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WHAT IS THE STANDARD FOR OBTAINING A PRELIMINARY INJUNCTION IN VIRGINIA?

Stuart A. Raphael *

ABSTRACT

A perception exists that the Supreme Court of Virginia has not articulated the legal standard for adjudicating preliminary-injunction motions in Virginia circuit courts. For decades, lawyers and legal scholars have advocated that Virginia trial judges borrow the federal preliminary-injunction standard applied in the United States Court of Appeals for the Fourth Circuit. Virginia trial courts have generally followed that advice. Virginia courts at first applied the Fourth Circuit's Blackwelder test, which called upon judges to balance the four traditional factors and allowed a stronger balance-of-hardship showing to offset a weaker showing of likely success on the merits. After the 2008 decision by the Supreme Court of the United States in Winter, the Fourth Circuit overruled Blackwelder in 2009 in Real Truth About Obama. The Real Truth test requires all four preliminary-injunction factors to be independently satisfied. Since then, Virginia circuit courts have generally applied the Real Truth standard.

This Article shows that ample Virginia precedent and English precedent support the consideration of the four traditional factors, making it unnecessary to rely on federal precedent. Under existing Virginia law, a plaintiff seeking a preliminary injunction must show a likelihood of irreparable harm (absent a statute that provides for an injunction). Beyond that, Virginia cases have balanced

* Judge, Court of Appeals of Virginia. The views expressed in this Article represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Canon 1(M) of the Canons of Judicial Conduct for the Commonwealth of Virginia, which permits judges to "speak, write, lecture, teach" and otherwise participate in extrajudicial efforts to improve the legal system. These views should not be mistaken for the official views of the Court of Appeals of Virginia or my opinion as an appellate judge in the context of any specific case.

the factors. The Supreme Court of Virginia has also allowed a preliminary injunction without a showing that the plaintiff was likely to succeed on the merits, provided the plaintiff demonstrated a “prima facie case.” Whether that showing must be a “fair” prima facie case or “strong” prima case will require further development. But this existing Virginia precedent provides a superior basis for evaluating preliminary-injunction motions in Virginia trial courts than the Fourth Circuit’s Real Truth standard.

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INTRODUCTION

Anyone who has handled preliminary-injunction motions in a Virginia circuit court knows there is no obvious or clearly established framework under Virginia law governing how the court should decide whether to grant relief. The Code of Virginia says simply, “No temporary injunction shall be awarded unless the court shall be *satisfied of the plaintiff’s equity*.”¹ That statutory requirement dates to 1777.² The Rules of the Supreme Court of Virginia do not set forth a test for preliminary³ injunctions either.⁴

Over the past several decades, the perception has developed that the Supreme Court of Virginia has not articulated a legal standard for determining when a preliminary injunction is appropriate. In 2008, the court “express[ed] no view” about whether Virginia should follow the “four-factor approach for determining whether a preliminary injunction should issue, similar to that adopted by the United States Court of Appeals for the Fourth Circuit.”⁵ In 2015, in the “highly publicized”⁶ Sweet Briar College case, the court issued an unpublished order stating that: “*No single test* is to be

1. VA. CODE ANN. § 8.01-628 (2015) (emphasis added).

2. See 1777 Va. Acts ch. 15, § 35, reprinted in 9 WILLIAM WALLER HENING, THE STATUTES AT LARGE 396 (1821).

3. Although “temporary injunction” has been the formulation used in Code of Virginia section 8.01-628 and its predecessors, the Supreme Court of Virginia and Virginia circuit courts have used *temporary injunction* and *preliminary injunction* interchangeably. *E.g.*, *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 60 n.6, 662 S.E.2d 44, 53, 53 n.6 (2008). So have Virginia-law commentators. *E.g.*, 2 CHARLES E. FRIEND & KENT SINCLAIR, FRIEND’S VIRGINIA PLEADING & PRACTICE § 33.02[1][b][ii], at 33–47 (3d ed. 2017) (“Temporary injunctions are also called preliminary, ancillary, or interlocutory injunctions.”). In 2022, the Virginia General Assembly used “preliminary” injunction, providing for direct discretionary review by the Supreme Court of Virginia of circuit court orders involving a “preliminary or permanent injunction.” 2022 Va. Acts ch. 307 (codified as amended at VA. CODE ANN. § 8.01-626 (Cum. Supp. 2022)). From January 1 until July 1, 2022, when that amendment took effect, the Court of Appeals had jurisdiction over interlocutory injunction appeals. See 2021 Va. Acts, Spec. Sess. I, ch. 489 (codified as amended at VA. CODE ANN. § 8.01-626 (Cum. Supp. 2021)); *NAACP (Hanover Cnty. Ch.) v. Commonwealth ex rel. Va. State Water Control Bd.*, 74 Va. App. 702, 710 n.2, 871 S.E.2d 662, 666 n.2 (2022) (discussing history of Code section 8.01-626).

4. The Code of Virginia and the Rules of the Supreme Court of Virginia set forth an expedited “petition for review” procedure for appellate review of interim and final orders determining whether to grant an injunction. See VA. CODE ANN. § 8.01-626 (Cum. Supp. 2022); VA. SUP. CT. R. 5:17A (2022); *NAACP*, 74 Va. App. at 710, 871 S.E.2d at 666 (noting that a petition for review provides a “faster timetable than would be available through a traditional appeal of a final order”). But those provisions do not establish the standard for determining when a preliminary injunction is proper.

5. *Levisa Coal*, 276 Va. at 60 n.6, 662 S.E.2d at 53 n.6.

6. KENT SINCLAIR, SINCLAIR ON VIRGINIA REMEDIES § 51-5[D], at 51-42 (5th ed. 2016).

mechanically applied, *and no single factor can be considered alone as dispositive*. Instead, a court must consider the *totality of the circumstances* and decide whether equity counsels for the temporary preservation of the status quo.”⁷ As an unpublished disposition, however, *Sweet Briar* may be cited as “informative” but is not “binding authority.”⁸

Without clear guidance from the General Assembly or the Supreme Court of Virginia, commentators and practitioners for decades have advocated following the federal preliminary-injunction standard used in the Fourth Circuit.⁹ Virginia circuit court judges have generally followed that suggestion.¹⁰

That advice should be reconsidered. Simply falling in line with the Fourth Circuit’s standard overlooks two centuries of Virginia precedent that bears on when a preliminary injunction is appropriate.¹¹ It overlooks the history of equity practice in England.¹² And it overlooks that the Fourth Circuit’s current (and rigid) test is the subject of an entrenched split among the federal circuits.¹³

There is a better approach. Revivifying earlier Virginia and English precedent reveals an existing Virginia-law standard for determining when a preliminary injunction should issue. The “traditional” four factors that modern equity courts evaluate when adjudicating preliminary-injunction motions were indeed considered by English and Virginia jurists in prior centuries.¹⁴ A plaintiff could not obtain a preliminary injunction without showing that the plaintiff would likely suffer irreparable harm without one.¹⁵ The remaining factors—likelihood of success on the merits, the balance of hardship, and the public interest—were also considered and evaluated using a balancing test.¹⁶ The most useful Virginia precedent to show that analytical framework is the Supreme Court of

7. Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 WL 3646914, at *2, 2015 Va. LEXIS 22, at *5 (June 9, 2015) (emphasis added).

8. VA. SUP. CT. R. 5:1(f) (2022).

9. See *infra* notes 31–32, 43–52 and accompanying text.

10. See *infra* notes 29 and 53 and accompanying text.

11. See *infra* notes 159–201 and accompanying text.

12. See *infra* notes 144–157 and accompanying text.

13. See *infra* notes 129–143 and accompanying text.

14. See *infra* notes 144–188 and accompanying text.

15. See *infra* notes 159–166 and accompanying text.

16. See *infra* notes 167–189 and accompanying text.

Virginia's 1875 decision in *Manchester Cotton Mills v. Town of Manchester*.¹⁷

By returning to the *Manchester Cotton* framework, Virginia litigants and trial judges will have a preliminary-injunction standard that is both workable and well-grounded in Virginia precedent.

I. THE FEDERAL STANDARD'S GRAVITATIONAL PULL

The Supreme Court of the United States set forth the familiar components of the federal preliminary-injunction standard in its 2008 decision in *Winter v. Natural Resources Defense Council, Inc.*:

A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.¹⁸

This standard is often called the “traditional four-factor test.”¹⁹

In 1977, the Fourth Circuit explained in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, that district courts should evaluate the four factors using a sliding-scale, “balance-of-hardship test.”²⁰ A court “first” should “balance the ‘likelihood’ of irreparable harm to the plaintiff against the ‘likelihood’ of harm to the defendant.”²¹ When “a decided imbalance” favors plaintiffs, then plaintiffs need not prove that their claims are likely to succeed on the merits.²² Instead, it should “ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.”²³ On the other hand, “[t]he importance of probability of success increases as the probability of

17. 66 Va. (25 Gratt.) 825, 831–32 (1875); see *infra* notes 167–1198 and accompanying text.

18. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

19. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (citing *Winter*, 555 U.S. at 31–33); see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits. It is recognized, however, that a district court must weigh carefully the interests on both sides.”).

20. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977).

21. *Id.* at 195.

22. *Id.*

23. *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

irreparable injury diminishes.”²⁴ Where irreparable harm is “simply ‘possible,’” the probability of success could be “decisive.”²⁵ “Even so, it remains merely one ‘strong factor’ to be weighed alongside both the likely harm to the defendant and the public interest.”²⁶ Thus, *Blackwelder* made “probable irreparable injury” to the plaintiff and “likely harm to the defendant” the two most important factors.²⁷ When that balance of hardship favored the plaintiff, it was “enough that grave or serious questions [were] presented; and plaintiff [did not need to] show a likelihood of success.”²⁸

Virginia circuit courts followed *Blackwelder* for about two decades.²⁹ The Fourth Circuit gently nudged them along in 1988 when it said there was “no great difference between federal and Virginia standards for preliminary injunctions.”³⁰ In the 1990s, the *Virginia Circuit Court Judges Benchbook*, published by the Judicial Council of Virginia,³¹ told circuit judges “there are no Virginia Supreme Court cases on point,” and—citing *Blackwelder*—said that “detailed standards have been articulated by the federal Fourth Circuit.”³²

In 2009, however, the Fourth Circuit concluded in *Real Truth About Obama, Inc. v. Federal Election Commission* that the Supreme Court’s 2008 decision in *Winter* had effectively overruled

24. *Id.*

25. *Id.*

26. *Id.* (quoting *Dino De Laurentiis Cinematografica, SpA. v. D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966)).

27. *Id.* at 196.

28. *Id.*

29. *See, e.g.*, *Abujaber v. Kavar*, No. 11514, 1989 WL 646147, at *1, 1989 Va Cir. LEXIS 288 (Jan. 4, 1989) (Loudoun Cnty.) (“In determining whether a preliminary injunction should issue the Court must consider the four factors as set forth in *Blackwelder*”); *see also* *Dillon v. Northam*, 105 Va. Cir. 402, 409–10 (2020) (City of Norfolk) (collecting cases showing “Virginia circuit courts’ prior reliance on” *Blackwelder*).

30. *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 173 (4th Cir. 1988).

31. The Judicial Council is part of the “judiciary branch of state government” in Virginia. VA. CODE ANN. § 17.1-700 (2018). Its membership consists of “the Chief Justice of the Supreme Court, one judge of the Court of Appeals, six circuit court judges, one general district court judge, one juvenile and domestic relations district court judge, two attorneys qualified to practice in the Supreme Court,” and the chairpersons (or their designees) of the House Courts Committee and Senate Judiciary Committee. *Id.*

32. VIRGINIA CIRCUIT COURT JUDGES BENCHBOOK 386–87 (Supp. 1995).

key aspects of *Blackwelder*.³³ The court in *Real Truth* based that conclusion on four considerations.

First, the Fourth Circuit interpreted *Winter* to “require[] that the plaintiff make a clear showing that it will likely succeed on the merits at trial.”³⁴ In *Blackwelder*, by contrast, the “likelihood-of-success requirement [was] considered, if at all, only *after* a balancing of hardships [was] conducted and then only under the relaxed standard of showing that ‘grave or serious *questions* are presented’ for litigation.”³⁵ *Winter*’s “requirement that the plaintiff clearly demonstrate that it will *likely succeed* on the merits is far stricter than the *Blackwelder* requirement that the plaintiff demonstrate only a grave or serious *question* for litigation.”³⁶

Second, *Winter* “requires that the plaintiff make a clear showing that it is likely to be irreparably harmed absent preliminary relief.”³⁷ “*Blackwelder*, on the other hand, requires that the court *balance* the irreparable harm to the respective parties, requiring only that the harm to the plaintiff outweigh the harm to the defendant.”³⁸

Third, *Winter* “emphasized the public interest requirement,” noting that “courts of equity should pay *particular regard* for the public consequences in employing the extraordinary remedy of injunction.”³⁹ Courts applying *Blackwelder*, by contrast, did not always consider the public interest “at length.”⁴⁰

And fourth, *Real Truth* read *Winter* to require the plaintiff to satisfy all four of the traditional preliminary-injunction requirements independently: each “must be satisfied as articulated.”⁴¹ *Blackwelder*, on the other hand, allowed “requirements to be

33. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010), *reinstated in relevant part*, 607 F.3d 355 (4th Cir. 2010). Eight years earlier, Judge Luttig argued that *Blackwelder* should be overruled as inconsistent with the Supreme Court’s “traditional” four-factor test. *See Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 868–71 (4th Cir. 2001) (Luttig, J., concurring).

34. *Real Truth*, 575 F.3d at 346.

35. *Id.* (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195–96 (4th Cir. 1977)).

36. *Id.* at 346–47.

37. *Id.* at 347.

38. *Id.*

39. *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

40. *Id.* (quoting *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 366 (4th Cir. 1991)).

41. *Id.*

conditionally redefined as other requirements are more fully satisfied so that ‘grant[ing] or deny[ing] a preliminary injunction depends upon a “flexible interplay” among all the factors considered.’”⁴²

Just as they had been following *Blackwelder*, Virginia commentators and circuit judges switched to *Winter* and *Real Truth* as setting forth the appropriate preliminary-injunction standard for Virginia courts. Judge Lannetti authored a 2015 law review article proposing a four-factor test “modeled” after the sequential test in *Real Truth*.⁴³ Under that proposal, the plaintiff not only must establish all four factors; he must show likelihood of success and likelihood of irreparable harm by “more than a 50%” probability.⁴⁴ Professor Sinclair’s treatise also refers readers to the *Winter/Real Truth* standard.⁴⁵ Professor Bryson’s treatise refers to the many circuit court cases that have followed the Fourth Circuit standard, first *Blackwelder* and then *Real Truth*.⁴⁶ Another common treatise continues to refer readers to federal cases applying *Blackwelder*, without mentioning that it was overruled by *Real Truth*.⁴⁷

In 2010, the *Virginia Civil Benchbook* began citing *Winter* for the preliminary-injunction standard and advised that *Blackwelder*’s “balance-of-hardship” test “is no longer to be applied.”⁴⁸ It added that “[a]ll four factors must be clearly shown,” and “[t]here is no adjustment to the requirements by balancing them under a relaxed standard.”⁴⁹ By 2017, it added a specific citation to *Real*

42. *Id.* (alterations in original) (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977)).

43. David W. Lannetti, *The Test—or Lack Thereof—for Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. RICH. L. REV. 273, 275, 323 (2015).

44. *Id.* at 322. Judge Durrer has twice cited the more-than-50% requirement and Judge Lannetti’s proposal. See *Lodal v. Dominion Energy*, 102 Va. Cir. 391, 394 (2019) (Orange Cnty.); *Ducard Vineyards, Inc. v. Lazy Creek Vineyards & Winery*, 99 Va. Cir. 449, 452 (2018) (Madison Cnty.).

45. SINCLAIR, *supra* note 6, § 51-5[D], at 51-46.

46. W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 7.05, at 7-11 n.52 (5th ed. 2017) (collecting cases).

47. See 10A MICHIE’S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA, *Injunctions* § 88 (2018).

48. VIRGINIA CIVIL BENCHBOOK FOR JUDGES AND LAWYERS § 8.06[3][b], at 8-17 to -18 (2010–2011 ed.).

49. *Id.* at 8-18.

Truth.⁵⁰ That guidance continues in the current version.⁵¹ Citing the Benchbook, Professor Sinclair observes that “Virginia judges . . . are referred to the *Winter* four-factor test and *instructed* to apply the test sequentially, as the Fourth Circuit did in *Real Truth*.”⁵² “Since the Fourth Circuit decided *Real Truth*, most Virginia circuit courts have evaluated temporary injunctions using the *Real Truth* sequential analysis.”⁵³

This Article suggests a different path.

Simply adopting the Fourth Circuit standard has overlooked several centuries of equity jurisprudence—in Virginia and in England—that provides important guidance to Virginia practitioners. Embracing that guidance will ground preliminary-injunction practice in Virginia precedent that does not depend on federal law for its legitimacy.

II. TESTING A SYLLOGISM THAT VIRGINIA LAW ALREADY IMPOSES THE *REAL TRUTH* STANDARD

Is it possible that Virginia law *already* imposes the four-factor test in *Winter* and *Real Truth*? Let’s test this syllogism: (1) Virginia’s “reception” statute makes the common law of England as of at least 1776—including equitable principles governing the issuance of injunctions—the rule of decision in Virginia unless altered by the General Assembly; (2) persuasive precedent from the United States Supreme Court establishes that the sequential test *was* the test applied in English chancery cases in the eighteenth century; so (3) *Winter* and *Real Truth* provide the test that Virginia courts must apply.

50. VIRGINIA CIVIL BENCHBOOK FOR JUDGES AND LAWYERS § 8.06[3][b], at 8-16 (2017–2018 ed.).

51. VIRGINIA CIVIL BENCHBOOK FOR JUDGES AND LAWYERS § 8.06[3][b], at 8-15 (2021–2022 ed.).

52. SINCLAIR, *supra* note 6, § 51-1[D], at 51-46 & n.41 (emphasis added).

53. *Freemason Street Area Ass’n, Inc. v. Sinesi*, 100 Va. Cir. 172, 184–85 (2018) (City of Norfolk) (Lannetti, J.) (collecting cases).

A. *Did Virginia's Adoption of the "Common Law of England" Include Principles of Equity Applied in England's High Court of Chancery?*

The major premise of the syllogism is defensible but not free from doubt. Code of Virginia section 1-200 currently provides that "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."⁵⁴ This provision was originally enacted as an "ordinance"⁵⁵ by the Virginia delegates who gathered to declare independence from England and who, in June 1776, adopted the Declaration of Rights⁵⁶ and Virginia's first Constitution.⁵⁷ The ordinance recited that severing ties with England made it "indispensably necessary to establish government . . . independent of the crown of Great Britain" and that "it will require some considerable time to compile a body of laws suited to the circumstances of the country."⁵⁸ The delegates found it "necessary to provide some method of preserving peace and security to the community in the [meantime]."⁵⁹

Most of Virginia's sister colonies followed Virginia's lead in formally adopting the common law of England.⁶⁰ Many States later

54. VA. CODE ANN. § 1-200 (2017).

55. 1776 Va. Acts ch. 5, § 6, *reprinted in* HENING, *supra* note 2, at 126–27.

56. *See* Declaration of Rights, 1776 Va. Acts ch. 1, *reprinted in* HENING, *supra* note 2, at 109.

57. VA. CONST. of 1776, 1776 Va. Acts ch. 2, *reprinted in* HENING, *supra* note 2, at 112.

58. 1776 Va. Acts ch. 5, § 1, *reprinted in* HENING, *supra* note 2, at 126.

59. *Id.*

60. *See* N.J. CONST. of 1776, art. 22 (July 2, 1776) ("[T]he common law of England, as well as so much of the Statute-Law, as have been heretofore practised in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature . . ."); DEL. CONST. of 1776, art. 25, (Sept. 20, 1776) *reprinted in* 1 LAWS OF THE STATE OF DELAWARE, app. at 89 (1700-1797) ("The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature . . ."); MD. CONST. of 1776, Declaration of Rights, art. 3 (Nov. 11, 1776) ("[T]he inhabitants of Maryland are entitled to the common law of England . . ."); N.Y. CONST. of 1777, art. 35 (Apr. 20, 1777) ("[S]uch parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York . . . shall be and continue the law of this State . . ."); 1778 N.C. ACTS ch. 5, art. 2 ("[A]ll such statutes, and such parts of the Common Law, as were heretofore in Force and Use within this Territory . . . are hereby declared to be in full Force within this State."); MASS. CONST. of 1780, pt. II, ch. 6, art. 6 (Oct. 25, 1780) ("All the laws which have heretofore been adopted, used, and approved in the province, colony, or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force . . ."); Act of Feb. 25, 1784, art. III, § 1, *reprinted*

admitted to the Union formally adopted English common law as well.⁶¹

One could debate whether doing so was necessary. Chief Justice Marshall (who as a lawyer had actively practiced in Virginia's High Court of Chancery)⁶² wrote in 1811 that, even if the common law of England had *not* been formally adopted in Virginia, "I should have thought it in force."⁶³ He reasoned that our "ancestors" brought with them to "America . . . the common law of their native country, so far as it was applicable to their new situation."⁶⁴ The "Revolution," he continued, did not "change[] the relations of man to man, or the law which regulated those relations."⁶⁵ Thus, "[i]n breaking our political connection with the parent state, we did not break our connection with each other."⁶⁶ The "ancient rules" would therefore remain in effect "until . . . changed by the competent authority."⁶⁷ In Marshall's view, in other words, "the common law of England was, and is, the common law of this country," and "the decisions of [English] courts, made before the Revolution, have all that claim

in WILLIAM A. HOTCHKISS, A CODIFICATION OF THE STATUTE LAW OF GEORGIA, INCLUDING THE ENGLISH STATUTES OF FORCE 93–94 (1845) (adopting the "common law of England"); N.H. CONST. of 1784, pt. II, art. 90 (June 2, 1784) ("All the laws which have heretofore been adopted, used, and approved, in the Province, colony, or State of New Hampshire, and usually practiced on in the Courts of Law, shall remain and be in full force . . .").

61. See, e.g., Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 572–74 (1882) (surveying jurisdictions); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 515–16 & nn. a–b (George F. Comstock ed., 11th ed. 1867) (same).

62. For a summary of Marshall's law and equity practice in Virginia between 1780 and 1800, see 5 THE PAPERS OF JOHN MARSHALL li–lvi, 53–61 (Charles F. Hobson et al., eds., 1987).

63. *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8,411) (opinion of Marshall, C.J.). *Livingston* was a diversity action filed in the federal circuit court for the district of Richmond against then-former President Thomas Jefferson alleging damages for trespass arising out of the seizure of a "batture" (an accreted sandbank) owned by Livingston along the bank of the Mississippi River in the then-federal Territory of Orleans. See generally Ronan E. Degnan, *Livingston v. Jefferson—A Freestanding Footnote*, 75 CALIF. L. REV. 115 (1987). The question in *Livingston* was whether a common-law action for trespass *quare clausum fregit* for injury to land could be brought only in the place where the land was located, unlike an action for trespass *vi et armis*—"with force and arms"—which was not so limited. *Id.* at 121. In dismissing the lawsuit, Judge Tyler and Chief Justice Marshall applied the common-law rule that the action could be brought only where the land was located—in the Territory of Orleans, not Virginia. *Livingston*, 15 F. Cas. at 662 (opinion of Tyler, J.); *id.* at 664–65 (opinion of Marshall, C.J.).

64. *Livingston*, 15 F. Cas. at 665.

65. *Id.*

66. *Id.*

67. *Id.*

to authority, which is allowed to [a State's] appellate courts."⁶⁸ By contrast, the decisions of English courts "made *since* the Revolution" were only persuasive precedent—considered only "as the opinions of men distinguished for their talents and learning."⁶⁹

Pennsylvania's experience may exemplify Marshall's view. After declaring independence, Pennsylvania did not formally adopt the common law of England.⁷⁰ Yet Pennsylvania courts held "that the common law of England has always been in force in Pennsylvania."⁷¹

Unfortunately, the clumsy wording of Virginia's 1776 ordinance created confusion about the relevant date that English law was received. The ordinance referenced not only "the common law of England" but also "all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first"—1607—"and which are of a general nature, not local to that kingdom."⁷² Was the common law of England adopted as of 1776, the year of independence? Or as of 1607, the "fourth year of the reign" of King James I (and the first year that settlers arrived at Jamestown)—the cutoff date for "acts of parliament"?⁷³

68. *Murdock v. Hunter*, 17 F. Cas. 1013, 1015 (C.C.D. Va. 1808) (No. 9,941). Before he was appointed to the U.S. Supreme Court, Stephen Field, as Chief Justice of the Supreme Court of California, expressed a similar view. See *Norris v. Harris*, 15 Cal. 226, 252 (1860) ("There is no doubt that the common law is the basis of the laws of those States which were originally colonies of England, or carved out of such colonies. It was imported by the Colonists, and established so far as it was applicable to their institutions and circumstances, and was claimed by the Congress of the United Colonies in 1774 as a branch of those 'indubitable rights and liberties to which the respective colonies' were entitled. In all the States thus having a common origin, formed from colonies which constituted a part of the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists—it has been so held in repeated instances—and it rests upon parties who assert a different rule to show that matter by proof." (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 322 (1826))).

69. *Murdock*, 17 F. Cas. at 1015 (emphasis added).

70. William E. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 422 (1968).

71. *Morris's Lessee v. Vanderen*, 1 Dall. 64, 67 (Pa. 1782).

72. 1776 Va. Acts ch. 5, § 6, reprinted in HENING, *supra* note 2, at 127; see THE PROCEEDINGS OF THE CONVENTION OF DELEGATES HELD AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, IN THE COLONY OF VIRGINIA, ON MONDAY, THE 6TH OF MAY, 1776 at 82 (1816).

73. The confusion was caused by the awkwardness of the 109-word sentence:

And be it further ordained, That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances,

In 2011, the Supreme Court of Virginia said in *Commonwealth v. Morris* that 1607 was the relevant date for determining when Virginia adopted the common law of England.⁷⁴ Courts in several states with similarly worded laws read the text the same way.⁷⁵

Just last year, however, the Supreme Court of Virginia in *White v. United States* overruled that portion of *Morris*, concluding that the 1776 ordinance did not “backdate the Commonwealth’s reception of English common law to the date of the Jamestown Charter.”⁷⁶ *White* left open the possibility, however, that 1792 is the better date for Virginia’s reception of English common law.⁷⁷ The General Assembly that year amended the 1776 ordinance to repeal the portion that had adopted “any [English] statute or act of parliament.”⁷⁸ As to “which of these two dates—1776 or 1792—fixes the date of the Commonwealth’s adoption of English common law,” the Court in *White* “offer[ed] no opinion.”⁷⁹

Did Virginia’s reception of the “common law of England” include the principles of *equity* as applied by English chancellors? The Supreme Court of Virginia has yet to answer that question. In some contexts, the term *common law* has meant the law applied in English common-law courts, as distinguished from the principles of equity applied in equity courts; in other contexts, however, the term has carried the broader meaning of the law embodied in judicial

declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

1776 Va. Acts ch. 5, § 6, reprinted in HENING, *supra* note 2, at 127.

74. *Commonwealth v. Morris*, 281 Va. 70, 82, 705 S.E.2d 503, 508 (2011) (“[O]ur adoption of English common law, and the rights and benefits of all writs in aid of English common law, ends in 1607 upon the establishment of the first permanent English settlement in America, Jamestown. From that time forward, the common law we recognize is that which has been developed in Virginia.”).

75. See, e.g., *O’Dell v. Sch. Dist.*, 521 S.W.2d 403, 405–06 (Mo. 1975); *Grimmett v. State*, 476 S.W.2d 217, 220 (Ark. 1972); *In re Smith’s Est.*, 97 P.2d 677, 681 (Wyo. 1940); *U.S. Fid. & Guar. Co. v. McFerson*, 241 P. 728, 728 (Colo. 1925). *But see Ketelson v. Stilz*, 111 N.E. 423, 424 (Ind. 1916) (“[I]t was not the purpose of the [Indiana] Legislature . . . to adopt the rules of the common law as announced and applied by the courts of England prior to 1607, but that the purpose was to adopt the general principles of the common law which underlie and control all rules of decision throughout all time . . .”).

76. *White v. United States*, 300 Va. 269, 277 n.5, 863 S.E.2d 483, 486 n.5 (2021).

77. *Id.* (citing 1792 Va. Acts ch. 79, reprinted in 1 SAMUEL SHEPHERD, STATUTES AT LARGE OF VIRGINIA 199–200 (1835)).

78. 1792 Va. Acts ch. 79, § 3, reprinted in SHEPHERD, *supra* note 77, at 200.

79. *White*, 300 Va. at 277 n.5, 863 S.E.2d at 486 n.5. Justice Mims, joined by Justice Powell, concurred in the result in *White*, concluding more definitively that “English common law was received in the Commonwealth of Virginia in 1776.” *Id.* at 288, 863 S.E.2d at 492 (Mims, J., concurring in the result).

precedent, rather than in a written statute or constitution.⁸⁰ The broader understanding of English “common law,” for example, might be suggested in the first charter to Virginia, which empowered the King’s Council of Virginia to provide “for the good ordering and disposing of all causes . . . as [near] to the common [laws] of England, *and the equity thereof*, as may be.”⁸¹ Similarly, King James I reportedly delivered a judgment in the High Court of Chancery stating that *equity* “is a *part of* the law of the land[] and of the ancient common law.”⁸² The delegates to the First Continental Convention may well have had the broader understanding in mind when they declared in 1774 that “the respective colonies are entitled to the common law of England.”⁸³

Courts in other states with English common-law-reception provisions like Virginia’s have generally held that equitable principles applied in English chancery proceedings were also received as part of the state’s law.⁸⁴ And even though Pennsylvania did not formally

80. *Compare Common Law*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“1. The body of law derived from judicial decisions, rather than from statutes or constitutions”), *and id.* (“2. The body of law based on the English legal system, as distinct from a civil-law system”), *with id.* (“4. The body of law deriving from law courts as opposed to those sitting in equity.”). The first edition of *Black’s Law Dictionary* referenced a similar dichotomy. *See* HENRY CAMPBELL BLACK, A DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 232 (1891) (“common law” definitions 1, 3, 5); *see also id.* (“6. In a wider sense than any of the foregoing, the ‘common law’ may designate all that part of the positive law, juristic theory, and ancient custom of any state . . . which is of general and universal application . . .”). Non-legal dictionaries capture the same dual meanings. *Compare Common Law*, 3 THE OXFORD ENGLISH DICTIONARY 570 (2d ed. 1989) (“2. The unwritten law of England, administered by the King’s courts, which purports to be derived from ancient and universal usage, and is embodied in the older commentaries and the reports of adjudged cases.”), *with id.* (“[A]lso used for the law administered by the King’s ordinary judges as distinguished from the *equity* administered by the Chancery and other courts of like jurisdiction . . .”).

81. 1 WILLIAM WALLER HENING, STATUTES AT LARGE 67–68 (1823) (emphasis added) (archaic spelling modernized).

82. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 38 n.1 (13th ed., Boston, Little, Brown & Co. 1886) (emphasis added) (quoting 1 COLLECTANEA JURIDICA 23, 61); *see* *Beall v. Ex’rs of Fox*, 4 Ga. 404, 424 (1848) (citing Story’s Commentaries).

83. Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), *reprinted in* CHARLES C. TANSILL, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, at 1, 3 (1927).

84. *See* *Lyn-Anna Props., Ltd. v. Harborview Dev. Corp.*, 678 A.2d 683, 685 (N.J. 1996) (“When New Jersey declared its independence in 1776, it adopted as its law the common law of England. The traditions of civil law generally received into the American Colonies included the twin features of the English system of laws—the right to trial by jury for an action at common law, and the right to an equitable action when a remedy of law might be inadequate.” (citation omitted)); *Busch v. City Tr. Co.*, 134 So. 226, 228 (Fla. 1931) (“[T]he equitable principles and rules, as administered in the English courts of Chancery, in so far as applicable to our conditions, have been adopted as a part of our common[] or unwritten

adopt English common law, the Pennsylvania Supreme Court has consistently held that the common law of England to be applied in Pennsylvania includes the principles of equity that had been applied before independence.⁸⁵ In one of its earliest explanations, the court reasoned that equity was part of the common law because “the common law is common right, common reason, or common justice.”⁸⁶ Similarly, in the mid-1800s, *Kent’s Commentaries* called “the rules and usages” of equity “a kind of *secondary common law*,

law.”); *U.S. Fid. & Guar. Co. v. Bramwell*, 217 P. 332, 334 (Or. 1923) (“The principles of equity are part of our common law.” (quoting *In re Pennock’s Estate*, 20 Pa. 268, 274 (1853))); *Cont’l Guar. Corp. v. People’s Bus Line, Inc.*, 117 A. 275, 279 (Del. Super. Ct. 1922) (“When we adopted the common law of England, we adopted it as an entire system so far as it was adapted to the circumstances of our people[,] and the principles of equity as administered in England constituted a part of the common law for the purpose of giving a practical effect to it.”); *Goodman v. Carroll*, 87 So. 368, 369 (Ala. 1921) (“The principles of equity were and are, unless changed by statute or unsuited to our institutions, a part of the common law.”), *overruled in part on other grounds by*, *Yauger v. Taylor*, 118 So. 271, 274 (Ala. 1928); *Martin v. Super. Ct. of Alameda Cnty.*, 168 P. 135, 136–37 (Cal. 1917) (“[W]e hold that our Legislature in its use of the phrase ‘common law’ had in contemplation the whole body of that jurisprudence as it stood, influenced by statute, at the time when the Code section was adopted,” and “that it embraced also in its contemplation the great handmaiden and coadjutor of the common law, equity.”); *Bloomfield State Bank v. Miller*, 75 N.W. 569, 570–71 (Neb. 1898) (“No one would assert that the phrase ‘common law’ was there used in contradistinction to the rules of equity. It undoubtedly includes the law derived from the English court of chancery.”); *State ex rel. Rhodes v. Saunders*, 25 A. 588, 588 (N.H. 1889) (“Equity, as a great branch of the law of their native country, was brought over by the colonists, and has always existed as a part of the common law, in its broadest sense, in New Hampshire.” (quoting *Wells v. Pierce*, 27 N.H. 503, 512 (1853))); *Campbell v. Colo. Coal & Iron Co.*, 10 P. 248, 250 (Colo. 1886) (“We use the term ‘common law’ in its broader sense, as including those doctrines of equity jurisprudence which have not been expressed in legislative enactments.”); *Le Barron v. Le Barron*, 35 Vt. 365, 367 (1862) (“[T]he adoption of the common law of England, by the legislature of the state, was an adoption of the whole body of the law of that country, (aside from their parliamentary legislation,) and included those principles of law administered by the courts of chancery and admiralty”); *Beall*, 4 Ga. at 425 (“When we adopted the Common Law of England, we adopted it as an *entire system*, so far as it was properly adapted to the circumstances of our people; and the principles of Equity, as there administered, for the purpose of giving a *practical* effect to those laws, constituted a part thereof.”); *Williamson v. Williamson*, 1 Johns. Ch. 488, 492 (N.Y. Ch. 1815) (calling “principles of law and equity . . . a branch of the common law”). *But see* *Ketelson v. Stilz*, 111 N.E. 423, 424 (Ind. 1916) (stating in dictum that “[t]he common law of England was derived from the universal usage and custom of the early English people, and is a system of jurisprudence founded upon principles of justice as it was conceived and administered by the English courts of law in contradistinction to the methods of administering justice employed by the courts of equity”).

85. *E.g.*, *Commonwealth ex rel. Hensel v. Phila., Bala & Bryn Mawr Tpk. Co.*, 25 A. 1105, 1106 (Pa. 1893) (“Equity is as much a part of the law of Pennsylvania as it was in 1787”); *Pollard v. Shaffer*, 1 Dall. 210, 213 (Pa. 1787) (“The Judges here are, therefore, to determine causes according to equity as well as the positive law; equity being a part of the law.”); *see also* *Vidal v. Mayor of Philadelphia*, 43 U.S. (2 How.) 127, 196 (1844) (holding that the equitable power of English chancery courts applied in Pennsylvania to determine a charitable heir’s entitlement to a bequest deemed too indefinite at common law).

86. *Pollard*, 1 Dall. at 213.

framed or promulgated by the Court of Chancery within the last two centuries.”⁸⁷

A counterargument could be made that Virginia adopted the common law of England in the narrower sense of the law applied only in common-law courts, not equity courts. “Until the Revolution there had been no separate equity court in Virginia; the General Court functioned as a tribunal to hear both actions at law and suits in equity.”⁸⁸ In 1777, however, the General Assembly created a High Court of Chancery with equity jurisdiction separate from the General Court.⁸⁹ Judges in the High Court of Chancery swore an oath to render judgment “according to equity and good conscience, and the laws and usages of Virginia.”⁹⁰ By contrast, the General Court was “a court of common law of general jurisdiction.”⁹¹ In 1785, Thomas Jefferson described Virginia’s system as an “imitation of that of England,” one “divided into two departments, the Common law and the Chancery.”⁹²

Early judicial decisions in Virginia provide clues but no definitive answer. Most of the records of Virginia’s High Court of Chancery were destroyed in the Richmond evacuation fire of April 3, 1865.⁹³ But George Wythe, who served as chancellor throughout the court’s existence (1777–1802), published selected decisions in 1795.⁹⁴ In a 1791 opinion,⁹⁵ Wythe explained that “the common law

87. KENT’S COMMENTARIES, *supra* note 61, at 532 (emphasis added).

88. 5 THE PAPERS OF JOHN MARSHALL, *supra* note 62, at 53.

89. *Id.*; see 1777 Va. Acts ch. 15, reprinted in HENING, *supra* note 2, at 389. The new court “took over the chancery suits then pending in the General Court and was given jurisdiction in all chancery cases, whether brought before it by original process, by appeal from a lower court or by any other legal means.” THOMAS JEFFERSON HEADLEE, THE VIRGINIA STATE COURT SYSTEM, 1776—A PRELIMINARY SURVEY OF THE SUPERIOR COURTS OF THE COMMONWEALTH WITH NOTES CONCERNING THE PRESENT LOCATION OF THE ORIGINAL COURT RECORDS AND PUBLISHED DECISIONS 4 (1969).

90. 1777 Va. Acts ch. 15, § 1, reprinted in HENING, *supra* note 2, at 389.

91. 1777 Va. Acts ch. 17, § 1, reprinted in HENING, *supra* note 2, at 401; see also *id.* at 401–02 (“The jurisdiction of the said court shall be general over all persons, and in all causes, matters, or things at common law . . .” (emphasis added)).

92. Letter from Thomas Jefferson to Philip Mazzei (Nov. 28, 1785), in 9 THE PAPERS OF THOMAS JEFFERSON, 1 NOVEMBER 1785 TO 22 JUNE 1786, 67 (Julian F. Boyd ed., 1954), <https://founders.archives.gov/documents/Jefferson/01-09-02-0056> [<https://perma.cc/RS92-MTBW>].

93. HEADLEE, *supra* note 89, at 4; 5 THE PAPERS OF JOHN MARSHALL, *supra* note 62, at 55.

94. GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA, BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS (1795); see HEADLEE, *supra* note 89, at 4.

95. *Dandridge v. Lyon*, 1791 WL 261, 1791 Va. LEXIS 5 (Va. High Ct. Ch. 1791).

delights . . . in redressing injuries, by whatever causes produced.”⁹⁶ In “instances” when the common law is “restrained from granting any redress,” or “the redress which it can grant is inadequate,” then “the court of equity” could supply “the remedy.”⁹⁷ In doing so, “the court of equity maintains a perfect harmony with the court of common law . . . aiding the party to assert . . . those rights,” and “thereby contributing its part towards accomplishing the main design of both, which is the attainment of justice.”⁹⁸

In the nineteenth century, the Supreme Court of Virginia⁹⁹ cited English chancery rulings from before and after 1776 without revealing whether it considered those precedents binding or persuasive.¹⁰⁰ In the 1806 case of *Baring v. Reeder*, Judge Roane argued that English common-law decisions should be received as persuasive precedent only, whether rendered before or after American independence.¹⁰¹ By contrast, Judge St. George Tucker suggested in his separate opinion that decisions in England before Independence were precedential but decisions “since our independence commenced” were only persuasive.¹⁰² One Virginia chancellor said in 1809 that Virginia had adopted English equity principles as part of the common law, but he viewed decisions of England’s High

96. *Id.* at *4, 1791 Va. LEXIS 5, at *12.

97. *Id.*

98. *Id.*, at *12–13.

99. The Court was called the “Supreme Court of Appeals” in Virginia’s first constitution. VA. CONST. art. XIV (1776). The name was shortened to “Supreme Court” in the current Constitution, ratified in 1970 and effective in 1971, and its “judges” were renamed “justices.” VA. CONST. art. VI, §§ 1–2, 7 (1971). To avoid confusion, this Article uses the Court’s current name to refer to decisions rendered before and after the effective date of the current Constitution.

100. *E.g.*, *Miller v. Truehart*, 31 Va. (4 Leigh) 569, 578 (1833) (citing *Crockford v. Alexander*, 15 Ves. Jun. 138, 138, 33 Eng. Rep. 707, 707 (Ch. 1808); *Mayor of London v. Bolt*, 5 Ves. Jun. 129, 130, 31 Eng. Rep. 507, 507 (Ch. 1799)); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 257 (1828) (citing *Pusey v. Pusey*, 1 Vern. 272, 273, 23 Eng. Rep. 465, 465 (Ch. 1684); *Goodwyn v. Lister*, 3 P. Wms. 387, 389, 24 Eng. Rep. 1112, 1113 (Ch. 1735); *Nutbrown v. Thornton*, 10 Ves. Jun. 159, 159, 32 Eng. Rep. 805, 805 (Ch. 1804)); *Bowyer v. Creigh*, 24 Va. (3 Rand.) 25, 27 (1825) (citing *Parry v. Owen*, 3 Atk. 740, 740, 26 Eng. Rep. 1224, 1224 (Ch. 1751)). This Article follows the citation style for early English cases used by the Supreme Court of the United States, not the *Bluebook*. Compare, *e.g.*, *McBurney v. Young*, 569 U.S. 221, 233 (2013), with THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION T2.43.1 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2021).

101. See *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 162–63 (1806) (Roane, J.) (“I would not . . . [receive] modern decisions in *England* . . . as *binding* authority. I would receive them merely as affording evidence of the opinions of eminent Judges as to the doctrines in question . . . [A]nd with respect to the *ancient* decisions in *England*, what Judge would wish to go further? Who will contend that they are *binding authorities* upon us, in all cases whatsoever?”) (emphasis added).

102. *Id.* at 158.

Court of Chancery as merely persuasive, not binding: “I have too much regard for myself, and the national character of my country, to rely upon English books, farther than for information merely, but not as authority: it was the *common law* we adopted, and not *English decisions*.”¹⁰³ Those comments reflect a widely held view in the seventeenth and eighteenth centuries that English precedents were simply “evidence” of the common law, not the common law “in itself.”¹⁰⁴

We need not definitively answer whether Virginia’s reception of English common law made earlier English chancery decisions binding precedent. To test the syllogism, however, let’s assume for argument’s sake that it did.

B. *How Traditional Is the “Traditional” Four-Factor Test?*

The syllogism’s second premise is that the “traditional” four-factor test for preliminary injunctions *was* the test applied in England in the eighteenth century. That premise could be supported by dicta from the decisions of the Supreme Court of the United States. The “Judiciary Act of 1789 conferred on the federal courts jurisdiction over ‘all suits . . . in equity.’”¹⁰⁵ Writing for the majority in 1999, Justice Scalia explained that the Court has “long held that [t]he “jurisdiction” thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”¹⁰⁶ “Substantially, then, the equity jurisdiction of the federal courts *is* the jurisdiction in equity exercised by the High Court of Chancery in England *at the time of* the adoption of the Constitution and the enactment of the original Judiciary Act,

103. *Marks v. Morris*, 14 Va. (4 Hen. & M.) 463, 463 (Super. Ct. Ch. 1809) (emphasis altered). Superior Courts of Chancery replaced the High Court of Chancery in 1802 but were abolished in 1831, when their jurisdiction was assumed by the Circuit Superior Court of Law and Chancery for particular localities. See HEADLEE, *supra* note 89, at 4, 13.

104. *Hampton v. Meyer*, 299 Va. 121, 139, 847 S.E.2d 287, 297 (2020) (Kelsey, J., dissenting) (quoting *Jones v. Randall*, Lofft 383, 385, 98 Eng. Rep. 706, 707 (K.B. 1774)); see also *id.* at 139 & nn.3–4, 847 S.E.2d at 297 & nn.3–4 (collecting authorities).

105. *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (alteration in original) (quoting 1 Stat. 78, § 11 (1789)).

106. *Id.* (alterations in original) (quoting *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939)).

1789.”¹⁰⁷ And “[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Federal Rule of Civil Procedure 65] and *depend on traditional principles of equity jurisdiction*.”¹⁰⁸

Although the Supreme Court has not said explicitly that the four-factor test is the same standard applied in eighteenth-century England, other cases could be read to support that inference. The Court has observed, for example, that the “commonplace considerations” used by federal courts when resolving preliminary-injunction motions “reflect a ‘practice with a background of several hundred years of history.’”¹⁰⁹ And at least in the related context of permanent injunctions, the Court has said that “the four-factor test” was “historically employed by courts of equity.”¹¹⁰

On closer inspection, however, the historical premise collapses. *Winter* did not ground its discussion of the four-factor test in English common law as of 1789. In fact, the Court cited no English authority for that proposition. None of the briefs in *Winter* addressed that history either.

Professor Leubsdorf has shown that “[t]he idea that there should be a single standard for all preliminary injunction cases emerged in *nineteenth-century* England.”¹¹¹ “There is no reason to believe that *eighteenth-century* judges and lawyers had conceived the idea of a general standard for all interlocutory injunctions.”¹¹² Leubsdorf credited an 1867 treatise by the English barrister William Williamson Kerr as devising the first “unified standard for preliminary injunctions.”¹¹³ As for eighteenth-century practice, “irreparable injury” and “the strength of the plaintiff’s case influenced decisions,” but there were only “hints of what would develop

107. *Id.* (emphasis added) (citations omitted) (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).

108. *Id.* at 318–19 (emphasis added) (quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2941, at 31 (2d ed. 1995)).

109. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

110. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

111. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 527 (1978) (emphasis added).

112. *Id.* (emphasis added).

113. *Id.* at 536 (discussing WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY (William Maxwell & Son 1867)). The first American edition of Kerr’s treatise appeared in 1871. *Id.* at 536 n.71 (citing WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY (Boston, Little, Brown & Co. 1871)).

into the balancing of convenience and a concern for preserving the status quo.”¹¹⁴ “Neither the cases nor the treatises,” Leubsdorf concluded, “suggest any attempt to discuss injunctions in general rather than particular injunctions against waste, patent infringement, and so forth.”¹¹⁵

The hypothesis that *Winter* and *Real Truth* simply reflect eighteenth-century chancery practice is also undermined by more than two hundred years of Supreme Court jurisprudence. The Supreme Court of the United States itself has not consistently applied a four-factor test in preliminary-injunction cases, an inconsistency that refutes the idea that *Winter*'s four-factor test was applied at the time of this nation's founding.

The Supreme Court was first asked to grant a preliminary injunction in 1792, in *Georgia v. Brailsford*.¹¹⁶ Georgia sought a preliminary injunction to restrain the marshal from releasing funds owed by the debtor to a British creditor, in conflict with a law enacted by Georgia during the Revolutionary War to sequester debts owed to British subjects.¹¹⁷ Georgia ultimately lost the case two years later, when the Court affirmed the jury's determination, consistent with the Treaty of Paris, that Georgia's sequestration law did not permit Georgia to confiscate the debt.¹¹⁸ But in the meantime, a divided four-to-two Court granted the preliminary injunction.¹¹⁹

Although the Court's separate opinions in *Brailsford* make it difficult to identify a single holding, none of the opinions applied anything resembling the modern-day four-factor test. Dissenting, Justice Johnson would have denied the preliminary injunction because, in his view, Georgia failed to “set forth a case of probable right, and a probable danger that the right would be defeated.”¹²⁰ By contrast, Justice Blair voted with the majority to grant the injunction. He reasoned that it was “too early” to reach a conclusion

114. *Id.* at 527–28. Some of the cases providing those “hints” are discussed in the next section. See *infra* notes 145–157.

115. Leubsdorf, *supra* note 111, at 528.

116. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792).

117. *Id.* at 404–05.

118. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794). For an extensive discussion of the history of *Brailsford*, see 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 73–88 (1998).

119. *Brailsford*, 2 U.S. at 405–09. In 1792, the Supreme Court had only six justices. 1 Stat. 73, § 1 (1789).

120. *Brailsford*, 2 U.S. at 405 (opinion of Johnson, J.).

about “the titles in collision” and it was “enough, on a motion of this kind, to [show] a colorable title.”¹²¹ Justice Iredell voted to grant the preliminary injunction because “justice will be done to Georgia, and an irreparable injury may be prevented.”¹²² Those collective views foreshadowed the elements of a preliminary-injunction standard. But the scattered opinions fail to show any coherent “test” that was already well accepted and generally applied.

A more coherent precursor of the four-factor test emerged in an 1847 case, *Truly v. Wanzer*,¹²³ where the Court adopted Justice Baldwin’s articulation of the standard from an opinion he issued when riding circuit in 1830:

[T]he strong arm of equity . . . never ought to be extended[] unless to cases of great injury, where courts of law cannot afford an adequate . . . remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction.¹²⁴

The Court’s statement in *Truly* that the plaintiffs “right must be clear” contrasts, however, with how the Court put it in 1929, when it said that the question presented need only be “grave.”¹²⁵ And in 1940 and 1975, the Court said that the plaintiff need raise only “serious questions.”¹²⁶

On the eve of *Winter*, legal commentators observed that the Supreme Court had “not yet enunciated a single, uniform standard for lower courts to employ in evaluating motions seeking preliminary and/or temporary injunctive relief.”¹²⁷ Then, in 2008, *Winter* announced that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is

121. *Id.* at 406–07 (opinion of Blair, J.).

122. *Id.* at 405–06 (opinion of Iredell, J.).

123. *Truly v. Wanzer*, 46 U.S. (5 How.) 141 (1847).

124. *Id.* at 142–43 (quoting *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1,617)). Justice Baldwin’s circuit opinion added, in language not quoted in *Truly*, that a preliminary injunction “will not be awarded in doubtful cases, or new ones, not coming within well established principles.” *Bonaparte*, 3 F. Cas. at 827.

125. *Compare Truly*, 46 U.S. at 142–43, with *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929).

126. *Withrow v. Larkin*, 421 U.S. 35, 43 (1975) (quoting *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940)).

127. KIRSTIN STOLL-DEBELL ET AL., *INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS* 19 (AM. BAR ASS’N 2009). Though published in 2009, this book evidently went to print too soon to reference either *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), or *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009). As a result, the book incorrectly cites *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), for the current standard in the Fourth Circuit. *Id.* at 24.

likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”¹²⁸

Yet even that statement was not enough to establish uniformity among the federal circuits. To the contrary, a three-way split has since developed.

The Fourth Circuit in *Real Truth* was first out of the gates in 2009, reading *Winter* to require that *all* four factors be satisfied and admonishing that a strong showing on one factor does not reduce the plaintiff’s burden to prove another.¹²⁹ Since then, the Fifth, Tenth, and Eleventh Circuits have also concluded that *Winter* requires a sequential test in which each factor must be independently satisfied.¹³⁰

But that conclusion does not inevitably follow from *Winter*. Justice Ginsburg pointed out in her dissent in *Winter* that the majority had not repudiated the balancing or “sliding-scale” test:

Consistent with equity’s character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a “*sliding scale*,” sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. *This Court has never rejected that formulation, and I do not believe it does so today.*¹³¹

Writing for the majority, Chief Justice Roberts did not respond to Justice Ginsburg’s assertion.¹³² Nor did the Fourth Circuit’s

128. *Winter*, 555 U.S. at 20.

129. *Real Truth*, 575 F.3d at 346–47. *See also supra* text accompanying notes 33–42 (discussing the four factors in depth).

130. *See* Def. Distributed v. U.S. Dep’t of State, 838 F.3d 451, 457 (5th Cir. 2016) (stating that a preliminary injunction should not be granted unless the party seeking it has carried the burden on “all four requirements” (quoting *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005))); *N.M. Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1246–47 (10th Cir. 2017) (rejecting “modified test” that allowed reduced showing of likelihood of success if other three factors met); *Swain v. Junior*, 961 F.3d 1276, 1284 (11th Cir. 2020) (stating that a party “must establish four separate requirements”).

131. *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting) (emphasis added) (citations omitted).

132. *See id.* at 31 n.5 (majority opinion) (“The bulk of JUSTICE GINSBURG’s dissent is devoted to the merits. For the reasons stated, we find the injunctive relief granted in this case an abuse of discretion, even if plaintiffs are correct on the underlying merits.”).

opinion in *Real Truth*, despite expressly repudiating the sliding-scale test that Justice Ginsburg said had survived.¹³³

By contrast, five other federal circuits continue to apply the sliding-scale balancing test even after *Winter*: the Second,¹³⁴ Sixth,¹³⁵ Seventh,¹³⁶ Eighth,¹³⁷ and Ninth.¹³⁸ The Ninth Circuit relied in part on Justice Ginsburg's dissent to conclude that "*Winter* did not disapprove the sliding scale approach."¹³⁹

A third, hybrid approach has been taken by the Third Circuit, which applies a "gateway factors" balancing test.¹⁴⁰ In the Third Circuit,

a movant for preliminary equitable relief must meet the threshold for the first two "most critical" factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all

133. *Real Truth*, 575 F.3d at 346–47; see also *Mountain Valley Pipeline, L.L.C. v. 6.56 Acres*, 915 F.3d 197, 215 n.7 (4th Cir. 2019) (noting that *Blackwelder's* "sliding scale" approach was overridden by *Winter*).

134. See *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 & n.8 (2d Cir. 2010) (comparing "flexible" and "sliding scale" approach).

135. *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 527 (6th Cir. 2017) ("As long as there is some likelihood of success on the merits, these factors are to be balanced, rather than tallied."). But see *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 328 (6th Cir. 2019) (Nalbandian, J., concurring) ("To the extent . . . our approach implies that a complete lack of a showing on one factor (especially irreparable harm or likelihood of success on the merits) could be justified by a showing on the other factors, . . . we may be in tension with the Supreme Court.").

136. *Doe v. Univ. of S. Ind.*, 43 F.4th 784, 791 n.4 (7th Cir. 2022) ("This circuit uses a 'sliding scale' approach to preliminary injunctions: 'the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa.'" (quoting *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020)); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief.").

137. *D.M. ex rel. Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999–1000 (8th Cir. 2019) (stating that "no one of these factors is determinative" and following the Eighth Circuit's description of the sliding-scale standard in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113–14 (8th Cir. 1981) (en banc)).

138. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) ("[T]he 'serious questions' approach survives That is, 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.").

139. *Id.* at 1132.

140. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017).

four factors, taken together, balance in favor of granting the requested preliminary relief.¹⁴¹

The court of appeals found support for that approach in the majority and dissenting opinions in *Winter*.¹⁴²

In short, the syllogism is wrong that Virginia's common-law reception statute requires Virginia courts to follow *Real Truth's* version of the sequential four-factor test when evaluating preliminary-injunction motions. Even assuming for argument's sake that Virginia's reception statute incorporated both common-law and equity precedents from England, eighteenth-century English cases did not apply a systematic preliminary-injunction standard. The syllogism is also refuted by the lack of a consistent standard applied by the Supreme Court of the United States. And the fact that ten federal circuits¹⁴³ in the twenty-first century have now developed three different approaches to applying *Winter* undermines any notion that *Winter*, let alone *Real Truth*, sets forth the same test that was historically applied in England's High Court of Chancery when Virginia declared independence.

III. REVIVIFYING VIRGINIA AND ENGLISH PRECEDENT

Parts I and II have shown that federal authorities do not provide a strong basis for Virginia's preliminary-injunction standard. This Part III anchors the appropriate standard in Virginia caselaw and English chancery precedent.

A. *Eighteenth-Century English Law Supports Considering Each of the Traditional Four Factors*

Professor Leubsdorf was right that eighteenth-century English cases provided useful "hints" about the four factors that modern

141. *Id.* at 179.

142. *Id.* at 177–78.

143. As of this writing, three other federal circuits have not yet decided if *Winter* mandates a sequential test for preliminary-injunction motions. See *Russomano v. Novo Nordisk Inc.*, 960 F.3d 48, 53 n.4 (1st Cir. 2020) (declining to resolve whether *Winter* allows "variations" on standard); *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018) (finding "no occasion for the court to decide whether the 'sliding scale' approach remains valid after *Winter*" (citation omitted)); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (declining to decide if "sliding-scale jurisprudence remains good law after *Winter*").

courts have now characterized as comprising the traditional test.¹⁴⁴ Start with the requirement for irreparable harm. Because England's High Court of Chancery could exercise jurisdiction only when the plaintiff had no adequate remedy at law,¹⁴⁵ the issuance of an interim injunction depended on whether irreparable injury would result. Thus, Lord Hardwicke refused a temporary injunction in 1752, "there being no immediate mischief likely to ensue."¹⁴⁶ And Lord Thurlow denied a preliminary injunction in 1786 to restrain a defendant alleged to have committed "mere" trespass because the plaintiff's injury could be remedied by an action at law for damages.¹⁴⁷

Eighteenth-century chancellors also considered a plaintiff's likelihood of success on the merits, although their opinions do not use that phrase and do not try to calibrate whether a preliminary injunction could issue with less than a fifty percent probability of ultimate success. In a 1752 case in which the plaintiff sought to enjoin the allegedly unauthorized publication of John Milton's *Paradise Lost*, together with accompanying commentary, Lord Hardwicke granted a preliminary injunction against publication pending a trial on the merits.¹⁴⁸ He did not need to resolve whether the plaintiff had an enforceable right: "if the case is doubtful, that may be a ground to grant an injunction until the matter can be considered at the hearing."¹⁴⁹ He said that, "not a clear right, but probability of right, may be, and is, a ground for an injunction."¹⁵⁰ In a 1765 copyright-infringement case, by contrast, Lord Northington dissolved a temporary injunction previously issued.¹⁵¹ He reasoned that the case presented "a new question" without "precedents in point," involving "much difficulty and consequence."¹⁵² Similarly, Justice Willes observed in dictum in a 1769 King's

144. Leubsdorf, *supra* note 111 at 527–28.

145. *E.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *434 ("T[he] suggestion indeed of every bill, to give jurisdiction to the courts of equity . . . is, that the complainant hath no remedy at the common law.").

146. *Fishmongers' Co. v. E. India Co.*, Dick. 163, 164, 21 Eng. Rep. 232, 232 (Ch. 1752).

147. *Mogg v. Mogg*, Dick 670, 671, 21 Eng. Rep. 432, 433 (Ch. 1786).

148. *Tonson v. Walker*, 3 Swans. 671, 681, 36 Eng. Rep. 1017, 1020 (Ch. 1752).

149. *Id.* at 679, 36 Eng. Rep. at 1020.

150. *Id.*

151. *Osborne v Donaldson*, 2 Eden 327, 327–28, 28 Eng. Rep. 924, 924 (Ch. 1765).

152. *Id.*

Bench case that “[w]here the plaintiff’s right is questioned and doubtful, an injunction is improper.”¹⁵³

One also finds early examples of the balance-of-hardship test. In a 1684 case, the King’s printers sought to enjoin Oxford University from publishing the Bible.¹⁵⁴ Although “the plaintiffs pressed much for an injunction to stay the University printers from going on with the printing of Bibles until the trial had settled the right,” the High Court of Chancery “refused to grant it, in regard that in case the right should be found with [the University], they would by such prohibition receive a prejudice, that [the chancellor] could not compensate nor make good to them.”¹⁵⁵

Eighteenth-century injunction opinions, at times, also addressed the public interest. For example, in denying the preliminary injunction in the 1752 case mentioned above—an action to prevent the erection of a brick wall that would have obstructed “plaintiffs’ lights”—Lord Hardwicke expressed apprehension that granting relief on a doubtful claim would mean that “no vacant piece of ground could be built on” in London.¹⁵⁶ And Lord Northington dissolved the preliminary injunction in the 1765 case mentioned above, in part out of concern that if an author’s title were interpreted too expansively, “such a property would give him not only a right to publish, but to suppress too.”¹⁵⁷

In short, while eighteenth-century English chancery cases do not support the rigid and sequential four-factor test set forth in *Real Truth*, they do support considering each factor to determine whether equitable relief is warranted. Virginia courts may properly embrace those factors because—as Judge Roane explained—English law on this point is at least persuasive, even if not binding.¹⁵⁸

153. *Millar v. Taylor*, 4 Burr. 2303, 2324, 98 Eng. Rep. 201, 213 (K.B. 1769).

154. *Hills v. Universitat. Oxon.*, 1 Vern 275, 275, 23 Eng. Rep. 467, 467 (Ch. 1684).

155. *Id.* at 276, 23 Eng. Rep. at 467.

156. *Fishmongers’ Co. v. E. India Co.*, Dick. 163, 163–65, 21 Eng. Rep. 232, 232 (Ch. 1752).

157. *Osborne*, 2 Eden at 328, 28 Eng. Rep., at 924.

158. *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 162–63 (1806) (opinion of Roane, J.).

B. *Virginia Precedent, Particularly Manchester Cotton, Supports Evaluating the Four Factors Using a Balancing Approach*

During the past 200 years, the Supreme Court of Virginia has issued dozens of opinions on the propriety of temporary injunctive relief. Perhaps because so many were decided in the nineteenth and early twentieth centuries, those opinions are rarely cited in the twenty-first century. But they establish general principles that should guide Virginia trial courts in deciding whether a preliminary injunction is appropriate.

At the outset, it is settled that a preliminary injunction may not be granted absent a showing that the plaintiff is likely to suffer irreparable harm without one because a “court of equity . . . *only* interferes upon the principle of preventing irreparable mischief.”¹⁵⁹ So a plaintiff seeking such interim relief “must charge that irreparable damage will result if the injunction is denied.”¹⁶⁰ “The injury complained of must be such that it is not susceptible of compensation in damages at law.”¹⁶¹ Thus, the plaintiff’s failure to allege “facts constituting such injury . . . is fatally defective.”¹⁶² As the Supreme Court of Virginia recently noted, “[t]he test of the chancellor’s jurisdiction was, from the beginning, as the test of equity jurisdiction has remained substantially to this day, the absence of a plain and adequate remedy at law.”¹⁶³

159. *Trent v. Cartersville Bridge Co.*, 38 Va. (11 Leigh) 521, 529–30 (1841) (emphasis added).

160. *Collins v. Sutton*, 94 Va. 127, 129, 26 S.E. 415, 416 (1896); *see also* 1 R.T. BARTON, PLEADING & PRACTICE IN THE COURTS OF CHANCERY 431 (1881) (“[A]ll the grounds upon which the right to an injunction rests are traceable to this general rule of preventing irreparable wrong or mischief.”).

161. *Moore v. Steelman*, 80 Va. 331, 340 (1885).

162. *Collins*, 94 Va. at 129, 26 S.E. at 416; *see also* *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983) (“In traditional chancery practice, lack of proof of irreparable harm is generally fatal.”). Numerous cases hold that conclusory allegations of irreparable harm are insufficient to withstand demurrer; the facts showing such irreparable harm must be specifically pleaded. *E.g.*, *Moore*, 80 Va. at 340 (“[T]he facts which show the irreparable nature of the injury must be set out in the bill, a mere general averment is not sufficient.”); *see also* *City of Lynchburg v. Peters*, 145 Va. 1, 26, 133 S.E. 674, 683 (1926) (“[T]he mere allegation [of irreparable injury] is not sufficient.”); *S. & W. Ry. Co. v. Va. & Se. Ry. Co.*, 104 Va. 323, 325–26, 51 S.E. 843, 844 (1905) (“The pleader must not content himself with a mere averment of his conclusions, but must show how the irreparable injury apprehended is to arise, by giving a full and detailed statement of the facts and circumstances, the nature and condition of his property, etc., so as to enable the court to determine the necessity for an injunction.”).

163. *Phillips v. Rohrbaugh*, 300 Va. 289, 305, 863 S.E.2d 847, 853 (2021) (quoting WILLIAM MINOR LILE, NOTES OF LECTURES ON EQUITY JURISPRUDENCE 271–72 (1921)); May

Even so, the court has recognized a modern exception to the irreparable-harm requirement when a statute specifically provides for an injunction as a remedy.¹⁶⁴ In that case, the plaintiff “is not required to establish the traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law, before the injunction can issue. All that is required is proof that the statute or regulation has been violated.”¹⁶⁵ But absent such statutory authority, the irreparable-harm requirement remains fundamental. As the court put it in 1825: “[t]here is no more frequent or better settled ground of demurrer to bills [in equity], than that there is a complete remedy at law.”¹⁶⁶

The three other preliminary-injunction factors are also grounded in Virginia precedent, which further teaches that trial judges should balance those factors when determining whether a preliminary injunction is warranted. The hidden gem for this point is the 1875 decision in *Manchester Cotton Mills v. Town of Manchester*.¹⁶⁷

The cotton-mill plaintiff in *Manchester Cotton* sought a temporary injunction to prevent the town from razing three company-owned brick buildings that the town claimed encroached on a public street.¹⁶⁸ The company had clear title to the land on which the buildings had been constructed, but the evidence was “very conflicting” about whether the company’s predecessor in title had dedicated the public street to the town.¹⁶⁹ The circuit court first granted, but then dissolved, a temporary injunction against demolition, concluding that the company had an “adequate remedy at

v. R.A. Yancey Lumber Corp., 297 Va. 1, 17–18, 822 S.E.2d 358, 367 (2019) (“In general, a court may not grant injunctive relief unless a party has shown that party would suffer irreparable harm without the injunction, and that the party has no adequate remedy at law.”).

164. See, e.g., *Carbaugh*, 225 Va. at 315, 302 S.E.2d at 35 (“When the General Assembly determines that certain conduct is inimical to the public interest, a petition for an injunction ‘need not contain an allegation of “irreparable injury.”’” (quoting *WTAR Radio-TV Corp. v. City Council of Va. Beach*, 216 Va. 892, 894, 223 S.E.2d 895, 897 (1976))); *Hinderliter v. Humphries*, 224 Va. 439, 450, 297 S.E.2d 684, 690 (1982) (A “statute authorizing the injunctive remedy relieves plaintiff of the normal burden of proving that an adequate remedy at law does not exist and that irreparable injury will occur.”).

165. *Va. Beach S.P.C.A., Inc. v. S. Hampton Rds. Veterinary Ass’n*, 229 Va. 349, 354, 329 S.E.2d 10, 13 (1985).

166. *Bowyer v. Creigh*, 24 Va. (3 Rand.) 25, 27 (1825) (opinion of Carr, J.).

167. *Manchester Cotton Mills v. Town of Manchester*, 66 Va. (25 Gratt.) 825 (1875).

168. *Id.* at 826.

169. *Id.*

law” to sue the town for damages if the buildings were demolished.¹⁷⁰

On interlocutory appeal, the Supreme Court of Virginia disagreed and ordered the temporary injunction “reinstated and continued” until title could be determined at a trial on the merits.¹⁷¹ The court began by observing that “[e]very application for an injunction is addressed to the sound discretion of the chancellor acting upon all the circumstances of each particular case.”¹⁷² The court found that the company had adequately shown that it would suffer irreparable harm if the town tore down the three brick buildings, which were likely being used as “places of residence” for the “operatives” of the cotton factory.¹⁷³ The frustration of property rights—the “destruction of the substance and value of the estate in the character in which it is enjoyed”—sufficed to show irreparable harm because “the threatened mischief reaches to the very substance and value of the estate.”¹⁷⁴

The court rejected the town’s argument that a temporary injunction should not be granted because of the legal uncertainty surrounding whether the company’s predecessor in title had dedicated the public street to the town.¹⁷⁵ The company’s legal title, “to say the least, [was] doubtful.”¹⁷⁶ And in “doubtful” cases, courts may “require the complainant first to establish his right at law.”¹⁷⁷ But here, the company had constructed and used the buildings “for more than twenty years,” and the town had seen the buildings erected; yet all that time, the town never made “any complaint.”¹⁷⁸ Those considerations made it unnecessary for the company’s “right to be first established at law.”¹⁷⁹

Citing Kerr’s famous treatise on injunction practice, the court in *Manchester Cotton* ruled that the company established the merit of its position by showing “a fair prima facie case” in support: “The court does not undertake to settle the right, but merely to preserve

170. *Id.* at 826–28.

171. *Id.* at 837.

172. *Id.* at 827.

173. *Id.* at 827, 831.

174. *Id.* at 828–30.

175. *Id.* at 830–31.

176. *Id.* at 830.

177. *Id.*

178. *Id.* at 831–32.

179. *Id.* at 832.

the property until the right is settled at law. *It is not essential that the applicant shall establish a clear title, but that he shall show a fair prima facie case in support of his title.*"¹⁸⁰

The court found more support for that "prima facie case" requirement in Lord Cottenham's 1841 opinion in *Hilton v. Earl of Granville*.¹⁸¹ But *Hilton*, as quoted in *Manchester Cotton*, required "at least a strong" prima facie case, not a "fair" prima facie case.¹⁸²

The court in *Manchester Cotton* also connected the merits inquiry to the balance-of-hardship analysis. When the plaintiff's "legal title . . . is clear, a perpetual injunction may be at once granted."¹⁸³ But when the plaintiff's title is "not clear, whether the court will interfere, by way of a temporary injunction, depends upon circumstances."¹⁸⁴ Hence the balancing: "The case resolves itself into a question of comparative convenience and inconvenience, whether the defendant will be more damnified by the injunction being granted, or the plaintiff by its being withheld."¹⁸⁵

Manchester Cotton struck that balance in the company's favor. "The refusal of an injunction [would have resulted] in the destruction of the buildings, and the conversion of the ground upon which they stand into a public thoroughfare, and the plaintiffs [would have been] put to a protracted and expensive litigation for compensation."¹⁸⁶ "An injunction would be of but little value *after* the buildings are levelled with the ground, and the lot upon which they stand appropriated as a highway."¹⁸⁷

The consideration of public interest also came into play. The court worried that if it simply deferred to the town's finding that the company's buildings obstructed the public street, then "every

180. *Id.* at 831 (emphasis added) (citing WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 196-97 (William Maxwell & Son 1867)).

181. *Id.* at 836 (citing *Hilton v. Earl of Granville*, 41 Cr. & Ph. 283, 292, 41 Eng. Rep. 498, 502 (Ch. 1841)).

182. *Id.* at 831, 836. *Hilton* said that, "[i]n order to induce the Court to interfere, for the purpose of protecting property pending the decision of a legal title, it is necessary for the Plaintiff to shew, at least, a strong *prima facie* case in support of the title to that which he asserts . . ." 41 Cr. & Ph. at 292, 41 Eng. Rep. at 502.

183. *Manchester Cotton*, 66 Va. (25 Gratt.) at 831.

184. *Id.*

185. *Id.* (first citing WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 294, 209-10 (William Maxwell & Son 1867); and then citing FRANCIS HILLIARD, THE LAW OF INJUNCTIONS 32 (Kay & Brother 1874)).

186. *Id.*

187. *Id.* at 836 (emphasis added).

house, every business, and all the property of the town [would be] at the uncontrolled will of the temporary local authorities.’ [That] doctrine is not . . . in accordance with a sound public policy.”¹⁸⁸

Manchester Cotton, in short, not only supports all four elements of the traditional four-factor framework, it also supports a balancing approach that allows a weaker likelihood-of-success showing to be counterbalanced when the other equities strongly favor the plaintiff. Other than the prerequisite that the plaintiff must show a likelihood of irreparable harm, the *Manchester Cotton* approach resembles the sliding-scale standard used in *Blackwelder*.¹⁸⁹

The *Manchester Cotton* standard also aligns well with the *permanent*-injunction standard that the Supreme Court of Virginia has applied for many years:

The decision whether to grant [a permanent] injunction always rests in the sound discretion of the chancellor, and depends on the relative benefit an injunction would confer upon the plaintiff in contrast to the injury it would impose on the defendant. Any burden imposed on the public should also be weighed.¹⁹⁰

Those “equities” must be “balanced.”¹⁹¹ The chancellor must “weigh the injury that may accrue to the one or the other party, and also the public, by granting or refusing the injunction.”¹⁹² The close alignment between the two standards corroborates that the *Manchester Cotton* standard is the correct one for preliminary injunctions. After all, the preliminary-injunction standard is “essentially the same” as the permanent-injunction standard, except the latter requires “actual success” on the merits.¹⁹³

The preliminary-injunction standard in *Manchester Cotton* differs in important ways from the Fourth Circuit’s standard in *Real Truth*. Although a showing of irreparable harm is essential under both decisions, the Supreme Court of Virginia has never required that the plaintiff satisfy *all* four factors. As the court said in its unpublished order in *Sweet Briar*, “[n]o single test is to be

188. *Id.* at 834 (quoting *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 505 (1870)).

189. *See supra* notes 20–28 and accompanying text.

190. *Fancher v. Fagella*, 274 Va. 549, 556, 650 S.E.2d 519, 523 (2007) (citing *Akers v. Mathieson Alkali Works*, 151 Va. 1, 8–9, 144 S.E. 492, 494 (1928)).

191. *See id.* at 557, 650 S.E.2d at 523.

192. *Akers*, 151 Va. at 9, 144 S.E. at 494 (quoting *Clifton Iron Co. v. Dye*, 6 So. 192, 193 (Ala. 1889)).

193. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987)).

mechanically applied, and no single factor can be considered alone as dispositive.”¹⁹⁴ While *Real Truth* eschewed a balancing or sliding-scale test,¹⁹⁵ *Manchester Cotton* embraced it.¹⁹⁶ And where *Real Truth* emphasized that a plaintiff must “make a clear showing that it will likely succeed on the merits at trial,”¹⁹⁷ *Manchester Cotton* requires only a “fair” prima facie case or “at least a strong” prima facie case.¹⁹⁸

C. *The Full Contours of the Merits Prong Require Further Development*

Because *Manchester Cotton* references both a “fair” prima facie case, on the one hand, and “at least a strong” prima facie case, on the other, the opinion leaves uncertainty about how strong the claim must be to warrant a preliminary injunction. A “prima facie case” means a “party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.”¹⁹⁹ Several cases after *Manchester Cotton* cited its “fair prima facie” case standard.²⁰⁰ Some suggested that when the balance of hardship heavily favors the plaintiff—such as when the case is “urgent”—a preliminary injunction may be issued even if the plaintiff’s prima facie claim remains “in doubt.”²⁰¹

194. Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 WL 3646914, at *2, 2015 Va. LEXIS 22, at *2 (June 9, 2015).

195. See *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009).

196. *Manchester Cotton Mills v. Town of Manchester*, 66 Va. (25 Gratt.) 825, 831 (1875).

197. *Real Truth*, 575 F.3d at 346.

198. *Manchester Cotton*, 66 Va. (25 Gratt.) at 831, 836. Some Virginia authority suggests that a strong showing of likely success on the merits is required for a “mandatory injunction” that orders the respondent to undertake an affirmative act. See *Va. Ry. Co. v. Echols*, 117 Va. 182, 184, 83 S.E. 1082, 1083 (1915) (“A mandatory injunction will not be granted upon a preliminary hearing except in cases of strong and imperious necessity, where the right to the injunction is clear.” (citing *Carpenter v. Gold*, 88 Va. 551, 14 S.E. 329 (1892))). *Carpenter* relied on Pomeroy’s treatise, see *Carpenter*, 88 Va. at 554, 14 S.E. at 330, which noted that a mandatory injunction “is used where the injury is immediate, and pressing, and irreparable, and clearly established by the proofs,” 3 JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA; ADAPTED FOR ALL THE STATES, AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 1359 (1883).

199. *Prima Facie Case*, BLACK’S LAW DICTIONARY (11th ed. 2019).

200. *Deane v. Turner*, 113 Va. 236, 238, 74 S.E. 165, 166 (1912); *Woolfolk v. Graves*, 113 Va. 182, 189, 69 S.E. 1039, 1041 (1912); *Bledsoe v. Robinett*, 105 Va. 723, 725, 54 S.E. 861, 861 (1906); *Callaway v. Webster*, 98 Va. 790, 791, 37 S.E. 276, 276 (1900); *Rakes v. Rustin Land, Mining & Mfg. Co.*, 2 Va. Dec. 156, 158, 22 S.E. 498, 499 (1895).

201. *Deane*, 113 Va. at 238, 74 S.E. at 166 (quoting *Callaway*, 98 Va. at 791, 37 S.E. at 276); see also *Woolfolk*, 113 Va. at 189, 69 S.E. at 1042 (same).

Manchester Cotton's citation of Kerr's 1867 treatise may provide additional insight about what the court may have meant.²⁰² As Kerr put it, the plaintiff need not "make out a clear legal title, but he must satisfy the Court that he has a *fair question* to raise as to the existence of the legal right which he sets up."²⁰³ Kerr referenced several mid-nineteenth-century English chancery opinions for that point;²⁰⁴ these opinions used slightly different formulations, such as a "fair question to raise,"²⁰⁵ a "substantial question to be decided,"²⁰⁶ or a "fair matter for investigation."²⁰⁷

Those terms were the precursors to *Blackwelder's* formulation that, if the balance of hardship tilts in plaintiff's favor, the likelihood-of-success prong is satisfied if "the plaintiff has raised questions going to the merits so *serious, substantial, difficult and doubtful*, as to make them *fair ground* for litigation and thus for *more deliberate investigation*."²⁰⁸ *Blackwelder* quoted that language from the Second Circuit's 1953 decision in *Hamilton Watch Co. v. Benrus Watch Co.*,²⁰⁹ which cited an 1897 formulation from the Eighth Circuit,²¹⁰ which cited several of the same English chancery cases collected by Kerr.²¹¹ Recall that the Supreme Court of the United States itself has said at times that a preliminary injunction may be awarded upon a showing that the plaintiff's case presents "serious questions."²¹² And those federal circuits that have concluded that *Winter* did not reject a sliding-scale test continue to find "serious questions" sufficient for injunctive relief

202. *Manchester Cotton Mills v. Town of Manchester*, 66 Va. (25 Gratt.) 825, 828 (1875).

203. KERR, *supra* note 113, at 196–97 (emphasis added); *see also id.* at 12 (same).

204. *See id.* at 197 n.u; *id.* at 12 n.c.

205. *Shrewsbury & Chester Ry. Co. v. Shrewsbury & Birmingham Ry. Co.*, 1 Sim. (N.S.) 410, 426, 61 Eng. Rep. 159, 165 (V.C. 1851).

206. *Great W. Ry. Co. v. Birmingham & Oxford Junction Ry. Co.*, 2 Ph. 597, 603, 41 Eng. Rep. 1074, 1076 (Ch. 1848).

207. *Glascott v. Lang*, 3 My. & Cr. 451, 456, 40 Eng. Rep. 1000, 1002 (Ch. 1838).

208. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (emphasis added) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

209. *Id.* at 195 (quoting *Hamilton Watch*, 206 F.2d at 740).

210. *Hamilton Watch*, 206 F.2d at 740 (citing *City of Newton v. Levis*, 79 F. 715, 718 (8th Cir. 1897)).

211. *City of Newton*, 79 F. at 718 (citing *Shrewsbury & Chester Ry. Co.*, 1 Sim. (N.S.) at 426, 61 Eng. Rep. at 165; *Great W. Ry.*, 2 Ph. at 603, 41 Eng. Rep. at 1076; and *Glascott*, 3 My. & Cr. at 456, 40 Eng. Rep. at 1002).

212. *E.g.*, *Withrow v. Larkin*, 421 U.S. 35, 43 (1975) (quoting *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940)).

when the balance of hardship tips strongly in the moving party's favor.²¹³

It bears mention that, in 1975, the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* clarified that England follows the “serious question” standard.²¹⁴ Lord Diplock explained that a more-than-50%-likelihood-of-success requirement would conflict with the discretion that equity entrusts to chancellors:

The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.²¹⁵

The English approach has much to recommend it. Suppose that the plaintiff would die—or to embellish the point, that the world would end—absent a preliminary injunction. Assume that the defendant would suffer little or no harm from being preliminarily enjoined (or that any harm could be compensated by money damages secured by an injunction bond).²¹⁶ But suppose that the chancellor

213. See *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (“[W]e join the Seventh and the Second Circuits in concluding that the ‘serious questions’ version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*.”); *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010) (“Nor does *Winter* address the requisite probability of success of the movant’s underlying claims.”); *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (requiring “a plausible claim on the merits”); *D.M. ex rel. Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999 (8th Cir. 2019) (describing the “fair chance of prevailing” standard, which “does not require the party seeking relief to ‘show “a greater than fifty per cent likelihood that he will prevail on the merits”” (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008) (en banc))). *But see Munaf v. Geren*, 553 U.S. 674, 690 (2008) (holding that the D.C. Circuit erred in permitting a preliminary injunction to issue on the standard that “the ‘jurisdictional issues’ presented questions ‘so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.’” (quoting *Omar v. Harvey*, 416 F. Supp. 2d 19, 23–24 (D.D.C. 2006))); *Where Do We Go Berkeley v. Cal. Dep’t of Transp.*, 32 F.4th 852, 863 (9th Cir. 2022) (stating that the “serious question” standard does not permit courts to grant an injunction “on a merely plausible claim”).

214. *Am. Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396, 407 (HL) (appeal taken from Eng.) (“The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.”).

215. *Id.* at 406. For nuances in how *American Cyanamid* has been applied in the United Kingdom, see John Sorabji, *Interim Relief: National Report for England and Wales*, 20 FLINDERS L.J. 157, 163–65 (2018).

216. See VA. CODE ANN. § 8.01-631(A) (2015) (“Except in the case of a fiduciary or any other person from whom in the opinion of the court awarding an injunction it may be improper or unnecessary to require bond, no temporary injunction shall take effect until the

predicts only a forty percent chance that the plaintiff will ultimately win at trial. Would it not be rational to grant the preliminary injunction? Would doing so constitute an abuse of discretion?

We will have to wait to find out the answer in Virginia. The Supreme Court of Virginia will have to tell us if the *Manchester Cotton* standard is coterminous with the “serious questions” formulation applied in cases like *Blackwelder* and *American Cyanamid*.

D. *The Manchester Cotton framework provides better guidance than a totality-of-circumstances standard*

The four-factor framework applied by the Supreme Court of Virginia in *Manchester Cotton* is far superior to the standardless “totality of the circumstances” inquiry suggested in its non-precedential order in *Sweet Briar*.²¹⁷ As shown above, the *Manchester Cotton* framework advances the rule of law because it is fully grounded in Virginia and English precedent. It requires no copying and pasting from federal practice.

What is more, the *Manchester Cotton* framework advances the rule of law by providing rational guideposts to guide and constrain the trial judge’s discretion. The demand exists for an intelligible standard. Thinking there isn’t one, Virginia practitioners and trial judges—for decades—have been drawn to the Fourth Circuit’s version of the federal standard.²¹⁸ Lawyers and jurists alike intuit that the traditional four factors provide the correct measures of equity. Indeed, the same four factors are generally used in the preliminary-injunction standard applied in state and territorial courts throughout the United States.²¹⁹ The *Manchester Cotton* framework explicitly recognizes those factors as the core considerations, guides the decisionmaker in applying them, and enables review of the analysis to determine if it is rational.

movant gives bond with security in an amount that the trial court considers proper to pay the costs and damages sustained by any party found to have been incorrectly enjoined, with such conditions as the trial court may prescribe.”)

217. Commonwealth *ex rel.* Bowyer v. Sweet Briar Inst., No. 150619, 2015 WL 3646914, at *2, 2015 Va. LEXIS 22, at *5 (June 9, 2015).

218. See *supra* notes 29–32, 43–53 and accompanying text.

219. STOLL-DEBELL ET AL., *supra* note 127, at 50–72 (surveying jurisdictions). Some jurisdictions have codified the standard. See NEB. REV. STAT. § 25-1063 (2022); N.Y. C.P.L.R. § 6301 (2022). Others have promulgated the standard in a rule of court. See IDAHO R. CIV. P. 65(e); UTAH R. CIV. P. 65A(e).

By contrast, a totality-of-circumstances test without guidelines or standards is no “test” at all. It risks inviting the criticism that seventeenth-century legal scholar John Selden leveled at equity practice:

Equity is a roguish thing. For law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot. What an uncertain measure would this be. One chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the chancellor's conscience.²²⁰

Blackstone similarly observed, though without Selden's sarcasm, that “there can be no established rules and fixed precepts of equity laid down, without destroying [its] very essence, and reducing it to a positive law.”²²¹

But proponents of equity rejected the idea that it condoned unbridled discretion. In 1818, Lord Eldon said that nothing would inflict “greater pain” on his conscience than thinking he had done something “to justify the reproach that the equity of this Court varies like the Chancellor's foot.”²²² He maintained that a chancellor must act under “well settled” and “uniform” doctrines, “laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.”²²³ Those doctrines should not “be changed with every succeeding judge.”²²⁴ Likewise, Thomas Jefferson viewed Blackstone as having “endeavored seriously to prove that the jurisdiction of the Chancery is a chaos, irreducible to system, insusceptible of fixed rules, and incapable of definition or explanation.”²²⁵ Jefferson insisted that was untrue; otherwise equity “would be a monster whose existence should not be suffered one moment in a free country.”²²⁶

220. JOHN SELDEN, *THE TABLE-TALK OF JOHN SELDEN* 61 (Oxford Univ. Press 1892). Notably, the editors concluded that Selden's statement “has ceased to be true, as equity has come gradually to be administered under settled rules.” *Id.* at 61 n.1; see 1 W. HAMILTON BRYSON, *CASES CONCERNING EQUITY AND THE COURTS OF EQUITY 1550–1660* xlvii (Selden Soc'y 2001) (discussing Selden's “well-known jibe at equity”).

221. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *61–62.

222. *Gee v. Pritchard*, 2 Swans. 402, 414, 36 Eng. Rep. 670, 674 (Ch. 1818).

223. *Id.*

224. *Id.*

225. Letter from Jefferson to Mazzei, *supra* note 92, at 71.

226. *Id.*

Their views that equity must be governed by the rule of law prevailed. In 1878, the Supreme Court of Virginia insisted that judicial discretion calls for a court to discern *by the law* what is just.²²⁷ It added that “‘discretion,’ says Lord Mansfield, ‘when applied to a court of justice, means *sound* discretion *guided by law*. It must be governed by rule: it must not be arbitrary, vague and fanciful, but legal and regular.’”²²⁸ The same concept recurs in Virginia jurisprudence throughout the nineteenth and twentieth centuries.²²⁹ In 1992, for instance, the court said that “[e]quity is a complex system of established law and is not merely a reflection of the chancellor’s sense of what is just or appropriate.”²³⁰ And as recently as 2018, the court repeated Lord Mansfield’s admonition that discretion “means sound discretion guided by law.”²³¹

To make good on that promise requires legal standards to guide the chancellor’s exercise of discretion. As between a standardless totality-of-circumstances test and the four-factor balancing test applied in *Manchester Cotton*, the better choice is obvious.

227. *Harris v. Harris*, 72 Va. (31 Gratt.) 13, 16 (1878) (“*Discretio est discernere per legem quid sit justum*” (citing Lord Coke, 4 Inst. 41)).

228. *Id.* (quoting *Rex v. Wilkes*, 4 Burr. 2527, 2539, 98 Eng. Rep. 327, 334 (K.B. 1770)).

229. *See, e.g.*, *City of Richmond v. Henrico Cnty.*, 185 Va. 859, 868, 41 S.E.2d 35, 40 (1947) (quoting *Harris*, 72 Va. (31 Gratt.) at 13); *Clinchfield Coal Co. v. Powers*, 107 Va. 393, 398, 59 S.E. 370, 372 (1907) (“a sound judicial discretion, regulated by the established principles of the court”); *Dunsmore v. Lyle*, 87 Va. 391, 393, 12 S.E. 610, 611 (1891) (same); *Bailey v. Bailey*, 62 Va. (21 Gratt.) 43, 57 (1871) (stating that discretion to set alimony is “not an arbitrary but a judicial discretion, to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case”).

230. *Tiller v. Owen*, 243 Va. 176, 179, 413 S.E.2d 51, 53 (1992); *see also* *Waikoloa Ltd. P’ship v. Arkwright*, 268 Va. 40, 48, 597 S.E.2d 49, 54 (2004) (citing *Tiller* for same proposition); *Verrocchio v. Verrocchio*, 16 Va. App. 314, 317–18, 429 S.E.2d 482, 484 (1993) (same).

231. *Comm’r of Hwys. v. Karverly, Inc.*, 295 Va. 380, 388 n.7, 813 S.E.2d 322, 326 n.7 (2018) (quoting HERBERT BROOM, COMMENTARIES ON THE COMMON LAW 22 (4th ed. 1869)). Chief Justice Marshall carried the same understanding to the federal bench. He explained, while presiding over the trial of Aaron Burr, that a motion directed to the court’s “discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d). Chief Justice Roberts repeated that admonition in 2009, explaining that the fact that the matter “is left to the court’s discretion ‘does not mean that no legal standard governs that discretion.’” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (first quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); and then quoting *Burr*, 25 F. Cas. at 35)).

CONCLUSION

To determine on a preliminary-injunction motion if the trial court is “satisfied of the plaintiff’s equity,”²³² a Virginia trial judge, sitting as chancellor, should consider the traditional four factors: (1) whether the plaintiff will suffer irreparable harm absent a temporary injunction; (2) the plaintiff’s likelihood of success on the merits; (3) the balance of hardship—that is, whether a temporary injunction would harm the defendant more than it would benefit the plaintiff, and (4) the public interest.²³³ Unless a statute entitles the plaintiff to injunctive relief, the plaintiff must show that it will likely suffer irreparable harm without a preliminary injunction.²³⁴ If the balance of hardship tilts decidedly in the plaintiff’s favor, the plaintiff need not show a strong likelihood of success on the merits if the plaintiff has put forth a prima facie case that the claim is meritorious.²³⁵ Whether that must be “at least a strong prima facie case,”²³⁶ a “fair” case,²³⁷ or simply a “serious question”²³⁸ remains an open question that the Supreme Court of Virginia will ultimately have to answer.²³⁹

This legal standard is amply supported by Virginia precedent, particularly *Manchester Cotton*, as well as by English equity practice (both before and after 1776). It better satisfies the rule of law, unlike an unbounded and standardless “totality of circumstances” approach. The Fourth Circuit’s *Real Truth* test, on the other hand, conflicts with Virginia law. Virginia has never needed it. The time has come to stop using it.

232. VA. CODE ANN. § 8.01-628 (2015).

233. See *supra* notes 144–198 and accompanying text.

234. See *supra* notes 159–166 and accompanying text.

235. See *supra* notes 180–182 and accompanying text.

236. *Manchester Cotton Mills v. Town of Manchester*, 66 Va. (25 Gratt.) 825, 836 (1875).

237. *Id.* at 831.

238. See *supra* notes 28, 126, 212–214 and accompanying text.

239. See *supra* notes 199–216 and accompanying text.