statute*, 21 CORNELL L. REV. 591, 595 (1936) (same).

¹⁹³ For example, the Court relied on the classic definition of unclean hands in its patent decisions to withhold relief for infringement as a result of bribery, perjury, and the suppression of evidence related to the patent. *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816–20 (1945) (perjury and suppression of evidence); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 240 (1944) (manufacture and suppression of evidence); Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 243 (1933) (bribery and suppression of evidence); *see also* Anenson & Mark, *supra* note 10, at 1451–52 (explaining that the Court relied on historical evidence, such as the original English case to recognize the defense, as well as secondary materials like the treatise authored by Sir Richard Francis credited with the idea of the maxim and American equity treatises authored by John Norton Pomeroy and Joseph Story). It similarly repeated the traditional test of *in pari delicto* in securities law in *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985). The Court explained that the defense “derives from the Latin, *in pari delicto potior est conditio defendentis*: ‘In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.’” *Id.* at 306 (“[D]enying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.”) (alterations in original). The doctrine stands for the idea that “courts should not lend their good offices to mediating disputes among wrongdoers.” *Id.* In *Pinter v. Dahl*, 486 U.S. 622 (1988), the Supreme Court restated that the two prongs of *Bateman, Eichler, Hill Richards, Inc. v. Berner*—equal responsibility for the underlying illegality and public policy—track the defense’s traditional criteria. *Id.* at 632–33. Likewise, in *US Airways, Inc. v. McCutchen*, the Court carefully delineated the equitable defenses at issue in employee benefits law and their foundations in light of customary practice. 133 S. Ct. 1537, 1547–50 (2013). Comparably, in the recent copyright case *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Court limited laches to its historical setting of equitable relief and refused the opportunity to fuse laches to legal relief for the first time. 134 S. Ct. 1962, 1967 (2014); *see also* SCA Hygiene Products v. First Quality Baby Products, 137 S. Ct. 954, 957, 959 n.2 (2017) (extending

and other consequences, including statutory goals.¹⁹⁴ Equity's historic connection to the public interest has been used in the service of legislative objectives.¹⁹⁵ In this way, these discretionary doctrines remain retrospective and retroactive phenomena fixed to their function. The cases show that it is a method of history moderated by policy analysis pursuant to statutory purposes and bound down by precedent.¹⁹⁶ In other words, there is no equity "in the air."¹⁹⁷ It is grounded in law. As fully explored

Petrella's refusal to extend laches to damages in patent law but not ruling on the defense's application to equitable relief).

¹⁹⁴ In *Perma Life Mufflers, Inc. v. International Parts Corp.*, an antitrust case, all of the concurring opinions analyzed the availability of the *in pari delicto* defense in antitrust law on policy grounds. See generally *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). The majority opinion indicated that a plaintiff's own delinquency under the antitrust laws would never defeat his or her statutory right to sue. *Id.* at 138. Furthermore, the Supreme Court in *Pinter v. Dahl* articulated the reasons that the *in pari delicto* doctrine's two elements fulfilled the objectives of the securities statutes. *Pinter v. Dahl*, 486 U.S. 622, 633–36 (1988). The Supreme Court has used the public interest doctrine to expand and contract equitable defenses. See *Virginian R. Co. v. System Federation*, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."); Shreve, *supra* note 145, at 382 ("The point [that equity courts may go further to give and withhold relief in the public interest] has been restated so often by federal courts that it has become an aphorism."). In endorsing unclean hands in patent law, the Supreme Court declared in *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*: "Where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions." See *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945). Correspondingly, the Court relied on the public interest criterion to constrain the employee misconduct defense, derived from unclean hands, in statutory actions. In the employment law case of *McKennon v. Nashville Banner Publ. Co.*, the Court explained that because the defense is founded on public policy, it might also be relaxed because of it. See *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 360 (1995).

¹⁹⁵ Anenson, *Age of Statutes*, *supra* note 18, at 543; cf. Farber, *Judicial and Agency Discretion*, *supra* note 9, at 123–24 (reviewing Supreme Court cases involving judicial and agency discretion and concluding that there is no discretion to override statutory goals); see also MEAGHER ET AL., *supra* note 174, § 1201, at 335 (explaining how equity intervened when there was "tendency to violate the public confidence or injure the public interest." (citing STORY, COMMENTARIES, *supra* note 29, § 258)); Anenson, *A View from Equity*, *supra* note 10, at 268 ("[T]he tradition of equity is sensitive to the public interest."). For a discussion of equitable defenses and the public interest, see Anenson & Mark, *supra* note 10, at 1503–04 (discussing extension of the equitable doctrine of unclean hands in the public interest); Anenson & Mayer, *supra* note 12, at 969 (discussing equitable defenses in light of the state courts time-honored role as guardians of public policy).

¹⁹⁶ Anenson, *Age of Statutes*, *supra* note 18, at 554–55 (calling the Supreme Court a medieval modernist in its approach to equitable defenses because it relies on history to define the defense, but also considers the policy objectives to amend its application).

¹⁹⁷ Paul Finn, *Unconscionable Conduct*, 8 J. CONT. L. 37, 43 (1994) (analogizing between the proximate causation requirement in torts and the necessary connection between unconscionable conduct and a party's injury in contract before legal consequences in equity will attach).

later in Part III.C., the Court is building a federal equity jurisprudence out of the general common law that reflects the shared consensus across the several states.¹⁹⁸

The Supreme Court should clarify that the existence of equitable remedial authority to deny relief includes the power to choose equitable defenses absent a clear statement from Congress to the contrary.¹⁹⁹ Correspondingly, the Court should announce that the absence of such remedial discretion would preclude equitable defenses. Justice Black, writing for the Court in *United States v. City of San Francisco*,²⁰⁰ indicated that the lack of discretion to deny relief also excluded equitable maxims.²⁰¹ He explained: “[T]his case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued.”²⁰² Equity interpretative aids should bring closer congruence between remedies and related defenses.

Whether or not premised on positive expressions of equitable relief in the statute, the Court could also connect equitable defenses to its larger jurisprudence assimilating common law and statute.²⁰³ The past-preserving presumption of discretionary defenses could be seen as an incorporation of judge-made doctrines under the common law canon of construction.²⁰⁴ The canon continues to be controversial among academics and certain judges.²⁰⁵ Nevertheless, in a broad

¹⁹⁸ See generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006) [hereinafter Nelson, *General Law*] (describing how federal courts continue to draw rules of decision from general American jurisprudence).

¹⁹⁹ Cf. Plater, *supra* note 76, at 563 (“If the courts themselves choose to eclipse traditional concerns in the light of statutory definitions of public interest it remains equity’s own balance.”). See discussion *infra* Part III.B. for a discussion of the *Petrella* majority’s rationale concerning the remedial defense of laches.

²⁰⁰ 310 U.S. 16 (1940).

²⁰¹ *Id.* at 30.

²⁰² *Id.*

²⁰³ It is well established that “Congress is understood to legislate against a background of common law principles.” *Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651, 1666 n.3 (2011) (Sotomayor, J., dissenting) (quoting *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991)); Eskridge, *Public Values*, *supra* note 89, at 1052 (arguing that the common law serves as the presumptive starting place for interpretation when generally worded statutes are analogous to an area of common law experience that Congress left to courts to develop).

²⁰⁴ See Eskridge, *Public Values*, *supra* note 89, at 1054–55 n.218 (citing *Pinter v. Dahl*, 486 U.S. 622 (1988) as evidence that the Court relies on principles of the common law to fill gaps in common law statutes); Goldstein, *supra* note 78, at 511 (referencing common law canon for equitable balancing).

²⁰⁵ See Shapiro, *Statutory Interpretation*, *supra* note 147, at 936 (“One of the oldest and most maligned maxims of statutory construction is that statutes in derogation of the common law should be strictly

survey of federal law, Professor Caleb Nelson found this approach pervasive.²⁰⁶ Notably, areas of absorption include across-the-board defenses under federal criminal law²⁰⁷ and remedies.²⁰⁸

construed.”); *see also id.* n.74 (citing Supreme Court cases dating back to 1812). Scholars criticized the original version of the canon that imported private law into legislation without considering its effect on public law goals. *See, e.g.,* Jefferson B. Fordam & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950); Barbara Page, *Statutes in the Common Law: The Canon as an Analytical Tool*, 1956 WIS. L. REV. 78 (1956). However, the Supreme Court’s implicit inclusion of equitable defenses in a silent statute can be grounded in the modern rule of statutory construction that the common law seals spaces in legislation unless inconsistent with statutory policy. Eskridge, *Public Values*, *supra* note 89, at 1051; *see* Jamison v. Encarnation, 281 U.S. 635, 640 (1930) (“The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.”), *quoted in* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 782 (1952). This reformed version of the canon has been lauded by scholars on rule of law grounds. Eskridge, *Public Values*, *supra* note 89, at 1051 (concluding that common law canon contributed to the law’s integrity in various areas like securities, anti-trust, and discrimination); *see also* Shapiro, *Statutory Interpretation*, *supra* note 147, at 937 (describing the common law canon as recognizing the value of “minimal disruption of existing arrangements consistent with the language and purpose of the law”). It has even been accepted by textualists on the Supreme Court in certain contexts. *B&B Hardware, Inc. v. Hargis Indus. Inc.*, 135 S. Ct. 1293, 1311 (2015) (quoting *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991)) (agreeing with the principle articulated by the majority that “Congress is understood to legislate against a background of common law adjudicative principles.”) (Thomas, J., dissenting); *cf.* Barrett, *Substantive Canons*, *supra* note 85, at 121–22 n.54 (explaining that textualists reject the common law canon (citing *ANTONIN SCALIA, A MATTER OF INTERPRETATION* 29 (1997) (remarking that the canon “seems like a sheer power grab”)). Approximating the remedies rule, this kinder, gentler version of the classic canon regulates interpretive discretion by conditioning the availability of defenses on the absence of a contrary meaning.

²⁰⁶ *See* Nelson, *General Law*, *supra* note 198, at 524 (finding the incorporation of judge-made rules of decision a reincarnation of the common law canon).

²⁰⁷ Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and the Unwritten Law*, 80 U. CHI. L. REV. 657, 751–58 (2013) [hereinafter Nelson, *Interaction Between Statutes and the Unwritten Law*] (analyzing the recognition of criminal defenses in federal law).

²⁰⁸ *See* *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 421 (2009) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 35 (1990)) (finding punitive damages available as a remedy in light of “general principles of maritime tort law”). In preserving its equitable discretion under a statute to stay judgment pending appeal, the Court emphasized the “presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (articulating the idea that statutes should be read in favor of preserving the common law or general maritime law)). It is unclear whether the Supreme Court is constricting the common law canon to determine the content of federal law as opposed to its availability. *See* *Samantar v. Yousaf*, 560 U.S. 305, 320 (2010) (explaining that the common law canon helps courts interpret statutes that clearly cover the field and does not help with the antecedent question).

There are other doctrinal canons, or resort to the Constitution itself, that may explain the recognition of equitable defenses as well.²⁰⁹ The text-to-tradition technique could be based on the judicial power under the Constitution.²¹⁰ The protective presumption of equitable discretion in statutory actions may be that Congress is seen as approaching the constitutional periphery of undue interference with the judiciary's power under Article III.²¹¹ Therefore, the assumption of equity could be conceived as avoiding constitutional doubts about restricting the equity jurisdiction of the federal courts²¹² or more generally as abrogating their authority concerning core adjudicative activities.²¹³ Relying in part on Professor Amy Coney

²⁰⁹ The mapping of equitable defenses and its implications under different canons of construction, or directly under the Constitution, is the subject of future research. See T. Leigh Anenson, *Canons, Coherence, and Equitable Defenses* (working paper, on file with author).

²¹⁰ It is an open question whether and to what extent that Congress can alter the law of equitable remedies. Bray, *New Equity*, *supra* note 10, at 1014 n.80; Resnik, *supra* note 25, at 269–70 (raising issue of whether Congress can intrude on the inherent powers of the federal courts over equity); Shreve, *supra* note 145, at 399 n.111 (characterizing Stone's concurrence in *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385 (1946) as invoking *Hecht* as authority for federal judicial independence as opposed to federal judicial deference to Congress); see also *Chambers v. NASCO Inc.*, 501 U.S. 32, 47–48 (1991) (endorsing the inherent power of the federal courts to award attorney fees against an opposing party for bad faith conduct without exhausting other remedies provided by the Federal Rules of Civil Procedure) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (finding authority to deny equitable relief provided by statute)).

²¹¹ Eskridge, *Public Values*, *supra* note 89, at 1023 (discussing presumption of equitable discretion for statutory remedies as safeguarding against Congress stripping the courts of their inherent powers); see also Barrett, *Substantive Canons*, *supra* note 85, at 178 (rejecting separation of powers rationale for substantive canons in favor of more specific constitutional values); Young, *supra* note 157, at 1592–93 (finding Article III a more persuasive ground than separation of powers in justifying the avoidance canon in particular jurisdiction-stripping cases).

²¹² There are two versions of the avoidance canon recognized by the Supreme Court. Eskridge, *Public Values*, *supra* note 89, at 1020–21. One version avoids an interpretation that would render the statute unconstitutional. *Id.* The other version avoids constitutional concerns even when the broader interpretation would not be invalid. *Id.* at 1021. The latter version is controversial. Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015) (reviewing Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015)). Compare Stephenson, *supra* note 89, at 38–39 (describing standard argument supporting substantive canons on grounds of advancing judicial modesty and inter-branch relations); Tyler, *supra* note 97, at 1426–27 (maintaining that new legislation should not be read loosely to impact long settled divisions of power among the branches) with Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (arguing that the avoidance canon creates a “judge-made ‘penumbra’” with a similar prohibitory effect as the Constitution).

²¹³ See Daniel J. Meador, *Inherent Judicial Authority in Civil Litigation*, 73 TEX. L. REV. 1805, 1819 (1995) (discussing bases of inherent judicial authority); Robert J. Pushaw, Jr., *The Inherent Powers of*

Barrett's work, I previously suggested a process-based theory where equitable defenses used primarily in a protect-the-court capacity may be understood as a form of federal procedural (as opposed to substantive) common law or as part of a court's inherent authority whose effectiveness may or may not be diminished by Congress.²¹⁴ Therefore, at least in some cases, the assertion of equitable defenses can be appreciated as preserving this pre-existing inherent power to safeguard the judiciary's constitutional core.²¹⁵

Two other risks are related to Llewellyn's criticism of covert canons that conceal legal reasoning and have implications for the incorporation of equitable defenses.²¹⁶ First, courts may be inconsistent in their use of statutory default rules. Second, the judicial practice of presumptions may lead to an unacceptable degree of uncertainty in the law.

B. Consistency

A concern with the canonical construction is the potential for inconsistent application.²¹⁷ There is some risk of irregularities undermining a uniform approach

Federal Courts and the Structural Constitution, 86 IOWA L. REV. 735 (2001) (mapping the inherent power of the judiciary).

²¹⁴ Anenson, *Process-Based Theory*, *supra* note 8, at 533–34 (citing Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 833, 879–88 (2008) (theorizing an area of federal procedural common law)). The Court's decisions on unclean hands in patent law have this characteristic. These decisions applied the doctrine of unclean hands to ban perjury and other evidentiary misconduct in securing a patent against plaintiffs seeking to enforce it. *See* Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816–17 (1945); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), *abrogated by* Standard Oil Co. v. United States, 429 U.S. 17 (1976); *see also* discussion *supra* Part I. Also instructive is that lower federal courts have asserted the federal law of equitable doctrines like unclean hands in diversity cases without an *Erie* analysis. Anenson, *Process-Based Theory*, *supra* note 8, at 535 (citing federal cases).

²¹⁵ The infusion of equitable defenses through the foregoing spectrum of interpretative conventions advances Professor Eskridge's thesis that canons are an important source of public values in statutory law. Eskridge, *Public Values*, *supra* note 89, at 1018 (describing the constitution, statutes, and the common law as three sources of public values in federal law). As an antecedent for public values analysis, equity-protective principles are a powerful unifying force by which the court advances and articulates shared ideals in the course of statutory interpretation. *Id.* at 1011 (describing canons as an antecedent to modern public values analysis).

²¹⁶ *See* Schacter, *supra* note 97, at 650 (describing competency critique that judges lack skills and resources to create and use certain kinds of normative canons).

²¹⁷ In his survey of canons of construction, Professor Eskridge found that the Supreme Court prefers them to preserve procedural values such as federalism rather than substantive values like nondiscrimination. Eskridge, *Public Values*, *supra* note 89, at 1084–93.

to equitable defenses.²¹⁸ The Court has not identified, much less accounted for, the asymmetries that appear across statutory contexts.

Consider the Court's controversial and divided decisions interpreting the Employee Retirement Income Security Act of 1974 (ERISA).²¹⁹ The Court has not used the equitable relief canon to understand its equity power under the statute.²²⁰ The statutory language specifies that courts may award "appropriate" equitable relief, which the Supreme Court has seemingly read as a limitation on its equity power.²²¹ The Court has caused confusion by restricting relief to that "typically" available in equity.²²² Scholars have questioned whether the Court simply meant historically an equitable remedy or whether the inquiry depended on the frequency of its customary use.²²³

²¹⁸ See Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 337–38 (2007) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 198–202 (2006)) (discussing Vermeule's view of favoring presumptions on issues that are inevitable on decision cost grounds).

²¹⁹ 29 U.S.C. §§ 1001–1461; see, e.g., *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (5–4), *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (5–4).

²²⁰ A way of rationalizing the Court's approach to remedies under ERISA may be to say that it was asking a different question. The most prominent use of the equitable relief presumption has occurred when the Court is deciding whether it has retained its equitable discretion under the statute to deny injunctive relief or whether, contrary to that tradition, it must automatically grant relief. Nevertheless, the Court has also used the remedies canon beyond the injunction inquiry to decide what kind of equitable remedies are available in enforcing a statute. See *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (interpreting the power of the federal court in an enforcement proceeding under 205(a) of the Emergency Price Control Act of 1942). In *Porter v. Warner Holding Co.*, the Court considered whether the statute authorized a judicial order of restitution to disgorge profits. The Court declared that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.*

²²¹ See *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) (rejecting definition of statutory provision that district court was allowed to order all relief an equity court could provide for the narrower definition that the power extends to only that relief typically available in equity); see also John Langbein, *What ERISA Means by "Equitable,"* 103 COLUM. L. REV. 1317, 1343 (2003) (criticizing the Court's pinched version of remedies). The doctrinal test the Supreme Court developed to comprehend the equitable authority of the federal courts has two parts. First, is the nature of the relief equitable? *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (explaining that "not all relief falling under the rubric of restitution was available in equity"); *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011) (citing *Mertens*, 508 U.S. at 257). And second, was it typically available in equity? See *id.*

²²² Langbein, *supra* note 221, at 1353.

²²³ *Id.* at 1343; Bray, *New Equity*, *supra* note 10, at 1014–15 (analyzing ERISA cases).

Congress has used the term “appropriate” in granting equitable remedies in other statutes without the Supreme Court giving it special mention or otherwise indicating that it tempers the traditional discretion of the federal courts.²²⁴ For instance, “appropriate” is in the remedial language of the employment discrimination statutes where the Court begins with the usual interpretative baseline of historic equity.²²⁵ In *McCutchen*, the majority cited the “appropriate” language to determine the conditions for the application of equitable defenses.²²⁶ Yet it did so without resort to counting the number of times it or other courts sitting in equity invoked those defenses.²²⁷ While the Court’s cases fit with an assumption of *traditional* equity outlined in Part I, clarifying whether the ERISA cases involving equitable relief fall under the absorption of ancient equity umbrella (or why the inquiry is different) would clarify the law and dispel any bias toward certain subject areas.²²⁸

More troubling concerning a consistent doctrinal assumption of equity is the majority opinion in *Petrella v. Metro-Goldwyn-Mayer, Inc.* The Court ultimately adopted laches in equity with heightened criteria in a way that is consistent with its approach to equitable defenses.²²⁹ Nevertheless, the majority in *Petrella* rejected the

²²⁴ The Supreme Court has construed the word “appropriate” to qualify other statutory language. In *Sossamon v. Texas*, Justice Thomas, writing for the majority, declared that the statute’s authorization of “appropriate relief against a government,” is not an unequivocal expression of state consent to waive sovereign immunity for the remedy of damages. 563 U.S. 277, 284–88 (2011) (interpreting Religious Land Use and Institutionalized Persons Act of 2000). He explained that “appropriate relief” is open-ended and ambiguous about the relief it includes because “appropriate” is inherently context-dependent. *Id.* at 289. *Cf. id.* at 293 (Sotomayor, J., joined by Breyer, J., dissenting) (explaining under general remedies principles, damages are the norm and equitable relief the exception).

²²⁵ *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 357–58 (1995) (advising that the ADEA gives federal courts discretion to “grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]”) (quoting ADEA 29 U.S.C. § 626(b) (2012)).

²²⁶ *U.S. Airways v. McCutchen*, 133 S. Ct. 1537, 1547 (2013) (“[H]ewing to the parties’ exchange yields ‘appropriate’ as well as ‘equitable’ relief.”).

²²⁷ However, this is likely due to the seemingly clear and consistent state court practice and treatises cited by the majority that the equitable defenses were abrogated by clear contract terms. *Id.* at 1546–47.

²²⁸ *Cf. Eskridge & Frickey, Quasi-Constitutional Law*, *supra* note 96, at 640–45 (finding that the Supreme Court more frequently uses canons to conserve executive rulemaking and federalism over government regulation, state sovereignty over national regulation, and executive rulemaking over congressional lawmaking); Mank, *supra* note 90, at 549 (concluding that textualists favor canons that narrow interpretations of statutes); Young, *supra* note 157, at 1605 n.287 (explaining that the presumption against federal preemption is often ignored or overridden but the presumption of state sovereign immunity is vigorously asserted).

²²⁹ See discussion *supra* Part I.

equity-endorsing canon of construction sanctioned by the dissent.²³⁰ Faced with the Court's own pro-equity principle that "equitable tolling is read into every federal statute of limitations," the majority declared that laches "can scarcely be described as a rule for interpreting a statutory prescription."²³¹

The better rationale—and one that would reconcile the majority opinion with a unified theory of statutory discretion—would have recognized the equity-preserving power of the federal courts to apply laches. Only then should the majority have determined that the situation did not merit extending the doctrine beyond its historic setting. The majority opinion would, therefore, be understood as actually applying the presumption of *traditional* equitable discretion in the absence of any reference to equitable defenses in the Copyright Act.²³² The content of that tradition was the defense's historical operation exclusively to equitable relief. Consistent with its equitable defense jurisprudence, the stated conflict between laches and statutory policies did not displace laches entirely within its customary setting.²³³

The irregularities in the outward expression of interpreting equitable principles is part of a larger problem, identified earlier, regarding the reticence of the Supreme Court to be open that they are exercising their discretion in determining whether and when these defenses apply rather than interpreting what they pretend Congress has

²³⁰ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 (2014). *Contra id.* at 1983 (Breyer, J., dissenting) (citing cases articulating the common law canon incorporating remedies and the equitable remedies canon).

²³¹ *Id.* at 1975. As the dissent pointed out, it makes sense for the Court to correspondingly contract such claims on grounds of laches involving the unreasonable and prejudicial delay in asserting a remedy. *Id.* at 1983 (Breyer, J., dissenting). Recognizing equitable doctrines in both types of statute of limitations situations provides equal treatment for both parties. The dissent criticized the majority for its seemingly inconsistent interpretative stance. *Id.* The majority's focus in determining whether to extend laches to legal relief was the prescriptive period and not the relief provisions.

²³² The Supreme Court's post-*Petrella* decision in *SCA Hygiene Products v. First Quality Baby Products*, can be read as adopting this view. 137 S. Ct. 954, 963 (2017) (recounting the Court's reiterations of the traditional rule that laches cannot be invoked to bar a claim for damages brought within a limitations period enacted by Congress).

²³³ Another way to explain the majority opinion in *Petrella* within a developing methodology of statutory equity is that laches was preempted by the passage of the statute of limitations because the Court found the defense to undermine the legislative goals of certainty and uniformity. *Petrella*, at 1967 ("Courts are not at liberty to jettison Congress' judgment on the timeliness of suit."). The Court seemed to draw a negative inference against laches from the statutory provisions providing for a long duration of the copyright term, a short time to sue for infringement, as well as a ceiling on damages. As a result, similar to the Court's equitable remedies jurisprudence, the conflict between the application of laches and statutory policy rebutted (or perhaps displaced) the presumption of equitable discretion. But the majority did not abrogate laches within the traditional setting of equitable relief.

directed.²³⁴ More attention and explication of the Court's actual approach would alleviate any potential and perceived prejudice against certain statutes that may impinge on the asserted imperatives of an impartial legal system. It would also deflect criticism that it may be preaching restraint but practicing activism.

Whether defenses are directly inserted into legislation or derived from the text as part of an equitable relief-retaining instruction, there are logical and practical reasons to consider equitable principles across statutes consistently.²³⁵ But the uniformity sought with equitable defenses should be in the rationale rather than the result.²³⁶ The Supreme Court should be consistent (and cognizant) when applying background assumptions of equity in construing a statute. Yet the ultimate shape of the defense should be (and often has been) statute specific. The fact that laches was not fused under the Copyright Act does not forever freeze the defense to its pre-merger status under other statutes.²³⁷ Equitable defenses are a particularized inquiry.²³⁸ They are not meant to capture reality in the same way that a cookie cutter

²³⁴ See Nelson, *Federal Common Law*, *supra* note 167, at 5 (relating the modern view that every rule of decision that has the status of federal law must be traced to a written source that either establishes the rule itself or authorizes the judiciary to do so); see also Nelson, *Interaction Between Statutes and Unwritten Law*, *supra* note 207 (showing how federal courts read statutes to encompass more issues that state courts do with the result that federal courts handle those issues under the rubric of statutory interpretation while state courts resort to the unwritten general common law).

²³⁵ Bray, *New Equity*, *supra* note 10, at 1019; Eskridge, *Public Values*, *supra* note 89, at 1036–40 (endorsing the idea that statutes are more than a series of ad hoc compromises—that they embody an overall rationality—where one statute is consistent with other statutes such that different statutes fit together coherently). Compare *Petrella*, 134 S. Ct. at 1974 (majority opinion) (mentioning only lower court copyright cases concerning laches but not the accrual rule) with *id.* at 1984–85 (Breyer, J., dissenting) (citing decisions applying laches at law under other statutes).

²³⁶ Contemplating whether equitable relief or remedies are legal terms of art that could be uniformly understood across statutes only gets us so far with respect to equitable defenses since they are context specific and may not be tethered to the statutory text. See Bray, *New Equity*, *supra* note 10, at 1013–14 (“In most instances, ‘equitable remedy’ and ‘equitable relief’ are unmistakably technical terms.”); see also Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 501–02 (2015) (explaining ways that legal language is technical, such as when it is rendered in Latin, when there is no ordinary use of the term, and when there is an ordinary use but the legal definition is different).

²³⁷ In *Petrella*, the majority distinguished other intellectual property statutes where circuit courts have allowed the defense of laches to bar damages. See *Petrella*, 134 S. Ct. at 1974 n.15 (citing Lanham Act governing trademarks and the Patent Act). The Supreme Court's decision in *SCA Hygiene Products v. First Quality Baby Products*, however, makes it highly unlikely it will extend laches to bar a claim seeking damages within a statute of limitations. 137 S. Ct. 954, 960 (2017) (categorically declaring that laches and limitations periods serve the same function making the presence of the latter displace the former).

²³⁸ See Anenson & Mark, *supra* note at 10, at 1515 (“Human diversity has been equity's lock and stock as well as its *raison de etre*.”).

captures dough. This position aligns with recent critiques of the Court's approach to equitable remedies where, perhaps accidentally, it eradicated evidentiary presumptions that had developed in particular fields.²³⁹

Exhuming ancient equitable defenses through a conservation canon aids courts in building a "statutory web."²⁴⁰ Whether judges see themselves as partners or faithful agents of Congress, they have undertaken a larger function as guardians of the law's continuity and coherence.²⁴¹ In this regard, we may find that equity serves an expressive function for litigants *and* courts.²⁴² The Supreme Court of Equity is preserving its primary corrective function in maintaining the sanctity of the law.²⁴³

²³⁹ No doubt in its ambition to ensure equity remained sufficiently flexible, the Supreme Court has resisted strong evidentiary presumptions for equitable relief, while maintaining a strong legal (interpretative) presumption of equity under silent statutes. *See* Bray, *New Equity*, *supra* note 10, at 1043–44 (citing Gergen, Golden & Smith, *supra* note 1, at 219–30 (criticizing the Court's rejection of traditional evidentiary presumptions in determining equitable relief)). Tailoring remedies and defenses to field-specific norms may seem to undercut the concept of remedies as a single law for all kinds of rights. *See* Laycock, *How Remedies Became a Field*, *supra* note 10, at 164 (explaining the evolution of the concept of "remedy" as a uniform law after the unbundling of the writ system). Yet the correlation between rights and remedies has always been acknowledged. *See, e.g.*, RENDLEMAN, *supra* note 107, at 86 ("A plaintiff's remedy should advance the policies of the substantive law it is based on."); *see also* Laycock, *How Remedies Became a Field*, *supra* note 10, at 165 ("A right with no effective remedy is unenforceable and largely illusory.").

²⁴⁰ Tyler, *supra* note 97, at 1428. Granted, the availability of these defenses may have only surface appeal since the Court is actually limiting their application in federal legislation. *See* discussion *supra* Part II.C.

²⁴¹ *See id.* at 1426 (discussing how courts use canons to tie "new interpretations to old in a principled fashion"); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 36 (1988) (positing that Hart and Sacks, *The Legal Process* is "about the development and maintenance of a rational legal system in which the courts are the shepherds of purpose and the guardians of principle) (citing J. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1414 (10th ed. 1958)).

²⁴² It brings us closer to Justice Stone's ideal of "a unified system of judge-made and statute law woven into a seamless whole by the process of adjudication." Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12 (1936).

²⁴³ Anenson & Mayer, *supra* note 12, at 974 (commenting that the application of equitable defenses reinforces equity's function in maintaining law's integrity); Anenson, *The Role of Equity*, *supra* note 15, at 74 (analyzing equitable defenses in the context of unfair competition that highlight equity's forgotten role in maintaining the integrity of the law); *cf.* Eskridge, *Public Values*, *supra* note 89, at 1094 (explaining scholarly endorsement of public values ideal as representing a greater faith in courts as a source of the law's integrity).

C. Certainty

Along with the potential for inconsistency and abuse, another concern with the practice of canons of construction (and equitable discretion generally) is uncertainty. Part I showed that the Court is maintaining a method of determining equitable defenses. Nonetheless, because the history-preserving presumption is not actually expressed in the Court's doctrine, it is difficult to discern from those decisions *when* the presumption applies. For example, does it operate at the beginning of the interpretative exercise or is it only activated by a finding of ambiguity?²⁴⁴ A gap?²⁴⁵ Perhaps it is unrealistic to ask judges to pinpoint whether the assumption of equity is displaced or rebutted.²⁴⁶ While the Court's application of equitable defenses is still in development, a decision structure is discernable. To summarize, the Supreme Court accepts equitable defenses unless it appears no possible application will ever work within statutory parameters.²⁴⁷ As discussed below, there is also a recognizable method of determining their content that corresponds to the Court's jurisprudence in absorbing other (non-equitable) judge-made doctrines and written statutes.²⁴⁸

In the interplay of equity and statute, scholars have not argued that legislation should remain pure and unsullied by judge-made law. Even ardent advocates of a

²⁴⁴ See *Hecht v. Bowles*, 321 U.S. 330 (1944) (indicating the statute was ambiguous as to whether judges retained their traditional equitable discretion to deny relief); see also Farber, *Equitable Discretion*, *supra* note 75, at 542 (indicating that only if congressional intent is unclear after normal methods of statutory construction are exhausted does the Court rely on the presumption of equitable discretion to issue equitable relief); Daniel Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 292 (1989) (asserting that judicial construction is legitimate only when the statutory text and legislative intent are ambiguous); Sunstein, *Interpreting Statutes*, *supra* note 84, at 437 (insisting on a sufficient degree of interpretative doubt in order to elicit the canons); cf. Farber, *Judicial and Agency Discretion*, *supra* note 9, at 110–11 (noting that it is unclear what factors create ambiguity in agency discretion cases).

²⁴⁵ The infusion of common law doctrines into legislation is usually seen as serving a gap filling function. See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (famously observing that “judges do and must legislate, but they can do so only interstitially”); Eskridge, *Public Values*, *supra* note 89, at 1051 (“Every statute has gaps in coverage, and often the gaps related to issues for which the common law has developed principles.”). A distinction may be that, rather than Congress remitting the development of remedies and associated doctrines and defenses to the courts, the common law canon operates in areas that the legislature has never considered (or could not reach consensus on how to respond). See generally Nelson, *Interaction Between Statutes and the Unwritten Law*, *supra* note 207 (describing how state rather than federal courts are more willing to recognize statutory voids to be filled with general common law). The background law of equity is part of the common law. Smith, *Fiduciary Law*, *supra* note 12, at 263 (referencing private law origin of equitable principles). While the common law and equity can be seen as rival or complementary systems, see W.S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 25–28 (1929) (discussing how the different remedies were a conflict in substantive rights and duties of citizens, but not a conflict in the form of the rules themselves); Philip A. Ryan, *Equity: System or Process?*, 45 GEO. L.J. 213, 215–17 (1957) (outlining debate over the conflict between equity and law); tradition has been the primary source of their development. HUNN,

judicial agency theory seem to accept assumptions that prefer equitable doctrines so long as they are fairly well defined. For example, Professor John Manning endorsed equitable tolling on this basis.²⁴⁹ Nonetheless, he questioned methods of statutory interpretation that invite courts to make adjustments based on social values whose content and method of derivation are both unspecified in advance.²⁵⁰ Manning's

supra note 71, at 50 (explaining that the common law did not pick the best or most enlightened practices, but those that reflected the customs of the community); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 754 (1993) (“The common law . . . has often been understood as a result of social custom rather than an imposition of judicial will.”). The Supreme Court in *Petrella*, in fact, used this language to describe the function of laches. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014). The Court decided that Congress meant to displace laches by enacting the limitations period and explained that laches principally functioned as a “gap-filling not legislative overriding” defense. *Id.*; *see also id.* at 1968 (citing *Teamsters & Employers Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002) (describing laches as filling a legislative hole when Congress does not enact a limitation period and where federal courts borrow state statutes of limitations). Correspondingly, the majority in *U.S. Airways* filled a contractual “gap” with the common fund defense as the best indicator of the parties’ intent. *U.S. Airways, Inc., v. McCutchen*, 133 S. Ct. 1537, 1550 (2013). Interpreting the contract, the Court held that the express term contradicts the background equitable rule of double recovery. *Id.* at 1549.

²⁴⁶ *See* Eskridge, *Norms, Empiricism, and Canons*, *supra* note 163, at 680 n.17 (commenting that the order in which canons are considered may affect the results); Young, *supra* note 157, at 1606 (emphasizing that some boundary is necessary to trigger application of the interpretative presumption). Policy analysis is deemed by textualists, who have a more narrow view of the judicial role in statutory interpretation, to be indicative of intent when a statute is considered ambiguous. Manning, *Absurdity Doctrine*, *supra* note 90, at 2409 (textualists “[will not] . . . sacrifice textually expressed means for . . . remote statutory ends”); Barrett, *Substantive Canons*, *supra* note 85, at 112 (“Textualism . . . maintains that the statutory text is the only reliable indication of congressional intent.”); *see also* Eskridge, *Public Values*, *supra* note 89, at 1037–38 (“[T]raditional legal process theory teaches that a statute’s purpose cannot overcome the plain meaning of the statute, and the Court often relies on this idea.”). The controversy in *SCA Hygiene Products v. First Quality Baby Products* centered on the content of the background rule of common law. The majority found it was that laches does not apply at law and determined that defendants’ cases did not overcome the presumption. 137 S. Ct. 954, 966 (2017). Justice Breyer, in dissent, determined that the presumption in the patent context was that laches applied to damages within the limitations period. *Id.* at 967–71 (Breyer, J., dissenting).

²⁴⁷ *See* discussion *supra* Part I; Anenson, *Age of Statutes*, *supra* note 18, at 534–35, 543–46.

²⁴⁸ *See* Nelson, *General Law*, *supra* note 198, at 506–25 (tracing the persistence of general federal common law built on a synthesis of state law in the purest federal enclaves and as background to federal statutes).

²⁴⁹ Manning, *Absurdity Doctrine*, *supra* note 90, at 2471–73 (finding doctrines of tolling and criminal necessity legitimate because the content and method of their derivation is specified *ex ante*). *Contra* Barrett, *Substantive Canons*, *supra* note 85, at 165 (“The exceptions that textualists are willing to read into criminal provisions and statutes of limitations are . . . flawed.”).

²⁵⁰ Manning, *Absurdity Doctrine*, *supra* note 90, at 2471.

concern is the very definition of equitable defenses. Equitable doctrines provide “individualized justice . . . illuminated by moral principles.”²⁵¹ Part I has shown that the Court is using an across-the-board canon of construction or background principle applicable to all federal statutes to presume these defenses are available. Nevertheless, the scope of their application is statute specific. My other research revealed that in ascertaining the availability of these defenses, a common law methodology prevails; that is, case by case, *ex post facto* decision-making.²⁵² But that does not mean these opinions lack reasoned explanations or attempts to find principles to govern future cases.

In setting the scope of the equitable defenses, there is an identifiable pattern in the Supreme Court’s decisional history of equitable defenses to assist in building a body of cases along principled lines.²⁵³ As mentioned earlier, the starting point for defining these doctrines is their historic definition and rationale.²⁵⁴ The substance is being supplied in part by state law.²⁵⁵ Yet another phenomenon is at work as well. It appears that the Court is distilling the governing rules of equitable defenses from the overlapping practices of many jurisdictions rather than the idiosyncratic rules of any particular state.²⁵⁶ The Supreme Court’s composition in creating equitable defenses supports Professor Caleb Nelson’s thesis of the post-*Erie* persistence of general federal common law.²⁵⁷ It also places federal equity jurisprudence within a broader experience concerning the relation between written statutes and unwritten law. From this standpoint, at least, the Supreme Court’s approach to equitable defenses would seem to refute recent claims that it is treating equity differently than law.²⁵⁸

²⁵¹ Ryan, *supra* note 245, at 217 (citing Emmerglick, *supra* note 102, at 254–55); *see also* Chafee, SELECTED ESSAYS ON EQUITY, *supra* note 10, at iii (commenting that equity courts “mainly clothed moral values with legal sanctions”).

²⁵² *See* Anenson, *Age of Statutes*, *supra* note 18, at 548–54 (analyzing how equitable defenses are derived in Supreme Court cases).

²⁵³ *Id.*

²⁵⁴ *Id.*; discussion *supra* Part I.C.; *see also* discussion *supra* Part I.

²⁵⁵ Anenson, *Age of Statutes*, *supra* note 18, at 554–55 (explaining that the Supreme Court rested its analysis of equitable defenses on private law decisions (citing *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) and *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1547, 1550 (2013))).

²⁵⁶ *Id.*

²⁵⁷ Nelson, *General Law*, *supra* note 198.

²⁵⁸ *See generally* Bray, *New Equity*, *supra* note 10 (analyzing statutory and non-statutory cases).

The traditional formulation, however, is subject to refinement in light of statutory purposes while still providing the district judge enough discretion to deviate from the rule.²⁵⁹ The Court is not remaking the defenses, but amending their application.²⁶⁰ The Supreme Court's stewardship in setting strictures on these doctrines makes it unlikely that their inclusion will undermine ideals of justice that the law should be sufficiently clear.

Such appellate supervision on federal equity jurisprudence corresponds to what Professor Sarah Cravens calls "procedural bounds" for judicial discretion.²⁶¹ The fact that the Court is sometimes synthesizing decisions across state lines in defining equitable defenses further confines judicial discretion.²⁶² Not unlike the Supreme Court's method of determining equitable remedies, it provides district courts with reasoning requirements derived from decisional law to exercise their discretion in assessing equitable doctrines that may prevent statutory relief.²⁶³ These firm yet flexible tests for equitable defenses provide an intelligible body of doctrine that affords accordion-like outlets for district courts to dispense justice.²⁶⁴ Arguably, in

²⁵⁹ Anenson, *Age of Statutes*, *supra* note 18, at 552. *But see* Anenson, *Process-Based Theory*, *supra* note 8, at 543, 546, 548 (noting that statutory purposes are not relevant when the defense is used procedurally primarily in a protect-the-court capacity).

²⁶⁰ *See* Anenson, *Age of Statutes*, *supra* note 18, at 556–62 (outlining ways that the Supreme Court is taking on a supervisory role concerning equitable defenses).

²⁶¹ *See* Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 983 (2010) (reviewing remedial discretion and concluding that procedural rather than substantive bounds are the most practically useful for constraining both the original discretion determinations and the appellate review of those determinations).

²⁶² Nelson, *General Law*, *supra* note 198, at 503, 568; *see* Nelson, *Federal Common Law*, *supra* note 167, at 36 (discussing the idea that courts can identify coherent themes in American common law).

²⁶³ Anenson & Mark, *supra* note 10, at 1505–07 (finding procedural bounds prevalent in equitable remedies and the discretionary defenses). Empirical assessments of other judge-made doctrines demonstrate the probability of more predictable decisions when there is clear precedent and effective judicial oversight. Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517, 520 (2006) (citing Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 612 (2004)).

²⁶⁴ *See* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 380 (1975) (discussing "[t]he obvious inappropriateness of denying discretion when a decision-maker must choose among an almost infinite number of alternatives on bases that are complex and yield uncertain conclusions"); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1561 (2003) ("We have to give the judge some elbow room, objectively, individually, contextually."); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 662 (1971) ("Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization . . ."); *see also* James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line—*

this way, the Supreme Court has taken advantage of the epistemic and institutional virtues of the analogical reasoning process.²⁶⁵ However, it is still providing a measure of predictability to justify the inclusion of equitable defenses in statutes that fail to provide for them.²⁶⁶

Just as Lord Selden's metaphor of the Chancellor's foot forever engrained in our memories the perils of equity on the rule of law,²⁶⁷ Professor Burbank reminds us that with equitable doctrines, as with life, we must take the bitter with the sweet.²⁶⁸ In attempting to tie up all the loose ends and get everything together, we lose much of our life experience. So it is with equity. Over the centuries, equity has defied academic notions of tidiness and symmetry. As judges are well aware, equity operates in the real world where results, not simply rationales, rule the day. Litigants rarely care about the adoption of any particular theory of statutory interpretation. They want justice as measured by case outcomes.²⁶⁹ Despite its many flaws, it is here

Balancing Test Continuum, 27 ARIZ. ST. L.J. 773, 825, 836 (1995) (describing various forms of legal commands such as multi-factor tests and totality of the circumstances tests and claiming that they all should exist).

²⁶⁵ See Marcus, *supra* note 264, at 1561 (discussing relation between judicial discretion and social legitimacy); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999) (defending analogical reasoning for its epistemic and institutional advantages); see also Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1072 (2003) ("Allowing an issue to be hashed out multiple times compensates for the imperfections—the very humanness—in the process of decisionmaking. It allows the courts to see a more complete picture before rushing to judgment."); Emily Sherwin, *Judges As Rulemakers*, 73 U. CHI. L. REV. 919 (2006) (proposing that the use of precedent and analogical reasoning broadens perspective and leads to better assessments of potential consequences).

²⁶⁶ See Rendleman, *Stages of Equitable Discretion*, *supra* note 70, at 1444 (explaining how appellate decisions limit a trial judge's equitable discretion by refining and clarifying the law) (citing Anthony Mason, *The Place of Equity and Equitable Remedies in the Contemporary Common Law World*, 110 L. Q. REV. 238, 258 (1994)). Bright line rules are not necessarily efficient or just. See, e.g., Watson, *supra* note 37, at 787–88 (demonstrating through doctrine how a narrow construction of the doctrine of equitable recoupment can produce inconsistent results); Yorio, *supra* note 19, at 1225–26 (refuting economic argument that equitable defenses are inefficient).

²⁶⁷ See JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., 1927).

²⁶⁸ See Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1315 (2000).

²⁶⁹ See McDowell, *Story's Science of Equity*, *supra* note 107, at 158 (explaining the Story "viewed Equity as a system of moral machinery, whose principles were at once enlarged and elevated, yet practical."); Chroust, *supra* note 109, at 125–126 (explaining the meaning of equity as a component of justice); see also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1531 (1987) (asserting that legitimacy of judicial lawmaking in statutory interpretation is defined not solely by the process but by results that respond to societal needs). This is not to endorse the realist position that only results count. The entire study is premised on the idea that reasons are important as well.

where the value of equity endures.²⁷⁰ While the Supreme Court has not addressed the source of its authority to craft limitations on legislation through equitable defenses or announced a tradition-tipping technique of statutory interpretation, it has maintained a method of judicial discretion allowing paradoxically for continuity and change in a way that exalts rather than degrades statutory law. “Many statutory regimes would not have functioned effectively without a leavening of equity.”²⁷¹

CONCLUSION

Who’s afraid of equitable discretion? Almost everyone it seems. Everyone, that is, except the Supreme Court of the United States.

This Article offers an analysis of equitable defenses whose existence and operation in statutory law have been largely ignored, undervalued, or simply uncharted over the last one hundred years. Because the Supreme Court has not provided clear direction in incorporating equitable defenses into federal statutes, this Article suggests a way of thinking about the relationship between judge-made equity and congressionally-created legislation. In particular, it has shown that the reservation of equitable defenses in federal statutes is realized by a resistance norm to the interference with traditional equitable discretion. It has also sought to explain and strengthen the acceptability of the interpretative choice favoring discretionary defenses.

The ambitions of this Article are both descriptive and normative. The descriptive purpose is to show how the Supreme Court’s interpretive technique operates to prefer equitable discretion. The normative purpose is to demonstrate that the methods of statutory construction, though controversial, are entirely acceptable and central to the operation of modern government and the rule of law. Given the institutional constraints on the federal judiciary and the renewed interest in statutory interpretation, understanding judge-made doctrines in the regulatory regime is

²⁷⁰ See Emily L. Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2083, 2087–88 (1997) (marking on the judicial preference for standards and the psychological importance of tailoring remedies to particular cases). While Llewellyn was skeptical of canons of statutory construction because they were a closed form of legal reasoning, see discussion *supra* note 177 and accompanying text, he was nevertheless convinced that open discretion preserved public faith in the judicial process. Karl N. Llewellyn et al., *The Case Law System in America*, 88 COLUM. L. REV. 989, 991 (1988).

²⁷¹ William Gummow, *Conclusion*, in EQUITY IN COMMERCIAL LAW, *supra* note 112, at 515, 517.

increasingly important.²⁷² This Article intends to bring equitable defenses into better focus under federal law.

²⁷² See, e.g., Shapiro, *Statutory Interpretation*, *supra* note 147, at 921 (“Academic interest in questions of statutory interpretation has reached a new peak.”); see also Farber, *Judicial and Agency Discretion*, *supra* note 9, at 135 (emphasizing that exploring the basis of judicial discretion in statutory cases is important).