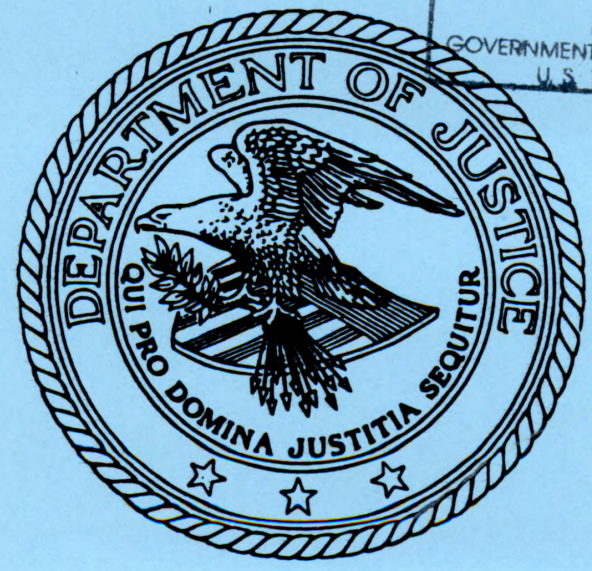
U.S. Department of Justice
Office of Legal Policy

Report to the Attorney General

Justice Without Law: A Reconsideration of the "Broad Equitable Powers" of the Federal Courts

August 31, 1988



JUSTICE WITHOUT LAW

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Executive Summary

The contemporary federal judiciary has cited its "broad equitable powers" as its authority to issue injunctions rearranging the governing policies and the resources of a variety of state and local institutions, including school systems, prison systems, mental hospitals, and city governments. Such judicial actions have been justified as required by the law and facts of the cases but have been criticized as overly expansive conceptions of equity and as invalid assumptions of executive and legislative powers.

This report undertakes a reexamination of the origins and nature of equity in English legal history; its importation and establishment in this country; the meaning of equity in Article III of the Constitution; the development of the injunctive power, especially in cases of public law; and the recent creation by the federal judiciary of a new equity jurisprudence. The report concentrates on the nature, first principles, and most important polices of equity and does not review every event in the historical development of equity nor every difference between law and equity.

I. The Tradition of Equity in England and the United States

The entire history of Anglo-American jurisprudence shows that equity as natural justice or as ad-hoc discretionary justice existed for a period of roughly 150 years in England (*never* in the United States) that ended about 350 years ago. All the older American authorities and all the American cases until well into the Twentieth Century concluded that the equity jurisdiction of the federal judiciary granted by Article III of the Constitution depends for its meaning on English equity at the time of the ratification of the Constitution. At that time, equity was a separate department of the law, tightly bound by rules, and was not a system of discretionary justice. The English courts have maintained this distinction. Our federal courts originally maintained it, but now have largely abandoned it.

II. Three Critical Principles of Equity

The importance of the famous maxims of equity has been overemphasized. But three other principles are critical: it is said that "where there is a right, there is a remedy;" that the equity court is a "court of conscience;" and that judges in equity rule according to "discretion." An

examination of its origins shows that the right/remedy principle is a general statement about the role of the judiciary, that it has no peculiar application to equity, and that it is true only if its contra-positive ("where there is no remedy, there is no right") is also true. The assertion that equity courts are courts of conscience refers to peculiarities of the history of equitable procedure and does not mean that judges in equity rule according to their private and subjective consciences. The equitable discretion of courts of equity originally referred to the discretion not to give a remedy and does not mean that judges can rule according to their private discretion. Equitable discretion is public discretion — discretion under law.

III. The Injunctive Power

An injunction in equity was originally a negative order that arose because the common-law courts could only award damages. Until well into the present century, injunctions were remedies issued primarily in cases having to do with real property — since damages were often inadequate in real property cases. Because of these origins, a jurisprudence developed that identified injunctions as preventive remedies that would issue in certain kinds of cases only when legal remedies were inadequate. Injunctions were not judicial alternatives to executive or legislative decisions concerning public or political rights. They issued only to enforce already-existing private rights.

IV. The New American Equity Jurisprudence

Three landmark Supreme Court cases form the basis of the new American equity jurisprudence practiced by the federal judiciary. In *Hecht Co. v. Bowles* (1944), Justice Douglas laid down the principle that federal judges have the authority to "do equity," by which he seemed to mean to "do justice." In *Brown II* (1955), the Supreme Court established the legal possibility that there can be a wide gulf between right and remedy and that remedies could be the subjects of separate and continuing judicial proceedings. In *Swann* (1971), the Court said that the equitable powers of the federal courts were very broad and largely discretionary. With these cases as authority, federal courts are today replacing other agencies and branches of government and appropriating public funds.

V. A Limiting Principle for the New Equity

Current cases, however, do provide some guidance for limiting the breadth of remedial orders. The *Swann* case laid down the additional principle that "the nature of the violation determines the scope of the remedy." This principle allows both litigators and judges to maintain that courts should do only what the Constitution requires; that courts are concerned with specific and substantive constitutional violations, not *de minimis* violations nor global conditions of injustice; that courts cannot remedy general societal ills nor should they rearrange the resources of society; and that appeals courts cannot simply defer to trial-court discretion in cases that deal with broad social conditions.

VI. Recapturing the Legacy: Suggestions for Reform

Long-term reform would require the federal courts to recall the origins of Anglo-American equity and realize that there is no independent authority for the federal judiciary to "do equity." Comparisons can be made to the English equity courts, whose practice has remained faithful to the historical development. The equity of Article III of the Constitution does not override the constitutional separation of powers. The Anglo-American conception of the role of the judiciary requires a close relationship between right and remedy.

Courts must cause justice to occur according to law. Equity is not a power equal to, or superior to, the Constitution and the laws. Specific examples of injustice may manifest themselves clearly, but the long-term consequences of resolving injustices according to the ad-hoc discretion of judges may not be so clear. Short-term solutions imposed by the judiciary that enervate and demoralize the other branches of government may set the stage for much worse social and political ills.

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Introduction

Citing its "broad equitable powers,"[1] the United States District Court for the Western District of Missouri issued a remedial order in a school desegregation case that included the precise capital-improvement budgets for each of thirty-six schools; prescribed the construction of gymnasiums, stadiums, and swimming pools; identified "appearance impairments" in the schools and ordered their elimination in order to achieve "suburban comparability" in "visual attractiveness;" and made curricular decisions involving class size, summer school, full-day kindergarten, before-and-after-school tutoring, and early-childhood education.[2]

In order to fund the measures, the court ordered that taxes be increased, explaining that "[a] district court's broad equitable power to remedy the evils of segregation includes the power to order tax increases and bond issuances."[3] Therefore, the court decided upon a three-part financing scheme. It ordered the property tax levy "to be increased to $4.00 per $100 assessed valuation through the 1991-92 fiscal year" and directed the school district to issue capital improvement bonds "in the total amount of $150,000,000 to be retired within 20 years from the date of issue."[4] Finally, having found that "many" former residents of the school district had left the district but continued to work there, the court said that it would be "equitable" to include them "in a plan to help defray the district's desegregation expense."[5] It decided that a kind of commuter income tax, a "1.5 percent increase as a surcharge on the Missouri State Income," was in order for "work done, services rendered and business or other activities conducted" within the geographic area of the district.[6]

The court's understanding of the breadth of its "equitable" powers to undertake what are clearly legislative and executive functions may

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[1] *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987).

[2] *Id.* at 403-04.

[3] *Id.* at 411-12.

[4] *Id.* at 412-13.

[5] *Id* .

[6] *Id.* This income tax surcharge was overturned on appeal, but the other parts of the district court's remedial scheme were affirmed. *See Jenkins v. Missouri*, No. 87-1749 (8th Cir. August 19, 1988).

seem startlingly offhanded, but such offhandedness is not uncommon today on the federal bench. Federal judges today justify previously-undreamt-of decrees as the exercise of "inherent equitable powers"[7] — without ever referring to the substance, content, or definition of those powers. A recent federal appeals court decision admitted that these powers are "nebulous" but "necessary to enable the judiciary to function."[8] Another recent circuit decision said that a court had "an inherent equitable power over its own process" but did not say what that power was.[9] In another case, a circuit court effectively said that the inherent powers equalled the equitable powers.[10]

In a single case, another federal appeals court recently spoke of "the typical power of a court of equity," "the traditional equitable power," and "the general, equitable power of a court."[11] The Eleventh Circuit recently spoke of its "traditional equitable powers to fashion the relief,"[12] while the Seventh Circuit spoke of its "inherent equitable power to grant this relief."[13] At the same time, the Fifth Circuit invoked the inherent power of courts under their "general equity powers."[14] A federal district court recently explained that it had an "inherent equitable power" to enforce its "general equitable powers."[15]

Last year, in a major civil rights case, the United States Supreme Court said that "[t]he essence of equity jurisdiction . . . [is] to do equity," and that equity implies "[t]he qualities of mercy and practicality."[16] The Third Circuit recently said that, with respect to claims arising out of the administration of property within its jurisdiction, a federal district court

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[7] *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915,. 916 (9th Cir. 1987).

[8] *Id.*

[9] *Cipollene v. Liggett Group, Inc.*, 822 F.2d 335, 344 (3d Cir.), *cert. denied*, 108 S. Ct. 487 (1987).

[10] *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers Inc.*, 817 F.2d 1533, 1536 n.6 (11th Cir. 1987). ("[A]ttorney's fees . . . may be sought under the equitable or inherent powers of the court . . .").

[11] *National Ry. Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 750 (7th Cir. 1987).

[12] *Dillard v. Crenshaw County, Ala.*, 831 F.2d 246, 250 (11th Cir. 1987).

[13] *In Re Disclosure of Grand Jury Material*, 821 F.2d 1290, 1293 (7th Cir. 1987).

[14] *In Re S.I. Acquisition, Inc.*, 817 F.2d 1142, 1146 n.3 (5th Cir. 1987).

[15] *Bower v. Weisman*, 674 F. Supp. 109, 112 (S.D.N.Y. 1987).

[16] *United States v. Paradise*, 107 S. Ct. 1053, 1077 (1987).

sitting in admiralty has "inherent equitable power" to act according to "equity and good conscience."[17] And a federal district court construed a 1946 Supreme Court case to mean that "a district court has the broad, inherent, equitable duty and power to do what justice is required."[18]

In the face of all this, one is reminded of the famous statement of the English jurist Selden who said concerning the elusiveness of equity that it was "a roguish thing" that varied with the length of each judge's foot.[19] A contemporary commentator has pointed out that the equitable foot of the modern federal judiciary is growing.[20] But a federal district judge said recently that he was "unaware" why a plaintiff would have the idea "that a federal judge is unconstrained by the rules of law that govern other officials." "Surely" the judge said, the plaintiff was aware that the federal courts have: "inherent equitable powers."[21]

Contemporary equity jurisprudence strikes many people as effectively unbounded, and statements from the judiciary such as the ones quoted above do suggest strongly that the federal judiciary either does not recognize general limits on equitable remedies, or at the very least is not able to articulate such limits. This study examines the phenomenon of modern equity jurisprudence with an eye toward rediscovering the boundaries of equity. It focuses on injunctive relief, because this feature of contemporary equity jurisprudence best illustrates the modern misconceptions about the supposedly boundless reach of equity. The reader should not conclude, however, that contemporary injunction practice is the only troublesome aspect of modern equity.[22]

Institutional Injunctions

The kind of comprehensive orders to state institutions that include elements of the legislative, the executive, and the judicial — of which the

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[17] *Bock v. M/V Green Star*, 815 F.2d 918, 922 (3d Cir. 1987).

[18] *United States v. Missouri Self Service Gas Company*, 671 F. Supp. 1232, 1241 (W.D. Mo. 1987).

[19] Selden Society, *Table Talk of John Selden* 43 (1927).

[20] Jennings, *The Chancellor's Foot Begins to Kick: Judicial Remedies in Public Law Cases and the Need for Procedural Reforms*, 83 Dick. L. Rev. 217 (1979).

[21] *In Re Wyoming Tight Sands Antitrust Cases v. Amoco Production Co.*, No. 85-2349-S Consolidated Cases, slip op. at 4 (D. Kan. October 9, 1987).

[22] *See* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 Univ. of Pa. L. Rev. 909 (1987).

Kansas City order is an example — have come to be called "institutional injunctions." They have been described by one of their most enthusiastic champions, Professor Abram Chayes of the Harvard Law School, in the following manner:

> The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating process at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders — masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.[23]

Another enthusiastic supporter has called some of the decrees issued as institutional injunctions "mind-boggling" and has described them as beyond "legal theory."[24] Judge Frank M. Coffin of the United States Court of Appeals for the First Circuit has said that "under these circumstances the judge must play not only an adjudicative role, but legislative and executive roles as well."[25] Another commentator has remarked that "These forms of relief raise the question whether the

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[23] Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976). Another commentator has offered this further description:

> Typically, the injunction is detailed and specific and establishes time periods for the accomplishment of the various changes a court has ordered. An institutional injunction often has serious fiscal implications and affects many groups not directly before the court. It is usually difficult to implement, requiring a district court to retain jurisdiction during the implementation phase. Often a court will create a monitoring device which becomes the court's "eyes and ears" during the implementation process. A court will often modify the original injunction during the implementation phase in order to accommodate new or unforeseen developments. Rudenstine, *Institutional Injunctions*, 4 Cardozo L.R. 611, 612-13 (1983).

[24] A.S. Miller, *Toward Increased Judicial Activism*, 143, 139 (1982).

[25] Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 Cal. L. Rev. 983, 989 (1979).

judiciary has begun to tolerate in itself a blending of functions that wou never be tolerated in another branch of government."[26] The Supre Court, in reviewing the institutional injunctions, fashioned by fede trial courts, has paid little attention to the constitutional separation powers. Instead, it has said that it "will be guided by equita principles."[27]

If contemporary statements such as these are measured against t historical development of equity and the original meaning of Article II grant of equitable jurisdiction, it becomes easier to see that present-d injunction practice has strayed outside its limits in a number characteristic ways. First, injunctions are now routinely used to adj disputes with a governmental entity. In the past, equity was conceived primarily as an alternative system to protect private interests against t activities of other private parties.

Second, the traditional understanding of judicial discretion dispensing injunctive remedies has been converted from a recognition limits on the scope of injunctions, to a rejection of the notion of limi The traditional conception was that the court could grant a successf petitioner no relief, or the maximum relief rules of equity permitted, anything between those two bounds. This was the traditional range equitable discretion. The modern understanding is decisively differe The successful suitor is now deemed entitled to some ill-defin minimum of equitable relief, and may get more than that minimu without limit, as a matter of discretion.

Third, modern equity (and therefore the modern injunction) is longer tied to pre-existing, well defined causes of action. Early in history, equity developed into a fairly precise system designed to relie particular perceived inadequacies of legal process. Equitable relief w available only if the petitioner's grievance fell within a recogniz category of injuries. Today, the same case can simultaneously create new cause of action and create an equitable remedy for it.

Fourth, the contemporary judicial understanding of equity h effectively trumped the constitutional separation of powers. In *Federal 78*, Alexander Hamilton, citing Montesquieu, maintained that t

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[26] Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. Rev. 661 (1978).

[27] *Brown v. Bd. of Education (Brown II)*, 349 U.S. 294, 300 (1955).

judiciary, "the weakest of the three departments of power," could not endanger "the general liberty of the people" as long as it was kept separate from the legislative and executive branches. Both critics and advocates concede that the judiciary today routinely exercises legislative and executive powers. Advocates seem to think that the necessity and opportunity to do justice by means of the equitable powers of courts have made the separation of powers less relevant today. But whether political liberty has been endangered by this change is a serious question that needs to be openly discussed.

Courts may do justice when they act unilaterally according to vague conceptions of their "broad" equitable powers. But it is impossible to argue that the judiciary under the American constitutional system has been charged with the general task of doing justice — regardless of laws or precedents. It is more commonly claimed that the purpose of our American system is to accomplish "justice under law."

As will be seen below, doing justice without law is a political purpose more consistent with a monarchy than a democratic republic.

This study is prompted by the two phenomena mentioned above: the seeming confusion about the federal judiciary's "broad," "inherent" and/or "traditional" equitable powers; and the invocation of these powers as a justification for the unprecedented decrees of the contemporary federal judiciary.

Since the federal courts describe their equity powers as "traditional," Part I of this study traces the tradition of equity to its source in England and to its origins in the United States. The history in the United States of the most important principles and policies of equity is brought up to the middle of this century. In Part II, a few of the controlling principles of equity are discussed more specifically.

Part III investigates the unique equitable remedy, the injunction — the means by which the federal judiciary has come to govern the day-to-day operations of state schools,[28] prisons,[29] jails,[30] mental hospitals,[31]

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[28] *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971).

[29] *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

[30] *Smith v. Sullivan*, 611 F.2d 1039 (5th Cir. 1980).

[31] *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), aff'd. in part and remanded in part, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

and apportionments.[32]

Part IV describes in detail the new equity jurisprudence fashioned by the federal judiciary since 1944. Part V describes some possible limiting principles for the new equity. Part VI looks to long-term reform and a recapturing of the Anglo-American tradition in equity.

I. *The Tradition of Equity in England and the United States*

A. *The English Origin*

Despite frequent dicta about the "tradition" of equity and a vague sense that equity has always stood for a kind of ad-hoc, discretionary justice, it is virtually impossible to find a federal decision that demonstrates a thorough knowledge of the equity tradition in Anglo-American jurisprudence.

English equity began not as a compartment of jurisprudence at all but as a way of seeking the charity of the king in cases of special hardship. Because of political constraints that prevented the expansion of causes of action at common law, the practice of seeking the king's beneficence developed into an institution. Despite these ad-hoc origins, however, equity became highly regularized in a comparatively brief time. By the American founding, English equity was in essence simply an alternative legal system which differed from the common law in the legal areas over which it had jurisdiction and in certain strictly-confined remedies that it could give. At the close of the Eighteenth Century, neither in England nor in the United States was there any conflict between equity and common law nor any sense that equity was a better or more just system.

At the time of the Norman Conquest of England (1066), "there was no central court which regularly administered a law common to the whole country."[33] Anglo-Saxon law was highly customary and heavily based on ownership of land. The law was administered in a collection of local courts that had various jurisdictions and authorities. The Normans

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[32] *Reynolds v. Sims*, 377 U.S. 533 (1964).

[33] 1 W. Holdsworth, *A History of English Law* 3 (1903).

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[32] *Reynolds v. Sims*, 377 U.S. 533 (1964).

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allowed these local courts to continue after the Conquest; they did not immediately centralize the administration of the laws.

The king's government was based on his own person — there was no division of the functions of government into departments. The king's "court," or Curia Regis, was composed of the king's household and his chief officials. It exercised legislative, executive, and judicial powers. During the reign of Henry II (1154-1189), the Curia Regis became more complex and differentiated. The Office of Chancellor emerged as the chief department in the king's court. The Chancellor, an ecclesiastic, kept the king's seal which was used to authenticate royal writings, or "writs." He became the secretary of state for all the departments of the court. During Henry II's reign, the interference by the king in the administration of local laws, which had occurred only occasionally and sporadically before, became so regular that it caused the creation of a new national law, the common law. "Under Henry II the exceptional becomes normal. He placed royal justice at the disposal of anyone who can bring his case within a certain formula."[34] Henry II's supervision of local justice was the beginning of the forms of action:

> Thus, following a practice which had obtained in Normandy, there began the issue by the Chancellor of royal letters known as *brevia* or writs, - and specifically as *brevia originalia* or original writs - authorizing the King's Court to take jurisdiction over the plaintiff's demand and requiring the defendant in one way or another to make answer in that court. The repeated issue of a writ based upon a given set of circumstances established a precedent for its later issue when like circumstances came to be presented and thus gave rise to the recognition that an action lay under those circumstances, - created in other words a form of action cognizable in the King's Court.[35]

The forms of action that arose at this time did not change essentially until the Nineteenth Century.[36] These royal writs, issued by the Chancellor, began as a royal beneficence, or royal prerogative. They

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[34] F.W. Maitland, *The Forms of Action at Common Law* 17 (Cambridge ed. 1976) (1st ed. 1909).

[35] R. W. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 18 (1952).

[36] F.W. Maitland, *supra* note 34, at 17.

became the basis for trial by jury because the royal prerogative included the power to grant a jury trial with one's peers acting as triers of fact — instead of acting only as witnesses as they did in the local courts.

At this point, the administration of justice was being centralized into the Chancellor's hand. There was no distinction between equity and the common law. "Common Law and Equity originated together as one undifferentiated system in the effort of the king to carry out his duty of furnishing security and justice to all in the community by making use of his prerogative power through his prerogative machinery."[37]

Relatively soon, however, challenges emerged to the Chancellor's creation of new writs, even though this power of creation was explicitly recognized in the Statute of Westminster (1275). This period saw the growth of baronial power and the institutionalization of that power in Parliament. Parliament became jealous of the Chancellor's power because it recognized that the power to issue original writs was "equivalent to a power to make new law."[38]

This reaction against the Chancellor's power to create new writs began the process of turning the common law into a highly rule-bound system. The Chancellor became conservative in the issuing of new writs. New actions had to be fit into the extant writs. The concept of a court's *jurisdiction* to act emerged from this development. "The effect of both these tendencies to mark out for the courts the boundaries of their jurisdiction and also the boundaries of the law which they applied, was the same. The Common Law was becoming a hard and fast system with certain clearly defined things which it could not do."[39]

During the next stage of development, the Chancellor's separate equity power was recognized. As the three common-law courts became more rigid in their procedures, they became more self-contained and independent of the councils of the kings. Justice was becoming centralized, but the common-law aspect of justice began to lose its character as the king's prerogative. "Disappointed suitors in the central courts at Westminster, deprived of a remedy by the growing strictness of the common law, began to address the King in petitions, seeking thus to

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[37] Adams, *The Origin of English Equity*, 16 Colum. L. Rev. 87, 91 (1916).

[38] 1 W. Holdsworth, *supra* note 33, at 398.

[39] Adams, *supra* note 37, at 96.

invoke his aid in their troubles."[40] As the first among the lords of the king's council, the Chancellor received and considered the petitions which sought to invoke "[the] reserve of justice in the king"[41] not delegated by him to the common-law courts. As Pomeroy points outs, this incipient equity power was "ill-defined."[42]

The earliest stage of equity "appears to have consisted of cases where, although there might have been a remedy at law, yet because the petitioner was poor and the defendant rich and powerful, the legal remedy was not satisfactory."[43] As Maitland describes this development, "Gradually in the course of the fourteenth century petitioners, instead of going to the king, will go straight to the Chancellor, will address their complaints to him and adjure him to do what is right for the love of God and in the way of charity."[44]

Before the conservative reaction to his writ-creating power occurred, the Chancellor would simply have invented a new writ whereby the complaint could be tried in a common-law court. Instead, barred from creating new forms of action, the Chancellor began to send for the petitioner's adversary in order to examine him directly concerning the petitioner's complaint. The procedure was different from the common-law courts in which a defendant issued a formal answer to a form of action filed against him. The Chancellor merely commanded (subpoenaed) the presence of the defendant without even informing him of the charge, and when he appeared, the Chancellor examined him under oath about the complainant's petition. "This procedure is rather like that of the ecclesiastical courts and the canon law than like that of our old English courts of law. * * * The defendant will be examined upon oath and the Chancellor will decide questions of fact as well as questions of law."[45]

The fundamental purpose of a petition to the Chancellor was to receive a specific relief that the common law did not provide. The Chancellor would resolve cases with what were effectively royal orders

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[40] Severns, *Nineteenth Century Equity Part I*, 12 Chi.- Kent L. Rev. 81, 92 (1934).

[41] F.W. Maitland, *Equity* 3 (1936).

[42] 1 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 36 (5th ed. 1941) (1st ed. 1881).

[43] Severns, *supra* note 40, at 93.

[44] F.W. Maitland, *supra* note 41, at 4-5.

[45] *Id.* at 5.

that commanded very specific actions or commanded the cessation or prevention of very specific actions. This was done completely outside of a context of a systematic jurisprudence or of precedent. The decrees of the king were in a true sense "the king's grace."[46] According to Blackstone, at this time, in the "infancy" of the courts of equity, "The decrees of a court of equity were then rather in the nature of awards, formed on the sudden *pro re nata* [i.e. according to the circumstances of each case], with more probity of intention than knowledge of the subject; founded on no settled principles, as being never designed, and therefore, never used, for precedents."[47] It is easy to understand, then, why a trial in equity never was, and never became, a jury trial. An appeal to the king in equity was a personal appeal to the *person* of the King. Jurymen had no place in such appeals.

Because the Chancery was a multi-faceted office, the Chancellor had command of a variety of resources with which to put into effect the Council's decisions about these petitions. The granting of relief concerning these petitions turned this part of his role into more of a judicial one. During the thirteenth and fourteenth centuries, this judicial function of the Chancellor — in addition to his power to issue writs — became recognized as a separate power.

In the 1400's, the Chancellor began to enforce the property rights provided by the new legal concepts of uses and trusts — which enforcement the common law courts had explicitly rejected. At the same time, complaints about the Chancellor's powers began again. According to Maitland,

> In this period one of the commonest of all the reasons that complainants will give for coming to the Chancery is that they are poor while their adversaries are rich and influential — too rich, too influential to be left to the clumsy processes of the old courts and the verdicts of juries. However, this sort of thing can not well be permitted. The law courts will not have it and parliament will not have it. Complaints against this extraordinary justice grow loud in the fourteenth century. In history and in principle it is closely connected with another kind of extraordinary justice which is yet more objectionable, the

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[46] 1 W. Holdsworth, *supra* note 33, at 401.

[47] 3 W. Blackstone, *Commentaries on the Laws of England* 433-34 (1765).

> extraordinary justice that is done in criminal cases by the king's council. Parliament at one time would gladly be rid of both — of both the Council's interference in criminal matters, and the Chancellor's interference with civil matters. And so the Chancellor is warned off the field of common law — he is not to hear cases which might go to the ordinary courts, he is not to make himself a judge of torts and contracts, of property in lands and goods.[48]

The incipient equitable powers of courts were being put in their place, but, according to Pomeroy, "it was conceded that the law courts could not furnish adequate remedies for certain classes of wrongs and that a separate tribunal was therefore necessary."[49] He notes that despite the protests of the common-law courts at the beginning of the 1400's, by the reign of Edward IV (1461-70), "the Court of Chancery was in full operation" and "the principles of its Equity Jurisdiction were ascertained and established upon the basis and with limitations which have continued to the present time."[50]

Holdsworth pinpoints 1474 as the year "that we get a case in which the Chancellor made a decree by his own authority."[51] To Holdsworth, this means that the Chancellor had "an independent jurisdiction as the head of an independent court".[52] Among the various causes of this development, according to Holdsworth, was the growing differentiation of functions between the Chancery and the other offices of the King's Council. The Council took on equitable petitions in criminal matters, a power that eventually became lodged in a new court, the Star Chamber, thus leaving the Chancellor with civil equity only. The Chancellor entertained petitions that the common law courts were unable to hear. Thus, the Chancery developed a true judicial function but one differentiated from both the common law courts and from the King's Council. In addition, the writ-issuing power of the Chancellor had become recognizably differentiated from Chancellor's power to hear civil petitions. Finally, the Tudor kings (1485-1603), who were both centralizers of

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[48] F.W. Maitland, *supra* note 41, at 6.

[49] 1 J. Pomeroy, *supra* note 42, at § 39.

[50] *Id.*

[51] 1 W. Holdsworth, *supra* note 33, at 404.

[52] *Id.*

political power and administrative reformers, institutionalized these historic trends and made them permanent.

The development of a complete jurisprudence of equity was not finished, however. Blackstone notes that at the beginning of the 1500's, "No regular judicial system at that time prevailed in the court [i.e. the Chancery]; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy according to the private opinion of the chancellor, who was generally an ecclesiastic."[53] Maitland observes that while reports of cases at law go back to the reign of Edward I (1272-1307), "On the other hand our reports of cases in the Court of Chancery go back no further than 1557; and the mass of reports which come to us from between that date and the Restoration in 1660 is a light matter. This by itself is enough to show us that the Chancellors have not held themselves very strictly bound by case law, for men have not cared to collect cases."[54]

This period, when the ecclesiastical Chancellors exercised independent equity jurisdiction, was the historic period of English equity that caused the most controversy. "[W]ith the idea of a law of nature in their minds they [the ecclesiastical chancellors] decided cases without much reference to any written authority, now making use of some analogy drawn from the common law, and now of some great maxim of jurisprudence which they have borrowed from the canonists or the civilians."[55] Thus, according to Severns,

> That there was at this time a real threat to the system of the common law there can be no doubt. If this intervention by the Chancellor had been permitted to go unchecked, it is possible a system of administrative law would have superseded the common law. * * * [A]fter the establishment of his judicial powers, the Chancellor became equity. * * * Therefore, it can be said that during this period decisions were rendered in equity cases upon principles of justice and conscience. Indeed, the phrase "court of conscience" is a phrase often met with at this time. * * * But men's consciences vary. Therefore, as the

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[53] 3 W. Blackstone, *supra* note 47, at § 54.

[54] F.W. Maitland, *supra* note 41, at 8.

[55] *Id.* at 8-9.

consciences of the Chancellors varied, so did equity.[56]

And from this era comes the famous statement of Selden that equity is "a roguish thing" that varies as the length of each Chancellor's foot: "One chancellor has a long foot; another a short foot, a third an indifferent foot; its the same thing in the Chancellors conscience."[57] And, according to Story, in the reign of Henry VIII, equity expanded into "a broad and almost boundless jurisdiction under the fostering care and ambitious wisdom and love of power of Cardinal Wolsey."[58]

It was precisely this period of free-wheeling equity that caused a full equity jurisprudence to develop, however. Forced to defend itself, the Court of Chancery began to develop principles for its decisions. In addition, the era of the ecclesiastical Chancellors ended. In 1530, Henry VIII named a common law lawyer, Sir Thomas More, to succeed Wolsey as Chancellor. More, "the first chancellor that ever had the requisite legal education,"[59] began the process of constructing a regular jurisprudence for equity.

In the latter half of the 1500's, "the jurisprudence of the court is becoming settled."[60] But the Chancellor had a great freedom in his decisions. As was said in a famous case from the era:

> The Office of the Chancellor is to correct . . . Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called *Summum Jus* * * * The Chancellor sits in Chancery according to an absolute and uncontrolable Power, and is to judge according to that which is alledged and proved; but the Judges of the Common Law are to judge according to a strict and ordinary (or limited) Power.[61]

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[56] Severns, *supra* note 40, at 99-101.

[57] Selden Society 43 (1927) (Pollock ed.).

[58] 1 J. Story, *Commentaries on Equity Jurisprudence* § 51 (J. Perry 12th ed. 1877) (1st ed. 1836) [hereinafter *Equity Juris*].

[59] J. Kent, *Commentaries on American Law* § 491 (12 ed 1873, Holmes ed) (1st ed 1826).

[60] F.W. Maitland, *supra* note 41, at 9.

[61] *The Earl of Oxford's Case*, 1 Chan. Rep. 485, 486-88 (1615).

A system of equity was growing in the form of case reports and published rules of procedure. Pomeroy says that by the reign of Charles I (1629-1649) so many precedents had accumulated "that they substantially contained the entire principles of equity."[62] Holdsworth describes equity's jurisdiction in 1650 as comprising five areas.[63] The first was trusts. The second was specific relief in contract. Third, the Chancellor took cases where the rigidity of the common law caused injustice. The chief grounds of this jurisdiction were fraud, forgery, mistake, and accident. Fourth, the Chancellor, with a more powerful and flexible procedure at his command, intervened where the common law could not provide relief. He used the powers of subpoena, specific performance, and injunction — powers unique to equity — to directly order parties to do what he thought proper according to the circumstances of cases or to *prevent* wrongs from happening — another power that the common law courts lacked. Fifth, the Chancellor had taken control over the form of action called "account," whereby a claimant sought to enforce another's duty to render an account to him.

The following exchange in a 1670 case shows that a transition was underway:

> Vaughan, Chief Justice. I wonder to hear of citing of precedents in matters of equity. For if there be equity in a case, that equity is an universal truth, and there can be no precedent in it. So that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself. And if the precedent be not the same case with this, it is not to be cited, being not to that purpose.
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> Bridgman, Lord Keeper. Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration, and weighing of the matter; and it would be very strange, and very ill, if we should disturb and set aside what has been the course for a long series of time and ages.[64]

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[62] 1 J. Pomeroy, *supra* note 42, at § 58.

[63] 1 W. Holdsworth, *supra* note 33, at 454-59.

[64] *Fay v. Porter*, 86 Eng. Rep. 902 (1670).

In another case soon thereafter, we can see a still-prevalent understanding of equity as "universal truth." Yet, equity is also said to "support" the law:

> Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtileties, [sic] invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.[65]

Story, Blackstone, and Kent agree that it was in the Chancellorship of Lord Nottingham (1673-1682), the "father of equity," that the development of equity was perfected. Story quotes Blackstone to the effect that Nottingham "built up a system of jurisprudence and jurisdiction upon wide and rational foundations."[66] Holdsworth says that Nottingham gave a "settlement"[67] to the law of equity, and Kent says that he made it "a regular and cultivated science."[68]

An example of Nottingham's view of judicial "conscience" in equity can be seen in the *Earl of Feversham's Case* where Nottingham, after noting the hardships on one of the parties, states, nevertheless, that

> Justice is a severe thing and knows no compliance nor can bend itself to any man's conveniences, and equity itself would cease to be Justice if the rules and measures of it were not certain and known. For if conscience be not dispensed by the rules of science, it were better for the subject there were no Chancery at all than that men's estates should depend upon

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[65]Case 203 - *Dudley and Ward (Lord) v. Dudley (Lady)*, 118, 119 (1705).

[66]Story, *supra* note 58, at § 52.

[67]6 W. Holdsworth, *A History of English Law* 547-48 (1903).

[68]Kent, *supra* note 59, § 492.

the pleasure of a Court which took itself to be purely arbitrary.[69]

The discretion inherent in equity is called a "science" in 1734:

> The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked *vir bonus est quis*? the answer is, *qui consulta patrum qui leges jurae, servat*; and as it is said in *Rook*'s case, . . ., that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is exercised here, is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy; in others again, it relieves against the . . . abuse, or allays the rigour of it; but in no case does it contradict or over-turn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with.[70]

All authorities agree that during the period of time from Chancellor Nottingham until the beginning of the nineteenth century, "the principles of equity became fixed."[71] According to Potter

> From the beginning of this period the reports of cases rapidly improved, so that it became possible not merely to say what had been decided, but also the grounds for decision. The boundaries between the common law courts and the Chancery became fixed, and the relations between law and equity, therefore, capable of being ascertained. Furthermore, under Lord Mansfield particularly, but also under many other common law judges, a spirit of progress was manifested in the

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[69] *Feversham (Earl of) v. Watson Case 823*, 2 Chan. Cases 639 (1678).

[70] *Burgess v. Wheate*, 1 Black 151; 1 Eden 213 (1734).

[71] 6 W. Holdsworth, *supra* note 67, at 465.

> common law itself, which tended to make it less dependent upon another jurisdiction to provide substantial justice. Innovation, therefore, was less necessary in the auxiliary jurisdiction of the Chancery. The Chancery judges themselves became conscious that too great a discretion exercised over the matters brought before them rendered the law uncertain, and expense a necessary corollary.[72]

In 1765, Blackstone asserted in the first edition of his *Commentaries* that law and equity had become both equally "artificial" systems and that the courts of equity were "governed by established rules and bound down by precedents."[73] And Lord Eldon, who was Chancellor from 1801-1827 and who was the last of the Chancellors of this period of development, remarked that "I cannot agree that the doctrines of this court are to be changed by every succeeding judge. Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot."[74]

At the close of the eighteenth century, equitable jurisdiction had come to comprise the following areas. First, equity had exclusive jurisdiction over special forms of property such as trusts, powers, the married woman's separate estate, and the mortgagor's equity of redemption. Second, by dint of its unique remedies of specific performance and injunction, equity had a special jurisdiction in contracts and torts (primarily continuing wrongs such as nuisance and waste). Third, equity's "classic" jurisdiction of relieving against the rigidity of the law had been confined to the areas of fraud, undue influence, accident, and mistake. Fourth, the different procedures of a court of equity enabled it to acquire jurisdiction over cases involving procedures such as accounting, marshalling of estates, election and conversion, sureties, partnership, set off, and discovery. Fifth, equity had jurisdiction over guardianship of infants.

Overall, then, it can be seen that by the beginning of the nineteenth century equity in England had gone through three stages: the first a

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[72] Potter's, *Historical Introduction to English Law and Its Institutions*, 595 (A. Kiralfy 4th ed. 1958) [hereinafter Potter's].

[73] 3 W. Blackstone, *supra* note 47, at 432-34.

[74] *Gee v. Pritchard*, 2 Swanst. 414 (1818).

preliminary stage when equity was not very distinct from law, the second the era of equity as the "court of conscience," the third of equity as a legal system. A recent commentator has summarized this history in the following manner:

> Thus, although the Chancery system existed in England for seven centuries, for half that time the chancellor acted as an administrative official responsible to the king. Furthermore, the Chancery Court operated as an independent judicial body under a rule of conscience i.e., individualized decisionmaking, *only from about 1461 to 1603*. Thereafter, Chancery utilized rules and principles in the same manner as had the common-law courts and in fact drew on the great common-law practitioners to develop these rules.[75]

There was no equitable jurisdiction in *public law*. Blackstone classified the equity jurisdiction as an area of "private law" and stated that "Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting, his property; not even in case where he is a royal trustee."[76]

B. *The Nature and Limitations of Modern Equity*

What was the nature of equity, then, at the close of the eighteenth century, at the end of seven hundred years of development and at the time of the ratification of the U.S. Constitution? For the answer we turn to two English authorities, Blackstone and Maitland, and two American authorities, Story and Pomeroy.

1. *Blackstone's Commentaries*

In 1765, William Blackstone published his *Commentaries on the Laws of England*, a four-volume work that influenced both English and American lawyers until well into the Twentieth Century. The first edition of the *Commentaries* sold more copies in America than in England.[77] In Book III, Blackstone undertakes to explicate "the character, power and practice"[78] of equity that prevailed in the Chancery

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[75] Jennings, *supra* note 20, at 221 (emphasis added).

[76] 3 W. Blackstone, *supra* note 47, at 428.

[77] Friedman, *A History of American Law* 88-89 (1973).

[78] 3 W. Blackstone, *supra* note 47, at 433.

in his time. He is particularly concerned to counter the erroneous ideas of "many ingenious writers"[79] and the "notions entertained by strangers [foreigners] and even by those courts themselves before they arrived to maturity."[80] He wants to make clear that even some of the ideas of former Chancellors, including Coke, Selden, and "the great Bacon himself,"[81] are out of date, having been stated "in the infancy of our courts of equity."[82]

Equity does not "abate the rigour [sic] of the common law,"[83] Blackstone contends, citing examples of hardships in areas of the common law whose rationales are entirely archaic but still in effect. Nor does equity determine according to the spirit — as opposed to the letter — of the law. Statutory construction is the same for both law and equity: each is bound to determine the "true sense of the law in question"[84] according to the "intent of the legislature."[85] Nor are fraud, accident, and trusts exclusive to courts of equity. The common law has an equal jurisdiction over fraud and accident, and there are even some trusts that are cognizable in courts of law. Finally, a court of equity does not act "from the opinion of the judge, founded on the circumstances of every particular case."[86] Instead, equity follows established rules and precedents, as do the courts of law.

Blackstone is intent on qualifying the maxim of equity that equity will lie where "the complainant hath no remedy at the common law."[87] He points out that this maxim does not mean every case in equity represents a case where the common law has proven to be inadequate. Equity is not a completely different legal system, Blackstone says. Both courts have the same "rules of property, rules of evidence, and rules of interpretation."[88] Both follow the "law of nations."[89] Courts of law

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[79] *Id.* at 433.

[80] *Id.* at 440.

[81] *Id.* at 433.

[82] *Id.*

[83] *Id.* at 430.

[84] *Id.* at 431.

[85] *Id.* at 430.

[86] *Id.* at 432.

[87] *Id.* at 434.

[88] *Id.*

judge according to the "most liberal equity"[90] where appropriate. Neither court can "vary men's wills or agreement" nor construe "a lawful provision" according to any standard but "its just intent."[91]

If courts of equity did act pursuant to these theories, Blackstone asserts, then they "[W]ould rise above all law, either common or statute, and be a most arbitrary legislator in every particular case."[92] Decisions in equity would be "mere arbitrary opinion, or an exercise of dictatorial power" controlled by "the loose and fluctuating dictates of the conscience of a single judge."[93] Such a practice of equity would be far worse than any severities of the common law:

> And certainly, if a court of equity . . . floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience, that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will.[94]

What, then, in Blackstone's view, were the differences between law and equity? Blackstone asserts that there are three procedural differences and two jurisdictional differences. The three procedural differences are the "modes"[95] of proof, trial, and relief. Equity differs from law in the means of proof because equity has the power of discovery to force a party under oath to disclose all he knows about a transaction. A court of law relied on direct examination at trial to reveal facts. From this power, equity courts gained jurisdiction over matters of account, debts, the administration of personal estates, partnerships, other mercantile transactions, and most matters of fraud.

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[89] *Id* . at 436.

[90] *Id.*

[91] *Id.* at 435.

[92] *Id.* at 433.

[93] *Id.* at 442.

[94] *Id.* at 440.

[95] *Id.* at 436.

By the difference in the mode of trial, Blackstone means only equity's power to use interrogatories and depositions to gain and preserve the testimony of absent witnesses. Again, at common law, the examination of witnesses could be conducted only in open court. With respect to the mode of relief, Blackstone says that equity's power to give "a more specific remedy,"[96] including specific performance and injunctions, allowed it to gain a jurisdiction concurrent with law in several areas, including executory agreements, waste, some frauds, and in the case of a multiplicity of lawsuits on the same transaction.

The *completely* exclusive jurisdictions of the court of Chancery are only two: the judicial construction of securities for monies lent, e.g., mortgages, and the form of a trust, or second use. Both of these jurisdictions are accidents of history. Equity took them on because the law courts rejected them.

2. *Story's Commentaries on Equity Jurisprudence*

Next to John Marshall, Joseph Story (1779-1845) was the preeminent American jurist of his time. An associate justice of the United States Supreme Court from 1811 until 1845, he was for the last sixteen years of that tenure also professor of law at Harvard. At the same time he wrote several influential treatises, one of which was his *Commentaries on Equity Jurisprudence*, published in 1836.

Story begins this work in the same manner as Blackstone begins his: he seeks to refute a number of erroneous ideas about equity. "Imperfect notions" about equity jurisprudence are so prevalent that they are "not only common among those who are not bred to the profession, but [they have] often led to mistakes and confusion in professional treatises on the subject."[97] Story first distinguishes equity understood in its broadest sense as natural law, natural justice, or natural reason. No nation has ever tried to incorporate "so wide a range of duties"[98] into its courts, Story points out. "Civil equity",[99] on the other hand, is the equity of courts, and this is equity "deduced from and governed by such civil

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[96] *Id.* at 438.

[97] *Equity Juris, supra* note 58, at § 1.

[98] *Id.* at § 2.

[99] *Id.*

maxims, as are adopted by any particular state or community."[100] "The settled distinction"[101] between natural justice and civil equity is that natural justice is binding in conscience, whereas civil equity is binding in law.

Some think of equity as a corrective of the law, Story says. In fact, this is an aspect of ancient Roman jurisprudence where equity was exercised by the praetors. But even the praetors' power did not extend to the "overthrow or disregard of the positive law."[102] Story criticizes St. Germain, Grotius, Puffendorf, Bacon, and Ballow for advocating that each case in equity "stands upon its own circumstances."[103] This leaves the definition of equity to "the arbitrary description of a judge."[104]

Like Blackstone, Story cites areas of the law whose severities have not been affected by equity. In addition, "there are many cases against natural justice, which are left wholly to the conscience of the party, and are without any redress, equitable or legal."[105] Nor is equitable interpretation any different from legal interpretation. "It is the duty of every court of justice, whether of law or of equity, to consult the intention of the legislature."[106] A court of equity does not have "a more liberal discretion"[107] than a court of law. Citing Blackstone that both law and equity are "now equally artificial systems," Story contends that a court of equity must follow precedent and not decide "upon circumstances, according to the arbitration or discretion of the judge . . ."[108]

Thus, since equity is now systematic, its practice is like law. Equity follows the law and "guides itself by the analogies of the law."[109] It acts according to fixed principles. But the law also acts like equity. "[T]he courts of common law are, in like manner, perpetually adding to the

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[100] *Id* .

[101] *Id.* at § 2.

[102] *Id.* at § 5.

[103] *Id.* at § 10.

[104] *Id.* at § 9.

[105] *Id.* at § 14.

[106] *Id*

[107] *Id.*

[108] *Id.* at § 18.

[109] *Id.* at § 19.

doctrines of the old jurisprudence; and enlarging, illustrating, and applying the maxims, which were at first derived from very narrow and often obscure sources."[110] Justice is as much the object of law as of equity.

Story explains why there was a different conception and practice of equity in earlier English history. The Chancellors were ecclesiastics or statesmen, neither of whom, unlike judges, were "very scrupulous in the exercise of power."[111] The authority of the Chancellors was not precisely a judicial authority. Instead, it was "administrative justice."[112] In addition, it was "a delegated authority from the crown"[113] or, in other words, the personal authority and benevolence of the king. Thus, the Chancellors did not issue judgments. Their decrees were "rather in the nature of awards."[114] By design, such awards were individualized, "founded on no settled principles,"[115] and not intended to serve as precedents.

Story defines "equity jurisprudence" as "that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice, which is exclusively administered by a court of common law."[116] This is not a circular definition. Rather, it expresses Story's major point about equity jurisprudence: it has come to be a question of jurisdiction in the English and American systems. It has been heavily determined by historical, and even sociological, factors: "the practical system, adopted by every nation, has been mainly influenced by the peculiarities of its own institutions, habits, and circumstances."[117] Thus, although there may be a variety of opinions about equity as natural justice, equity, as *an arm of Anglo-American jurisprudence*, has "a restrained and qualified meaning:"

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[110] *Id.* at § 20.

[111] *Id.* at § 21.

[112] *Id.*

[113] *Id.*

[114] *Id.* at § 22.

[115] *Id.*

[116] *Id.* at § 25.

[117] *Id.* at § 36.

> The remedies for the redress of wrongs, and for the enforcement of rights, are distinguished into two classes: first, those which are administered in courts of common law; and secondly, those which are administered in courts of equity. Rights, which are recognized and protected, and wrongs, which are redressed, by the former courts, are called legal rights and legal injuries. Rights, which are recognized and protected, and wrongs, which are redressed, by the latter courts only, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at common law, and the remedies, therefore, are remedies at common law; the latter are said to be rights and wrongs in equity, and the remedies, therefore, are remedies in equity.[118]

According to Story's analysis, there is no other choice but a "bounded" definition of equity. Other conceptions of equity lead inevitably to Selden's famous criticism:

> If, indeed, a court of equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superseding the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the judge, acting, if you please, . . . according to his own notions and conscience; but still acting with a despotic and sovereign authority. A court of chancery might then well deserve the spirited rebuke of Selden.[119]

According to Story, equity, "as at present administered,"[120] falls into three jurisdictions. In the first, equity is *concurrent with law*. This is the original and most familiar jurisdiction of equity. It exists where the courts of law give inadequate remedies or no remedies at all. It has two

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[118] *Id.* at § 25.

[119] *Id.* at § 19.

[120] *Id.* at § 62.

branches: 1) where the subject-matter is the principal ground of the jurisdiction, and 2) where the remedy is the principal ground of the jurisdiction. Among the areas of the law under the first branch are accident, mistake, actual and constructive fraud, accounts, partition, and partnership. By dint of historical development and circumstances, both law and equity came to have jurisdictions over these areas. A plaintiff, then, came to have a choice of courts but would choose a court of equity because it gave a better, but not necessarily a unique, remedy. Among the remedies unique to equity that make up the second branch are rescission, cancellation, specific performance, and injunctions. Here, a plaintiff brings his suit in equity, even though the law also has remedies, solely because these unique equitable remedies are better.

The second jurisdiction of equity is its jurisdiction *exclusive of law.* This likewise has two branches. The first branch contains the subject-matters that are exclusive to equity: trusts; uses; penalties; forfeitures; setoffs; awards establishing wills; and the protection of infants, lunatics, and married women. Suits concerning these subject-matters can only be brought in Chancery. The second branch is the remedial branch, and, with a few additions, it contains the same unique equitable remedies that fall in the remedial branch of the concurrent jurisdiction. Here, the plaintiff brings suit in equity because the law has no available remedies. The remedy sought can be the same as under the concurrent jurisdiction, e.g. an injunction or specific performance. But the remedy sought can also be one not available in the concurrent jurisdiction. Among these are the writs *ne exeat regno*[121] and *supplicavit.*[122]

The auxiliary jurisdiction is the smallest jurisdiction of equity. It governs procedural remedies exclusive to equity but which are used to assist the law courts in attaining justice. There are three remedies under this jurisdiction: bills of discovery, bills to perpetuate testimony, and bills to take testimony *de bene esse* [i.e. in anticipation of future need] pending a suit.

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[121] A writ issued to prevent a person from leaving the realm.

[122] A writ for taking sureties of the peace, whereby persons acting in a way that demonstrate a likelihood of misbehavior are required to give assurances against such misbehavior.

3. *Pomeroy's Equity Jurisprudence*

John Norton Pomeroy, professor of law at Hastings College of Law, published the first edition of his *Treatise on Equity Jurisprudence* in 1881. Widely cited by American courts at all levels, it went through five editions, the last of which was published in 1941. Pomeroy was prompted to compose this work because he thought that the then-recent mergers of law and equity in the states together with procedural reforms in the states were causing confusion about the nature of equity. He wrote to defend "certainty in legal rules and security of legal rights"[123] against what he observed had been the revival of the notion

> somewhat vague and undefined perhaps, but still widely diffused among the legal profession, that equity is nothing more or less than the power possessed by judges — and even the duty resting upon them — to decide every case according to a high standard of morality and abstract right; that is, the power and duty of the judge to do justice to the individual parties in each case. This conception of equity was known to the Roman jurists, and was described by the phrase, *Arbitrium boni viri*, which may be freely translated as the decision upon the facts and circumstances of a case which would be made by a man of intelligence and of high moral principle; and it was undoubtedly the theory in respect to their own functions, commonly adopted and acted upon by the ecclesiastical chancellors during the earliest periods of the English Court of Chancery. It needs no argument to show that if this notion should become universally accepted as the true definition of equity, every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost.[124]

Although he gives much more emphasis to Roman influences in the history of English law, Pomeroy's account of the development of equity is essentially the same as Blackstone's and Story's. Equity "as it now exists,"[125] he says, is "a department"[126] of the law. It does not "enforce

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[123] 1 J. Pomeroy, *supra* note 42, at § 43.

[124] *Id.*

[125] *Id.*

[126] *Id.* at § 46.

benevolence," nor does it decide each case "[on] its own particular circumstances."[127] It is not equivalent to natural law or morality; it is not "the infinite"[128] aiding the finite. These various conceptions of equity may have had some influence in equity's development. It is true that equity, "while passing through its period of growth,"[129] did serve to relax, supplement, contradict, defeat, and supply omissions to legal rules that were "harsh, unjust, and unconscientious in their practical operation."[130] Nevertheless, equity did not reform the entire body of the common law. One of the reasons for this is that the legislatures and the law courts themselves began to accomplish needed reforms.

The equity courts adopted the notion of the "conscience" of the court in order to accomplish their "reforms" of the common law. Pomeroy attributes this development wholly to the fact of ecclesiastics serving as Chancellors. In the beginning, the conscience of the court was personal to the Chancellor. This opened up a wide jurisdiction for the Chancery to police "all departures from honesty and uprightness."[131] As equity developed a genuine jurisprudence, however, the personal conscience of the Chancellor evolved into a "judicial conscience" that became "the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines."[132] Equity became "a system of positive jurisprudence"[133] controlled by precedents.

Pomeroy asserts, however, that equity is not as "artificial" as both Blackstone and Story contended. He specifically criticizes both of those jurists for downgrading too much the element of right, justice, and morality in equity. He attacks Blackstone for saying that equity *never* had a power to correct the common law and dismisses him as "purely a common law lawyer" who never really understood equity.

Pomeroy summarizes his views of the nature of equity in four propositions. The first is that the moral law, as such, is not an element of

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[127] *Id.* at § 46 n.7.

[128] Id.

[129] *Id.* at § 52.

[130] Id.

[131] *Id.* at § 56.

[132] *Id.* at § 57.

[133] *Id.* at § 59.

the human law. It is the task of legislation to [borrow] the rules of morality and [embody] them into law "by giving them a human sanction."[134] Until this is done, the moral law is not binding upon citizens as part of the law of a state. The second proposition is that many moral precepts are not jural in nature. They may be binding in conscience with respect to personal duties or they may not "relate to mankind considered as forming a society,"[135] but they are not enforceable in courts.

The third proposition is that equity does not contain all of the moral principles that have been adopted in jurisprudence. Both the common law and statutes have embodied some of these moral principles, and equity does not have a legal monopoly on morality. But equity, the common law, and statutory legislation taken together do not incorporate all of morality. Much is the result of what Pomeroy calls "expediency,"[136] by which he means the circumstances and events of history, including the influence of ancient institutions, motives of policy, the need for certainty in legal affairs, the necessity of legal rules corresponding with the average conduct of man, and the peculiarities of the English remedial system.

Pomeroy's fourth proposition is that because of the ancient infusion of morality into equity and because of its equally-ancient purpose of circumventing the harshness of the common law, equity has an inherent and continuing capacity to meet changing social needs. Probably neither Blackstone nor Story would have asserted this proposition, but it is clear that Pomeroy does not mean it to be a principle that swallows all other principles of equity jurisprudence. For instance, he says that equity has "full freedom"[137] to adapt its relief to the particular rights and liabilities of each party, but it is not "common" for a court of equity to exercise "this extreme flexibility."[138] In addition, he states that although equity will not suffer a right to be without a remedy, equity will provide relief only if the right "is one which comes within the scope of *juridical* action, of *juridical* events, rights, and duties."[139] Equity will not invent rights,

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[134] *Id.* at § 63.

[135] *Id.* at § 64.

[136] *Id.* at § 65.

[137] *Id.* at § 115.

[138] *Id.*

[139] 2 J. Pomeroy, *supra* note 42, at § 424 (emphasis in original).

enforce rights that have not previously been declared, or enforce rights which are "*purely* moral."[140]

4. *Maitland's Lectures on Equity*

In 1909, F.W. Maitland, the renowned and influential professor of law at Cambridge University, published his twenty-one lectures on equity. Maitland was lecturing after the English merger of equity and law, accomplished by the Judicature Act of 1875. Because of the merger, Maitland was forced to define equity as "that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity."[141] Although Maitland himself admits that this is "a poor thing to call a definition," his meaning is clear: present-day equity is defined by rules of jurisdiction:

> You will see what this comes to. Equity is now, whatever it may have been in past times, a part of the law of our land. What part? That part which is administered by certain courts known as courts of equity. We can give no other general answer. We can give a historical explanation. We can say, for example, that the common law is derived from feudal customs, while equity is derived from Roman and canon law . . ., but in no general terms can we describe either the field of equity or the distinctive character of equitable rules. Of course we can make a catalogue of equitable rules, and we can sometimes point to an institution, such as the trust strictly so called, which is purely equitable, but we can make no generalization.[142]

It can be seen that this definition from the beginning of the Twentieth Century is the most modest that we have considered. Maitland avoids talking about the nature — and even the principles — of equity. If Blackstone, Story, and Pomeroy agree that equity developed into a specific jurisprudence with specific principles and precedents, Maitland seems willing only to say that this development has culminated in a collection of not-necessarily-related rules.

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[140] *Id.* (emphasis in original).

[141] F.W. Maitland, *supra* note 41, at 1.

[142] *Id.* at 13-14.

Conflicts between law and equity "belong to old days, and for two centuries before the year 1875 the two systems had been working together harmoniously."[143] Equity is "supplementary law," Maitland says. It presupposes the common law, which it depends on. Because equity is not a self-sufficient body of law, it is not "a single consistent system, an articulate body of law."[144] It is "a mere string . . . a number of disconnected doctrines," not a "logical scheme."[145] Maitland maintains that all the principles of equity have been assimilated into the various areas of the law and of substantive equity. He therefore spends most of the time in his lectures exploring the various areas of substantive equity, primarily trusts, mortgages, and equitable estates. He also describes "[the] three novel and fertile remedies" that equity has contributed to our legal system: injunctions, specific performance, and the judicial administration of estates.[146] To Maitland, it is these three remedies together with the legal institution of the trust that constitutes equity's main legacy to English jurisprudence.

C. *The American Colonial Era*

In order to understand the role that equity played in the American colonies up to the time of the Constitution, it is necessary to have some understanding of the colonial legal system, including the status and power of the colonial courts and of colonial juries.

By the time of the American Revolution, American law had become substantially — but still incompletely — Anglicized. However, this was not the case at the beginning of the settlement of the territories that later became the United States. Early colonial law varied by colony, and the earliest colonial "laws" were completely dependent on the exigencies of the precarious new settlements. The rules of these settlements resembled martial law more than civil law.

As the settlements became more secure, a true rule of law developed. Still, "in the beginning, judicial business in the colonies was not separated from public business in general. The same people made

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[143] F.W. Maitland, *supra* note 41, at 17.

[144] *Id.* at 19.

[145] *Id.* at 21.

[146] *Id.* at 22.

laws, enforced them, decided cases, and ran the colony."[147] Thus, there was no separation of governmental powers in the early colonial period. This was a consequence of the exigencies of pioneer life and the lack of an English tradition of separation of powers.[148] There was also no separation of powers because there was no clear separation of public business. Judicial matters were not separate from other public matters. Courts handled administrative matters, and the highest court of a colony "was almost always more than a court."[149] And in an era when government was truly local, the local court of a colony typically was a governing body as well as a place to settle cases or controversies. These local "courts" would also have a great deal of authority to run the local economies.

1. *Civil Trial by Jury*

One cannot understand the controversies at the time of the ratification of the Constitution concerning the role of the judiciary — including its equity role — without understanding the importance of the Anglo-American jury. The colonists agreed with Blackstone about the dangers of unbridled equity powers. Keeping the volume of judicial business in the hands of the jury — and, therefore, out of equity — was a major concern.

As the colonies progressed and their legal systems became more organized, the important English right to a jury trial asserted itself. This right in criminal matters was uncontested and noncontroversial. But the right to a jury in a civil trial had a more checkered history. In England, jurors were originally witnesses. Later, they acted pursuant to a mixed authority of their original role as witnesses and their evolving role as triers of cases. There were conflicts between juries and judges, who could imprison jurors who did not render the verdict that the Crown wanted.

In England, it was not until *Bushell's Case*[150] in 1670 that it became settled that jurors were immune from punishment for supposedly

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[147] L. Friedman, *A History of American Law* 33 (1973).

[148] "And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown." 3 W. Blackstone, *supra* note 47, at 23-24.

[149] L. Friedman, *supra* note 147, at 44. The Massachusetts state legislature is still called The General Court.

[150] 6 State Tr 999 (1670).

"wrongful" verdicts. That was the beginning of the modern jury exercising independent judgment. Between the time of *Bushell's Case* and the middle of the Nineteenth Century, the jury decided both questions of fact and law. This made the jury not only a settler of disputes but a case-by-case promulgator or revisor of laws, and, thus, a governing body. Although scholarship may not yet be able to tell us precisely how powerful the juries were in the American colonies up until the time of the Revolution,[151] it is important to understand that a trial by one's "peers" was a fundamental event of local government where a popular consensus about justice could be directly effectuated. Thus, according to the American historian Forrest McDonald, in the states, "the actual enforcement of the laws was commonly entrusted . . . above all, to juries."[152] So, it was not surprising for the colonists, in the Declaration of Independence, to object to "depriving us, in many cases, of the benefit of trial by jury."

2. *Courts of Equity in the Colonies*

Substantive legal doctrines, both in law and equity, were adopted by the colonies in piecemeal fashion. As the colonies became larger, better organized, and more developed, ever larger portions of the English legal system were adopted. Nothing, however, was imported wholesale. The English inheritance was put into effect according to circumstance and the perceived needs of each community and colony. There were "thirteen separate legal systems."[153]

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[151] McDonald says that in England, from 1670-1760, "juries ruled with impunity both as to law and as to fact." F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 40 (1985). But Holdsworth does not make as sweeping a statement as McDonald, and he observes that, after *Bushell's Case*, the English judges began to order new trials when they had a fundamental disagreement with the verdict of a jury. *See* 1 W. Holdsworth, *supra* note 33, at332-50. In 1787, Alexander Hamilton seemed familiar with this judicial tactic, for he said that "where the jury has gone evidently wrong, the court will generally grant a new trial." *The Federalist No. 83*, at 545 (Modern Library ed. 1937). On the other hand, Potter does not give the English judge the firm authority to order a new trial until 1816. Potter's, *supra* note 72, at 245. But a modern commentator seems to agree with McDonald. *See* comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170, 173 (1964). ("Judging from the limited sources available, the right of the jury to decide questions of law was widely recognized in the colonies.")

[152] F. McDonald, *supra* note 151, at 86.

[153] Friedman, *supra* note 147, at 31.

No other area of English law was as various as equity. Before any courts of equity could be established, a significant hostility to equity itself had to be overcome. Critically, the equity courts did not use juries.[154] "Judges were what Americans distrusted."[155] Equitable justice was the prerogative of the king. Because it was royal justice, chancery was associated with English executive power. People were wary of the ideas about equity and arbitrary justice that Blackstone set out to refute.[156] Dane observes that

> there was a court of chancery for a very short time in Rhode Island, but its arbitrary conduct soon caused its discontinuance. Attempts were made to establish a court in Massachusetts, but failed. In New York the chancery powers were exercised in the executive branch (for a time) of the government, and according to Smith's History were always unpopular. In New Jersey much the same.[157]

Americans obviously preferred that their juries, rather than their judges, have the power to act on consensual notions of natural justice.

The available sources essentially agree about the extent of equity in the period immediately before the Revolution.[158] Except for the short period of time in Rhode Island, already mentioned, New England states had no courts of equity. New York and New Jersey had separate equity courts, although, as noted above, Dane says that the courts were unpopular in both states. Story claimed that, because of its unpopularity,

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[154] Neither did courts in vice-admiralty, so these courts were the objects of hostility as well. In addition, the vice-admiralty courts were burdened with another source of hostility. They also were concerned with taxation, since the exchequer was never set up in America.

[155] F. McDonald, *supra* note 151, at 85.

[156] When Blackstone's *Commentaries* were published in the colonies, Americans became "his most avid customers." (L. Friedman, *supra* note 147, at 88).

[157] N. Dane, *A General Abridgement and Digest of American Law*, ch. 225, Art. 2, § 1 (1824).

[158] *Equity Juris*, *supra* note 58, at § 56, N. Dane, *supra* note 157, at ch. 225, Art. 2, § 2, and *The Federalist No. 83*, at 546-47 (A. Hamilton) (Modern Library ed. 1937). *See also* Re, *Remedies, Cases and Materials* 45 (1987) ("The history of equity in the United States as a system of law as distinguished from a system of lay magisterial discretion in hard cases dates from the second decade of the [Nineteenth Century]"). This text is a classic reference source.

the New York court of chancery had "very little business" until 1778, although it was established in 1701.[159] Pennsylvania set up a court of chancery in 1720 but abolished it in 1739. Delaware never had a court of chancery. Among the southern states, the Carolinas had chancery courts but, in both states, the governor was chancellor. In Virginia, a three-judge panel exercised equitable jurisdiction, and in Maryland the lieutenant governor was chancellor.

It is clear that equity played a very minor role in the law of the colonies. New York had the most developed legal system of any colony, but its court of chancery apparently was dormant for almost the entire Eighteenth Century.[160] Throughout the colonies, there were no powerful equity judges, and "equity powers were but rarely placed in the hands of a single man."[161] The Articles of Confederation did not provide for national courts,[162] and therefore, did not provide for equity courts.

D. *Equity in The Constitution*

Section 2 of Article III of the United States Constitution deals with the jurisdiction of the judicial power of the United States. There, a jurisdiction in equity is given to the federal courts:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

According to the records of the Philadelphia Convention of 1787,[163] the phrase, "in Law and Equity," — which was later to appear in the Eleventh Amendment as well[164] — was inserted without any debate or

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[159] *Equity Juris*, *supra* note 58, at § 56 n.1.

[160] "Even in the State of New York . . . equity was scarcely felt in the general administration of justice." *Equity Juris*, *supra* note 58, at § 56.

[161] N. Dane, *supra* note 157, at ch. 225, Art. 2 § 3.

[162] Under the Articles, there was an authority for the Congress to appoint ad-hoc courts of ultimate appeals to settle disputes between states. *See* N. Dane, *supra* note 157, at ch. 225, Art. 9, §§ 2-3.

[163] *See* P.B. Kurland and R. Lerner, *The Founders' Constitution* 220-27 (1987).

[164] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

attempt to define its terms.[165] Earlier drafts had provided that the judicial power would extend to all cases arising under the laws and Constitution of the United States.

In *Federalist No. 80*, Alexander Hamilton explains the need for federal jurisdiction over equitable causes:

> There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud*, *accident*, *trust*, or *hardship*, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states.[166]

At least two points can be made about Hamilton's pragmatic explanation. The first is that the Constitution had not provided for a distinct centralized court of Chancery but only for an equitable jurisdiction. Hamilton's point seems to be that equitable jurisdiction is a practical necessity because areas of the law traditionally labeled equitable are so commonly litigated. In mentioning fraud, accident, trust, and hardship, Hamilton is referring to specific jurisdictions of equity, not to a general concept of equitable power. The second is that Hamilton looks to the practice of the states for guidance about the needs of the federal judiciary. State courts administer equity, and therefore the federal courts, in order to administer justice and satisfy the expectations of litigants, must do so as well.

Section 2 of Article III seems to represent a decision by the Philadelphia Convention to incorporate the English legal tradition into the Constitution. The Convention delegates, who had just successfully rebelled against English rule, were inventing a new government. They did not have to continue the unique legal history of England. But, although there were major controversies about the power and role of the new

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[165] "It will be observed further, that though equity is very often mentioned in the many charters, constitutions, and statutes [i.e., colonial charters, the federal and state constitutions, state and federal statutes] above cited or referred to, yet in none of them is it in any degree whatever defined, though the expression clearly must have had reference when used, to some code of equity in a system of jurisprudence, yet none is named, not even the state or nation in which to be found." (N. Dane, *supra* note 157, at ch. 225, Art. 3 § 7).

[166] *The Federalist No. 80*, at 539 (A. Hamilton) (Modern Library ed. 1937).

federal judiciary,[167] and although there was some controversy about ho and why an American legal system might be different from the inherite English system, there were fundamental assumptions — prevailing a both the Philadelphia Convention and at the state ratifying convention — about the English inheritance. When the Americans of the lat Eighteenth Century thought of a system of courts, they naturally thoug of law and equity.

Nevertheless, the prevalent misgivings about equity played significant role in the controversy concerning the lack of a constitution provision protecting the right to trial by jury in civil matters, controversy ultimately resolved only by the ratification of the Sevent Amendment.[168] Article III, Section 2, Clause 3 of the Constitutio provides that in the federal courts the trial of all crimes excep impeachment shall be by jury and shall be conducted in the state wher the crime was committed. There was no question at the Philadelphi Convention about trial by jury for crimes. Whether the Constitutio should guarantee a jury in civil matters was another question.

There was strong support for guaranteeing the civil jury. Hug Williamson of North Carolina and Elbridge Gerry of Massachusetts too this position. Nathaniel Gorham of Massachusetts argued that it woul be too difficult to provide for civil juries in the Constitution because "i is not possible to discriminate equity cases from those in which juries ar proper."[169] Instead, he argued, it should be left to the Congress t consider this matter in more detail. George Mason of Virginia agree with Gorham, but, nevertheless, proposed that a bill of rights be draw up that would include a "general principle" about civil juries. Gerr concurred in this proposal. But Roger Sherman of Connecticut agree with Gorham and argued that state bills of rights were adequate t protect the right to a civil jury, that "there are many cases where juri are proper which cannot be discriminated,"[170] and that the issue shoul

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[167] *See The Federalist No. 78-83*, at 521-74. (A. Hamilton) (Modern Library ed. 1937

[168] "In Suits at common law, where the value in controversy shall exceed twenty dollar the right of trial by jury shall be preserved, and no fact tried by a jury shall b otherwise re-examined in any Court of the United States, than according to the rules o the common law." U.S. Const. amend. VII.

[169] *The Records of the Federal Convention of 1787*, at 587 (M. Farrand, ed. rev. ed. 193 (hereinafter cited as "Farrand").

[170] *Id* .

be passed to the new Congress once the Constitution was ratified. The question was not voted on immediately. When it was taken up later, Gerry and Charles Pinckney of South Carolina made a motion to include trial by jury "as usual in civil cases."[171] But Gorham's and Sherman's views prevailed, and the motion was defeated.

After the Convention, the twin and related issues of equity and civil juries were joined in a series of widely-distributed pamphlets, *The Observations of the Federal Farmer*, which appeared in 1787-88. There, concern was expressed that giving the new national courts jurisdiction in law and equity would allow a dangerous "discretionary power" in judges. For, while chancery proceedings in England were "now reduced to a system," that was not so in America because of the great variety among the states with respect to equity.[172] Why, it was asked, should a federal judge be granted the power to decide according to law and equity? Is it not sufficient that he decide "according to the spirit and true meaning of the constitution?"[173]

Fears about equity were voiced in the *Essays of Brutus*, another anti-Federalist source, which appeared in counterpoint to *The Federalist Papers* in the *New York Journal* between October, 1787, and April, 1788. One of them quoted Blackstone's criticisms of the notion of open-ended equity and contended that the proposed Constitution as written gave such dangerous powers to federal judges:

> The judicial are not only to decide questions arising upon the meaning of the constitution at law, but also in equity. By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.[174]

Another essay in *The Federal Farmer* asked why Article III should have provided for trial by jury in criminal but not in civil cases.[175] Why was civil trial by jury, "the most valuable part of the British Constitu-

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[171] *Id.* at 628.

[172] *The Federal Farmer*, January 17, 1988, in 2 H. Storing, *The Complete Anti-Federalist* 2.8.195 (1981).

[173] 2 H. Storing, *supra* note 172, *id.*

[174] *Id.* at 2.9.137.

[175] *Id.* at 2.8.51.

tion, and indisputably the best mode of trial ever invented"[176] omitted from the Constitution? The author argues for the civil jury not only as a means of securing a fair trial, but also as an arm of government:

> If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases. * * * Nor is it merely this controul [sic] alone we are to attend to: the jury trial brings with it an open discussion of all causes, and excludes secret and arbitrary proceedings.[177]

A last quotation from *The Federal Farmer* serves as a concise summary of most of the era's controversies with respect to the power and role of the judiciary and shows the central position of equity in such controversies:

> The judicial powers of the courts extends in law and equity to certain cases: and, therefore, the powers to determine on the law, in equity, and as to the fact, all will concentre [sic] in the supreme court: — These powers, which by this constitution are blended in the same hands, the same judges, are in Great-Britain deposited in different hands — to wit, the decision of the law in the law judges, the decision in equity in the chancellor, and the trial of the fact in the jury. It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion.[178]

To these objections Alexander Hamilton turns his attention in *Federalist 83*. He begins by asserting that the lack of mention of civil juries does not, as some alleged, mean that the right to a civil jury is abolished. It means merely that the power to provide for trial by jury in

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[176] *Id.* at 2.8.190.

[177] *Id.*

[178] *Id.* at 2.8.42.

federal civil cases is given by the Constitution to the Congress. In fact, Hamilton says, little of the current custom with respect to the civil jury will change under the new Constitution. The national judiciary will have "no cognizance" of most civil matters which "will remain determinable as heretofore by the State courts only and in the manner which the State constitutions and laws prescribe."[179] And since a jury has never been required in admiralty and equitable actions, those classes of cases will also not be affected.

In a long section in which he points out the variety of state provisions concerning law and equity courts and the trial by jury, Hamilton shows "that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States."[180] To this variance among the states with respect to the civil jury, Hamilton adds his own "deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one."[181] Juries are incompetent to determine issues of international law and treaties, for instance, he says.

In addition, Hamilton defends the distinction between cases at law triable by a jury and cases in equity triable without a jury. The "circumstance that constitute cases" in equity are often too "nice and intricate" for juries.[182] Equity is an extraordinary jurisdiction, Hamilton says. A constitutional allowance for juries in all civil matters might cause equitable principles to be extended to all civil cases which would, in turn, cause every civil case to be treated specially and individually. There would no longer be any "general rules"[183] of adjudication.

However, the converse might also occur if there were a right to a jury trial in all civil matters. If the law courts attempted to rule in matters of equity, the entire institution of the jury would be undermined with "questions too complicated"[184] for the jury to decide. It is best, Hamilton concludes, to preserve the exceptional nature of equity jurisdiction and to continue the segregation of law from equity. Rather

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[179] *The Federalist No. 83*, at 542 (A. Hamilton) (Modern Library ed. 1937).

[180] *Id.* at 547.

[181] *Id.* at 548.

[182] *Id.* at 549.

[183] *Id.*

[184] *Id.* at 550.

than mix their different purposes and procedures, each can remain "a sentinel over the other."[185]

1. *Equity in The Constitution as English Equity*

With the lack of a definition of equity in the Constitution, with the significant antagonism to equity in general, and with the minor role that equity courts had played in the colonies, it seems that there would have been a major question about the meaning and extent of the equitable powers of the new federal courts. Yet, there was universal agreement that these powers were to be understood as the same as those of the equity court of England at the time.

For example, Story explained the intent behind Article III, Section 2 in the following manner:

> What is to be understood by "cases in law and equity," in this clause? Plainly, cases at the common law, as contradistinguished from cases in equity, according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American States were familiarly acquainted.[186]

In 1835, Story observed that because equity had "no existence"[187] in some of the colonies, it took much longer — until the close of the Eighteenth Century, in fact — for an equity jurisprudence to develop in the United States. New York had the most developed equity jurisprudence, Story says, but it was not systematized until the time of Chancellor Kent, who was at the peak of his career in the first quarter of the Nineteenth Century.[188]

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[185] *Id.* at 549.

[186] J. Story, *A Familiar Exposition of The Constitution of the United States* § 315 (1986 ed.) (1st ed. 1840).

[187] *Equity Juris, supra* note 58, at § 56.

[188] In *Federalist No. 83*, written in 1788, Hamilton says that New York equity was following English equity:

> In this state, the boundaries between actions at common law and actions of equitable jurisdiction are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other states the boundaries are less precise.

(Federalist No. 83, at 571 (A. Hamilton) (Modern Library ed. 1937).

In the same year, forty-eight years after the drafting of the Constitution, Story maintained that equity was still administered "in the modes, and according to the forms which appertain to it in England," namely, as "a branch of jurisprudence."[189] American equity was more English than American common law was English because the common law was imported only in a piecemeal fashion and according to local circumstances. But the Constitution caused English equity to be imported in a wholesale fashion. It created a national equity jurisdiction all at once, ignoring the fact that there were no American precedents in equity nor an established jurisprudence in equity.[190]

Dane, writing in 1824, agreed with Story about the meaning of equity in Article III of the Constitution:

> The equity mentioned in that constitution is undoubtedly some uniform general code of equity; and it is equally certain that we can find this code no where but in England, or in the English decisions in equity, we have in English books in this country. The practice in the Supreme Court of the United States in which alone such a uniform plan can grow up in our country, is in full confirmation of this opinion; for it is in those books only [that] it looks for authorities; at most the exceptions are so few as not [to] deserve attention.[191]

In the *Federal Papers*, Hamilton had said that "the principles by which that relief [in equity] is ground are now reduced to a regular system."[192] And in 1826, Kent said that "at this day, justice is administered in a court of equity upon as fixed and certain principles as in a court of law," that the "system of equity" was a kind of "secondary common law" that had been created by the English Chancery Court only "within the last two centuries."[193]

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[189] *Equity Juris, supra* note 58, at § 58.

[190] In 1824, Dane said about American precedents in equity:

> Though those decided in our courts are yet but few, yet in fact, near all in the English code of equity are authorities here, as will be observed on examining them, and on noticing the vast numbers of them cited, and almost alone cited in our trials in equity. N. Dane, *supra* note 157, at ch. 225, Art. 2 § 3.

[191] N. Dane, *supra* note 157, at ch. 225, Art. 1.

[192] *Federalist No.83*, at 549 and note (Modern Library ed. 1937).

[193] 1 J. Kent, *supra* note 59, at §§ 489, 490.

a. *English Equity at the Beginnings of the American Constitutional System*

The Chancellor at the time of the American Revolution and the framing and ratification both of the Constitution was Lord Thurlow. He was Chancellor from 1778 until 1792, and although he was a skilled lawyer, the verdict of history is that he did not leave many important decisions as a legacy.[194]

A previous section[195] has related how in the period before Lord Thurlow the modern view of equity as a systematic branch of jurisprudence was fast developing. After Thurlow came Lord Loughborough, who was Chancellor from 1793 until 1801. According to Holdsworth,[196] Loughborough was not a distinguished Chancellor, but he continued the development of a fixed equity jurisdiction. For instance, he said with respect to equity as moral law that, "legal obligations are from this nature more circumscribed than moral duties."[197]

After Loughborough, came Lord Eldon, Chancellor from 1801 until 1827. Eldon is considered to have been one of the great Chancellors.[198]

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[194] "With great natural abilities, with a considerable knowledge of law, and with undoubted rhetorical powers, he could scarcely be considered in any other light than as a political chancellor: and having failed in that character, his reputation as a judge does not at the present day stand very high." E. Foss, *A Biographical Dictionary of the Judges of England*, 664 (1870). "He never really mastered equity and relied on others for learning, but nevertheless delivered some judgments of lasting importance." D. Walker, *The Oxford Companion to Law*, 1218 (1880). "[U]nlike Lord Nottingham, Lord Hardwicke, and the Chancellors whose memory we venerate, upon his elevation to the bench he despised the notion of entering on a laborious course of study to refresh and extend his juridical acquirements * * * he did little in settling controverted questions, or establishing general principles." J. Campbell, *The Lives of the Lord Chancellors and Keepers of the Great Seal of England* 195 (1848).

[195] See Section 1.A.

[196] "Several of his decisions were reversed, and many of his judgments can only be described as thin. * * * Though none of his decisions show any striking developments in the principles and rules of equity, they do illustrate the growing fixity and precision of those rules and principles." 13 W. Holdsworth, *A History of English Law* 579 (1952). "His judgments in equity are of more permanent value than those on matters of common law, though even of these, none made any striking developments in the principles of equity." D. Walker, *supra* note 194, at 1293 (1980).

[197] *Parsons v. Thomason*, (1797) 1 Bla. T.R. 327.

[198] "Lord Eldon, during an exceptionally long tenure of office, was able finally to define and limit the sphere of the system he was called upon to administer. * * * The reports

He was the contemporary of Story, Kent, and Dane, and his time as Lord Chancellor was also contemporaneous with the first Supreme Court decisions construing the meaning of "equity" in Article III.

Two leading cases still serving as definitive precedent in England demonstrate that Eldon finished the task of systematizing equity and finally settling its jurisprudence. In *Gee v. Pritchard*, Eldon said that

> The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case; I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done nothing to justify the reproach that the Equity of this Court varies like the Chancellor's foot.[199]

In *Davis v. Duke of Marlborough*, Eldon was equally clear:

> It is not the duty of a Judge in Equity to vary rules, or to say that rules are not to be considered as fully settled here as in a court of law.[200]

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of Eldon's decisions fill thirty-two volumes, and it is fair to say that it is upon these reports that modern equity is grounded." Potter's, *supra* note 72, at 598. "[O]ne of the greatest of equity lawyers, [h]is decisions were thorough, painstaking, learned and clear." H. Hanbury and R. Maudsley, *Modern Equity* 12 (10th ed. 1976). "Eldon is the third of the three great Chancellors who have created our modern system of equity. Nottingham is its father; Hardwicke settled its leading principles and many of its subordinate rules; Eldon worked out in detail the scope and application of those principles and rules, harmonized conflicting interpretations of them, and thus completed the task of making it almost as systematic as the common law." 13 Holdsworth, *supra* note 196, at 627. "He was the most learned lawyer of his day, his judgments illuminating every branch of the civil law, and a complete master of equity, and his reputation rests on his development of equity. Many of his decisions are leading cases. His great contribution to equity consisted in seeking to settle the principles and to make the rules of equity nearly as fixed and ascertained as those of common law." D. Walker, *supra* note 194, at 1120 (1980).

[199] *Gee v. Pritchard* (1818) 2 Swan 402 at 414.

[200] *Davis v. Duke of Marlborough* (1819) 2 Swan 108 at 163.

b. ***Enacting the Original Understanding***

Much of the federal judicial system was left inchoate by the Constitution. For instance, while Article III created the Supreme Court, it did not create any lower federal courts. The first law passed after the convening of the First Congress in 1789 was the Judiciary Act of 1789.[201] In addition to creating the lower federal courts, fixing their jurisdiction, and fixing the appellate jurisdiction of the Supreme Court, that Act provided for both common law and the equity jurisdiction of the federal judiciary.

With respect to equity jurisdiction, the Judiciary Act provided that equity would be distinct from, supplementary to, and subordinate to the law — the universal understanding of the role of equity both in England and American. Section 16 provided that

> Suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.[202]

Three years later, the Congress authorized the Supreme Court to promulgate equity rules for the federal courts, although the Court did not exercise this power until 1822. The thirty-third and last of those first equity rules provided that

> In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit courts shall be regulated by the practice of the High Court of Chancery in England.[203]

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[201] 1 Stat. 73.

[202] *Id.* § 16.

[203] 20 U.S. (7 Wheat) xiii (1822). The Act of 1792 provided that

> The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the form of writs and other processes, the modes of framing and filing procedures and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceedings to obtain relief, of drawing up, entering and enrolling decrees, and of proceedings before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit and district courts. 1 Stat. 276.

2. *Supreme Court Construction.*

Case law construction by the Supreme Court of the phrase "equity" in Article III, agrees with the authorities already cited. And from the early 1800's until the merger of the procedure of law and equity in the federal system in 1938, the Supreme Court adopted three important constructions of the phrase "cases . . . in equity:" (1) the English Court of Chancery is the source; (2) a plain and adequate legal remedy must be pursued before an equitable remedy; (3) because the right to trial by jury is at stake, legal remedies must be pursued first.

a. *The English Court of Chancery as Its Source*

In 1818 in *Robinson v. Campbell*, the Court ruled that cases were to be divided between law and equity "according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."[204]

In the middle of the Nineteenth Century, the Court made a similar statement:

> In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the Court of Chancery in England.[205]

At the end of the Nineteenth Century; the Court had not changed:

> The inquiry rather is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a Court of law, or one which only a court of equity was fully

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[204] 16 U.S. (3 Wheat.) 212, 223 (1818).

[205] *Fenn v. Holme*, 62 U.S. (21 How.) 481, 484 (1858).

competent to give.[206]

Immediately before the promulgation of the Federal Rules of Civil Procedure, the Court again observed:

> From the beginning, the phrase "suits in equity" has been understood to refer to suits in which relief is sought according to the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts.[207]

The new Federal Rules did not change substantive rights but only procedure. Even after the promulgation of the Rules, the Court still held that only specific statutory changes had altered the source of American equity:

> The suits "in equity' of which these courts were given "cognizance' ever since the First Judiciary Act, . . . constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject of course, to modifications by Congress."[208]

b. *A Plain and Adequate Legal Remedy Before An Equitable Remedy*

The Court has found that the "plain, adequate, and complete" language of Section Sixteen of the Judiciary Act of 1789 was also the English rule at the time of the Constitution.[209] Equitable remedies will lie only when the legal remedies are inadequate.

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[206] *Mississippi Mills v. Cohn*, 150 U.S. 202, 206 (1893).

[207] *Gordon v. Washington*, 295 U.S. 30, 36 (1935).

[208] *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939). "Equity jurisdiction, as conferred by the Constitution on federal courts imposes a duty to adjudicate according to the equitable rules and principles developed by the Court of Chancery at the time the United States Constitution was framed." *Bell v. Hood*, 71 F. Supp. 813, 819 (D.C. Cal. 1947).

[209] "Perhaps the most general, if not the most precise, description of a court of equity, in the English And American sense, is, that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and compete remedy cannot be had in the courts of common law." *Equity Juris, supra* note 58, at § 33.

After the first quarter of the Nineteenth Century, the Court decided:

> This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held, that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy.[210]

Toward the end of the Nineteenth Century, the Court elaborated:

> The sixteenth section of the Judiciary Act of 1789, . . . declared "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law," . . . . The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England.[211]

And in 1930, the Court, quoting one of its earlier decisions, said that

> "whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court . . ."[212]

c. *Legal Remedies Before Equitable Remedies Helps to Preserve the Right to a Trial By Jury*

The Supreme Court has always recognized that the necessity of seeking a legal remedy before an equitable remedy helps to reserve as many civil trials as possible for trial by jury.

In the middle of the Nineteenth Century, the Court said that,

> whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a

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[210] *Boyce's Executors v. Grundy*, 28 U.S. (3 Pet.) 210, 215 (1830).

[211] *Whitehead v. Shattuck*, 138 U.S. 146, 150-1 (1891).

[212] *Henrietta Mills v. Rutherford Co.*, 281 U.S. 121, 127 (1930).

> plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.[213]

At the end of the Nineteenth Century, the Court still recognized this as a constitutional issue:

> The Seventh Amendment of the Constitution of the United States declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." That provision would be defeated if an action at law could be tried by a court of equity . . .[214]

And immediately before the merger of federal law and equity:

> Section 267 of the Judicial Code provides: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." . . . That rule has always been followed in courts of equity. The enactment gives it emphasis and indicates legislative purpose that it shall not be relaxed. * * * It serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed.[215]

By the end of this report, it will be seen whether the contemporary Supreme Court has maintained its watchfulness in this area. The importance of its past watchfulness, preserved from the original understanding through the Nineteenth Century and into modern times, could not be greater. As evidenced by the decisions of the Court quoted in this subsection, the constitutional status of equity has a critical relationship to the constitutional right to a civil jury. The jury right served as a limitation on the expansion of equity.

E. *The Civil Jury as a Political Institution*

It is clear that the constitutional right to a civil jury served as a limitation on the expansion of equity. But the jury could serve such a powerful role only because it was still regarded as a political institution

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[213] *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1856).

[214] *Whitehead*, 138 U.S. at 151.

[215] *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932).

well into the Nineteenth Century. In 1833, Story remarked on "the inestimable privilege of a trial by jury in civil cases — a privilege scarcely inferior to that in criminal cases, which is counted by all persons to be essential to political and civil liberty."[216]

One year later, Tocqueville gave great emphasis to trial by jury in his *Democracy in America*. He says that it is a political institution "above all," for it places the "real direction of society in the hands of the governed, or a portion of the governed, instead of leaving it under the authority of the Government."[217] In fact, Tocqueville says, the civil jury is even more important than the criminal jury:

> When the jury is reserved for criminal offenses, the people only witnesses its occasional action in certain particular cases; the ordinary course of life goes on without its interference, and it is considered as an instrument, but not as the only instrument, of obtaining justice. This is true *a fortiori* when the jury is only applied to certain criminal causes. When, on the contrary, the influence of the jury is extended to civil causes, its application is constantly palpable; it affects all the interests of the community; every one cooperates in its work: it thus penetrates into all the usages of life, it fashions the human mind to its peculiar forms, and is gradually associated with the idea of justice itself.[218]

Today, because of the explosion of constitutional cases seeking injunctive relief, the equity jurisdiction of the federal courts has expanded greatly, and the civil jury has experienced a corresponding relative decline. Besides the growth in equity jurisdiction, additional causes of the civil jury's decline have been the merger of law and equity which has had the inadvertent effect of blurring the substantive distinction between law and equity,[219] and the growth of constitutional and statutory law.[220] A commentator has shown how decisions of the

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[216] Story, 3 *Commentaries on the Constitution of the United States* Ch. 38 (1833).

[217] A. Tocqueville, 1 *Democracy in America* 331 (Schocken ed, 3d, 1967).

[218] *Id.* at 336.

[219] *See* Subrin, *supra* note 22.

[220] McDonald thinks that there was a certain inevitability in this latter cause:

> The rationale for the institution of trial by jury was somewhat undermined. It was one thing for juries to disregard legislative enactments under the empire, for then they

state courts of Massachusetts progressively reduced the status and power of the civil jury in the Nineteenth Century.[221]

F. *Modern English Equity*

English equity continues to look to the time of Lord Eldon as the final fixing of its basic principles. An 1879 case in Chancery shows how conservative the equity court had become by that time:

> [I]t must not be forgotten that the rules of Court of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. * * * [I]n cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases. * * * There is, perhaps, nothing more important in our law than that great respect for the authority of decided cases which is shown by our tribunals. Were it not for that our law would be in a most distressing state of uncertainty.[222]

In 1948, when the U.S. Supreme Court was still saying that it was guided by English practice as it stood on the eve of the American revolution in equity, the English Court of Chancery was saying that:

> Nevertheless, if the claim in equity exists, it must be shown to have an ancestry found in history and in the precedents of the courts administering equity jurisdiction. It is not sufficient that because we may think that the "justice" of the present case requires it, we should invent such a jurisdiction for the first time.[223]

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could plausibly assert that they did not merely represent the people but in fact were the people. It was quite another to do so afterward, for now the legislatures acted — or claimed to act — under authority of grants of power from majorities of the people in whole political societies. To the extent that those claims were legitimate, the case for the absolute authority of the juries was questionable.

F. McDonald, *supra* note 151, at 41.

[221] *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170 (1964).

[222] *In Re Hallett's Estate*, 13 Chancery Division 710-11 (1879).

[223] *Diplock v. Wintle*, (1948) Ch 465 at 481, (1948) 2 All ER 318 at 326.

And an even more recent case summarizes the modern and contemporary role of equity in English jurisprudence:

> Since the time of Lord Eldon the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles.[224]

G. *The Merger of Law and Equity in the Federal Rules of Civil Procedure*

After its initial promulgation of rules for federal equity suits in 1822, the Supreme Court produced revisions in 1842, 1888, and 1912.[225] All versions of the federal rules for equity practice concerned procedure almost exclusively. The original Section 16 of the Judiciary Act of 1789, the importance of which has been discussed above, was an exception that covered the jurisprudence of the equity jurisdiction.

Section 16 was rendered obsolete by the merger of law and equity in the Federal Rules of Civil Procedure in 1938.[226] Its substance was not, however, repealed — and it never has been. For in 1934, the Act enabling the Supreme Court to promulgate civil rules for the federal district courts specifically limited the prospective rules to "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[227] The new rules were not to "abridge, enlarge, nor modify the substantive rights of any litigant," and were to preserve "inviolate" the right to "trial by jury as at common law and declared by the seventh amendment to the Constitution."[228]

It is apparent that the ancient distinctions between law and equity were intended to survive the merger of law and equity in the federal system.[229] As numerous contemporary authorities and the Supreme

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[224] *Campbell Discourt Company Ltd. v. Bridge*, (1961) 1 QB 445 at 459, (1961) 2 All ER 97 at 103.

[225] *See* Talley, *The New and Old Federal Equity Rules Compared*, 18 Va. L. Rev. 663 (1913).

[226] It was not officially repealed until 1947, when a complete revision of Title 28 of the U.S. Code went into effect. *See* H. Rpt. 308 at A236 (1947).

[227] 48 Stat. 1064 (1934).

[228] *Id.*

[229] "Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected." *Stainback v. Mo*

Court attest, the federal courts must still ask themselves whether a party seeking equity has a adequate remedy at law.[230] Thus, it follows that the English law of equity should still be understood as our law in all instances where it has not been modified by American law. The fundamental principles of American equity still relate back to English equity at the time of the Constitution and during the early years of the Eighteenth Century.

II. *Three Critical Principles of Equity*

This section investigates the validity and current relevance of three jurisprudential principles commonly regarded by courts as essential foundations of equity.

The first is the maxim, "where there is a right, there [is] a remedy." No other principle or consideration in contemporary equity practice can be said to be more important than this. As a justification for judicial power, it is often regarded as kind of a summary of most of the substance of federal equitable jurisdiction.[231] It is fundamentally the basis of the book, *The Civil Rights Injunction*, by Professor Owen Fiss of the Yale Law School, that is an extended argument for the superiority of the judicial branch of government over the executive and legislative branches.[232]

Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949). "Instead, the merger of law and equity and the abolition of the forms of action supply one uniform procedure by which a litigant may present his claim in an orderly manner to a court empowered to give him whatever relief is appropriate and just. The substantive principles that applied previously are not changed, and it remains for the court to decide, in accordance with those principles, what form of relief is proper on the particular facts proven." Wright, *The Law of Federal Courts* § 67 (4th ed 1983).

[230] "The Court has recently reaffirmed the "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the serving party has an adequate remedy at law . . .' " *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974), *quoting Younger v. Harris*, 401 U.S. 37, 43-44 (1971). "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). "[H]istorically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy." Wright and Miller, *Federal Practice and Procedure: Civil* § 2942 (1973).

[231] *See* Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 Hastings L. J. 665, 672 (1987).

[232] *See* Fiss, *The Civil Rights Injunction* (1978).

The second principle is that judges rule in equity from the perspective of their own "discretion." The Supreme Court has made the seemingly all-inclusive statement that both "[t]he nature and the scope of the remedial decree"[233] are matters for a trial judge's discretion.

The third principle, closely related to the second, is that a court of equity is a court of "conscience." This clearly harkens back to the notions of an earlier era, already described, of equity as morally superior to law. Under this principle, federal judges today rule in equity cases on the basis of what is "fair,"[234] "just,"[235] and "wise."[236]

A. *"Where there is a right, there is a remedy"*

Although attempts to crystalize principles of the law into maxims are common in the law of every country,[237] their importance varies by country. In our tradition, the famous maxims of English equity are of debatable significance. The first attempt to formulate maxims in equity was published by Richard Francis as *Maxims of Equity* in 1728. The success of this endeavor has been criticized by Holdsworth who noted that "In some cases something like the maxim can be found in the cases cited to illustrate it; but in many cases it is the author's own deduction."[238] And, in a famous essay, Roscoe Pound agreed, saying that "his maxims for the most part are independent attempts to state principles derived from study of the cases."[239]

Francis listed this maxim as one of the fourteen that he described.[240]

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[233] *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976).

[234] *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

[235] *Hills V. Gautreaux*, 425 U.S. 284, 286 n.2 (1976).

[236] *Gautreaux v. Romney*, 457 F.2d 124, 126 (7th Cir. 1972).

[237] *See* R. Pound, *The Maxims of Equity* 34 Harvard L.J. 809 (1921).

[238] 12 W. Holdsworth *supra* note 33, at 188.

[239] R. Pound, *On Certain Maxims of Equity*, Cambridge Legal Essays (1926) 261-162.

[240] 1. He that will have equity done to him must do it to the same person. 2. He that hath committed iniquity shall not have equity. 3. Equality in equity. 4. It is equity, that he should make satisfaction, which received the benefit. 5. It is equity, that he should have satisfaction, which sustained the loss. 6. Equity suffers not a right to be without a remedy. 7. Equity relieves against accidents. 8. Equity prevents mischief. 9. Equity prevents multiplicity of suits. 10. Equity regards length of time. 11. Equity will not suffer a double satisfaction to be taken. 12. Equity suffers not advantage to be taken of a penalty or forfeiture, when compensation can be made. 13. Equity regards not the

But this is also one of his maxims that Pound regarded as most dubious.[241] In the same century as Francis, Blackstone placed a great deal of emphasis on this maxim. But he treats it as a general tenet of jurisprudence, "a settled and invariable principle in the laws of England,"[242] fundamental to the work of *any* court. "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[243] Blackstone does not mention the right-remedy principle in connection with equity.

Despite Blackstone's view that the right/remedy maxim has no specific relation to equity, it is important to understand what Blackstone means by this maxim. Rights are not created by courts, Blackstone says. Courts exercise power over the law's "remedial" part, "whereby a method is pointed out to recover a man's private rights, or redress his private wrongs." The "declaratory" part of the law, "whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down" is controlled by "the wisdom and will of the legislator."[244] In the English tradition, the "legislator" is a multifarious combination of the King, the Parliament, certain crucial documents like *Magna Carta*, statutes, and, of high importance to Blackstone, custom. But, despite these multiple sources, to Blackstone, the distinction between the declaratory and remedial parts of the law, and between the court and the legislator, is clear.

Holdsworth does not discuss this maxim/principle in his *History*. Story does not mention it in his treatise on equity. Nor does Dane in the chapter on equity in his *Abridgement*. In Brooms' *Legal Maxims*, this maxim is discussed as a maxim of the common law: "According to this elementary maxim, whenever the common law gives a right or prohibits an injury, it also gives a remedy."[245] During this period, we get the Court of Chancery stating emphatically that the right-remedy maxim is not a ground for equitable jurisdiction

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circumstance, but the substance of the act. 14. Where equity is equal, the law must prevail.

[241] R. Pound, *supra* note 239, at 266-267.

[242] 3 W. Blackstone, *supra* note 47, § 109.

[243] *Id.* at § 23.

[244] 1 W. Blackstone, *supra* note 47, §§ 53-54.

[245] *Broom's Legal Maxims* 118 (10th ed. 1939) (1st ed. 1845).

> I may observe that the absence of a remedy for a supposed wrong in another place, is not, of itself, any reason for this Court assuming a jurisdiction on the subject; the case must be such as to bring it properly within the jurisdiction of this Court *on other grounds.*[246]

Beginning at the time of Pomeroy, this maxim began to be accepted as a maxim of equity, but is difficult to find any authority who attached much weight to it. On the other hand, all the authorities are careful to point out its limitations and qualifications. Pomeroy and the Englishmen Snell[247] and Keeton[248] state that this statement "really underlies the whole jurisdiction of equity,"[249] for equity arose because there were legal rights that had no legal remedies. As such, it may be "only a truism," as the American Clark[250] suggests, or simply, equity's version of the "more comprehensive legal maxim,"[251] as Pomeroy explains.

But, it must be "greatly qualified if it is to be accepted as a statement of principle on which court of equity act," says the American McClintock.[252] It must "not be pressed too far as a characteristic of equitable jurisdiction," says Keeton.[253] There are "important limitations," says Pomeroy.[254]

For, the right must be "capable of being remedied by courts of justice,"[255] because "[t]here are many types of injury which cannot be redressed in Equity, any more than at law."[256] It must be "within the

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[246] *Ryves v. Duke of Wellington*, 9 Beav. 600 (1846) (emphasis added).

[247] R. MeGarry and P.V. Baker, *Snell's Principles of Equity* (27th ed. 1973) (1st ed. 1868) [hereinafter *Snell*'s].

[248] G.W. Keeton, *An Introduction to Equity* (1938).

[249] *Snell*'s, *supra* note 247, at 27. 2 J. Pomeroy, *supra* note 42, § 424 (1941). G. Keeton, *supra* note 248, at 117.

[250] G.L. Clark, *Equity* 29 (1954).

[251] 2 J. Pomeroy, *supra* note 42, § 424.

[252] H.L. McClintock, *Handbook of Equity* 42 (1936).

[253] G. W. Keeton, *supra* note 248, at 117.

[254] 2 J. Pomeroy, *supra* note 42, § 424.

[255] *Snell*'s, *supra* note 247, at 27.

[256] G. Keeton, *supra* note 248, at 120. .

scope of judicial action."[257] And, as a judicial institution, equity has limitations. "Equity does not undertake to redress wrongs which are violations of moral, as distinguished from legal, obligations."[258] And, according to Pomeroy,

> [E]quity cannot interfere to give any remedy, unless the right in question, the invasion of which constitutes the wrong complained of, is one which comes within the scope of *juridical* action, of *juridical* events, rights, and duties. The right must belong to the purview of the municipal law, — must be one which the municipal law, through some of its departments, recognizes, maintains, and protects.[259]

It can be seen how Pomeroy echoes the Blackstone dictum that the court only recognize rights; they do not create them.

In addition, a court of equity has "practical limitations"[260] in redressing wrongs. Also, "[e]quity will not interfere where the wrong is satisfactorily redressed at Common Law."[261]

Snell suggests that this maxim may have originated in equity's auxiliary jurisdiction — a jurisdiction that, after the merger of law and equity, no longer exists — where equity would use its superior processes, e.g., discovery, to assist in the vindication of a recognized right in a court of law.[262] Keeton agrees that this auxiliary jurisdiction is the perfect example of how equity will not let a right go unremedied.[263] Moreover, Pound suggested that the maxim may have originated in the Chancellor's power to issue new writs, not in his equitable powers.[264]

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[257] H.L. McClintock, *supra* note 252, at 41.

[258] *Id.* at 42.

[259] 2 J. Pomeroy, *supra* note 42, § 424 (emphasis in original).

[260] H.L. McClintock, *supra* note 252, at 42. *See also* Wright, *The Law of Remedies As a Social Institution*, 18 Univ. Det. L.J. 376, 376 (1955) ("We know today that the [i.e. the maxim *ubi jus, ibi remedium*] is not an accurate description of the law, and that there are, indeed rights for which there is no remedy.").

[261] G. W. Keeton, *supra* note 248, at 118.

[262] Snell's, *supra* note 247, at 28.

[263] G. W. Keeton, *supra* note 248, at 118.

[264] Pound, *supra* note 239.

1. *Judicial Recognition of the Limitations of the Right-Remedy Principle*

In the Nineteenth Century, the Supreme Court recognized the qualified nature of the right-remedy declaration. In *Rees v. City of Watertown*, an 1873 case with a pattern of facts every bit as unconventional as anything of our day, the Supreme Court based its decision on such qualifications. The City of Watertown had defaulted on a bond obligation to plaintiff Rees. Rees pursued his remedies at law, secured a judgment against the city, but was unable to collect because of the city's bankruptcy. He pursued and won another legal remedy, mandamus. The court ordered the city council to tax the citizens to raise enough funds to pay off Rees. A majority of the city council responded to this mandamus by resigning, thus leaving Rees again without an effective remedy. Rees next went into equity seeking a decree that his judgment be executed on the private property of the citizens of Watertown. It was on this astonishing petition that the Supreme Court ruled.

The Court agreed that justice was on Rees' side, but it said that the constitutional and traditional English boundaries between law and equity had to govern:

> The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. * * * A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels.[265]

In the same term, in a similar tax case, the Supreme Court added:

> It is very clearly shown that the total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief. * * * But the hardship of the

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[265] *Rees v. City of Watertown*, 86 U.S. (19 Wall) 107, 121-22 (1873).

> case, and the failure of the mode of procedure established by law, is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles.[266]

Even in the Twentieth Century, the Court has recognized the limited nature of the right-remedy declaration. In a case in which it refused to order an equitable cancellation of an insurance policy, despite proof of fraud, the Court stated:

> But although the adequacy of the legal remedy precludes resort to a federal court of equity, it does not follow that the converse is true — that the want of a legal remedy in the federal courts gives the suitor free entrance to a federal court of equity.[267]

And in a contemporaneous case, the Court recognized that a Congressional act restricting the jurisdiction of legal remedies did not cause a corresponding increase in the jurisdiction of equitable remedies:

> But want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers. The statute forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibition of Congress, applicable alike to suits at law and in equity.[268]

2. *How Rights are Related To Remedies*

Thus, the statement, "where there is a right, there is a remedy," may only be a truism about what courts do and how they operate. Its correct use in the past two centuries relates to jurisdictional considerations. If there is a right established under the jurisdiction of the courts of law, then the courts of law will award a remedy to vindicate it. If there is a right established under the jurisdiction of the courts of equity, then

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[266] *Heine v. The Levee Comm'r.*, 86 U.S. (19 Wall) 655, 658 (1873).

[267] *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 569-70 (1939).

[268] *Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 69-70 (1935).

equity will vindicate it. Neither law nor equity has an "adaptable"[269] juridiction; both have a precise jurisdiction.

The original basis for this understanding is that in the Anglo-American tradition, right and remedy are really inseparable. Traditionally, there has never been a dichotomy in court between right and remedy. One implied the other, and both were determined in a single judicial analysis. As quoted above, Blackstone thought that every law had a "declaratory" part and a "remedial" part. But they were parts of the same whole.

The forms of action were writs that provided for remedies. Courts controlled remedies for wrongs. Under common law, the existence of rights was implied from the existence of remedies. If a plaintiff's proposed action did not correspond to one of the fixed writs, he had no cause of action, he had no remedy, he had no right. "Writ, remedy, and right are correlative terms."[270] Thus, the disappointed suitor found that "where there is no remedy, there is no wrong."[271]

Of course, it was because of this rigid system that suitors began to petition for the king's benevolence — which was the beginning of English equity. Suitors complained to the king that they had been wronged and were left without a remedy. In proposing to the king that they be vindicated, they were often proposing new remedies and sometimes new rights. But after equity developed as a separate legal system with its own precepts, the correlation of right and remedy was not different. One implies the other. As a general rule, they must be thought of at the same time.[272]

B. *The Original Meaning of Equitable "Discretion"*

A judge's "discretion" in the awarding of equitable remedies has had two closely-related meanings. The first is that a judge has an inherent discretion in equity because equity began when unusual cases — that is, fact patterns that did not fit the forms of action at common law

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[269] *Rees*, 86 U.S. at 107.

[270] 1 W. Holdsworth, *supra* note 33, at 398.

[271] F.W. Maitland, *supra* note 34, at 4.

[272] "But we err if we lose sight of the intertwining, the neat equating, of right and remedy which the maxim suggests." Wright, *The Law of Remedies As a Social Institution*, 18 Univ. Det. L.J. 376, 377 (1955).

— were presented for adjudication to the Chancellor. Claims in equity were individualized or as Dane put it, dependent "on the particular circumstances of each case."[273] Since the claims were individualized, a judge had to exercise individual judgment, or discretion. But, it was precisely this license to exercise individual judgment that became limited over the centuries as equity developed its modern jurisdiction.

The consequence of this progressive limitation is the second meaning of judicial discretion, a meaning that is roughly the opposite of the meaning commonly attributed to it today.[274] Despite what was said in the previous subsection about the correlation of right and remedy both in law and in equity, a plaintiff in equity, unlike a plaintiff in law, did not get his remedy automatically once he had proven his case.[275] The judge was said to exercise discretion in the award of the remedy. Many of the maxims of equity were rules for this discretion. Thus, a plaintiff who had otherwise proven and won his case would receive no remedy if he had "dirty hands." He would receive no remedy if laches obtained. He would receive no remedy if "the award of specific relief would inflict a hardship on the defendant which [was] out of all proportion to the injury."[276] Unlike law, discretion in equity looked "to the conduct not merely of the defendant but also of the plaintiff."[277] Discretion in equity was a set of considerations to be weighed by a judge in deciding *not* to grant an otherwise warranted remedy.[278]

Understood in this way, then, discretion in equity is not the *personal* discretion of the judge, it is a *judicial* discretion "governed by settled

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[273] N. Dane, *supra* note 157, at ch. 225, Art. I.

[274] Today, judicial *discretion* is equivalent to judicial *freedom*. In a 1987 concurrence, Justice Stevens rebuked the Solicitor General for his "unprecedented suggestion" that a judge's discretion must be "narrowly tailored." *United States v. Paradise*, 107 S. Ct. 1053, 1077 (1987).

[275] "The early bills were in the form of humble petitions for a favor, not for relief to which the law entitled them." H.L. McClintock, *supra* note 252, at 27.

[276] H.L. McClintock, *supra* note 252, at 28. "Equity not infrequently withholds relief which it is accustomed to give where it would be burdensome to the defendant and of little advantage to the plaintiff." *Di Giovanni*, 296 U.S. at 71-72.

[277] Snell's, *supra* note 247, at 570.

[278] "Equitable relief cannot be demanded as a matter of right whenever specified facts are shown." McClintock, *supra* note 252, at 27.

rules."[279] Thus, the Court of Chancery has said that

> It is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which adopted in this and the other Courts, which is, that the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.[280]

Well into the Twentieth Century, the Supreme Court recognized that the rules of equitable discretion were the rules of equitable restraint. In a 1935 case, the Court said that the "judicial discretion" of the court may not always award equitable relief even when there is a "theoretical inadequacy of the legal remedy,"[281] and that "judicial discretion" guided "a court of equity in determining whether it should grant or withhold a remedy which it is within its power to give."[282] In a 1943 case, the Court noted that a court of equity "may decline to interfere" with state criminal proceedings "for this reason" (i.e., for the reason of discretion).[283]

Today, the principle of judicial discretion as judicial restraint has been confounded by the Supreme Court, which has suggested[284] that some plaintiffs in constitutional litigation have *a right* to an injunction.

C. *The Court of Equity as a "Court of Conscience"*

That the court of equity is a court of conscience has had two meanings, but only the original meaning is still relevant today.

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[279] G.W. Keeton, *supra* note 248, at 123.

[280] *Haywood v. Cope*, 25 Beav. 140, 141 (1858).

[281] *Di Giovanni*, 296 U.S. at 70.

[282] *Id.* at 73.

[283] *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943).

[284] *See* Section IV.B.5 below.

Originally, it meant that equity was exercised on the conscience of the *defendant* whom the Chancellor stopped from taking unjust advantage of common law procedures:

> In general, however, when the word "conscience" was used, this denoted the conscience of the defendant, and the court by decree *in personam* prevented his making an unconscionable use of his rights at common law.[285]

In the *Earl of Oxford's Case* (1615), already referred to, the Chancellor said

> When a judgment is obtained by oppression, wrong, and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party.[286]

With respect to the current relevance of this first meaning, Hanbury and Maudsley point out that the jurisdiction of equity to act directly on the conscience of the defendant can be considered almost a definition of the jurisdiction of a court of equity to act *in personam*:

> The Chancellor's jurisdiction is against the person; *in personam*, and directed to the conscience of the individual in question. And the Chancellor has the power to back up his orders with the threat of imprisonment for those in contempt.[287]

The second, no longer relevant, meaning of "conscience" has to do with the conscience of the Chancellor. As has already been pointed out, in the Middle Ages, that era between the era of equity as the beneficence of the king and the era of an equity jurisprudence, the Chancellors decided petitions according to their own consciences. "This appears to have been an importation from the canon law; almost all the medieval

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[285] 16 *Halsbury's Laws of England* § 1204, n.1 (1976).

[286] *Earl of Oxford's Case*, (1615) 1 Rep Ch 1.

[287] Hanbury and Maudsley, *supra* note 198, at 6. *See also* 2 Pomeroy, *supra* note 42, § 430 (". . . the most important principle that equity acts upon the conscience of a party, imposing upon him a personal obligation of treating his property in a manner very different from that which accompanies and is permitted by his mere legal title.").

Chancellors were ecclesiastics."[288] Pomeroy says that during this time, conscience became synonymous with equity.[289] So, "as the consciences of the Chancellors varied, so did equity."[290]

But, as already related, this conception of equity had to decline as equity came to recognize precedent, became systematized, and developed a true jurisprudence. It is now approximately 300 years out-of-date, for by 1670, Lord Nottingham was already saying

> With such a conscience as is only *naturalis* and *interna*, this court has nothing to do; the conscience by which I am to proceed is merely *civilis* and *politica*, and tied to certain measures.[291]

III. *The Injunctive Power*

A. *The Historical Development of the Injunction*

An injunction is a directive of the court ordering a person to do or refrain from doing an act. It literally began as a *royal order*, and it still retains essential characteristics of unilateral power. It is equity's most powerful weapon, "the strong arm of the Court,"[292] and it is the means by which the courts have undertaken legislative and executive functions. An injunction is *specific* relief because it is fashioned according to the specific circumstances of a case, whereas damages may be said to be *equivalent* relief because they are a monetary equivalent of, or substitute for, an injury.

Some important aspects of its origin help to bring out its uniqueness. Injunctions stand midway between the two other remedies that

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[288] Snell's, *supra* note 247, at 8. *See also* Spence, 1 *The Equitable Jurisdiction of the Court of Chancery* 410 (1846) ("The term Conscience, as denoting a principle of judicial decision, appears to have been of clerical invention.").

[289] 1 J. Pomeroy, *supra* note 42, at § 58.

[290] Severns, *supra* note 40, at 101.

[291] *Cook v. Fountain*, (1676) 3 Swanst. 585 at 600. Concerning this case, Spence commented that "When, therefore, Lord Nottingham declared, that . . . the Conscience by which he was to proceed was merely *civilis* and *politica*, he was not making a rule but declaring what had become of the established doctrine of the Court." Spence, *supra* note 288, at 417.

[292] *Atty. Gen. v. Utica Ins. Co.*, 2 John. Chan. 375, 378 (1817) (per Chancellor Kent).

courts can give: the other civil remedy of damages and the criminal remedies of imprisonment or execution. It appears that the injunction had a double origin. It arose as the Chancery's primary alternative to damages. And it arose because of specific institutional circumstances of the Chancery.

Already by the Twelfth Century, damages had become "the principal common law remedy"[293] in contracts and tort, although the common law courts gave a variety of specific remedies with respect to actions in real property.[294] Even at that time, however, the new writ of trespass that became the source of much of the common law was laying the groundwork for the assessment of damages in real property actions as well.

Damages would not always satisfactorily remedy wrongs in contract, tort, or property. Petitions began to be directed to the king, his Council, and his Chancellor to more effectively enforce *already-existing* rights. This is the origin of equity's concurrent jurisdiction, where equitable jurisdiction will lie solely because of equity's unique remedies. For instance, the law courts would give damages for a breach of contract, but there were times when a petitioner was not satisfied with this equivalent compensation and wanted the contract enforced. This is the origin of the equitable remedy of specific performance, which is really just an injunction in contract. Likewise, damages would not be a satisfactory compensation for continuing nuisances, trespasses, or wastes. In these kinds of case, petitioners wanted *something specific done*. They did not want an equivalent compensation. Their petitions alleged that because of the specific circumstance of their cases, their *already-recognized* rights would be violated without the King's intervention. According to Holdsworth, it took centuries for it to be finally worked out what kinds of cases warranted equitable rather than legal relief. "It was not till the eighteenth century that it was settled that equity would only grant specific relief if damages were not an adequate remedy."[295]

The injunction's second but concurrent origin is more important than the first because the first was dependent on it. It has to do with the

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[293] Potter's, *supra* note 72, at 354.

[294] 5 W. Holdsworth, *supra* note 33, at 287.

[295] 1 W. Holdsworth, *supra* note 33, at 457.

Chancery's different process. Holdsworth gives a succinct characterization:

> The Chancellor by means of the writ of subpoena and his power to commit for contempt exercised strict control over the persons of all parties to a suit. He could order them to act in any way he saw fit in order to secure justice. Thus he could examine them; and in aid of proceedings either in his own court or in the courts of common law, could enforce the discovery of documents in their possession. It was because he was able to exercise this control that he was able to give remedies which the common law courts could not give. The decree for specific performance is one instance of this. Another is the issue of an injunction. The courts of common law might give a remedy when the wrong had been done; they could not interfere to prevent it.[296]

Thus, "the proceedings were literally *in personam*."[297] By contrast, in the law courts, the formalities of original and intermediate process took time. Even when trial began, the court did not directly examine the parties. Actions in contract, tort, and property were *in rem*, the courts exercising no power over the persons of the parties. "The only command given was that to the sheriff, either to turn over to the plaintiff some specific property hitherto in the possession of the defendant, or to take and sell enough of the property of either party to satisfy the money judgment of the court."[298] No one could be imprisoned except by trial by jury.

As has already been said, the appeal to equity was not only an appeal to the king's grace, it was a personal appeal prompted by the technical inadequacy of the law courts. So, the Chancellor, really a stand-in for the person of the king and, thus, a representative of royal power, acted personally and unilaterally. He *ordered* the presence of the parties without necessarily even informing them why they were being subpoenaed. He *ordered* them to personally carry out his decrees under pain of being *ordered* to prison.

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[296] *Id.* at 458.

[297] Potter's, *supra* note 72, at 156.

[298] G.L. Clark, *supra* note 250, at 4.

In addition, it is necessary to note again that this relief-granting power did not develop into a court until the middle 1500's at the earliest. Thus, it was not a *judicial* power originally. It was simply the power of the king. There were not rules for its exercise, and, thus, there was no *process* that made it predictable and accountable. In fact, its main purpose was to avoid process — the defective process of the law courts.

B. *The Complete Development*

In the Eighteenth Century in England, the main development in equity was in its exclusive jurisdiction. The law of mortgages and trusts, for instance, was being refined by the Chancery. Chancery's use of the injunction in aid of its concurrent jurisdiction was becoming limited to specific areas.

Injunctions were issued primarily in cases having to do with real property. In tort, injunctions issued in aid of cases of waste and nuisance. "Nearly all the torts against which an injunction was sought were, at this period, torts to property."[299] In property, injunctions issued primarily in aid of quiet possession actions, in landlord and tenant actions, and in actions having to do with easements and profits. At the same time, the analogous relief of specific performance was most commonly used in aid of actions in contract granting some interest in land.[300] But, overall, Potter says that until the beginning of the nineteenth century, "the grant of an injunction appears to have been comparatively rare."[301]

It is not surprising that land would be a prime subject for the exercise of equitable powers, for it is pre-eminently the commodity that has no equivalent. Damages are frequently an unsatisfactory remedy in land cases. Since each plot of land is unique and specific, specific relief in equity seems the correct remedy in controversies over land. However, it may be more important to note that the injunction was confined almost exclusively to land cases. This represents the judgment of history about the limited nature of the injunction as a *regular judicial instrument.* A jurisprudence of the injunction developed according to the following principles.

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[299] 5 W. Holdsworth, *supra* note 33, at 325.

[300] *Id.* at 321-325; 6 *Id.* at 657-660.

[301] Potter's, *supra* note 72, at 629.

1. *No Right To An Injunction*

The power of the court to issue an injunction is discretionary, that is, it does not follow directly from a proven injury. A court must be discreet, that is, restrained, in issuing an injunction. Discretion means restraints on the issuance of *an otherwise warranted* injunction. This alone makes the injunction dramatically different from the award of damages — which are not so much *awarded* as they are *required* when satisfactorily proven. It has been correctly pointed out that "equitable rights are not always the same in their effect as legal rights."[302]

According to Pomeroy, a "fundamental principle of the utmost importance" limits the issuance of injunctions:

> The restraining power [i.e. the injunctive power] of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.[303]

Many of the maxims of equity are of this type. For instance, the plaintiff must have clean hands, and he must not have allowed too much time to elapse before bringing his action. The court may look at "the balance of convenience,"[304] in order to determine the precise effects of the anticipated injunction. An injunction that burdens the defendant too heavily may not issue — despite the defendant's fault or liability. Other policies limiting the issuance of injunctions are that injunctions will not enjoin a crime.[305] Nor will a federal court normally enjoin a criminal proceeding.[306] An important rule is that injunctions will not be awarded unless a threatened injury will be "irreparable" or "great and immediate."[307] And, as has already been shown, modern equity follows precedent.

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[302] Hanbury and Maudsley, *supra* note 198, at 16.

[303] 4 J. Pomeroy, *supra* note 42, § 1338.

[304] F.W. Maitland, *supra* note 41, at 326.

[305] *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

[306] *Younger v. Harris*, 401 U.S. 37 (1971).

[307] *Watson v. Buck*, 313 U.S. 387 (1941).

2. *The Inadequacy of the Legal Remedy*

This is the most important of all limits on injunctions. Its source both in the tradition of English equity and in the Judiciary Act of 1789 has already been shown. It clearly shows that equitable remedies have been conceived as secondary to legal remedies. The federal civil rules did not affect this hierarchy. "Historically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has not adequate remedy."[308]

3. *The Flexibility of Injunctions*

This is inherent in the notion of *specific* relief, and as such, may be another example of a truism. Damages are a remedy of a "prescribed form,"[309] according to Story. It is in order to avoid the prescriptions of the law courts that plaintiffs seek "forms of remedy adapted to the objects"[310] of each case. The injunctive power, being specific rather than general or equivalent relief, allows courts to:

> Adjust the decrees, so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and as the real and substantial rights of all the parties.[311]

An injunction is a remedy "not limited to any fixed form."[312]

4. *Pre-Existing Rights*

Reference is made again to the statement of Pomeroy quoted above that the injunction extends to rights and duties that are "recognized by law."[313] It has also been said that "A right that is to be protected by an

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[308] Wright and Miller, *supra* note 230, § 2942.

[309] 1 J. Story, *Equity Juris*, *supra* note 58, §§ 27-28.

[310] *Id.*

[311] *Id.* § 28

[312] H.L. McClintock, *supra* note 252, at 15.

[313] *Supra* note 303.

injunction must be one that is known to law or equity."[314] And: "In general, he who seeks an injunction must establish that there is an actual or threatened injury to some right of his."[315] Also: "A preliminary injunction should not be granted where plaintiff's right to it is doubtful."[316] For, "[i]n the various cases in which it gives specific relief it is obvious that legal duties . . . have not been fulfilled."[317]

5. *The Infrequency of Mandatory Injunctions*

Injunctions that simply prohibit, restrain, or prevent some act of the defendant are called prohibitory injunctions. Injunctions that require a positive act to be done are called mandatory injunctions. The new institutional injunctions, as illustrated by the Kansas City case, are mandatory injunctions. Until the last forty years, the federal courts disfavored mandatory injunctions because of what they regarded as their inability to supervise them and assure their performance. This is one of the reasons that the federal courts stayed away from "political questions."[318] In 1909, it was said that "the jurisdiction of a court of equity by way of mandatory injunction is rarely exercised."[319] And in 1956, the English authority, Keeton, could still say that mandatory injunctions were "naturally only granted sparingly."[320]

6. *Equity and Public and Political Rights*

As pointed out by Blackstone,[321] equity existed in the private law. Equity cases were controversies between private parties, usually about real property or contracts for real property. Equitable remedies were not instruments of government nor instruments to control, monitor, or overturn the actions of governmental entities. In England, the king could not be sued. As the English royal power devolved into a parliamentary democracy, the parliament inherited the sovereign's immunity from suit.

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[314] Hanbury and Maudsley, *supra* note 198, at 72.

[315] Snell's, *supra* note 247, at 627.

[316] 1 Joyce, *Injunctions* § 21 (1909).

[317] 6 W. Holdsworth, *supra* note 33, at 658.

[318] *See e.g., Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Colegrove v. Green*, 328 U.S. 549 (1946).

[319] 1 Joyce, *supra* note 316 at 176.

[320] G.W. Keeton, *supra* note 248, at 312.

[321] See Section I.B.1.

And since the English courts were the king's courts anyway, it was impossible for equitable orders to issue from the king against the king. This impossibility continued into the English parliamentary system, for English government has only a loose separation of powers. The courts are subordinate to parliament.

Civil suits were private suits. The remedies of damages or specific relief adjusted the relations of private individuals and their property. Public law was criminal law. Crimes were offenses against the public. When the government wanted to prohibit certain behavior, it could do so by making it a crime. The government acted directly through the courts when the courts handed out criminal remedies.

a. *Public Nuisances*

Since injunctions, like all equitable remedies, were in the domain of private law, there is no English legal history of injunctions in matters of public law. The only "public interest" cognizable by a court of equity was a public nuisance.

With property the main subject of equity, injunctions were commonly awarded to prevent various wrongs to property, including waste and nuisance. In English law, the notion of a public nuisance is as old as the notion of private nuisance.[322] Until the Nineteenth Century, however, suits by the Attorney General to prevent or abate public nuisances were usually filed in the criminal courts. According to Blackstone, the remedy for "common [i.e. public] nuisances," a species of "public wrongs," was to be found in the public, that is, the criminal, law: "common nuisances are such inconvenient or troublesome offenses, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable."[323] In an 1838 case, the United States Supreme Court agreed: "A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated; and the person who caused it may be punished."[324]

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[322] Potter's, *supra* note 72, at 417.

[323] 4 W. Blackstone, *supra* note 47, § 167.

[324] *Georgetown v. The Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 97 (1838). *See also* 2 J. Story, *supra* note 58, § 923. ("In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders.").

Nevertheless, equity did have its own jurisdiction to restrain public nuisances. According to Story, "In regard to nuisances, the jurisdiction of courts of equity seems to be of a very ancient date; and has been distinctly traced back to the reign of Queen Elizabeth."[325] But Lord Eldon, in an 1811 case, said that "The interposition of this Court upon the subject of [public] nuisance" was "very confined and rare."[326] In an 1817 New York case in chancery, Chancellor Kent said that the jurisdiction of equity in such matters was almost non-existent:

> It is well understood, that public nuisances are public offenses, over which the Courts of law have had a uniform and undisputed cognizance. * * * The plain state of the case, then, is that an information here filed by the attorney-general, to redress and restrain, by injunction, the usurpation of a franchise, which, if true, amounts to a breach of law, and of public policy. I may venture to say, that such a prosecution is without precedent in this Court, but it is supported by a thousand precedents in the Courts of law.[327]

And Story, writing in 1857, said that the intervention of equity in cases of public nuisance was still "rare."[328] Governmental entities could resort to equity to enjoin public nuisances, but it was not necessary. The power of the criminal law could be invoked.

Indeed, equity had no direct jurisdiction over public nuisances. The basis of its rarely-exercised jurisdiction over public nuisances concerned two of its procedural advantages. Equity, unlike law, had preventive remedies. The courts of equity accepted cases of public nuisances when property would be irreparably damaged without the power of equity to order an immediate cessation of the cause of the public nuisance.[329] Second, equity would eliminate the need for a multiplicity of suits restraining the same nuisance. "By a perpetual injunction, the remedy is

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[325] 2 J. Story, *supra* note 58, § 921.

[326] *The Attorney General v. Cleaver*, (1811) 18 Ves. Jun. 217.

[327] *Attorney General v. Utica Insurance Company*, 2 Joh. Chan. 288, 302 (1817).

[328] 2 J. Story, *supra* note 58, § 923.

[329] "Where the proceedings in the subordinate tribunal, or the official acts of public officers, affecting the title to real estate, lead in their execution to the commission of irreparable injury to the freehold." *Mayor v. Messerole*, 26 Wend. 132, 140 (S. Ct. of N.Y. 1841).

made complete through all future time; whereas, an information or indictment at the common law can only dispose of the present nuisance; and for future acts new prosecutions must be brought."[330]

b. *Suits by the Public*

Only the public could sue to prevent or abate a public nuisance. Individuals could not sue to represent the public interest against a nuisance. "A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney-general in England, and at the suit of the state, or the people, or municipality, or some *proper officer* representing the commonwealth, in this country."[331] But a private party who suffered "some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance"[332] could bring a private suit against a public nuisance. Effectively, then, a private suit to abate a public nuisance was merely a suit against a private nuisance that was also or otherwise a public nuisance. In order to maintain his suit, the private plaintiff had to allege and prove special injury entirely different from what other members of the public suffered.[333]

c. *Political Rights and the Public Interest*

Suits to enjoin public nuisances were rare. A major obstacle was that injunctions existed in the private law as remedies for private wrongs. However, when the attorney general did intervene to prevent or abate a nuisance to the public, the resulting suit in equity was not essentially different from other equity suits. At issue was whether the equity court would use its unique ability to directly order an individual person to do or refrain from doing something.

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[330] 2 J. Story, *supra* note 58, § 924.

[331] 4 J. Pomeroy, *supra* note 42, § 1349 (emphasis added).

[332] 3 W. Blackstone, *supra* note 47, § 220. "If any particular individual shall have sustained special damage from the erection of [the public nuisance], he may maintain a private action for such special damage; because to that extent he has suffered beyond his portion of injury, in common with the community at large." *Georgetown*, 37 U.S. (12 Pet.) 97-98.

[333] The injury must be "over and above the general damage sustained by the rest of the public." Kerr, *A Treatise on the Law and Practice of Injunctions* 167-68 (2d Am ed 1880). "The public and the private right have nothing to do with each other." *Sampson v. Smith*, (1838) 3 Sim 272, 275.

But public nuisances were the only kinds of cases in which the equity courts had jurisdiction over a "public interest." As stated before, neither English law nor American law at the beginning of the Nineteenth Century had any experience with suits proposing to enjoin the deeds or activities of governmental bodies. "A court of equity has no jurisdiction to interfere with the public duties of any of the departments of government."[334] Nor was there any precedent for the equitable protection of public or political rights. "The traditional limits of proceeding in equity have not embraced a remedy for political wrongs."[335]

i. *Nineteenth Century Tax Suits*

In our time, we are accustomed to suitors seeking to overturn legislative or executive acts by means of judicial acts. In Nineteenth Century America, the same strategy seems to have obtained with respect to the issue of taxation. Both the state and the federal courts entertained many claims for injunctions against the collection of state taxes.

For instance, in an 1856 case in the Supreme Court of New Jersey, some resident taxpayers of a township sought to prevent the township from collecting a tax related to the Civil War effort. The United States Congress had passed a law providing for a manpower draft but which allowed individuals to literally buy their way out the duty of serving in the armed forces by paying a certain sum into the U.S. Treasury. In response, the Township of Delaware enacted a property tax to raise the necessary sums to collectively pay the draft-avoidance bounties for all of its sons. In seeking an injunction against the tax, the plaintiffs alleged that such a tax was an illegal and unconstitutional use of their property for a private instead of a public purpose.

Such a case would obviously be every bit as controversial today as it was in 1856. It is hard to imagine a contemporary court declining to reach some of the substantive issues, but that is what the Supreme Court of New Jersey decided. The Court said that such an issue of "public law" called for "a most delicate exercise of [judicial] power."[336] Such judicial power, that is, "interfering with the execution of the law,"[337] had "never

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[334] Kerr, *supra* note 333, § 3.

[335] *Giles v. Harris* , 189 U.S. 475, 486 (1903).

[336] *Hoagland v. Township of Delaware*, 2 C.E. Green 106, 114 (1856).

[337] *Id.* at 115.

been exercised to that extent by a court of equity," for the "questions involved" were "strictly questions of law, within the cognizance and peculiar jurisdiction of the common law courts."[338] The remedies at law were "full, adequate, and complete,"[339] the court said, although it did not mention what those remedies were.[340]

Not only did the law courts provide adequate remedies, there was no other ground for "equity jurisdiction."[341] Equity did not have cognizance of a suit because no known ground of equity jurisdiction had been invoked:

> While these [cases discussed] establish the principle that a court of equity may interfere to restrain the collection of a public tax assessed upon the property of individuals, they establish, with equal clearness, the principle that the bill must contain some peculiar ground of equitable jurisdiction.[342]

In other words, no public suits are permitted. Private suits built on fact situations that might otherwise be public suits will be entertained. But the cause of action is private. The equitable jurisdiction invoked must be a well-known — not a novel — one. Even an allegation of illegality or unconstitutionality is insufficient to invoke the power of equity.

The same analysis was followed by United States Supreme Court in an 1870 case. A bank sought to enjoin the collection of an Illinois tax upon its stock by arguing, *inter alia*, that a block of stock followed its owner, who was not domiciled in Illinois. The Supreme Court said that it would act in equity only if there were no adequate remedy at law or in order to prevent a multiplicity of suits. Neither rationale obtained, the Court said. Thus, "[even] [a]ssuming the tax to be illegal and void,"[343] "[the] equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance."[344] Equity suits may be set

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[338] *Id.* at 114.

[339] *Id.*

[340] Presumably an action in trespass or for *certiorari* or for prohibition. *See* High, *Injunctions* § 491 (4th ed 1905).

[341] *Id.* at 115.

[342] *Id.* at 116.

[343] *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 109 (1870).

[344] *Id.* at 112.

in public circumstances, but there is "no ground for the interposition of a court of equity which would not equally justify such interference in any case of threatened invasion of real or personal property."[345]

In a later Nineteenth Century case, the United States Supreme Court said that even though a challenged state tax is unconstitutional and without binding effect on the plaintiffs, it would not and could not use its equity powers to give relief:

> And while an unconstitutional tax may, in the language of the learned judge holding the Circuit Court, confer no right, impose no duty and support no obligation, it will be perceived that, in our view, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist.[346]

ii. *Public Policy and Public Officers*

Taxation served as the prime basis of attempts to get Nineteenth Century American courts to interject equity into public law. But numerous attempts were made in other areas.

Two New York Chancery decisions by Chancellor Kent served to deflect many Nineteenth Century initiatives in public-interest law. In *Attorney General v. Utica Insurance Co.*,[347] the attorney general of New York sought an injunction against an insurance company on the grounds that the company was engaging in banking operations in violation of state law. Thus, this suit to enforce New York law had the advantage of being brought by the officer directly responsible for law enforcement. Nevertheless, Kent ruled that the attorney general did not have the discretion to ask an equity court to accomplish something in a matter involving "a breach of law and of public policy"[348] that it was not designed to accomplish:

> The exercise of the banking power cannot be brought under the head of a public nuisance. * * * The whole question, upon

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[345] *Id.*

[346] *Shelton v. Platt*, 139 U.S. 591, 600 (1891).

[347] 2 Johnson Chan. 370 (1817).

[348] *Id.* at 390.

> the merits, is one of law, and not of equity. The charge is too much of the nature of a misdemeanor to belong to this Court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall better consult the stability and utility of the powers of this Court by not stretching them beyond the limits prescribed by the precedents.[349]

In a case decided in 1841, the Supreme Court of New York ruled on the petition of some land owners who sought to enjoin the city council of Brooklyn, New York from widening a public road onto their properties. The land owners convincingly agreed that the city council was not going to give them adequate compensation for the public taking. In the New York Court of Chancery, Chancellor Kent turned down the injunction. Upon appeal, the New York Supreme Court followed Kent's ruling and said that the granting of an injunction in such a situation would cause to come into being:

> a doctrine that would at once bring under the review of that court all that immense mass of proceedings in opening and widening streets and avenues in our cities and villages; in laying out public and private roads in our towns; and, in fine, the doings of every subordinate tribunal, or public officer, that might affect the title to real estate. Any one familiar with this description of legal proceedings, carried on quietly and almost daily in these subordinate jurisdictions, and extending over every part of the territory of the state, will at once realize the boundless field opened, and which, if the precedent be established by an affirmance of this decree, that court will be driven irresistibly to enter; even if it should itself be inclined, hereafter to hesitate on review, however overwhelming the new mass of litigation, or formidable the labor consequent upon it. * * * These hard cases make bad precedents in the courts both of law and equity and are usually found at the bottom of them. But it is satisfactory to know here, as has been before stated, that upon the ground and principle of the relief of the court below, the remedy of the party is still open and complete.[350]

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[349] *Id.* at 390-91.

[350] *Mayor v. Meserole*, 26 Wead. 130, 139-40 (1841).

In an 1822 case involving another town ordnance, Chancellor Kent refused jurisdiction and said that "This is not a case of a private trust, but the official act of a political body; and in the whole history of the English Court of Chancery, there is no assertion of such a jurisdiction as is now contracted for."[351] In an 1873 case, the New Jersey Supreme Court refused to enjoin the construction of a bridge that had been authorized by the legislature. The court said that "The work which it is sought to enjoin is a public enterprise of much importance to the people of this state, who, through the legislature, have authorized its construction."[352]

In a 1903 case, plaintiffs sought to invoke the equitable powers of the Indiana courts in a dispute involving both the redistricting of a town by the town council and the right of certain persons to hold public office and exercise public powers. Citing Story and Blackstone, the Supreme Court of Indiana made the following trenchant observations:

> The authorities clearly establish that courts of equity will not interfere to determine questions concerning the appointment or election of public officers or their title to office. * * * Various reasons have been assigned for the rule, — as the existence of an adequate remedy at law, the non-concern of equity with matters of a political nature, and the impolicy of interfering with a *de facto* officer pending a contest as to his title. * * * The further claim advanced on behalf of appellees, that they were entitled to maintain an injunction on behalf of the public, is also destitute of merit. * * * The authorities, however, without exception, both in England and America, deny to a private person an injunction for an invasion of the public right where the bill or complaint fails to show a special injury to the complainant. * * * Equity has no writs that may be said to found jurisdiction. Its processes are remedial, and the bill or complaint must on its face disclose a case for equitable intervention.[353]

The United States Supreme Court gave expression to this doctrine in the 1888 case of *In Re Sawyer*, an often-cited decision that ruled this

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[351] *Movers v. Smedley*, 6 Johns. Chan. 28, 31 (1822).

[352] *Easter and McMahon v. New York and Long Branch R.R. Co.*, 9 Green 24, 58 (1873).

[353] *Landes v. Walls*, 160 Ind. 216, 218-22, 66 N.E. 679 (1903).

area of the law well into the Twentieth Century. This colorful case was originally brought by a police judge, Parsons, who had been duly elected to his office as provided by the ordnances of Lincoln, Nebraska. Soon after his election, the town council and the mayor, Sawyer, of Lincoln began to pursue ways to remove him for allegedly misappropriating public funds. In direct violation of the ordinances governing the town council, they had a three-member subcommittee of the council conduct what was in effect an impeachment hearing. When Parsons objected to the lawful jurisdiction of such a subcommittee, the council passed a new ordinance establishing the subcommittee's jurisdiction. Whereupon, the subcommittee, which Parsons said was influenced by "gamblers and pimps," voted to remove Parsons from office. Parsons went into the federal circuit court seeking to enjoin the town council from removing him from office. The circuit court did issue the injunction, and when Sawyer and the council disobeyed it, the court put them all into jail for contempt. Their appeal was heard by the Supreme Court. The Court dissolved the injunction and said:

> It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorarl*, error, or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure, established by the common law or by statute.
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> No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. * * * It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or propsective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political nature come within the jurisdiction of the Court of Chancery. Nor has the Court of Chancery jurisdiction to interfere with the duties of any

department of government, except under special circumstances, and when necessary for the protection of rights of property.[354]

d. *The Beginnings of Change in the Doctrine: In Re Debs (1895)*

As demonstrated above, there was a consensus in the inheritance from England, in the state and federal courts, and in the treatises about equity's jurisdiction in public law. This consensus began to unravel with the United States Supreme Court's decision in the famous labor strike case of *In Re Debs.*[355] *Debs* concerned the jailing for contempt of Eugene Debs, the president of the American Railway Union, who refused to call off a strike against the Pullman Company after having been enjoined to do so by a federal district court. The Pullman Company, a manufacturer of railroad cars, had prompted the strike by announcing a 20 percent reduction in wages. In response, Debs' union decided to refuse to operate any trains that included cars manufactured by the Pullman Company. In the era of the railroads, this decision had the effect of completely halting railroad transportation into and out of Chicago, the nation's railroad and transportation center. As the strike spread to other areas, it became apparent that the country was facing a nationwide paralysis of all transportation and commerce. President Cleveland ordered the U.S. Army to make preparations to intervene, but, in an imaginative move,[356] he told the United States Attorney General to order the U.S. Attorney in Chicago to go into the federal courts to seek an injunction against Debs and other union leaders. After being jailed for disobeying the injunction that the Attorney General had successfully won, Debs appealed to the Supreme Court that the injunction was unlawful.

It may be safe to say that no judicial body in history had ever been asked to adjudicate in such a situation. The Supreme Court was being asked to attempt to put down a national insurrection. The Court upheld the contempt action against Debs, who, in an act that has to be

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[354] *In Re Sawyer*, 124 U.S. 200, 212-14 (1888) (quoting Kerr on *Injunctions* at 213-14) (emphasis in original).

[355] 158 U.S. 564.

[356] "To ask Mr. Debs and his fellow leaders to bow to so drastic an injunction at a moment when blood was hot, and when victory seemed to them assured, was a stern test of their sweet reasonableness." 2 McElroy, *Grover Cleveland* 149 (1923) (quoted in Frankfurter and Greene, *The Labor Injunction* 19 (1930)).

considered much more important than the Court's judicial reasoning, decided to obey. In a remarkable political act, Debs called off the strike.

The United States government had never filed a suit of such wide social and political ramifications, and no federal court had ever ruled in such a suit. The Supreme Court made a gallant effort to fit the case into some kind of traditional framework. No Attorney General had ever attempted to enforce similar federal power over local striking laborers. The main reason for this was that few thought that the federal government had such power. The Supreme Court noted that the Congress had exclusive control over the mails and that the federal government could certainly act against any interference with the mails. This, of course, ignored the fact that the Congress could make some other arrangments besides the railroads for mail delivery. In addition, the Court decided, the Congress had a similar power over interstate commerce that could be enforced in the same manner.

But the overriding issue of the case was whether there was any appropriate judicial role at all. All were agreed that the executive had some kind of authority to act. The question was, as the Court put it, "Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved?"[357] In answering its own question in the negative, the Court injected a third element into the standard judicial analysis concerning the "ordinary" remedies at law compared to the "extraordinary" remedies available in equity. When ordinary remedies will suffice, the Court said, the courts may not resort to equity. But when the choice is "between force and the extraordinary writ of injunction, the rule will permit the latter."[358] Where this "rule" came from, the Court did not say. It cited no authority.

With this conclusion in hand, the Court had only to further rule that the entire nationwide strike was just one big public nuisance that could be abated in equity by suit of the proper official:

> [I]t has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control. * * * Indeed, the obstruction of a highway is a public nuisance (4 Blackstone's *Commentaries* 167), and a

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[357] *Debs*, 158 U.S. at 582.

[358] *Id.* at 583.

public nuisance has always been held subject to abatement at the instance of the government.[359]

Occurring at the turn of the twentieth century, *Debs* was a landmark case. But its influence should not be overestimated. It may be thought that the sharp break with traditional equitable principles and the expansive public-interest kind of reasoning in *Debs* leads directly to our contemporary institutional injunctions. This is not so for at least four reasons. First, the circumstances of *Debs* were truly unique and extraordinary. A strike that was literally stopping commerce across the entire country was an unprecedented nationwide emergency of the first order. Second, by its fancy footwork in labeling the strike a public nuisance, the Court confined the ramifications of its decision to what seemed like traditional areas. Third, *Debs* did not create nor encourage the opportunity for *private parties* to bring suits in public law. The plaintiff in *Debs* was the Attorney General, the public official in charge of preventing these supposed nuisances. Fourth, *Debs* led to a great deal of labor legislation and regulation at the state and federal levels, so its primary effect was confined to the field of labor. Thus, *Debs* cannot be said to provide a model for contemporary judicial regulation in the fields of education or penology.[360] Nevertheless, after *Debs*, it could hardly be argued very convincingly that equity did not involve itself in issues of "public policy."

e. *Ex Parte Young (1908): The Keystone of Federal Judicial Action Against the States*

More important than *Debs* was the turning-point case of *Ex parte Young*,[361] decided by the Supreme Court in 1908. In *Young*, the Supreme Court confronted a major obstacle — unknown to the English tradition in equity — to federal injunctive intervention into issues of public policy: the American federalist system and especially the Eleventh Amendment.

The Eleventh Amendment was ratified in 1798 in order to overturn the Supreme Court's decision in *Chisholm v. Georgia*,[362] where the Court

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[359] *Id.* at 586-87.

[360] *See* Frankfurter and Greene, *The Labor Injunction* (1930).

[361] 209 U.S. 123 (1908).

[362] 2 U.S. (2 Dall.) 419 (1793).

had held that a citizen of one state could sue the state government of another state. The Eleventh Amendment provides that

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State.

In a perhaps debatable interpretation, the Supreme Court expanded this immunity of state governments to include suits by its own citizens as well.[363]

The subject-matter of the *Young* case was the passage of a 1907 Minnesota law providing for a reduction in railroad rates. The day before the law could take effect, stockholders of nine railroad companies won an injunction from the federal district court restraining Young, the Minnesota attorney general, from enforcing the law. The stockholders succesively persuaded the court that the new rates were confiscatory and a deprivation of property without due process of law, a violation of the Fourteenth Amendment.

On appeal, the Supreme Court upheld the injunction. The long opinion of the Court by Justice Peckham and the equally-long solo dissent by Justice Harlan are both complicated, problematical, and have already been the subject of much critical writing.[364] Neither justice talks much about equity; both concentrate their efforts on the Eleventh Amendment. But Peckham's opinion for the Court has had a decisive influence in the development in the twentieth century of federal judicial powers in equity. This section will concern itself only with one specific conclusion of Peckham's.

At the height of the *Lochner* era of substantive due process, Peckham concluded that the Minnesota law did indeed violate the plaintiffs' Fourteenth Amendment rights. But, because of the Eleventh Amendment, that conclusion alone did not allow him to rule in the plaintiffs' favor. In what is now a famous analysis, Peckham decided that

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[363] *Hans v. Louisiana*, 134 U.S. 1 (1890).

[364] *See e.g.*, Duker, *Mr. Justice Rufus W. Peckham and the Case of Ex parte Young: Lochnerizing Munn v. Illinois*, 1980 B.Y.U.L. Rev. 539; Weick, *Erosion of State Sovereign Immunity and the Eleventh Amendment by Federal Decisional Law*, 10 Akron L. Rev. 583 (1977).

the suit was one against Young personally, not against the state of Minnesota. No state could authorize its officers to act against the United States Constitution, Peckham said. This law is unconstitutional. Therefore, Young was not authorized by the state of Minnesota to enforce it. Therefore, he was not acting for Minnesota, so the suit was not against Minnesota. Therefore, the suit did not violate the Eleventh Amendment. Consequently, Young could be sued and enjoined from acting.

Clearly, this is a sophistry by the Court.[365] In dissent, Harlan pointed out the obvious:

> Let it not be forgotten that the defendant Young was sued, not as an individual or because he had any personal interest in these matters, but *as, and solely because he is,* an officer of the State charged with the performance of certain public duties.[366]

In sidestepping the Eleventh Amendment, the Court established that state officials could be enjoined in federal courts at the initiative of private suitors. But the Court has never directly accepted the claim at law that suitors could get damages from state officials.[367] The hugely important consequence of this is that the Supreme Court — having breached the Eleventh Amendment's (as well as the Tenth Amendment's) protections of the sovereignty of the states — has established a clear avenue for private plaintiffs to seek equitable remedies, but not legal remedies, against the states.

What happens from a practical perspective is that a state official is sued privately for what are really his public actions. His employer, the state, conducts and funds his defense, and indemnifies him against any personal liability. Therefore, although sued personally, he is not personally at risk. If he loses, a federal court will order him to undertake some

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[365] "The decision in Ex parte Young rests on purest fiction. It is illogical. It is only doubtfully in accord with the prior decisions. It was greeted with harsh criticism by the country when it was decided and for years thereafter. * * * Yet, this case, ostensibly dealing only with the jurisdiction of the federal courts, remains a landmark in constitutional law. * * * Today it provides the basis for forcing states to desegregate their schools and reapportion their legislatures. Both lines of case are highly controversial. Yet in perspective the doctrine of Ex Parte Young seems indispensable to the establishment of constitutional government and the rule of law.". C. Wright, *The Federal Courts,* § 48 (4th ed 1983).

[366] *Id.* at 184.

[367] *See e.g., Edelman v. Jordan,* 415 U.S. 651 (1974).

actions that, obviously, cost state money. But the expenditure is to be as an indirect consequence. It is not regarded as the prime remedy. Thus, another fiction is maintained: that federal courts are not appropriating the public monies of the states. Such directly-directed appropriations would really be remdies at law: damages.

But the state official does experience some personal risk: if he, by himself or as official state policy, should decide to disobey the federal injunction, he can be sent to jail for contempt of court. This is his only vulnerability, and it provides a definitive incentive for him to obey. In weighing their personal liability against state policy, state officials choose personal safety.

All this has proved to be uniquely adaptable to the purposes of some federal courts in their efforts to supervise the public policy of the states. Compared to other scenarios — for instance, the direct appropriation of state monies — the risk of political controversy is probably less. What is sacrificed, of course, is the content of policy.

The federal judicial intervention into state affairs sanctioned by the *Young* decision provoked much political controversy. But the controversy led to only a limited corrective. Congress passed the Three-Judge Court Act[368] which provided that injunctions against allegedly unconstitutional state statutes could be issued only by a federal district court panel of three judges. The Act was repealed in 1976.[369]

From, the time of *Debs* and *Young*, however, the Congress began to provide in legislation specific provisions for the issuance of injunctions in a variety of areas. With the promulgation of the Federal Rules of Civil Procedure in 1938 and in the current jurisprudential climate of an unprecedentedly powerful federal judiciary, this has now become routine in federal law and in federal cases. Critically, however, it is not provided in the Federal Rules nor has the Congress ever provided that injunctions were to issue from the federal courts according to standards different from the received Anglo-American jurisprudence.

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[368] 36 Stat. 577 (1910).

[369] 90 Stat. 1119 (1976).

C. *The Response of the English Courts to the Merger of Law and Equity*

The final English merger of law and equity occurred with the passage of the Judicature Act of 1873. That Act, the relevant provisions of which are still in effect, permitted judges exercising the new combined procedure to grant injunctions whenever "it shall appear to the Court to be just or convenient." Seemingly, this is a wide power — and clearly without precedent in either English or American history.

However, the Court of Chancery has declined to take the opportunity that the words would seemingly give it. In 1899, the Court ruled that the Judicature Act had "to some extent enlarged" equity jurisdiction, but had "not revolutionized" it.[370] English authorities in equity agree. Keeton has noted that "The Act did not, however, confer on the Court power to create new heads of actionable wrong."[371] Maitland said that the Act did not destroy precedent in equity for "judges must follow the stream of decision in adjudging that the issue of an injunction will or will not be just or convenient."[372] Snell adds that "the principles on which the court acts have not been altered; the plaintiff must still establish some legal or equitable right before he can obtain an injunction."[373]

IV. *The New American Equity Jurisprudence*

This section will chronicle the creation of a new equity jurisprudence in civil cases involving institutional injunctions.

A. *The Foundation of the New Equity Jurisprudence*

The foundations of the new jurisprudence of equity are contained in three Supreme Court cases: *Hecht Co. v. Bowles,*[374] *Brown v. Board of Education (Brown II),*[375] and *Swann v. Charlotte-Mecklenburg Board of Education.*[376]

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[370] G.W. Keeton, *supra* note 249, at 314.

[371] *Cummins v. Perkins,* (1899), 1 Ch 16 at 20.

[372] F.W. Maitland, *supra* note 41, at 325.

[373] Snell's, *supra* note 247, at 625-26.

[374] 321 U.S. 321 (1944).

[375] 349 U.S. 294 (1955).

[376] 402 U.S. 1 (1971).

1. *Hecht v. Bowles (1944): Justice Douglas' Foot*

Hecht v. Bowles laid down the jurisprudential philosophy of the new equity. *Hecht* contains what may be one of the most influential passages of dicta in the history of the American judiciary. Writing for the Court, Justice Douglas characterized equity in the following manner:

> The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.[377]

Since 1944, this passage has been cited in federal decisions, including *Brown II* and *Swann*, as the standard articulation of the basic principles of equity.[378]

In this passage, Justice Douglas revived all at once the notion of equity as natural justice. He cites no authorities or judicial precedents for the entire sweeping statement — nor for any parts of it. He equates equity with "mercy" and with the power "to do equity." The latter is an obvious tautology ("equity is the power to do equity"), but Douglas must mean it in the sense of "equity is the power to do justice" or "equity is the power to do what is right." In another passage of the case, he calls equity "an ameliorating system of justice."[379]

Douglas' statement that an injunction is supposed to deter not to punish is false, since an injunction is supposed to remedy a wrong. It may have secondary aspects of deterrence, but it is difficult to understand why a Supreme Court justice would have to say that a civil remedy, an injunction, is not supposed to have a characteristic, punishment, of a criminal remedy.

Douglas' assertion about the flexibility of equity may or may not be correct. In fashioning its remedies, equity has a certain flexibility. Equity

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[377] *Hecht Co.*, 321 U.S. at 329-30.

[378] *See Brown II* at 300; *Swann*, 402 U.S. 329-30.

[379] *Id.* at 330.

does not have a flexibility about its jurisdiction, however. And equity is highly rule-bound, as has been shown. Douglas' expansive statement about equity as *the* instrument for "nice adjustment and reconciliation between the public interest and private needs" could not be more astonishing. By comparison with the present day, equity was still in touch with its origins and traditions and was still relatively uninvolved with public interest litigation. How equity could already at that time have become the perfect instrument for judicial adjustment of public law Douglas does not explain or deign to give an account. Nor does he explain what became of equity's historic disinclination to involve itself in public interest adjudication.

The facts and holding of the *Hecht* case are well in keeping with Douglas' dicta. As was pointed out in a previous section,[380] the universal understanding of equity's "reception" into this country is that the rules of English equity controlled — except where they had been altered by statute or promulgated rules of court. The *Hecht* case dealt with the wartime Emergency Price Control Act of 1942, a certain section[381] of which provided that an injunction "shall be granted" once a violation of the Act had been proved. All parties to the case agreed that it had been proven that a Washington, D.C. store, the Hecht Company, violated the Act.[382] However, when the administrator of the Office of Price Administration, the federal agency that enforced the Act, moved the trial court for an injunction pursuant to the proven violation, defendant Hecht Company argued that the language "shall be granted" was a grant of only discretionary authority to the court. The administrator argued that the Act provided *him* with discretion, the normal administrative discretion to bring an action of enforcement, but that once he exercised his discretion by bringing an action and after a violation was proven, then an injunction was required to be issued.

The Supreme Court rejected the argument of the Administrator and, although conceding that the "literal meaning"[383] of the relevant section of the Act seemed to require injunctions, ruled that the Act in question was not intended to alter the historic judicial discretion over whether equitable remedies will issue. In addition, the Court only

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[380] *See* Section I.D.2.a.

[381] *Hecht Co.*, 321 U.S. 321, 328 (1944).

[382] "There is no substantial controversy over the facts." 321 U.S. at 324.

[383] *Id.* at 328.

indirectly conceded — in a passage without conviction or emphasis — that the Congress could bind its equitable discretion by statute.[384]

The appeals case was a straightforward one concerning the rules of statutory construction. Douglas pinpointed "the question in this case" as

> [W]hether the Administrator, having established that a defendant has engaged in acts or practices violative of § 4 of the Act is entitled as of right to an injunction restraining the defendant from engaging in such acts or practices or whether the court has some discretion to grant or withhold such relief.[385]

With this characterization of the issue on appeal, it would be easy to imagine that the facts of the case achieved only the most marginal mention in the Douglas' opinion. Not so. Douglas displays the facts in full dress parade. With this parade, he displays his true *ratio decidendi* of the case. Douglas is "doing equity" to the Hecht Company, which, if Douglas' recitation of the facts is correct, had a sympathetic case to plead.

There is "no doubt," Douglas says, of Hecht's "good faith and diligence."[386] When the Price Control Act was passed, the manager of the Hecht's store volunteered his store "as a laboratory in which the Administrator might experiment with any regulation which might be issued."[387] The store instituted its own price control office, that eventually grew to twenty-eight employees, in order to police itself. Violations cited by inspectors of the Office of Price Administration "were at once corrected."[388] Despite all this good faith, the Office of Price Administration still decided, after discovering new violations, to seek the injunction in court. The company responded that all violations were involuntary and corrected as soon as known.

The asked-for injunction would have prevented Hecht's from selling anything in violation of the Act's regulations and required the keeping of

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[384] "It is therefore even more compelling to conclude that, if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain." *Id.* at 330.

[385] *Id.* at 322.

[386] *Id.* at 325.

[387] *Id.*

[388] *Id.*

complete and accurate records. But the district court found that it would be "unjust" and not "in the public interest" to award the injunction against Hecht's.[389] According to the language and the context of the entire Supreme Court opinion, it is rather clear that Douglas felt the same way.

It will be seen in sections below that *Hecht* established the role of the federal courts as arbiters of conflicts between "public" and "private" interests. That there is no basis in equity jurisprudence for that role has already been mentioned. But it is revealing to show the extent to which Douglas believed in the new role for the courts that he was inventing, for something very akin to Douglas' belief seems to animate the federal courts today.

"Of all the consequences of war, except human slaughter, inflation is the most destructive,"[390] Douglas quotes the Congress as the reason for passage of the Price Control Act. Reasoning from the twin conclusions of the case that plain statutory language intending to alter equitable remedies did not alter them in fact and that the judiciary must have discretion, meaning, judicial freedom of choice, in its cases, Douglas concludes that the federal judiciary has a new responsibility: fighting inflation. "The Administrator does not carry the sole burden of the war against inflation. The courts have also been entrusted with a share of that responsibility."[391] What he means by this manifestly-false statement is that the federal judiciary, in overseeing executive discretion with judicial discretion, will make important final decisions fulfilling the purposes of the Price Control Act. Here is the clear articulation of the notion of judicial oversight of the performance of other branches of government. And, according to Douglas, this judicial oversight is a function of the equitable powers of courts.

Both Douglas and Frankfurter in a brief concurrence made two additional points worth noting. In talking about the "historic"[392] continuity of equity up to and through their era, they both demonstrate an understanding that the procedural merger of law and equity under the Federal Rules of Civil Procedure, promulgated six years prior to the

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[389] *Brown v. Hecht Co.*, 49 F. Supp. 528 (D.D.C. 1943).

[390] At 331.

[391] *Id.*

[392] *Id.*

Hecht decision, did not change the substantive rules of equity. This is ironic, of course, in Douglas' case at least for, as has been shown above, his description of "the historic injunctive process" had no basis in history.

The other point evident in both Douglas' and Frankfurter's opinions is that the discretion of the court in equity is the set of received rules by which an equity court may *withhold* relief. In support of his view of the discretion of a court of equity, Douglas cites *Meredith v. City of Winter Haven,*[393] a case decided in the Supreme Court the previous year which includes a rigorous and thorough explication of the traditional view of equitable discretion as power "to withhold."[394]

2. *Brown II: The New Equity Procedure*

In the first *Brown v. Board of Education I,*[395] the Supreme Court, after unanimously concluding that segregated schooling violated the Fourteenth Amendment, asked the parties to the case for further argument about "appropriate relief."[396] In doing so, the Court broke new jurisprudential ground by establishing the possibility that there can be a wide gulf between right and remedy. Instead of the interlocking relationship between right and remedy whereby each immediately implies the other, the Court said that they could be so disconnected as to be subjects for different lawsuits.

In *Brown II,* the Court told federal trial courts in school desegregation case to formulate remedies according to their own assessment of "local conditions."[397] Since this decision, institutional injunctions have been largely unreviewable.[398] A nearly complete deference is accorded the trial court because only the trial court knows the local conditions. The adjudication of remedies becomes like the adjudication of facts: the almost-disqualifying presumption is with the trial court. And since the all-embracing law was enunciated in *Brown I,* appeals court have little

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[393] 320 U.S. 228 (1943).

[394] *Id.* at 235.

[395] 347 U.S. 483 (1954).

[396] *Id.* at 495.

[397] *Brown II,* 349 U.S. at 299.

[398] In *Section* V, *infra,* it is argued that this unreviewability may be changing now — and that it needs changing.

law to review in school desegregation cases. The trial courts do not adjudicate law anyway, for *Brown I* settled the law, and *Brown II* charged the trial courts to adjudicate remedies, not law.

Thus were launched hundreds of school desegregation cases, many of which are continuing today while other new ones are being launched, almost all of which were not complete lawsuits but compliance suits only. Across the country, federal district courts became habituated to dealing with educational institutions. So it may not be surprising that some of those judges extended this kind of suit into new areas, like prisons and mental hospitals. For instance, Judge Frank M. Johnson of the United States District Court for the Middle District of Alabama, after desegregating seventy-six Alabama school systems,[399] later took on the Alabama prison system[400] and the Alabama mental hospital system.[401]

In these cases will be found little adjudication of rights. The emphasis is always on facts — sometimes quite shocking facts — and on remedies. The chief difference that has been ignored is that there often has not been a law-establishing decision by the Supreme Court to authorize the district courts to involve themselves in the operation of these institutions. For instance, the supposed "constitutional" right to treatment that Judge Johnson proclaimed in the mental-hospital case of *Wyatt v. Stickney* has never been endorsed by the Supreme Court.[402] But this has not stopped the *Wyatt* case from serving as a precedent for dozens of successor cases.

But the Supreme Court did not turn the district courts loose into the field created by *Brown II* without some guidance. Equity was to guide them:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies [citing *Alexander v. Hillman* in a footnote] and by a facility for adjusting and reconciling public and private needs [citing *Hecht v. Bowles* in a footnote]. These cases call for the exercise

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[399] *Lee v. Macon County Bd. of Educ.*, 292 F. Supp. 363 (M.D. Ala. 1968).

[400] *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

[401] See the discussion of *Wyatt v. Stickney* below.

[402] *Id.*

> of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.[403]

This "guidance" does not offer much guidance. The only thing said about equity, albeit in the most general terms, is that it is flexible and that it reconciles public with private. These attributes are called "traditional," although, as we have seen, the reconciliation capability of equity was formulated by Douglas only ten years prior to *Brown I*. On the other hand, it is true that equity is flexible, both in its procedure and in its consideration of remedies, but it is hard to understand why Warren cited the 1935 case of *Alexander v. Hillman*[404] as authority for this. *Alexander* is a complicated case having to do mostly with the procedures of receiverships. It does not provide any guidance for the federal district courts about the extent of their equitable flexibility in shaping institutional injunctions.

Overall, Chief Justice Warren gives no analysis of equity. The phrase "equitable principles" seems to have some self-evident meaning. That meaning can only be the same as Douglas' doing of equity. *Brown II* charges the district courts to do equity and largely insulates them from review of their deeds.

The only other measure of the equitable powers of courts offered in *Brown II* is a results-oriented measure. Plaintiffs are to be admitted to desegregated schools "as soon as practicable." The courts are called upon to "effectuate" this task and to cause a "full implementation" of the constitutional principles of the case. "Full compliance" of the public schools is required. Actions must be undertaken "in an effective

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[403] *Brown II*, 349 U.S. at 300.

[404] 296 U.S. 222 (1935).

manner."[405] In a later case, the Court was to further explain this standard by stating emphatically that remedies were required "to realistically to work now."[406] In the end, then, although Warren refers to equitable "principles," he is unable to describe any. He gives equity a job to do, and equity will be measured solely by whether it accomplishes its job. Equity becomes a special judicial superpower that gives little recognition to issues of jurisprudence, constitutionalism, separation of powers, or federalism.

3. *Swann: The Breadth of Equity*

Brown II could not put off all questions, however. In *Swann v. Charlotte-Mecklenburg Board of Education*,[407] the first school-busing case, the Court decided that it had to define "[I]n more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I*."[408] The question had arisen whether the equitable powers of courts included the power to order the busing of school children in order to achieve racial balance. In other words, there was a question about the breadth of equitable remedies. Chief Justice Warren Burger, writing for the unanimous Court, answered this question about breadth by asserting that equitable powers were broad:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.[409]

In support of this assertion, Chief Justice Burger cites the passage from *Hecht* but Burger's assertion is dubious, of course. Remedial powers of any kind do not have an "inherent" breadth. Remedies are limited by and to the wrongs they are supposed to cure. Burger seems to be trying to say this when he says that remedial powers are broad once "a right and a violation have been shown." But he contradicts this by claiming an "inherent" breadth in equitable remedies.

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[405] *Id.* at 300.

[406] *Green v. County School Board I*, 391 U.S. 430 (1968).

[407] 402 U.S. 1 (1971).

[408] *Id.* at 6.

[409] *Id.* at 15.

The fundamental problem with the development, through *Hecht*, *Brown II*, and *Swann*, of these new doctrines about equitable remedies is the context in which they are being applied. *Brown I* discovered not only a constitutional violation; it discovered a nationwide unconstitutional condition. That is what is truly broad in these cases. Then, in *Brown II*, the Court asked equity to remedy the condition. And, in *Swann*, the Court effectively sets up a causal relationship: because the wrong is broad, therefore, the remedy must be broad.

In truth, the Court is just inventing new remedies and new remedial doctrines — and calling them equitable. The only part of the tradition of equity that these new doctrines approximate is the time in English history when the Chancellors had the latitude to "do justice."

Burger freely continues the pattern of tautological and circuitous reasoning that marks these cases when he purports to give "some guidelines" by saying that

> [A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right.[410]

Yet, Burger cites none of these other cases as examples. Nor were there other cases at that time, for the equitable correction of unconstitutional conditions by means of an injunction was by no means a traditional function of equity. In addition, this statement of Burger suggests that there was some similar precedent in equity for school busing, when in fact there was not.

As in *Hecht*, the *Swann* case included the issue of a possible statutory constriction of the federal judiciary's "historic equitable remedial powers."[411] Title IV of the Civil Rights Act of 1964[412] included a provision prohibiting "the transportation of pupils or students"[413] to achieve racial balance. Burger said that this could be ignored because its only purpose was to prohibit "the expansion" of the "existing powers" of the federal courts. "There is no suggestion," Burger said, "of an intention

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[410] *Id.* at 15-16.

[411] *Id.* at 17.

[412] 42 U.S.C § 2000 et seq.

[413] § 2000c-6.

to restrict those powers or withdraw from courts their historic equitable remedial powers."

Within this passage is the entire story of the new equity. Burger may have been unaware that the equity he was adjudicating was received English equity except as modified by statute. In the cited section of the 1964 Civil Rights Act, Congress in fact was clearly exercising its statutory authority to restrict the existing remedial power, equitable or legal, of the federal courts. Burger retreats into history to defend equity in the same case in which he is misreading the legacy of history about equity. He says that the Civil Rights Act did not affect the existing powers of the federal courts at the same time that he expands in unprecedented fashion those existing powers. He says that the Act intended only to prohibit expansions of federal remedial powers at the same time that he goes about expanding them. Burger gets to have both the past and the present at the same time. He cites history in defense of his doing away with history.

B. *The Principles of the New Equity*

With the *Hecht*, *Brown II*, and *Swann* cases serving as the foundations, certain principles of the new equity have emerged.

1. *Equity as Superior to Law*

It is quite apparent that the federal courts have resurrected an English notion of equity left behind three centuries ago. In the *Hecht* case, Justice Douglas effectively said that equity was a practical mercy that made the law better. He also invented the superlegal and superconstitutional task for equity of reconciling the public interest and private interests. It is this supertask that forms the basis of *Brown II*. In *Swann*, Chief Burger made equity a judicial power arguably broader than anyone else in history ever conceived it. He effectively gave it the authority to rearrange any rule, practice, or institution of government in order to accomplish its objective.

In *Reynolds v. Sims*, the "one-man, one-vote" reapportionment case, Justice Warren, writing for the Court, said that the plaintiffs were seeking relief that would be "just, equitable, and proper,"[414] and he also

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[414] 377 U.S. 533, 541 (1964).

talked about apportionment schemes that were "fair and equitable."[415] This pairing of words like proper, just, and fair with the word "equity" is common in federal court opinions. It effectively indicates an equating of those words with equity. In *Hills v. Gautreaux*, a housing case, the Supreme Court also talked about what was "just and equitable,"[416] as well as what was "necessary and equitable,"[417] a possibly stronger concept. The federal appeals court in the same case spoke of the "wise discretion" of a court of equity.[418]

In the second *Milliken v. Bradley* case, the Supreme Court said that "flexibility and sensitivity" are characteristic of equitable decrees.[419] The district court in the same case spoke of "a just, feasible, and equitable" desegregation plan.[420] In the second *Lemon v. Kurtzman* case, the Supreme Court called equitable remedies "a special blend of what is necessary, what is fair, and what is workable."[421] In a case involving an injunction setting the rules for hiring in a city police department, a federal district court said that it must take the "broader public equity" into account.[422]

All these descriptions taken together[423] indicate that federal judges regard equity as superior to the law; and as their own special power, different from and superior to their constitutional grant of authority. And in the end, equity is indescribable:

> [W]ords are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern. . . .[424]

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[415] *Id.* at 565.

[416] 425 U.S. 284, 286 n.2 (1976).

[417] *Id* . at 292.

[418] *Gautreaux v. Romney*, 457 F.2d 124, 126 (7th Cir. 1972).

[419] 433 U.S. 267, 280 n.15 (1977).

[420] *Bradley v. Milliken*, 411 F. Supp. 943, 944 (D.C. Mich. 1975).

[421] 411 U.S. 192, 201 (1973).

[422] *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n*, 354 F. Supp. 778, 797 (D. Conn. 1973).

[423] Oftentimes, a federal court does not attempt to characterize equity anew. It simply defers to Dooulgas' statement in *Hecht.*

[424] *Swann*, 402 U.S. at 31.

2. *Courts of Equity Replacing Other Agencies and Branches of Government*

In *Swann*, the Supreme Court said that "Judicial authority enters only when local authority defaults."[425] The Court is here explaining that the federal courts will not only declare violations of rights but they will also conduct the "day-to-day implementation"[426] of the remedies for those violations. In the reapportionment case of *Connor v. Finch*, the Court said that when "the state legislature has failed," the federal courts, "in the legislature's stead," must become "draftsmen of reapportionment plans."[427]

In *Pugh v. Locke*, federal district court judge Frank M. Johnson took over the operation of the Alabama prison system and asserted that "[t]he Alabama Legislature has had ample opportunity to make provision for the state to meet its constitutional responsibilities in this area, and it has failed to do so;"[428] while, in *Wyatt v. Stickney*, the same judge took over the Alabama mental-hospital system and said that "[t]here can be no legal (or moral) justification for the State of Alabama's failing . . ."[429]

This is a clear revision of the American constitutional system from one of three *differentiated* (legislating, executing, judging) and separated powers into one of three undifferentiated and general powers, each of which acts as a kind of backup to the other two.

3. *Courts of Equity and the Appropriation of Public Funds*

State legislative and executive branches may not only fail in their policies, they may also fail to appropriate the funds that the federal district courts think necessary. In *Wyatt v. Stickney*, Judge Johnson said that the lack of public funds for the Alabama mental-hospital system was the reason for the lawsuit.[430] Also mentioned has been Judge Clark's confident statement in the Kansas City desegregation case that his "broad equitable power" included "the power to order tax increases and

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[425] *Id.* at 16.

[426] *Id.* at 6.

[427] 431 U.S. 407, 414-15 (1977).

[428] 406 F. Supp. 318, 330 (M.D. Ala. 1976).

[429] 325 F. Supp 781, 785 (M.D. Ala. 1971).

[430] *Id.* at 784.

bond issuances."[431]

In one of the appeals court episodes of the *Milliken v. Bradley* school desegregation case, it was held that requiring the appropriation of Michigan state funds not only did not violate the Eleventh Amendment and the holding of *Ex parte Young*[432] but it was also "within the equitable powers of the court."[433] The court also warned darkly that it would not tolerate "a cutback in essential educational programs to meet the expenses of implementing the desegregation plan."[434] In *Holt v. Sarver*, the Arkansas prison case, the judge said that "money will be required" to implement his plans for the prison but that he found "no reason to believe" that the state legislature would not come up with the money.[435]

In the Mississippi prison case, the Fifth Circuit told the defendants that their contention that they must wait until "the Legislature acts on appropriations" was "unsupported by the law."[436] In the Alabama prison case, Judge Johnson said that it was "established beyond doubt" that the state must either close its prisons or fund them according to what Johnson was announcing were the new constitutional standards for their operation;[437] the appeals court in the Arkansas prison case said that lack of funds was "not an acceptable excuse" for failure to implement his decree.[438]

It seems that the federal courts regard the appropriation of public funds delegated to the legislative branch by the federal and every state constitution not as a deliberative act but as a kind of an equitable requirement.

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[431] *Supra* note 3.

[432] 209 U.S. 123 (1908).

[433] *Bradley*, 540 F.2d at 245.

[434] *Id.* at 246.

[435] 309 F. Supp. 362, 383 (E.D. Ark. 1970).

[436] *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974).

[437] *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976).

[438] *Finney v. Arkansas Bd. of Correction*, 506 F.2d 194, 201 (8th Cir. 1974).

4. *Discretion as Equivalent to Freedom*

This has two aspects: discretion is a kind of private "judgment call" of the trial court and the judgment call of the trial court is essentially unreviewable.

a. *Discretion and Private Judgment*

In *Baker v. Carr*, Justice Brennan said that "[t]he discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction . . . in one case is not precedent in another case where the facts differ."[439] In other words, the exercise of discretion is confined to each case. No case sets a precedent for succeeding cases. Since each case is *sui generis*, there are no rules to guide judges. Likewise, in *Hills v. Gautreaux*, a housing case, the Court said that "[t]he nature and scope of the remedial decree to be entered on remand is a matter for the District Court in the exercise of its equitable discretion. . . ."[440] If both the nature and scope of a remedy is left to the discretion of the trial judge, what rules could there possibly be for the exercise of his discretion?

The Supreme Court attempted to establish some guidelines for equitable discretion in its second decision in *Milliken v. Bradley*.[441] In that decision, the Court first, cited the *Swann* case for the principle that the nature of the violation must determine the scope of the remedy.[442] Second, the *Milliken* Court said that a remedy must indeed remedy something. Third, the Court said that "the interests of state and local authorities" must be taken into account.

However, the key to all three of these guidelines for discretion is that decisions about them have been largely made by discretion. This is proved by one of the holdings in *Milliken*. The Court was asked to decide whether a trial court's decree requiring particular *educational* programs was an appropriate remedy in a school desegregation case. Up until the *Milliken* case, it was thought that since the violation concerned student *assignment*, the remedy must likewise be confined to student assignment. The Supreme Court held that educational programs could be appropriate

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[439] 369 U.S. 186, 236 (1962) (quoting *Cook v. Fortson*, 329 U.S. 675, 678 n.8 (1946)).

[440] 425 U.S. at 306.

[441] 433 U.S. 267 (1977).

[442] *See* a discussion of this *Swann* principle in Section V. *infra*.

remedies for student misassignment but that only the trial court, in the exercise of its "equitable discretion"[443] could determine this.

b. *Discretion and Reviewing Courts*

So, the *Milliken* Court reviewed a new question about the kinds of remedies available in school-desegregation cases by saying that it was unreviewable so long as a trial court judge engaged in a kind of process governed by equity. There are some questions, the Court implied, that a trial judge must ask, but he has the authority, or "discretion" to answer them himself — which means that he has the *freedom* to give the answers. Thus, equitable discretion is made to be similar to a question of fact that only the trial judge has the perspective to answer.

Indeed, the Court has made it plain that equitable powers are powers of the trial court and that deference is due the exercise of those powers. In *Swann*, the Court said that the "breadth and flexibility" about which it spoke are inherent in the "district court's equitable powers."[444] Discretion was "the district court's discretion."[445] In *Lemon v. Kurtzman II*, the Court said that "in shaping equity decrees, the trial court is vested with broad discretionary power." Thus, "appellate review is correspondingly narrow."[446] A federal district court has said that "[f]ederal District Courts have broad equitable powers to remedy constitutional violations."[447]

In *United States v. Paradise*, the Court said that "the district court has first-hand experience with the parties and is best qualified to deal with the "flinty, intractable realities of day-to-day implementation of constitutional commands.' "[448] The Court did review the district court's decree in *Paradise*, but, in upholding the decree, the Court placed great emphasis on the fact that the district court had gone through the correct equitable process ("the district court properly balanced . . . the interests") — quite apart from its conclusion. For, the district court's "proximate position and broad equitable powers mandate substantial

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[443] 433 U.S. at 286 n.17.

[444] 402 U.S. at 15.

[445] *Id.*

[446] *Lemon v. Kurtzman*, 411 U.S. 193, 200 (1973).

[447] *Resident Advisory Bd. v. Rizzo*, 425 F. Supp 987, 1026 (E.D. Pa. 1976).

[448] 107 S. Ct. 1053 (1987) *quoting Swann.*

respect for this judgment."[449]

5. *Duty and Discretion*

Ironically, the Supreme Court has contradicted itself about equitable discretion — in both its contemporary sense of the freedom of the trial judge as well as its classic sense of the restraint of the trial judge.

It will be remembered that Justice Douglas in *Hecht* stated that a certain federal statute had not removed from the judiciary the discretion whether to grant or withhold an injunction. This discretion, Douglas called, "traditional" to equity. The previous subsection immediately above has pointed out that an unfettered discretion — a freedom — obtains in the federal equitable jurisdiction today.

What is to be made, then, of a principle laid down by the Supreme Court that a federal district court has:

> not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.[450]

Echoing this principle, a federal district court has said in a housing case that it "recognized its duty"[451] and in another housing case, a federal judge said that he had "not merely the power but the duty to remedy."[452]

And what is to be made of a recent opinion of the Supreme Court in which the breadth and flexibility of equity, deference to *discretion* of the trial court, and the *duty* of the trial court are included in the *same paragraph* without a hint of contradiction:

> In determining whether this order was narrowly tailored we must acknowledge the respect owed a District Judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. A district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well

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[449] *Id.* at 1074.

[450] *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (emphasis added).

[451] *United States v. City of Parma*, 504 F. Supp. 913, 917 (N.D. Ohio 1980).

[452] *Resident Advisory Bd.*, 425 F. Supp. at 1026.

> as bar like discrimination in the future. * * * Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.[453]

Clearly, a trial court cannot have a duty and a discretion at the same time on the same matter. What the Court is really saying is that discretion works in only one direction. A trial judge has the discretion to issue injunctions but has no discretion to withhold injunctions. There is now a right to an injunction, and judges must award them.

C. *The Paradigm: Wyatt v. Stickney*

Wyatt v. Stickney is the paradigm of the institutional injunction case. The various episodes of the case concerned the re-arranging of the Alabama mental hospital system by Judge Frank M. Johnson of the U.S. District Court for the Middle District of Alabama.[454] *Wyatt* has been cited in dozens of subsequent cases, not only in the field of mental health but in other fields as well.[455]

In the first installment of *Wyatt* in the district court,[456] patients at Bryce Hospital in Tuscaloosa, sought a preliminary injunction. Bryce Hospital was a mental-health hospital with 1,600 employees and 5,000 patients, the majority of whom were involuntarily committed through civil proceedings. Among the 5,000 patients were 1,500-1,600 geriatric patients who received custodial care but no treatment and 1,000 mental retardates most of whom also received custodial care but no treatment.

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[453] *United States v. Paradise*, 107 S. Ct. 1053, 1073 (1987)(citations and quotation marks omitted).

[454] According to medical, psychiatric, and humane standards, the system may have needed re-arranging. This subsection, however, discusses only the role of the judiciary in such a situation.

[455] *See e.g., Ohlinger v. Watson*, 652 F.2d 775 (9th Cir. 1980); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974); *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973); *Gomes v. Gaughan*, 471 F.2d 794 (1st Cir. 1973); *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980); *Keyes v. School Dist. No.1, Denver, Colo.*, 439 F. Supp. 393 (1977) (school desegregation); *Lora v. Board of Ed.*, 456 F. Supp. 1211 (1978) (school desegregation); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974) (reapportionment); *Ad Hoc Committee on Judicial Administration v. Massachusetts*, 488 F.2d 1241 (1st Cir. 1973) *cert. denied*, 416 U.S. 986 (1974) (reapportionment).

[456] 325 F. Supp. 781 (M.D. Ala. 1971).

Obviously, the hospital was being used for mixed purposes. This was not acceptable to Judge Johnson who said concerning the geriatric patients: "The evidence is without dispute that these patients are not properly confined at Bryce Hospital since these geriatric patients cannot benefit from any psychiatric treatment or are not mentally ill."[457]

For two and one half years before the injunction hearing, the hospital (as well as all hospitals in the Alabama mental health system) had been in the process of changing its organization and methodology of treatment in order to render better service to its patients. Despite the fact that it would be adjudicating a case based on facts that were changing, the court found that the pre-reorganization treatments "failed to conform to any known minimums established for providing treatment for the mentally ill."[458] What is more, "[t]he evidence," Johnson said, "further reflects that Alabama ranks fiftieth among the states in the Union in per-patient expenditures per day."[459]

Johnson next said that "[t]he patients . . ., for the most part, were involuntarily committed . . . without the constitutional protections that are afforded defendants in criminal proceedings".[460] The ways in which civil commitment was similar to criminal commitment could have been a major issue in the case. However, Judge Johnson did not take up this question. Instead, he held that "unquestionably" there was a constitutional right to treatment.

When patients are involuntarily committed, Johnson said, in proceedings without the constitutional protections that are afforded defendants in criminal proceedings for the sake of *treatment*, they have "a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition."[461] Confinement for treatment gives one a right to treatment:

> The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punish-

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[457] *Id.* at 784.

[458] *Id.*

[459] *Id.*

[460] *Id.*

[461] *Id.*

ment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions such as Bryce . . . To deprive any citizen or his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[462]

All of this is said without citing any authority. Instead, the court cited two opinions by the D.C. Circuit authored by Judge Bazelon: *Rouse v. Cameron*[463] and *Covington v. Harris* (1969),[463] and a concurrence in another D.C. Circuit decision, *Ragsdale v. Overholser.*[465]

Thus, Judge Johnson abruptly identifies a constitutional right to treatment without discussing the Constitution at all and by mentioning three cases, all of them from the D.C. Circuit, none of which was on point. The perfunctory discussion of right in this case is sandwiched between an extended discussion of the facts and a detailed discussion of remedial strategy.

It appears that that the plaintiffs in *Wyatt* were seeking a remedy without a clear constitutional right. In accomplishing this objective for the plaintiffs — the situation at Bryce Hospital was without "moral justification,"[466] Johnson said — Johnson paid scant attention to the rights part of the right-remedy analysis. Indeed, in this case, there was nothing else that he could do — since there was not then, nor has there been declared yet, a constitutional right to treatment.

The court did more than just mention the issue of how the right to treatment was to be funded when it next stated that it was a matter of

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[462] *Id.* at 784-85 (emphasis in original).

[463] 373 F.2d 451 (D.C. Cir. 1966).

[465] 281 F.2d 943 (D.C. Cir. 1960). *Rouse* was a *criminal* case where *habeas corpus* had been filed, where the defendant had a trial and was found not guilty by reason of insanity and was then committed, and where there was a *statutory* right to treatment under the Washington, D.C. Code. *Covington* concerned the case of a habitual criminal who was civilly committed instead of prosecuted for his most recent crime. He also had filed a writ of *habeas corpus.* The *Covington* court relied substantially on *Rouse* and upon the same statutory right relied on in *Rouse.* Judge Johnson's reference to *Ragsdale* was to a dicta in a concurrence to that case. In *Ragsdale, habeas corpus* was dismissed, and in both *Rouse* and *Covington,* denials of *habeas corpus* were reversed and remanded for further proceedings.

[466] *Wyatt,* 325 U.S. at 785.

"evidence" that "the failure of Bryce Hospital to supply adequate treatment is due to a lack of operating funds."[467] "[I]ndefinite delay cannot be approved,"[468] the court, quoting *Rouse,* said. Here, Johnson was doing more than serving notice that the lack of legislative appropriations would not be permitted to serve as a barrier. He was asserting that the *reason* for the suit is the lack of funds. The plaintiffs were seeking a judicial appropriations of funds left unappropriated by the state legislature.

The court decided to issue a preliminary injunction ordering the defendants (the governor, the commissioner and board of mental health, and others) within ninety days to prepare:

> a. "A precise definition of the mission and functions of Bryce Hospital" (in order to resolve the question of whether the hospital exists for the sake of the old, the mentally ill, or the mentally retarded);
>
> b. A plan for "appropriate and adequate treatment" at Bryce;
>
> c. A report on the efficacy of the reforms already underway.

The plaintiffs had asked for an order of reference to a master for an "authoritative determination" of the standards of adequate treatment. The court reserved ruling on this request in order to give the defendants an "opportunity" to promulgate and implement their own standards for adequate treatment and in order to allow the defendants a reasonable time to evaluate their already-underway reforms. The court conceded that the commissioner of mental health was able to head up the study of Bryce but warned that it would appoint a "panel of experts" to determine "objective and subjective hospital standards"[469] if the defendants failed.

Finally, Johnson ordered the United States, through the Departments of Justice and HEW, to appear

> as *amicus* for the purpose of assisting this Court in evaluating the treatment programs at the Bryce Hospital facility and in assisting the defendants in meeting the subjective standards of

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[467] *Id.* at 784.

[468] *Id.*

[469] *Wyatt,* 325 U.S. at 785.

> the United States Department of Health, Education, and Welfare as said standards pertain to adequate treatment, personnel, space, equipment and facilities.[470]

It is safe to assume that the Department of HEW was eager to place its resources under the power of the court. HEW may already have been participating in the case in indirect ways. But, there is no apparent authority in the Federal Rules of Civil Procedure for a trial court to order the intervention into a case of a non-party. There is also no authority in those same rules for an amicus at the trial level.

Johnson's corralling of HEW is one of the first examples of what has become a common occurrence in all institutional injunction cases. A large number of people, organization, and institutions participate. Precise definitions of the various intervenors blur at the edges. So, whether called parties, amici, masters, experts, or receivers, many people and many resources are placed at the disposal of the court.

Bryce later requested and was granted six months to prepare its plans. The hospital hired consultants to help in the formulation of its report to the court. But, in the second installment of this case,[471] Johnson rejected the hospital's report. The United States, appearing as amici, objected to the report as did all other amici who had been admitted to the case, the ACLU, the American Psychological Association, and the American Ortho-Psychiatric Association. The plaintiffs objected to the report, and, in fact, the defendants objected to their own report:

> All the objections raised by amici and by plaintiffs generally are supported by the reports of Bryce's consultants. There seems to be a consensus of opinion among the experts that the treatment program at Bryce Hospital continues to be wholly inadequate.[472]

Thus, it appears that this case had come to lack a controversy. One can guess that the Alabama Department of Mental Health, with a view to favoring the more powerful remedies that the court might order, did not *want* the hospital to pass muster. In addition, it is interesting to note the appearance of the psychological and psychiatric associations, since, in

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[470] *Id.* at 786 (emphasis added).

[471] 334 F. Supp 1341 (M.D. Ala. 1971).

[472] *Id.* at 1344.

Rouse, the court noted that "[i]n the opinion of the American Psychiatric Association no tax-supported hospital in the United States can be considered adequately staffed."[473] In other words, it was a given that expert testimony would show the report of the hospital to be inadequate. The *Rouse* court had quoted Justice Frankfurter to the effect that "the only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment."[474] In the context of lawsuits like *Rouse* and *Wyatt*, this means that it is impossible — if courts are going to use scientific "evidence" as legal evidence — for any institution to ever be scientifically and medically acceptable, and, therefore, constitutionally acceptable.

After taking some expert testimony and advice, Johnson decided that there were three conditions of "adequate and effective treatment" in public mental institutions: 1) a humane psychological and physical environment, 2) qualified staff in numbers sufficient to administer adequate treatment, and 3) individualized treatment plans. These, Johnson called "medical and constitutional requirements".[475]

With respect to a humane psychological and physical environment, the first condition, the following, *inter alia*, were found to be "unconstitutional" at Bryce: "inferior" food, "shoddy" wearing apparel, non-therapeutic work assigned to patients (*e.g.*, housekeeping chores), and "overcrowding caused to some degree by poor utilization of space." With respect to sufficient numbers of staff, Johnson stated that "[m]ore psychiatrists, Doctor of Philosophy level psychologists and qualified Medical Doctors are not only a medical but are also a constitutional necessity. . . ."[476] And with respect to individualized treatment plans, Johnson said that records on each patient must be kept. The parties were told to draw up new plans to meet these three conditions. The court again threatened the appointment of, but did not appoint, a master.

The court also expanded the class of plaintiffs to include patients involuntarily confined for mental treatment purposes at two other hospitals, Partlow and Searcy, because of "strong indications . . ., sparse as it is, that the conditions at Partlow and Searcy are no better than those

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[473] *Rouse*, 373 U.S. at 458.

[474] *Id.* at 457.

[475] *Wyatt*, 334 U.S. at 1344.

[476] *Id.* at 1343.

at Bryce."[477] Johnson did not say how the evidence can be both *strong* and *sparse* at the same time. The officials at Searcy were only too eager to agree to be defendants. They actually answered the complaint against them by agreeing to be bound by the standards "ultimately ordered" by the court in the future, *i.e.*, they waived a trial (factfinding) in their enthusiasm to be part of the remedy. This commendable volunteer spirit, Johnson said, "obviated the necessity for this Court's holding a formal hearing on the conditions currently existing at Searcy."[478]

In the next installment, Johnson rendered two decisions granting permanent injunctive relief, one to promulgate the "minimum constitutional standards for adequate treatment of the mentally *ill*" at Bryce and Searcy,[479] and the other to promulgate "the minimum constitutional standards for adequate *habilitation* treatment of the mentally *retarded*" at Partlow.[480] The court did hold a hearing to hear evidence about the conditions at Partlow but does not mention anything about the facts presented at that hearing. The necessity for paying much attention to facts may have been obviated by Partlow's willing stipulation to be bound by the court's decree. Johnson said that "the parties and amici stipulated to a broad array of these standards and *proposed additional ones* for the Court's evaluation."[481] Here we have the volunteer spirit again. Johnson voiced his approval of Partlow's attitude in this case by saying that "Commendably, defendants have offered no rebuttal."[482]

It should be noted that Johnson without hesitation extended the constitutional right to *treatment* for the mentally *ill* to include a constitutional right to *habilitation* for the mentally *retarded*. Since the mentally retarded can't be treated in the sense that their mental condition can be improved, what can the state do beyond adequate custody? By his decrees, Johnson rather clearly included a constitutional right to humane *custody* in the constitutional right to *treatment*. And he did this, again, while beginning the first installment of the case by repudiating the mere issue of custody.

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[477] *Id.* at 1344.

[478] *Wyatt v. Stickney*, 344 F. Supp. 373, 375 n.1 (M.D. Ala. 1972).

[479] *Id.* at 373.

[480] *Id.* at 390.

[481] *Wyatt*, 344 F. Supp. at 390 (emphasis added).

[482] *Id.* at 391.

In promulgating these two sets of standards, Johnson recognized his collaborating colleagues, the amici, who "performed invaluable service for which this Court is indeed appreciative."[483]

Both sets of "constitutional standards" are long bills of patients' rights and detailed prescriptions for patient care. Among the rights were a right to privacy and dignity, an unrestricted right to sealed mail, a right to be free from unnecessary or excessive medication, a right to be free from physical restraint and isolation, and a right to a humane psychological and physical environment within the hospital facilities. Among the prescriptions were identification of specific classifications of treatment personnel and the precise numbers required in each classification, one tub or shower for each fifteen patients, a minimum day room area of forty square feet per patient, a minimum dining room area of ten square feet per patient, and precise temperatures for dishwashing water, faucet hot water, and heating. In addition, Johnson created, and named the members of, human rights committees for all three institutions.

It can be seen that Johnson, in promulgating a right to treatment and in requiring that treatment be done, did not prescribe the actual treatments. He did not endorse specific psychiatric or psychological theories. Ironically, however, after basing this case on the notion that treatment and not mere custody was required, most of Johnson's constitutional standards turned out to be more custodial than treatment. Most of the standards concern daily living arrangements — dining, sleeping quarters, the physical plant, recreation, hygiene, etc. And most of the standards that are more personal in nature, *e.g.*, a prohibition on corporal punishment, are more legalistic than treatment. Or, at least, if they are considered treatment, they are negative treatments *i.e.*, what treatments cannot be done. Standards for the individualized treatment plans, about a third of the total standards, did set up detailed procedures and schedules for diagnosis and treatment. But questions of specific therapies for individual patients were omitted.

Johnson again issued his warning that failure to comply with his decree could not be justified "by a lack of operating funds." He said that, despite recent improvements, the budget for mental health was "woefully short of the minimum required for constitutional care." What was at stake were not merely "ordinary governmental functions such as paving roads and maintaining buildings." Instead, the "very preservation of

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[483] *Id.* at 390 n.4.

human life and dignity" was at stake. A prompt response from the legislature was "imperative" in order to "satisfy its well-defined constitutional obligation." Otherwise, the court would have to appoint a master "to insure that proper funding is realized" by utilizing "other avenues of fund raising."

Having thus warned the governor and state legislature in no uncertain terms, he reserved ruling, however, on plaintiffs' requests that the Mental Health Board be required to sell land holdings in order to raise funds and that the treasurer and comptroller of the state be enjoined from authorizing expenditures for comparatively "nonessential state functions."

Finally, Johnson decided to award attorney's fees to plaintiffs' lawyers. Such fees were justified because of the "bad faith" of the defendants who knew about the substandard conditions at the hospitals but did not do enough to correct them. Attorneys' fees were also justified because of the substantial benefits conferred upon the public by the plaintiffs' lawyers who were acting as "private attorneys general." Indeed, in "order to eliminate the impediments to *pro bono publico* litigation and to carry out congressional policy,"[484] attorney's fees were actually "legally required."

When *Wyatt* was appealed,[485] the decision on appeal was substantially based on *Donaldson v. O'Connor*, another Fifth Circuit case decided six months earlier than the *Wyatt* appeal. It is necessary to consider *Donaldson*, then, before proceeding with the Fifth Circuit's reasoning in *Wyatt*.

It is with the decision in *Donaldson v. O'Connor*[486], written by Judge Minor Wisdom, that we get to first principles. *Donaldson* was the first decision by a federal court of appeals about the right to treatment. The case concerned an adult man, diagnosed as a paranoid schizophrenic, who was civilly committed to a Florida state mental hospital where he stayed for nearly fifteen years. During that time he received little or no psychiatric care or treatment. The committing judge had told Donaldson that he was being sent to the hospital "for a few weeks." Donaldson lived

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[484] *Id.* at 409 (emphasis in original).

[485] *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

[486] 493 F.2d 507 (5th Cir. 1974).

in a locked ward with sixty other patients approximately a third of whom were criminals. He was eventually released because different physicians took over his case and decided that his continued confinement was not medically indicated. Obviously, this was a good fact pattern to bring a test case about the right to treatment.

The court's own summary of the case's procedural history is important:

> Donaldson brought this suit while he was still a patient at the hospital. In his original complaint, Donaldson sought to bring this suit as a class action on behalf of all patients in the hospital's Department C. In addition to damages, to the plaintiff and to the class, the complaint sought habeas corpus relief directing the release of Donaldson and of the entire class, and sought broad declaratory and injunctive relief requiring the hospital to provide adequate psychiatric treatment.
>
> After Donaldson's release, and after the district court dismissed the action as a class suit, Donaldson . . . filed his First Amended Complaint. This complaint sought individual damages and renewed Donaldson's prayers for declaratory and injunctive relief to restrain the enforcement of Florida's civil commitment statutes unless Florida provided adequate treatment to its civilly committed patients. The complaint asked the district court to convene a three-judge district court to consider the plaintiff's attack on the constitutionality of the civil commitment statutes as they then operated . . . however, the plaintiff in a memorandum brief abandoned the prayer that a three-judge court be convened. The prayers for injunctive and declaratory relief therefore were effectively eliminated from the case.[487]

So, the case continued as a Section 1983 suit for compensatory and punitive damages against five hospital and state mental health officials. In a jury trial, Donaldson was awarded a total of $28,500 in compensatory damages and $10,000 in punitive damages against two doctors who in turn had been his attending physicians. The doctors were held personally liable. They appealed claiming that there was no federal constitutional right upon which to base a Section 1983 suit.

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[487] 493 F.2d at 512-13.

The court began by stating that "civil commitment entails a massive curtailment of liberty in the constitutional sense."[488] Additionally, the court noted that "civil commitment, because it is for an indefinite term, may in some ways involve a more serious abridgement of personal freedom than imprisonment for commission of a crime. . . ."[489]

It seems that at this point the court could have stopped to do one or both of two things. It could have declared the Fourteenth Amendment's right to liberty was the right involved here and that Donaldson could collect damages under that right. And/or the court could have advised Donaldson to file another action for the tort of false imprisonment. Either or both of these remedies could have avoided the declaration of a new constitutional right. And, just as important, either or both of these remedies could have avoided the invention of the institutional injunction that was needed to enforce the right to treatment. Thus, we see that two distinct manifestations of judicial restraint could have changed the result in this case and in the cases that it spawned. While thinking solely about rights, the court could have sought to avoid the declaration of a new one. When thinking solely about remedies, the court could have avoided the invention of what is really a new remedy, the institutional injunction, by comprehending that this new right was going to require a remedy that transgressed the limits of the judicial power. In other words, the court could have said that the remedy was forbidden because there was no right.

But the court did not stop there. Wisdom postulated a theory in defense of the notion that the due process clause guarantees a right to treatment:

> [P]ersons committed under what we have termed a *parens patriae* ground for commitment must be given treatment lest the involuntary commitment amount to an arbitrary exercise of government power proscribed by the due process clause.[490]

Wisdom formulated this theory by adopting the notion that due process deprivations of liberty must be justified by a "permissible governmental

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[488] *Id.* at 520.

[489] *Id.*

[490] 493 F.2d at 521.

goal."[491] Wisdom said that people are civilly committed because they are dangerous to others under a police-power rationale or because they need care or treatment under a *parens patriae* rationale. In order for the *parens patriae* rationale to be a permissible government goal, the committed person must have a right that treatment be actually provided. In support of this, Wisdom quoted Johnson's first *Wyatt* opinion.

But, Wisdom may have confused treatment with confinement here. He is not actually going through a substantive due process inquiry. He begs the prior question of whether civil confinement is a permissible government goal, or, in other words, whether, there exists a *parens patriae* rationale for the civil confinement of adults. But he at least should ask whether treatment itself is a permissible government goal. Instead of this, Wisdom is really establishing that a *quid pro quo* — treatment for confinement — is permissible. But this *quid pro quo* is not the government's goal. Wisdom decides to establish it as the condition of the goal but never really asks whether the goal, treatment, is permissible.

The appellants argued that a constitutional right to treatment should not be declared by the court *because* "such a right cannot be governed by judicially manageable or ascertainable standards."[492] Wisdom denied this argument for three reasons. He said that courts can use *comparison*. In some cases, as in this one, adequate treatment can be ascertained because the facts present examples both of adequate and of inadequate treatment. Wisdom said that courts can also use *expert testimony*, as in *Rouse*, to ascertain what adequate treatment is. He also said that in some cases like *Wyatt*, the parties will agree to *stipulations* as to adequate treatment.

So, returning to the *Wyatt* appeal, the Fifth Circuit held that the appealable issues in *Wyatt* were "largely foreclosed by our decision, issued since the institution of this appeal, in *Donaldson v. O'Connor*."[493] The court did not pause at the fact that *Donaldson* was a case for damages while *Wyatt* was a class action for injunctive relief.

The state of Alabama made a great deal of its contention that "the order of the district court invades a province of decision-making

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[491] *Id.* at 520

[492] *Id.* at 525.

[493] 503 F.2d at 1312.

exclusively reserved for the state legislature."[494] Not so, said Wisdom, "the state may not fail to provide treatment for budgetary reasons alone,"[495] for:

> [It] is the essence of our holding, here and in *Donaldson*, that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those [people] constitutional.[496]

The court next had a chance to face squarely the issue of right v. remedy. Alabama argued that the plaintiffs had adequate remedies at law: habeas corpus, medical malpractice, and ordinary tort actions. *Donaldson* declared a right to treatment in a suit for damages. The *Wyatt* court said that *Donaldson* controlled the question of the right to treatment but then was faced with the seemingly very large questions of whether class injunctive relief could guarantee the right to treatment, whether the court had the power to order such relief, and whether the right to treatment was conjoined only with certain remedies. Alabama argued that treatment must by definition be individualized and that, therefore, class injunctive relief was inappropriate.

We should probably regard *Donaldson* as the case concerning whether there is a right to treatment and *Wyatt* as the case concerning the extent of the judiciary's remedial powers.

The *Wyatt* court treats this question in a cavalier fashion, disposing of it in two paragraphs with no references to any precedents. The court simply says that the plaintiffs seek *preventive* relief and that, therefore, habeas corpus relief and tort damages are by definition inadequate. This, of course, answers the question with the question. You cannot answer that the plaintiffs seek preventive relief to the question whether the courts have the power and the means to order preventive relief.

The court answered the question of whether class injunctive or individual relief is appropriate by saying that the purpose of class injunctive relief is to provide only the environment for individual treatment and that it was more efficacious for this purpose than a series

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[494] *Id.* at 1314.

[495] *Id.* at 1315.

[496] *Id.*

of individual suits. (The next legal question obviously is what happens when an individual patient is dissatisfied with his individualized treatment that comes about through the process established by injunctive relief.)

Thus, in the end the court lumps together in the same right to treatment Mr. Donaldson's very personal right to have a specifically-different treatment with a group right to a standard operating procedure that leads to individual treatment. This is as good an example as any of the difference between the judicial power (*Donaldson*) and the legislative power (*Wyatt*).

Finally, the court said that Alabama had stipulated to the findings of the district court and stipulated to the remedies and that, therefore, it was up to the state to find the money to carry out the remedies. The Fifth Circuit remanded the case to the district court to decide whether the state was making an effort in "good faith" or whether the courts would have to take other measures. So, the game of chicken between the federal courts and the state of Alabama over who has power to draw funds from the public purse was put off again.

The surprise ending of this story is that the *Donaldson* right to treatment was overturned by the Supreme Court in 1975.[497] The Court let the result stand but said that it was the right to liberty that was at stake. So, since the *Donaldson* right to treatment controlled *Wyatt*, *Wyatt* was left without a constitutional leg to stand on. What is more, the Supreme Court has never declared a constitutional right to treatment. Thus, all the cases spawned by *Wyatt* may be equally lacking in constitutional foundation.

Finally, one other case that serves as a telling comparison is involved here. It is a district court case, *Burnham v. Department of Public Health of the State of Georgia*,[498] in which the rationale for the right to treatment was critically considered. But, this decision was *also* appealed to the Fifth Circuit and was overturned, without an opinion, on the same day that the appeal in *Wyatt* was published.[499] The court noted

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[497] 422 U.S. 563 (1975).

[498] 349 F. Supp. 1335 (N.D. Ga. 1972).

[499] Judge Wisdom's juggling of these cases must be noted. The appeals to the Fifth Circuit in *Wyatt*, *Donaldson*, and *Burnham* were *all pending in the Fifth Circuit at the same time*. The Fifth Circuit had all three district decisions in its hands before it resolved

that the related cases in the D.C. Circuit (e.g., *Rouse*) all concerned a statutory right and, therefore, were not precedents. In the constitutional realm:

> Not every governmental function results in an individual right . . . While the 14th Amendment guarantees equal protection of the laws, it does not create any new rights in itself.[500]

And unlike the *Donaldson* case and all the iterations of the *Wyatt* case, the judge in *Burnham* presented a serious discussion of the remedial power of courts:

> Plaintiffs assert that the remedies of habeas corpus, medical malpractice, and ordinary tort actions would not function to provide an adequate remedy in that the wrong sought to be remedied affects the system of care and treatment as a whole and not on an individual basis; that individual action could not affect the entire scheme of treatment. The Court finds such a description inconsistent with plaintiffs argument that each individual patient should have his particular therapy or

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any one of them. So, it seems that it could have consolidated them all as asking for a ruling on the existence of a constitutional right to treatment. It may or may not have then separated the cases again for a ruling on the scope of federal remedial powers.

But the Fifth Circuit did not do this. Instead, it published its decision in *Donaldson* on April 26, 1974. *Donaldson* cited the district opinion in *Wyatt* as authority, and it distinguished *Burnham*. The decisions in *Wyatt* and *Burnham* were published on the same day, November 8, 1974. The court said that *Donaldson* controlled *Wyatt*, and it resolved *Burnham* without an opinion, saying only that *Donaldson* and *Wyatt* controlled.

But how can *Donaldson* control *Wyatt* when the *Donaldson* opinion said that *Wyatt* controlled *Donaldson* in part? And: How can the *appeals* court in *Donaldson*, contemplating its *appeals* decision in *Wyatt*, cite the *trial* decision in *Wyatt* as controlling *Donaldson*? And: How can *Wyatt* be controlled by *Donaldson* when they both present the same question to the same court at the same time? The Fifth Circuit artificially holds up *Donaldson* to itself as a precedent when *Donaldson* was really being decided at the same time as the case, *Wyatt*, that it was standing as a precedent for. This allows the court to pretend in *Wyatt* that there was in fact a precedent and that the issue was becoming old and settled already. And in general: how can an appeals court, when asked by three separate trial courts to decide a common question, cite one of the trial court's posing of the question as the answer to the question? Note that the Fifth Circuit did not consider three district court rationales and choose the best one. It cited one as authority for resolving the others.

[500] *Id.* at 1339.

> treatment personalized . . . . Since each patient is an individual and what is good treatment for one might mean disaster for another, the only feasible way in which the adequacy of treatment could ever be measured is against the needs of a particular patient . . . . The Court is persuaded that some matters are left for legislative and executive resolution short of federal judicial review. All too often, an instance of judicial overreach can result in a reduction of government services to a minimal level for fear of subsequent accountability for some innovative beneficial program. The rigidity of the court process can often stifle intelligent experimentation in dealing with social problems, often to the ultimate detriment of the very persons for whose benefit the litigation is commenced.[501]

D. *The New Equity and The Old*

Two commentators, one of whom is a federal appeals court judge, have precisely laid out the details of the new equity and contrasted it with the Anglo-American tradition of equity.

In his *Equity and the Constitution*,[502] Professor Gary L. McDowell diagrammed the differences between the new equity and the old in the following manner:

OLD	NEW
Equitable and legal procedures separated.	Equitable and legal procedures merged.
Applied to specific individuals.	Applied to broad social groups.
Focused on specific concrete rights, especially property.	Focused on more abstract rights, especially equality.
Usually exercised in a *proscriptive* way to block the enforcement of an unjust law or action.	Greater emphasis on broad remedial mandates, hence generally exercised in a *prescriptive* way.
Largely bound by precedent.	Largely unbound by precedent.

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[501] *Burnham*, 349 F. Supp. at 1343-44.

[502] G. McDowell, *Equity and The Constitution* 9 (1982).

OLD	NEW
Required an irreparable injury that was immediate, great, and clear.	Irreparable injury generally proved by a resort to social-science hypotheses.
Restricted by the federal principle.	Not restricted by the federal principle.

And Judge Frank M. Coffin of the First Circuit presents the following comparisons:[503]

	Conventional Adjudication	New Model
The Issue	Likely to be of private rights and duties. If public body involved, issue likely to be procedural.	Likely to involve substantive rights and means of compelling a public body to effectuate those rights.
Parties	Likely to be one "person" suing another.	Likely to be a class of individuals suing a class of officials, public institutions, and political entities.
Critical facts	Historical (what has happened) and adjudicative (relevant to rights and liabilities of the two parties).	Predictive (situation as it is likely to exist during life of decree) and legislative (relevant to continuing decree).
Governing Principle	Legal precedents.	Strategy, tactics, and potential outcomes not informed by legal precedent.

[503] Coffin, *supra* note 25, at 989.

	Conventional Adjudication	New Model
Taking of evidence	Adversary hearing and rules of evidence.	Wide participation, relaxed standards, more expert opinions.
Relief sought	Declaration, negative injunction, damages: normally narrow, closely tied to legal injury.	Affirmative injunction, affecting many beyond parties: potentially broad.
Framing of decree	Imposed by court after hearing evidence.	Large amount of negotiation.
Impact	Confined to parties.	Affects a large segment of society.
Duration of court involvement	One-time judgment.	Continuing decree: subject to reopening and amendment.
Role of Judge	Passive: adjudicative in resolving dispute between two parties in a one time, normally self-executing, judgment.	Active: legislative in framing criteria: executive in implementing decree.
Review	Abuse of discretion and error of law: sufficiency of evidence and legal precedents important.	Contribution of appellate court to policy, strategy, and tactics more important than monitoring fact findings or legal principles.

V. *A Limiting Principle for the New Equity*

The breadth-and-flexibility principle of *Swann* is without doubt the controlling principle in institutional injunction cases. The federal courts have come to regard it as their license-without-limit to make policy for

social institutions. In the Kansas City school desegregation case, already mentioned, the district court referred to this principle as its justification for ordering, *inter alia*, a tax increase.[504]

There is, however, a seemingly contradictory principle in *Swann*. In that case, the Supreme Court laid down the limiting principle that "the nature of the violation determines the scope of the remedy."[505] The Court distinguished between the judicial power and the power of "school authorities:"

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[506]

As opposed to the discretionary powers of these school authorities "whose powers are plenary," judicial authority, the Court said, "may be exercised only on the basis of a constitutional violation."[507] By way of comparison, the breadth-and-flexibility principle seems to imply that the powers of the judiciary are "plenary."

The Court did not cite any authorities or precedents for this nature-and-scope principle but said that the principle was the same "[a]s with any equity case."[508] This paper has already shown that in the tradition of equity, right and remedy were so closely allied that one implied the other. So, the *Swann* Court seemed to be enunciating a traditional principle and, again, one seemingly opposed to the principle that a court has a broad-and-flexible free hand once a violation has been determined.

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[504] *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part and reversed in part*, No. 87-1749 (8th Cir. August 19, 1988).

[505] *Swann*, 402 U.S. at 16.

[506] *Id.*

[507] *Id* .

[508] *Id.*

Absent a substantial return to the first principles of the Anglo-American tradition of equity — a return discussed in Section VI below — it may be useful to current practice to explore different aspects of this limiting principle, together with some related principles, suggested by the cases.

A. *The Validity and Relevance of the New Principle*

1. *Not Confined to School Desegregation Cases*

The nature-and-scope principle is not a judicial technique for determining how to go about desegregating public schools. The *Swann* Court said that it applied to "any equity case" and that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right."[509] In *Hills v. Gautreaux*, a housing desegregation case, the Supreme Court said that the principle, as elaborated upon in *Milliken I* (see below) "was premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context."[510] There were "fundamental limitations," the Court said, on "the remedial powers of the federal courts to restructure the operation of local and state governmental entities."[511]

In the employment discrimination case of *General Building Contractors Ass'n, Inc. v. Pennsylvania*, the Supreme Court construed the limiting principle to mean that the remedial powers of the federal courts "could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and the extent of that violation."[512] And in a recent prison case, the United States Court of Appeals for the District of Columbia explained that "These principles, expounded in the main in school desegregation cases, are fully applicable in cases in which prison conditions are found to constitute cruel and unusual punishment."[513]

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[509] 402 U.S. at 15-16.

[510] *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976).

[511] *Id.* at 293.

[512] 458 U.S. 375, 399 (1982).

[513] *Inmates of Occoquan v. Barry, 844 F.2d 828 (D.C. Cir. 1988), reh'g denied, July 8, 1988.*

2. *The Limiting Principle and the Equity of Milliken II*

In *Milliken v. Bradley (Milliken II)* (1977), the Supreme Court approved a district court's use of educational components (changes in the curriculum and in teaching and teaching methods) in a school desegregation decree. Since school desegregation had been commonly thought to be concerned with *access* to education, not the *conduct* of education, this represented a large expansion of the original *Brown* right and of the possible remedies associated with the *Brown* right. In addition, Professor Chayes has argued that this expansion essentially nullified the *Milliken v. Bradley (Milliken I)* (1974) decision that elaborated upon the restrictive nature-and-scope principle in *Swann* and that it was a turning-point — the essential judicial endorsement of unfettered equitable remedies — that cannot now be changed.[514] It is the purpose of this subsection to show that *Milliken II* did not refute *Milliken I* and, therefore, nullify the limiting principle first enunciated in *Swann*.

a. *Milliken I*

In *Milliken*, the Detroit desegregation case, the district court found that the Detroit Board of Education and the State of Michigan had both committed acts that caused segregation in the Detroit school system. The court found that the racial segregation in the schools of Detroit could not be eliminated without including in the desegregation decree school districts surrounding Detroit — even though there was no finding of a violation by the surrounding districts and even though the surrounding districts were not parties to the action.

The court emphasized the practical effectiveness of its remedial order and found that the "minimum remedy" was "maximum actual desegregation, taking into account the practicalities of the situation."[515] Since the state was "ultimately responsible for public schooling throughout the state,"[516] the court thought that it could reach the surrounding districts by including the state in its remedial order. The court decided

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[514] *See* Chayes, *Public Law Litigation and the Burger Court*, 96 Harv. L.R. 4, 49-50, 55 (1982).

[515] 345 F. Supp. 914, 937 (E.D. Mich. 1972).

[516] *Id.* at 940.

upon a massive cross-district busing plan based on racial percentages[517] and involving fifty-three school districts.

In affirming the decision of the district court, the Sixth Circuit engaged in little substantive analysis. It accepted the key finding of the district court that the multi-district decree was necessary for the sake of effectiveness and did not consider the issue of the want of wrongdoing of the surrounding districts.[518]

In overturning the lower courts, the Supreme Court noted that its prior desegregation decisions did not require racial balancing in the schools and that the district court had erred in trying to achieve such balance. Its prior decisions required only that remedies "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[519] Since discriminatory conduct occurred only in the Detroit school system, restoration could take place only in that system.

Citing the *Swann* "nature-and-scope" principle, the Court said that the district court's remedy was "wholly impermissible" because there had been "no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect."[520] No actions of the state or the outlying districts could be shown to have "directly caused" any interdistrict segregation, the Court said.[521] Therefore, "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[522]

The Supreme Court's decision clearly was a limitation on the power of courts and on the kinds of public issues that courts may take on. In separate dissents, both Justices White and Marshall argued that the Court was limiting the effectiveness of any decree that the district court

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[517] "Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [will be] substantially disproportionate to the overall pupil racial composition." *Id.* at 918.

[518] *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973).

[519] *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

[520] *Id.* at 745.

[521] *Id.*

[522] *Id* .

could now possibly order.[523] But the Court's decision concedes this point and imposes a prior limitation on the question of effectiveness in remedies. Remedies must be as effective as possible, but any remedy can only be as large as the violation. Courts do not have the power to impose the objectively-best social result; they can only right wrongs. Courts are invoked only when wrongs have occurred. But they act only to the limits of the wrongs. They cannot use a wrong as the basis for further action — action beyond the judicial.

b. *Milliken II*

In *Milliken II*,[524] the Supreme Court ruled for the first time that the federal courts could include educational components in their desegregation decrees. Until that decision, it had been thought that desegregation in education was a matter of school assignments, not of educational performance.

In a lengthy opinion, the district court found that the educational components, including provisions for testing, counseling, retraining of teachers, and reading, were "needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation."[525] Without citing expert opinion or supportive evidence,[526] the court made a number of assertions about the educational components. For instance, about testing, the court said that "the discriminatory use of test results can cause resegregation."[527] About counseling, the court said that "[s]chool districts undergoing desegregation inevitably place psychological pressures upon the students affected."[528] About in-service training of teachers, the court said that "[i]t is known that teachers' attitudes toward students are affected by desegregation."[529] And about reading, the court said that "statistical data establishes that minority youngsters lag significantly behind their white counterparts in reading skills."

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[523] *Id.* at 776, 784.

[524] 433 U.S. 267 (1977).

[525] *Bradley v. Milliken*, 402 F. Supp. 1096, 1118 (E.D. Mich. 1975).

[526] The court did, however, hear expert testimony during the proceedings. *See id.* at 1118.

[527] *Id.* at 1142.

[528] *Id.* at 1143.

[529] *Id.* at 1139.

However, about none of these educational factors did the court find a causal line between the factors and segregation. The court did not prove that any of them were constitutional violations. Nevertheless, it fashioned remedies to address them.

In affirming the district court's conclusion, the appeals court said very little. The Sixth Circuit stated that the findings of the district court were "not clearly erroneous" and were "supported by ample evidence."[530] "The need" for retraining of teachers was "to insure that the teachers and administrators will be able to work effectively in a desegregated environment."[531] The testing component was "needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools."[532] And the court, citing *Brown*, said that without the reading and counseling components, "black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish."[533] Thus, the court seemed to think that these good reasons for the educational components were the "ample evidence" that it spoke of.[534]

Only in the Supreme Court was there a consideration of the issue of violations and remedies and whether educational remedies were properly a measure of the violation. The Court said that equitable principles governed choice of remedies in desegregation cases and that three principles controlled the application of equitable principles. The first is the *Swann* nature-and-scope principle; the second is the *Milliken I* principle that decrees must be remedial, that is, restorative; that third is "the interests of state and local governments in managing their own affairs," which can be contravened only when "school officials fail in their affirmative obligations."[535]

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[530] *Bradley v. Milliken*, 540 F.2d 229, 241 (6th Cir. 1976).

[531] *Id.*

[532] *Id.*

[533] *Id.*

[534] Consequently, in its consideration of this case, the Supreme Court accepted uncritically that "The District Court expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system." *Milliken II* at 274-75.

[535] *Milliken II* at 280-81.

It can be seen that the first principle emphasizes the right and violations of right. It is the violation of right that measures the remedy. The second principle emphasizes the remedy and is almost tautological. It says that remedies must be remedial and defines "remedial" as "restorative." Remedies right wrongs. Remedies attempt to restore the victims of wrongs to the place they would have been if the wrong had not occurred. The third principle is clearly a derivative of the constitutional principle of federalism.

But only the nature-and-scope principle was at issue in *Milliken II*, the Court said, for the petitioners were not arguing either the restorative or the state/local principle. The petitioners argued that "since the constitutional violation found by the District Court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments."[536] Therefore, the petitioners alleged, the district court should have ordered only assignment remedies, not educational remedies; for educational remedies corresponded to another violation.

The Supreme Court said that it was going to decide this nature-and-scope question, but it did not really do so. The petitioners were clearly asking a question about the nature of the right violated. They wanted to know whether lack of educational accomplishment was included in the nature of the right first identified in *Brown*.

The Court, citing a passage in *Milliken I* to mean more than it was written to mean, said that remedies must be tailored to "the condition that offends the Constitution."[537] That condition was "Detroit's *de jure* segregated school system."[538] A district court could find that "the need" for educational components in the remedy "flowed from" that violative condition.[539] Consequently, the Court endorsed the district court's decision.

But it is difficult to argue that the Supreme Court cleared up anything with this conclusion. If the constitutional violation is the entire school system, then it would seem that everything about the school

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[536] *Id.* at 281.

[537] *Id.* at 282.

[538] *Id.*

[539] *Id.*

system could be conceived to flow from the large violation. The Court obscured the fact that it dramatically expanded the definition of the right in *Milliken II*. In *Brown*, it had said that "segregation of children in public schools solely on the basis of race" was the violation. And it had specifically discounted other factors, for it said that this segregation by racial groups, was the violation "even though the physical facilities and other "tangible' factors[540] may be equal." Thus, the Court was simply wrong when it said that the entire segregated school system was the condition that violated the Constitution.

Until *Milliken II*, it had been understood that the *specific* violation was assignment of pupils by race. With the Court in *Milliken II* creating an amorphous *general* violation, it is understandable that the Court could endorse a notion about remedies directed to concerns that "flowed from" constitutional violations.

There are still more problems with and qualifications about the Court's reasoning. Two paragraphs after saying that the only principle before it was the nature-and-scope principle, the Court said that the educational components "were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner."[541] In other words, the Court, after saying that it would not deal with the restorative principle, used that principle to explicate the nature-and-scope principle.

In addition, the Court repeatedly stated that it was only endorsing the *possibility* that the lower court could make such findings about the educational components. It was not laying down a rule that courts could order educational remedies. The Court said that "We do not, of course, imply that the order here is a blueprint for other cases."[542] In this case, the Court said, the district court's remedies were endorsed "by local

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[540] 347 U.S. 483, 493 (1954). About the "tangible factors," the *Brown* Court said, "Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible' factors." *Brown*, 347 U.S. at 492.

[541] 433 U.S. at 282.

[542] *Id.* at 287.

school authorities" and were based "on abundant evidence."[543] Thus, in the end, the Court did not really say that *it* found that educational remedies were matched to the nature and scope of the desegregation violation. It said only that a specific lower court could make such a finding. Thus, the real reasoning of the case was a somewhat conventional restatement of the Court's deferral to the record of the lower court that has been a hallmark of institutional injunction cases.

The limited nature of the case was re-emphasized by Justice Powell in his concurrence. Powell said that he wrote to emphasize the case's "uniqueness, and the consequent limited precedential effect of much of the court's opinion."[544] He expressed a considerable agreement with the argument that the educational remedies did not correspond to the constitutional violation. Powell said that he doubted whether there was "any precedent for a federal court's exercising such extensive control over the purely educational responsibilities of a school board."[545] And he said that it was "arguable" that the remedies were "too generalized to meet the standards prescribed by this Court," [546] and that it was "not frivolous" for the state to contend that the district court had made "no finding of a constitutional violation with respect to the past operation of any of these programs."[547]

Powell's joining in the opinion turned out to be highly circumstantial. He said that the district court assumption of the power of the school board was justified, first, because the district court had made a finding that the school system was "chaotic and incapable of effective administration."[548] Second, the school board itself was not contesting the decree. Powell was apparently unwilling to argue a case for school board authority more effectively than the school board itself. Third, and most important, Powell, like the majority, found that the record of the district court precluded any other result:

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[543] *Id.* Significantly, however, the Court did not review the district court's evidence. Nor could it. As already pointed out above, the district court made only assertions; it included no proofs of or evidence about its assertions.

[544] *Id.* at 292.

[545] *Id.* at 294.

[546] *Id.* at 298.

[547] *Id.* at 295.

[548] *Id.* at 296.

> But the majority views the record as justifying the conclusion that "the need for educational components flowed directly from constitutional violations by both state and local officials." . . . *On that view of the record,* our settled doctrine requiring that the remedy be carefully tailored to fit identified constitutional violations is reaffirmed by today's result. I therefore concur in the judgment.[549]

Overall, then, *Milliken II,* because it purported to be based only on an analysis of the nature-and-scope principle, cannot be said to have applied the three principles of remedies that it announced. Thus, it does not stand for the proposition that educational components of desegregation remedies meet those three principles or, in other words, that the *Brown* right and the remedial powers of the courts have been vastly expanded. Nor does it even stand for the proposition that educational components in a desegregation decree will always meet the nature-and-scope principle. It stands only for the result based on the specific facts of that case. And, as pointed out above, even that result is questionable since the supposedly "abundant evidence" found by the lower court, and considered a crucial support for the lower court's decision, was never revealed by the three levels of the federal judiciary that issued opinions in the case.

B. *Some Aspects of the Limitation of Remedies*

1. *The Constitutional Standard and the Standards of the Service and Social-Science Professions*

In institutional injunction cases, the role of judges has unavoidably intersected the role of psychiatrists, educators, and penalogists. There is a tendency to think that the expertise of judges and social scientists can comfortably overlap — with the consequence that both may act according to the same principles. But it does not appear that the Supreme Court has endorsed the tendency.

In *Milliken II,* the Supreme Court did not say that objective educational criteria — test scores, for instance — were the standards that courts were to use in their decrees. The Court said only that it was possible for a trial court to decide to use educational components as remedies. Although it is plausible to argue that the *Milliken II* Court

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[549] *Id.* at 298 (emphasis added).

altered the original *Brown* right by saying that it was permissible to use educational criteria in school desegregation cases, the Court did not say explicitly that it was doing so.

The most recent decisions in the Richmond, Virginia, school desegregation case have more clearly affirmed that in school desegregation cases, the federal courts are not dealing with educational standards. In *Bradley v. Baliles*,[550] the district court, citing the Supreme Court precedent of *Green v. County School Board of New Kent County*,[551] said that a school system will be deemed desegregated "when it is devoid of racial discrimination in regard to faculty, staff, transportation, extracurricular activities, facilities and pupil assignment."[552] This is "the primary defect" in segregated school systems.[553] Eliminating "*the vestiges of segregation*, in areas such as student achievement," the Court said, "is ancillary to and separate from the primary goal of eliminating the *segregation itself*."[554]

With respect to prisons and jails, the Supreme Court has said more than once that professional standards are different from constitutional requirements. In *Bell v. Wolfish*,[555] the Court said that "correctional standards issued by various groups" such as the American Correctional Association "do not establish the constitutional minima."[556] In *Rhodes v. Chapman*, the Court said that "contemporary standards of decency" define the purview of the Eighth Amendment and that "the opinions of experts" do not "suffice to establish" such standards.[557]

In another prison case, the United States Court of Appeals for the District of Columbia stated recently that

> [N]either "deficient" conditions or conditions that violate "professional standards" rise to the lofty heights of constitutional significance. Indeed, the obvious danger of employing

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[550] 639 F. Supp 680 (E.D. Va. 1986), *aff'd*, 829 F.2d 1308 (1987).

[551] 391 U.S. 430 (1968).

[552] *Baliles*, 639 F. Supp. at 687-88.

[553] *Id.*

[554] *Id.* (emphasis in original).

[555] 441 U.S. 520 (1979).

[556] *Id.* at 543-44 n.27.

[557] 452 U.S. 337, 348 n.13 (1981).

> professional standards as benchmarks is that they ineluctably take the judicial eye off of core constitutional concerns and tend to lead the judiciary into the forbidden domain of prison reform.[558]

In a case dealing with the rights of the mentally-handicapped in confinement, the Court identified the role of the professional expert as one for the evaluation of the legislature, not the judiciary:

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professional and not by the perhaps ill-informed opinions of the judiciary.[559]

In today's legal environment, it may seem startling that a court has said that the role of experts in the service and social-science professions is to advise *legislators*, not judges. This conclusion, however, is a consequence of the essential difference between the two roles. Legislators may take advice because it is their job to *deliberate* and act according to their discretion. The role of jduges is to *judge*, that is, to decide what the law requires.

2. *Specific Violations*

In overseeing the operations of multi-facility institutions, the federal courts have come to deal with broad and systemic social problems. Recend cases suggest, however, that the courts ought to avoid such problems and, instead, identify specific problems amenable to specific solutions.

In *Inmates of Occoquan v. Barry*, the appeals court criticized the district court for not analyzing prison conditions "with specificity."[560] The lower court "succumbed to the . . . error" of concluding that "a variety of deficiencies in the prisons in question warranted a global remedy . . . rather than a remedy mandating specific corrections of specific problems."[561] The "broad equitable discretion" of the judiciary should not be invoked as a "talisman" to order remedies that accomplish

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[558] *Occoquan*, 844 F.2d at 837.

[559] *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3256 (1985).

[560] *Occoquan*, 844 F.2d at 839.

[561] *Id.* at 841.

more than is necessary to remedy constitutional violations.[562] A federa court, instead, should "identify the conditions causing the constitutiona violation and order those conditions remedied."[563]

In a similar prison case, the Eighth Circuit recently agreed that court may not jump from finding a collection of problems in priso conditions to a comprehensive remedy that does not present itself clearl as an efficacious solution to specific problems. Concerning a distric court conclusion about the relationship between specific violations an the elimination of the practice of housing two prison inmates in cell designed for one inmate, the appeals court said that:

> An appropriate remedy would relate to correction of the constitutionally deficient conditions that have been found to exist, if any there be, rather than to the elimination of double-celling.[564]

Some of the school desegregation cases seem to stand for th opposite principle. The Supreme Court in *Columbus Board of Educatio v. Penick* said that a finding of racial discrimination in one part of school system "furnishes a sufficient basis for an inferential finding of systemwide discriminatory intent unless otherwise rebutted. . . ."[565] An in *Dayton Board of Education v. Brinkman*, the Court explicitly rejecte the notion that in school desegregation cases, plaintiffs are obliged "t prove with respect to each individual act of discrimination precisely wha effect it has had on current patterns of segregation."[566]

But more recent school desegregation cases are not using thi approach. In *Bradley v. Baliles*, the district court rejected broad claim that the federal courts should cure racial isolation in schools *per se* an provide for better school achievement among blacks. In breaking thes comprehensive claims into their specific parts, the court said that " would be prudent to consider and evaluate the evidence that wa

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[562] *Id.* at 843.

[563] *Id.* at 842.

[564] *Cody v. Hillard*, 830 F.2d 912, 914 (8th Cir. 1987), *cert denied*, 108 S. Ct. 1078 (1988

[565] 443 U.S. 449, 467-68 (1979).

[566] 443 U.S. 526, 540 (1979).

presented at trial."[567] In a long analytical opinion, the court proceeded to consider and weigh the evidence in specific detail.

In other recent school desegregation cases, federal courts have followed similar approaches. They have rejected claims for further relief for school systems where the courts have found that the initial wrong, assignment by race, has been cured and no intent to discriminate has been found to continue to exist. An example is the Boston school desegregation case, where the appeals court rejected a claim for a generalized continuing supervision of the school system by the district court. The appeals court looked at the nature of the case and at the evidence with respect to a number of specific factors. Concerning "white flight," for instance, it said that "school officials who have taken effective action have no affirmative fourteenth-amendment duty to respond to those who vote with their feet."[568]

In *Youngberg v. Romeo*,[569] a case dealing with mental hospitals, the Supreme Court found the specific-violation principle and spoke approvingly of two concurring opinions in the appeals court decision in the case. The Court approved of language in the appeals court that criticized the majority for " 'abandonment of incremental decision-making in favor of promulgation of broad standards. . . .' "[570] In addition, the Court endorsed language that warned against reaching issues not presented by the case because that:

> requires a court to articulate principles and rules of law in "the absence of an appropriate record . . . and without the benefit of analysis, argument, or briefing' on such issues.[571]

In another recent case involving the rights of the mentally-handicapped in confinement, the United States Court of Appeals for the Second Circuit overturned parts of the lower court's order. The court pointed out that a remedy must be "narrowly tailored to remedying

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[567] *Baliles*, 639 F. Supp. 693.

[568] *Morgan v. Nucci*, 831 F.2d 313, 323 (1st Cir. 1987).

[569] 457 U.S. 307 (1982).

[570] *Id.* at 319 n.25.

[571] 457 U.S. at 319 n.25.

constitutional violations."[572] The court then engaged in specific analysis to conclude, for example, that the Constitution does not mandate twelve-month schooling for the mentally handicapped and does not bind the states to a certain formula for stipends to families of the mentally handicapped. Thus, the lower court could not require these things in a package of "extensive improvements" for a mental hospital.[573]

In a larger sense, it is almost the definition of the judiciary that it deals with specifics. Law-making is the fashioning of general rules for groups. Courts are invoked when an individual controversy has occurred about a specific application of the general rule.

3. *What the Constitution Requires*

A corollary of the concept that the courts must deal with the specific and the concrete is that the judiciary deals only with what the laws or constitutions require. It is for the legislature and the executive to exercise choice and discretion. In the apportionment case, *Whitcomb v. Chavis*, the Supreme Court overturned a sweeping re-apportionment order of a district court and warned that "[t]he remedial powers of an equitable court must be adequate to the task, but they are not unlimited."[574]

In a subsequent re-apportionment ruling, the Court elaborated on its holding in *Whitcomb* by saying that "the District Court erred in fashioning a court-ordered plan that rejected state policy choices more than was *necessary* to meet the specific constitutional violations involved."[575]

The same principle of necessity has received emphasis from the Supreme Court in prison cases. In *Bell v. Wolfish*, the Court laid down the principle, repeated many times in subsequent decisions of the federal judiciary,[576] that in determining whether prevailing conditions at prisons offend the Eighth Amendment, the courts "must be mindful that these

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[572] *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1252 (2d Cir. 1984).

[573] *Id.* at 1243.

[574] 403 U.S. 124, 161 (1971).

[575] *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (emphasis added).

[576] *See e.g., McMurry v. Phelps*, 533 F. Supp. 742 (W.D. La. 1982); *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980); *Jones v. Mabry*, 723 F.2d 590 (8th Cir. 1983).

inquiries spring from *constitutional requirements* and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility."[577]

Only when the courts restrict themselves to what the laws and the Constitution *require* can it be said, as Alexander Hamilton said in *Federalist 78*, that the courts "have neither force nor will, but merely judgment."

4. *The Courts and "General Societal Ills."*

Allied to both of the foregoing principles is the related principle that courts must not stray beyond the true boundaries of the institutions that they are scrutinizing. In *Swann*, the Supreme Court said

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities.[578]

Likewise, in *Morgan v. Nucci*, the appeals court said that "judicially imposed desegregation remedy goes too far if it attempts to engineer some sort of idealized racial balance in the schools."[579] And in the Richmond desegregation case, the appeals courts said that "a school desegregation plan cannot remedy these general societal ills, even when they indirectly affect current students."[580]

5. *There May be a Practical Time Limit on How Long a Federal Court May Oversee a State Institution*

In *Bradley v. Baliles*, the district court found that no discrimination or vestiges of discrimination remained in the Richmond School system.

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[577] 441 U.S. at 539 (emphasis added).

[578] 402 U.S. at 22.

[579] 831 F.2d at 325.

[580] *School Bd. of the City of Richmond, Va. v. Baliles*, 829 F.2d 1308, 1314 (4th Cir. 1987).

A significant factor relating to this finding was the passage of time, fourteen years, since the implementation of the first decree in the case. The court said that "the longer the time since a school system has been segregated, the less likely it would be that vestiges of such segregation remain in the system."[581] The court also pointed out that "no student currently attending school in RPS has ever personally been subjected to *de jure* segregation."[582]

In the Boston school desegregation case, the appeals court recently dealt with the interplay of the passage of time and what the federal courts can realistically expect to achieve with their orders. The court pointed out that the law required only "maximum *practicable* desegregation"[583] and that:

> Little in the record suggests, however, that implementation beyond what presently exists is likely to be obtained. Student assignment orders have been in effect since the start of this suit's remedial phase in 1975. Over recent years, school defendants have attempted in good faith and with considerable success to make attendance patterns conform to the court's guidelines. While the goal of absolute compliance everywhere in the city may have remained elusive, no evidence has been presented to indicate that absolute compliance will become any more attainable in the future, nor has the court made findings or included specific instructions in its orders such as might be expected if it felt that school authorities were guilty of readily correctible errors.[584]

In still another school desegregation case, the Sixth Circuit rejected a claim that disparities in achievement scores were related to past segregated schools because, the court said, *inter alia*, that "we believe it is unrealistic to presume that this disparity in achievement is related to school segregation that ended in 1971."[585]

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[581] 639 F. Supp. at 691. The appeals court declined to rule on the issue of elapsed time. *See Baliles*, 829 F.2d at 1313.

[582] 639 F. Supp. at 689 (emphasis in original).

[583] 831 F.2d at 324 (emphasis in original).

[584] *Id.* at 324.

[585] *Oliver v. Kalamazoo Bd. of Education*, 640 F.2d 782, 811 (6th Cir. 1980).

6. *The Courts and De Minimis Violations of the Constitution*

In the prison case of *Estelle v. Gamble*, the Supreme Court laid down the principle that

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.[586]

In a more recent case dealing with confinement of the mentally handicapped, the Second Circuit endorsed this principle when it said that "Isolated instances of inadequate care, or even of malpractice, do not demonstrate a constitutional violation."[587] And in the Boston school desegregation case, the First Circuit said that the federal courts must not engage in "fine tuning" of social institutions.[588]

7. *Rearranging the Resources of Society*

In his highly-qualified and critical concurrence in *Milliken II*, Justice Powell pointed out that the original opposing litigants in the case, parents and the Detroit school system, had now joined forces in "a friendly suit" against the state.[589] Because no case or controversy remained from the original suit, it was apparent, said Justice Powell, that the parties were now pursuing the purpose of "extracting funds from the state treasury."[590]

In the Buffalo school desegregation case, the Second Circuit warned that "a court must be alert not to permit a school board to use a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegrega-

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[586] 429 U.S. 97, 292 (1976).

[587] *Society*, 737 F.2d at 1245.

[588] *Morgan*, 831 F.2d at 325.

[589] 433 U.S. at 293 (1977).

[590] *Id.*

tion."[591] And in the Richmond case, the district court said that "Although increased State funding to RPS would be desirable, as such funding would almost certainly have a beneficial effect on students, the Court only has the authority to order such funding if it is necessary to remedy the effects of past State-imposed segregation."[592]

8. *Deference*

a. *To the Trial Courts*

In institutional injunctions cases, the federal courts of appeals and the United States Supreme Court have largely operated on a principle of deference to the factual findings of the federal district courts. As pointed out above, the Supreme Court in *Milliken II* used this principle approving the district court's decree ordering educational components as part of a school desegregation remedy. The prevailing standard of deference has been recently enunciated by the Third Circuit:

> [W]e examine the district court's judgment not with the plenary review appropriate to review for error in subject matter jurisdiction, but search instead for indications that the district court abused its discretion. We defined that standard with specificity in *Evans*, emphasizing that as a reviewing court we are not empowered to consider remedial orders *de novo*, that where there has been intentional segregation the fashioning of a remedy is committed to the exercise of the district court's discretion, and that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." 555 F.2d at 378 (quoting *Swann* . . .). Thus, in the formulation of orders seeking to remedy the vestiges of intentional segregation, "an improper use of discretion exists only when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used." (citation omitted)
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> As a component of our review for abuse of discretion, our standard for examining the district court's fact finding is the

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[591] *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983).

[592] *Bradley v. Baliles*, 639 F. Supp. at 690.

familiar clearly erroneous rule.[593]

The contemporary question is whether this standard of deference to the trial court can still stand when trial courts, like the court in the Kansas City case, begin to order income tax increases, the institution of a commuter tax, and the issuance of bonds. Recent federal decisions, as pointed out in this section on the *Swann* limiting principle, do not seem to be following a tactic of deference. In the *Occoquan* and *Cody* prison cases, for instance, the appeals courts issued detailed corrections of the trial court's assessment of the facts.

b. *To State Officials*

Deference by the federal courts to the decisions of state officials regarding the policies of state institutions is a consequence of almost every principle enunciated in this section. As already described, it has been enunciated by the Supreme Court as the third element of the *Milliken II* elaboration of the *Swann* limiting principle. If, after two decades of judicial oversight of state institutions, some federal courts are recognizing the limits of their efficacy and the attenuation of the original violation, judicial deference to policymakers is now and will become an increasingly important consequence.

9. *A Model Case: Occoquan v. Barry (1988)*

The district court in *Inmates of Occoquan v. Barry*,[594] found that the Eighth Amendments was violated by prisons of the District of Columbia. The court capped the number of prisoners at a multi-complex prison farm and required prison officials to report periodically on what steps were being taken to address the "deficiencies" that the court had found.

The case was heavily dominated by experts. The plaintiff prisoners called five experts, and the prison officials called the same number. In addition, the court took extensive judicial notice of the professional standards of such organizations as the American Public Health Association, the American Correctional Association, the Occupational Safety and Health Administration, and the National Fire Protection Association.

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[593] *Hoots v. Pennsylvania*, 703 F.2d 722, 725 (3d Cir. 1983).

[594] 650 F. Supp. 619 (D.D.C. 1986).

The opinion of the court is a comprehensive penological, health, and safety survey of nearly every area and sub-area of prison life, including environmental conditions, fire safety, medical services, mental health services, and the "cumulative impact" of all these conditions. The court surveyed a total of twenty-three sub-areas of prison life. In all of these, the court found what it repeatedly called "deficiencies," which can be roughly defined as a falling-short of standards promulgated by some professional association, together with certain conclusions of fact by the court.

For instance, the court, by using the American Correctional Association's *method* of calculating the American Public Health Association's *standard* of 95 square feet of living space per inmate,[595] found that the Occoquan facility did "not provide adequate living space for inmates."[596] As a consequence of this inadequacy, the court found that there was a significant increase in the "risk of transmission of airborne diseases," that "excessive noise levels were prevalent in the living and day room areas of the dormitories," that "the lighting is inadequate throughout the dormitories," and that "general sanitation in the dormitories was found to be below acceptable standards."[597]

Concerning fire safety, the court found that the Life Safety Code, devised by the Life Safety Code Committee of the National Fire Protection Association, constituted "the minimum standards for fire safety in a correctional setting."[598] Under that Code, Occoquan had several buildings that were deficient because the "new building" standards of the Code were not applied when those buildings were modified, renovated, or when the occupancy was changed. The court also found deficiencies in the fire alarms, smoke detectors, fire extinguishers, electrical wiring, and evacuation plans.

Concerning programs, work opportunities, and activities for inmates, the court found "no disagreement among the expert penologists that inmates should be engaged in some productive enterprise" and that

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[595] "The accepted method of calculating living space is prescribed by the American Correctional Association ("ACA"). The ACA method of measurement of living space instructs that the calculation of total living space of a housing unit excludes the day room, toilet and shower rooms, as well as traffic corridors." *Id.* at 621.

[596] *Id.*

[597] *Id.*

[598] *Id.* at 626.

"idleness among inmates results in a variety of problems, including heightened tension, frustration, and violence."[599] The court further found that too many of the available jobs were only "make work" jobs, instead of "genuine full time jobs."[600]

The court did not restrict itself to the application of penological and health standards, as demonstrated by the examples above. Concerning the prison's food service, the court listened to expert testimony from both parties, noted that "neither expert felt that the conditions in the kitchen posed any imminent threat of harm to the inmates," but decided, nonetheless, that it did "not share defendants' view that all is well with the Occoquan food service."[601] The court then pointed out several deficiencies. Similarly, the court found that the "overworked" mental-health staff was "burned out," with a resulting "adverse impact on the quality of care."[602]

The court said that the applicable Eighth Amendment benchmark to measure these deficiencies was "contemporary standards of decency," a standard enunciated by the Supreme Court in *Rhodes v. Chapman.*[603] The district court also quoted the *Rhodes* court's admonition that trial courts should rely on "objective factors to the maximum possible extent."[604] This seemed to be the court's justification for its nearly-complete reliance on professional penalogical, health, and safety standards.

But the *Rhodes* court did not give a specific test to determine when prison conditions violate the Eighth Amendment and, thus, it did not equate "objective factors" with social-science or other non-legal standards. One of its purposes was to distinguish objective factors from "the subjective views of judges."[605] And it gave an example of objective factors in one capital-punishment case as those "derived from history,

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[599] *Id.*at 623.

[600] *Id.* at 624.

[601] *Id.* at 622.

[602] *Id.* at 630.

[603] 452 U.S. at 346.

[604] *Id.*

[605] *Id.*

the action of state legislatures, and the sentencing by juries."[606] These are sources entirely different from the social sciences or service professions.

Having found deficiencies in the Occoquan prison according to professional standards, the district court decided that the prison conditions "as a whole" violated the Eighth Amendment:

> Every facet of the operation at Occoquan is characterized by systemic deficiencies. While any one component, *i.e.* harmful noise levels, food services, etc., may not fall below the prescribed eighth amendment standard, the cumulation of the various deficiencies aggravated and exacerbated by an ever-increasing number of inmates creates a constitutionally unacceptable situation.[607]

However, citing its "broad" remedial powers, the court decided that it would not issue a detailed decree because "The primary responsibility for achieving the goals of the penal function in the criminal justice system, within constitutional parameters, is best left with the local government and prison officials."[608] Instead, the court capped the population of the prison and each dormitory within the prison. It also required prison officials to make monthly written reports about their efforts to improve the deficiencies.

Thus, the court contradicted itself. It issued a global remedy, the capping of the prison population, and enunciated some kind of principle of restraint as its rationale for a global remedy instead of a detailed decree. But it had already itemized a long list of specific deficiencies that it ordered prison officials to improve. The specificity of these deficiencies left little discretion with "local government and prison officials."

The district court's opinion is not arbitrary or idiosyncratic. The conclusions of the court are elaborately annotated with references to professional "objective" standards or to evidence taken in court. Thus, Judge Greene, in his dissent to the appeals court's overturning of the decision of the district court, was arguably correct when he said that "It cannot seriously be suggested, and appellants do not contend, that the factual finding that underlie the district court's conclusions are not

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[606] *Id.*

[607] 650 F. Supp. at 632.

[608] *Id.*

supported by the evidence."[609] And even when the court seems to be operating on its own opinions and failings, *e.g.*, when speaking of "burned-out" staff — it makes references to the trial transcript for support. The court's decision is a thorough investigation and criticism of the penalogical conditions at Occoquan.

In overturning the decision of the trial court, the Circuit Court of Appeals for the District of Columbia directed its attention to a survey of the facts found by the district court, a determination of the correct Eighth Amendment standard, and a determination of the extent of the remedial power of the federal courts.[610]

The appeals courts surveyed the district court's findings of fact and noted that the district court had found conditions "deficient," "excessive," "inadequate," not "acceptable," and "insufficient."[611] However, the district court "did not fashion a specific remedy tailored to specific findings of constitutional violations."[612]

The D.C. Circuit then criticized the district court's opinion as an exercise in "prison reform" instead of a decision about "core constitutional concerns."[613] The lower court had misinterpreted *Rhodes*, the D.C. Circuit said. *Rhodes* stands for the proposition that courts must look to "essential human needs," not deficiencies.[614] And these needs are determined by "the public attitude toward a given sanction or condition," not by penology.[615] The court rejected "professional standards as doing service for constitutional benchmarks."[616] Thus, an "objective" constitutional determination is not a scientific one. "It is decency — elementary decency — not professionalism that the Eighth Amendment is all about."[617]

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[609] 844 F.2d at 847.

[610] *Inmates of Occoquan v. Barry*, 844 F.2d 828 (D.C. Cir. 1988).

[611] *Id.* at 4, 5, 11.

[612] *Id.* at 15.

[613] *Id.* at 20.

[614] *Id.* at 18.

[615] *Id.*

[616] *Id.* at 19.

[617] *Id.*

The court said that the lower court's analysis in which it accumulated mere deficiencies into a global constitutional violation was incorrect:

> Time and again, the District Court pointed to "deficiencies' in conditions prevailing at the Occoquan facilities. Time and again, the court referred to the standards promulgated by various professional organizations or "agreement' among the experts concerning "sound correctional practice.' This approach, as we read the court's opinion, provided the foundation for its conclusion that liability was established under the "totality of the circumstances.' But what we see, unfortunately, wanting in the analysis is a determination that these "deficiencies' and shortfalls — alone or in combination — rose to the level of deprivations of the "minimal civilized measure of life's necessities.' Those necessities — food, shelter, health care, and personal security — must be analysed with specificity to determine whether essential mainstays of life have been denied to the inmates of Occoquan. If the necessities are provided, then the Eighth Amendment has been satisfied (apart of course from any claim, not asserted here, that the conditions are disproportionately severe in view of the various offenses for which the inmates stand convicted).[618]

Finally, the D.C. Circuit considered the extent of the remedial powers of the courts. The district court did not have the power to make the Occoquan prison "a better place or to bring it within sound penological practices."[619] These are not judicial abilities, the court said. Citing the *Swann* and *Milliken* principles, the appeals court noted that the district court had imposed a population cap as a remedy but had not found that overcrowding at Occoquan had violated the Constitution. Therefore, the remedy was not tailored to fit the violation. And since the district court had found only deficiencies, instead of violations, at Occoquan, the judicial remedial power could not be invoked at all. The decision of the district court must fall. The Constitution trumps the new equity:

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[618] *Id* . at 24 (emphasis in original).

[619] *Id.*

Our parting of the ways is equally fundamental with respect to our respective visions of the nature and scope of judicial power. Our colleague reads the judicial literature to give the courts broad power to fashion sweeping remedies to correct identified constitutional violations. There can be no doubt that the literature indeed contains language supporting precisely that broad vision, summoning up the historic image of the chancellor taking whatever steps in his broad discretion seem appropriate to rectify the situation found tainted with illegality. But it scarcely needs to be said that the lawsuit before us is no ordinary suit in equity. In this setting of institutional conditions litigation, courts must, as the Supreme Court has said time and again, craft remedies with extraordinary sensitivity. Here, courts work in an arena that represents a crossroads where the local political branches of government meet the Article III branch and the higher commands of the Constitution. Those expressions of concern, of restraint, mean something quite clear to us. It is, upon analysis, an attitude of respect for and consideration of the extreme difficulties confronting the political branches whose charge it is to make the policy decisions eventuating in the construction and operation of the Nation's prison system. It also means that we will not be quick to presume that the two other branches will cavalierly succumb to engaging in what the lower courts have been, at times, rather quick to condemn as *systemic constitutional* violations.

And it is but another dimension of the Supreme Court-mandated attitude of respect and consideration, albeit emphatically not to degenerate into judicial enervation and abdication, that the Court has impressed upon the lower tribunals in emphasizing the need narrowly to tailor the remedy to fit the violation. Rhetoric aside, that fundamental teaching, we believe, is at the core of the Supreme Court's message to the inferior federal courts over the last decades. That core message, to put it simply, trumps the broad rhetoric that our colleague understandably features.[620]

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[620] *Id.* at 34.

VI. *Recapturing the Legacy: Suggestions for Reform*

The previous section offered several practical suggestions immediately applicable to federal cases. This section explores various issues raised by this study with a view towards long-term reform.

A. *The Power to Do Equity*

Justice Douglas' proclamation in *Hecht v. Bowles* that equity is the judicial power "to do equity" has become the dictum that launched a thousand equity cases. On its face, it means nothing — since it is a tautology. Douglas can be presumed to have offered a further explanation when he went on to say that equity is some mixture of "mercy and practicality" and that this mixture made equity particularly suitable for "nice adjustment and reconciliation between the public interest and private needs." These assertions, however, have no precedents in the history of our jurisprudence, and Douglas did not cite any.

In its time, the *Hecht* case obviously did not have the impact that *Brown v. Board of Education* did in its time. But the Court in *Brown II* seemed to need the *Hecht* formulation to justify its turning-over of school desegregation cases to the federal district courts. Thus, although the *Brown* cases started the contemporary history of institutional injunctions issued against state institutions by federal courts, *Hecht* provided a needed rationale. And since the *Brown* cases introduced the idea of a separation between right and remedy — a right can be declared in one judicial decision and the remedy in another — the *Hecht* rationale has proven even more important.

Despite the Supreme Court's statement in *Brown II* that district courts could follow "traditional" principles of equity in fashioning desegregation remedies, there was, in fact, no such tradition and, therefore, no guidance in existence for the district courts to follow. Nor did the *Hecht* formulation supply any guidance, although it did supply the authority for the district courts to fashion their own solutions. Subsequently, this delegation to the discretion of the federal district courts became institutionalized in the federal judiciary, not only in the school cases but also in the succeeding cases concerning reapportionment, prisons, jails, mental hospitals, and other areas.

The importance of tracing the history of equity, as has been done in this study, is to understand that it had a very specific development.

Justice Douglas' proclamation about doing equity may be the most extreme claim for equity ever. Since it does not say or imply that equity serves the purpose of doing justice when, for circumstantial reasons, normal judicial procedures cause obvious injustice, it does not even restrict equity to the business of doing justice. Nor does it even admit the other ancient grounds for a liberal equity: Christianity and the natural law. Doing equity has no grounds. Douglas' statement grants an additional judicial power, a power to act according to a judge's private judgment.

B. *Justice According to Law v. Justice Without Law*

But it is clear that federal judges equate their private judgment with public justice. Federal courts see themselves as courts of conscience with a generalized power to correct injustices. Many of the decisions at the district court level — *Wyatt v. Stickney* is the paradigm — have been characterized by a particular manner of proceeding whereby emphasis is placed on the sometimes shocking facts and on the remedy that the court will apply — with little or no analysis of the new or established right that has been violated. These two-part cases of facts and remedy — as opposed to three-part cases of facts, right, and remedy — rather clearly establish that federal judges are taking the opportunity to correct perceived injustices when and where they find them.

When this conception of the federal judiciary as courts of conscience is combined with the conception of equity as an ad-hoc unreviewable power of trial judges, the result is a justice without rules, or in other words, *justice without law.*

C. *Recalling the Origins of Equity*

Since the history of equity is largely unknown today, it is not surprising that the true nature of equity is also largely unknown. The *Hecht* case of 1944, which explains nothing about the origin or nature of equity, is usually the oldest source cited by a federal court. The federal judiciary is today operating on an extremely powerful principle about which it has little understanding.

The history of Anglo-American equity and jurisprudence does show, however, that it is necessary to re-explain equity periodically. Blackstone, Story, and Pomeroy were all keen to refute the prevailing misconceptions about equity of their times. And the most important

misconception that they all set out to refute was the same one prevailing today, namely, equity as natural justice.

A profound change might be effected in the federal judiciary if it were widely known among judges that in the entire history of Anglo-American jurisprudence, equity as natural justice existed for a period of roughly 150 years in England (*never* in the United States) that ended 350 years ago.

D. *Re-Examining the Federal Rules*

The merger of the *procedures* of law and equity by the Federal Rules of Civil Procedure in 1938 may be a major reason for the loss of important *principles* of equity. Merger may have caused the notion to prevail that there were no more distinctions between law and equity. And that which was not supposed to happen — change in substantive rights — has happened. It hardly needs saying that when a federal judge uses what is supposedly an injunction to revoke prevailing policies and institute new policies controlling the daily lives of hundreds of inmates in a prison that substantive rights are being altered.

A recent pathbreaking study by Professor Stephen N. Subrin has pointed out that the relatively informal rules of equity triumphed over the highly formal rules of common law when the equity and common law procedures were merged into the Federal Rules. "[O]ur current legal landscape," Subrin concludes, with its "expansion of legal theories, law suits, and, consequently, litigation departments; enormous litigation costs; enlarged judicial discretion; and decreased jury power" is substantially the product ,of the expansion of equity procedure and equity thinking caused by the promulgation of and the precedents set by the Federal Rules.[621] Subrin goes on to say that

> Our infatuation with equity has helped us to forget the historic purpose of adjudication. Courts exist not only to resolve disputes, but to resolve them in a way that takes law seriously by trying to apply legal principles to the events that brought the parties to court. The total victory of equity process has caused us to forget the essence of civil adjudication: enabling citizens to have their legitimate expectancies and rights fulfilled. We are good at using equity process and thought to

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[621] Subrin, *supra* note 22, at 925.

> create new legal rights. We have, however, largely failed at defining rights and providing methods for their efficient vindication. The effort to defeat formalism so that society could move forward toward new ideas of social justice neglected the benefits of formalism once new rights had been created.[622]

Section VIII of the Federal Rules is entitled "Provisional and Final Remedies and Special Proceedings" and includes Rule 65, "Injunctions." Yet Rule 65 as a whole contains only a few procedural rules about how injunctions issue, even though 65(d) is supposed to be concerned not only with the form but also "the Scope" of injunctions. One cannot find in the Federal Rules even any indirect hint about the pre-eminence of the civil injunction in federal practice today.

The better view may be that remedies are part of substantive, rather than procedural law, but the formerly-subordinate position of equitable remedies was a matter of procedural law. So, it is almost bizarre that the once highly-circumscribed instrument, the injunction, is now used to such powerful effect without any parameters set out in the Federal Rules.

E. *The English Comparison*

As has been pointed out in this paper, the federal courts still speak of their traditional equity powers, but the only known predicate for this tradition is the English Court of Chancery.

In an irony of history, the English Court of Chancery, which has a seeming charge in the 1873 Judicature Act to fashion extreme remedies as "justice and convenience" warrant, has not done so; while the American federal judiciary, which has no such charge, has done so.

F. *Equity and the Separation of Powers*

This study has made much of the fact that English equity, especially as enunciated at the time of the American Founding, is a never-repudiated and, therefore, binding precedent on American courts. There is, however, a critical difference between the English and American traditions. In the United States, equity was incorporated into a larger

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[622] *Id.* at 1001.

legal scheme: a written Constitution. In England, there is no written constitution, and equity developed organically over a period of centuries.

Perhaps the main constitutional difference between the United States and England is the separation of powers, a subject whose relationship to equity that has been analyzed at length elsewhere.[623] In England, where the prime minister is a member of Parliament and the courts are subject to Parliament, there is no separation of powers as we understand that doctrine. The constitutional separation of powers, with its purpose of guarding against the concentration of political power, is a uniquely American putting into-practice of the ideas of Locke and Montesquieu. The American Founders cannot be imagined to have put equity in the judiciary article of the Constitution while thinking that it encompassed the power in both the legislative and executive articles. They would presumably find it difficult to comprehend the current state of judicial affairs where it is conceded by all, including the judges themselves, that the judiciary is routinely exercising executive and legislative powers, among which is the appropriation of public monies. In addition to recognizing the limitations inherent in equity, it is incumbent on the federal judiciary to develop a more comprehensive jurisprudence that recognizes the limitations of the judicial power.

The importance of the separation of powers was self-evident to the Founders. At the beginning of *Federalist 47*, Madison asserts that if it were true that the proposed Constitution violated the separation of powers, as some anti-Federalists had alleged, then he himself would not bother to defend it. For:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[624]

In *Federalist 78*, Hamilton discusses, among other things, how the judiciary could turn into a tyrant. In his famous conception, the judiciary has neither "Force [exercised by the executive] nor Will [exercised by the legislature], but merely judgment," and is, therefore,

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[623] *See* Nagel, *supra* note 26.

[624] *Federalist 47* at 313 (Modern Library ed. 1937).

"the weakest of the three departments of power."[625] Thus,

> [T]he general liberty of the people can never be endangered from that quarter . . . *so long as the judiciary remains truly distinct from both the legislature and the Executive.*[626]

Hamilton goes on to say that if the judiciary were to be combined with either or both of the other two powers, it would likely come at the initiative of those two. Hamilton thought that "the natural feebleness of the judiciary" would prevent it from encroaching upon the legislature or the executive. Thus, Hamilton does not seem to have anticipated the current problem of judicial encroachment.

The issue of the separation of powers is intimately connected to the issue of doing justice under law, or so it was to the Founders. The Massachusetts Constitution of 1780, for instance, proclaimed that

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, not of men.

But in order to make the often-enunciated American maxim that "Ours is a government of laws, not of men" true in practice, it must bind the judiciary as well as the legislature and the executive. The judiciary is as much bound by law as the executive, and all three departments are equally bound by the Constitution. In our democratic republic, it is anticipated that justice will be administered according to law, and the separation of powers is one constitutional device that exists to preserve this anticipation. In Appendix B, an excerpt from one of the essays of the eminent jurist Roscoe Pound succinctly describes the advantages of justice according to law.

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[625] *Federalist 78* at 504 (*Id.*)

[626] *Id.* (emphasis added).

G. *Injunctions As Royal Orders*

The gradual transformation of the English monarchy into a democracy (constitutional monarchy) coincided with the gradual systematizing of the equity power. The injunctive power, along with all other powers in equity, became tightly controlled by rules. This paper has been an effort to call attention to the fact that the only known analogue to the current injunctive power of the American federal judiciary is the ancient power of the English sovereign to act unilaterally.

Thus, what is perhaps most striking about contemporary federal equity practice is that it exists in a democracy, especially a constitutional democracy like our own which in its design had the major purpose of dividing, limiting, checking, and balancing public power. A highly-unilateral, discretionary public power is incompatible with such a design. A federal judge today has the power to re-arrange people, social policy, and social institutions in a manner that even the English kings never dreamt of doing as part of their personal "grace." The personal nature of this power — so similar to royal power — has been nowhere better characterized than by Professor Owen Fiss, an ardent champion of institutional injunctions:

> The issuance or enforcement of an injunction becomes an expression of a person, as much as it is an expression of an office — and represents a striking instance of the personification of the law — when we speak of the decisional authority in the injunctive process we often talk not of *the law* or even of *the court*, but of Judge Johnson or Judge Garrity.[627]

H. *Where There Is No Remedy, There Is No Right*

A major recurrent theme of this report has been that under the Anglo-American tradition of jurisprudence, there is no wide gulf between right and remedy. This is implicit in the phrase "equity jurisprudence." In the centuries leading up to the time when equity became systematized, the Chancellor may have had a somewhat arbitrary discretion to implement surprising remedies. But this freedom of the Chancellor had to disappear when equity became an alternative legal system. The more systematized equity became, the more it became bound by rules for when equitable remedies would issue. As written precedents

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[627] Fiss, *The Civil Rights Injunction* 28 (1978) (emphasis in original).

in equity accumulated, the possibility that a right could be found without the remedy being somewhat obvious became less and less.

Section II. A. of this paper may be the only analysis in existence that attempts to trace the history of the maxim, "where there is a right, there is a remedy," with a view to rediscovering its historical and true meaning. That analysis showed that there is no basis for regarding it as specific to equity at all and that it is just as meaningful to regard it as a maxim of the common law, or even, as a epigram describing the essential mission of the judiciary. Its connection to equity may be the result only of its association with the comparatively unimportant auxiliary jurisdiction of equity whereby access into equity was sought in order to enlist the freer and more powerful procedures of the equity court.

What is certain is that it cannot be taken as a one-line summary of either the nature or the jurisdiction of equity. Regarded as a minimum, it expresses only the truism that courts enforce rights with remedies. Regarded as a maximum, it does not mean that the judicial branch of government has an untrammeled freedom to cause the result in society that it wants — as long as it makes some attempt to say that a right is involved.

By the time common law had developed into a legal system, the processes governed by the forms of action made it clear that the contra-positive of the adage, "where there is a right, there is a remedy," was likewise true.[628] Where there was no remedy, there was no right. If a suitor's plea did not correspond to one of the forms of action, he had no cause of action. He had no enforceable right recognized by the common law. When equity developed into its own legal system, the same rule applied. This is all the more proven by the history of the right-remedy adage, related in this report, where it is demonstrated that the adage has no specific connection to equity.

That there is no right where there is no remedy is proven by the *Rees*,[629] *Heine*,[630] *Dows*,[631] and *Sawyer*[632] cases, as described in this

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[628] As a matter of logic, the contra-positive of a statement is always true if the statement itself is true.

[629] *See* Section II.A.1.

[630] *Id.*

[631] *See* Section III.B.6.c.i.

paper. These Nineteenth Century cases in the Supreme Court dealing with property rights, taxation, and public officers have important similarities to our contemporary institutional injunction cases. In both kinds of cases, the Court was being asked to intervene in unconventional ways into public controversies. The difference is that the Nineteenth Century Supreme Court, citing both the nature of the judiciary and the nature of equity, declined to intervene. As quoted in a previous section, in the *Rees* case, the Court said that

> A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of the law.[633]

In the *Heine* case, the Court said

> It is very clearly shown that the total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief.[634]

In *Dows*, a case where an injunction was sought against the collection of a state tax, the Court made an even stronger statement of principle when it said that "*even assuming the tax to be illegal and void*," that

> [T]he equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance.[635]

In *Sawyer*, the Court laid down the comprehensive principle that

> The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property; nor do matters of a political nature come within the jurisdiction of the court of chancery; nor has the court of chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property.[636]

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[632] *See* Section III.B.6.c.ii.

[633] *Rees*, 86 U.S. (19 Wall.) at 122.

[634] *Heine*, 86 U.S. (19 Wall.) at 658.

[635] *Dows*, 78 U.S. (11 Wall.) at 109 (emphasis added).

[636] *In Re Sawyer*, 124 U.S. at 214.

These cases and others suggest that an alternative equity jurisprudence is still available and that there is a well-developed foundation for a contemporary return to the true Anglo-American equity jurisprudence. As already stated, several of the older cases were brought with the same purposes and upon the same basis as contemporary institutional injunction suits. The reasons why such suits were rejected in the Nineteenth Century but accepted in the Twentieth need to be studied more closely.

In the English tradition, courts gave remedies. They did not give rights. Because their concern was with remedies, they developed a jurisprudence of when remedies would or would not issue. This is the subject of equity jurisprudence. Today, courts give rights as well as remedies, and the Supreme Court has effectively said that federal equitable remedies will expand to correspond with the right declared. That a remedy is as big as a right is the current one-rule jurisprudence of equitable remedies in the federal courts. So, when the right declared is as large as a state institution with several branches — a state prison system, for example — the remedy becomes very large indeed.

Absent an abrupt return to a more classic equity jurisprudence, Section V of this study, "A Limiting Principle for the New Equity," is a suggestion for the development of a set of guidelines to help the federal judiciary be more precise in its fashioning of injunctions in institutional cases. Although it presumes a continuation of the current practice of a separation of right and remedy, the principle that "the nature of the violation determines the scope of the remedy" does not seem at variance with a more classic jurisprudence. If judges become diligent in fashioning a more precise match between right and remedy, they will naturally develop the habit of thinking of right and remedy together, rather than separately.

I. *The Role of the Civil Jury*

That there was a fundamental antagonism between equity jurisdiction and the jurisdiction of the civil jury was obvious to the American colonists and to the newly-liberated American people at the time of the Founding. Since equity did not use juries, when equity judges strayed into areas governed by the common law, the right to trial by jury became restricted. The Seventh Amendment guaranteeing the right to trial by jury in cases at common law was a response to concerns about the reach of equity judges, among other concerns.

It is clear that the civil jury in federal cases is being crowded out by the contemporary explosion of federal equity cases. Over the last several decades, an entirely new area of federal adjudication, namely, public policy cases in equity, has emerged. Since there is no precedent for these cases in either law or equity, the adjudication of these cases in equity means that juries cannot be involved. Consequently, the ratio of federal jury cases to the total of federal civil cases has necessarily become smaller.[637] Another consequence is that the role of judges in society has become much greater.

Juries supply a lay element to the judicial process. Institutional injunction cases are perhaps the best contemporary examples of an extreme professionalization that is common in federal adjudication today. The extensive use of special masters, experts, and court-appointed monitors[638] — along with the change in the role of the judge, now often referred to as a "manager"[639] — in adjudication all imply that only professional expertise can solve questions of social policy. This in turn implies that the law is well beyond the reach of any layman who randomly shows up on the jury rolls.

The conception of the role of the lay citizen in the process of law was quite different at the time of the Founding. Juries not only found the facts, they found the law as well. In addition, the jury was regarded as an important political institution, that is, an instrument where the people themselves directly governed.

Today, there is no jury role for citizens in setting the policies of social institutions in institutional-injunction cases. And since judges have taken over legislative and executive power in such cases, there is likewise no citizen role by way of voting in the exercise of those powers.

Conclusion: Resisting the Urge to do Justice

When the ratification of the Constitution was being debated in 1787, some of the anti-Federalists warned of the danger of federal judges

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[637] Assuming that the influence of other factors in the increase of total federal civil cases has not changed.

[638] *See, e.g.*, Kirp and Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 Ala. L. Rev. 313 (1981).

[639] *See, e.g.*, McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440 (1986).

ruling according to equity *and* the Constitution, instead of equity *under* the Constitution. The contemporary fulfillment of this warning is the phenomenon that prompted the preparation of this report. Today, the federal judiciary can be observed deciding cases as if equity were a power equal, and sometimes superior, to the entire Constitution — instead of a subordinate power provided for by only one section, Article III.

Justice Douglas' *Hecht* opinion that the role of the judiciary is to "do equity" has had a nearly-incalculable effect on our contemporary federal courts. Perhaps even more important has been the influence of former Chief Justice Earl Warren whose judicial career institutionalized the notion that federal judges must "do justice," regardless of law or precedent.[640]

Compared to such a conception of the judicial role, questions of federalism and separation of powers may seem to be bland and lifeless issues of procedure. Yet, they were not so to the Framers of the Constitution. Madison thought that together the separation of powers and federalism *protected rights* and, in fact, were "a double security" for rights.[641] He also thought that the two doctrines essentially defined American constitutional government.[642] If so, then the judicial assumption of state legislative and executive functions — vaguely justified as the exercise of "broad equitable powers" — is a development of far-reaching implications. It seems to strike at the heart of our system of government.

Specific examples of injustice may manifest themselves clearly, the long-term consequences of resolving injustices according to an ad-hoc and discretionary view of the judicial role may not be so clear. In Roscoe Pound's review of the advantages of justice under law, he points out that the:

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[640] One of Warren's biographers has said that:

> Warren cast legal controversies in ethical terms, identified instances of injustice, and sought to use the powers of his office to provide a remedy. He functioned on the Court much as he had as governor, identifying needed reforms and seeking to undermine the position of those opposing such reforms by emphasizing that their opposition perpetuated injustices.

G. White, *Earl Warren: A Public Life* 350 (1982).

[641] *Federalist 51* at 339 (Modern Library ed. 1937).

[642] They made our republic "compound," whereas other republics were "single." *Id.*

> [A]dministration of justice according to law insures that in the weighing or balancing of conflicting interests, the more valuable ultimate interests, social and individual, will not be sacrificed to immediate interests which are more obvious and pressing but of less real weight.[643]

In a democratic republic such as ours, the structures of government; the allocation of public powers; and the accountability of all persons, institutions, and instruments of government to the people are not mere means. They are ends. They are "ultimate interests," both to the society as a whole and to each individual. It may be difficult to convince a prisoner experiencing an oppressive incarceration that he should care that the prison system be reformed only in a manner consonant with a self-governing people and with free and accountable institutions. But short-term solutions imposed by the judiciary that enervate and demoralize the other branches of government may set the stage in the future for much worse social and political ills.

The structures of government are not disposable. They are, in fact, crucial to justice, for the Constitution "establishes" justice as much in its three defined and separated powers as it does in the Bill of Rights and in its other provisions.

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[643] *See* Appendix B.

Appendix A

Examples of Institutional Injunction Cases According to the New Equity

The Appendix is a sampler of cases that demonstrate the kinds of broad legislative and executive powers that the federal judiciary has assumed today. It should not be taken to imply that the institutions in these cases did not need reforming nor that some kind of judicial intervention was not necessary.

1. *Boyd v. Board of Directors of McGehee High School District No. 17 et al.*, 612 F. Supp. 86 (E.D. Ark. 1985).

In *Boyd*, U.S. District Judge George Howard intervened in a hotly disputed high school homecoming queen election. Under the aegis of 42 U.S.C. 1983, Judge Howard granted a preliminary injunction ordering the school's football coach (who conducted the original, disputed election) to hold a new election with a voting machine, and further ordered that a football player suspended from the team by the coach for walking out of a pep rally and refusing to play at that night's game (as a protest against the coach's alleged manipulation of the election) be reinstated with full privileges pending a trial on the merits. At trial the judge ruled the election issue moot (as the new election with the voting machine led to the same result and the aggrieved homecoming queen candidate did not appear at trial to press her claims), but announced that the suspended player was entitled to $250 in nominal damages and $1,000 in punitive damages from the coach for the deprivation of his First Amendment free speech and Fourteenth Amendment due process rights. Judge Howard reasoned that the player's boycott of the game was entitled to First Amendment protection, and that his "privilege of participating in interscholastic athletics" was a property interest protected by the Fourteenth Amendment entitling him to a hearing before being suspended from the team.

2. *United States v. Board of Education of Chicago*, 567 F. Supp. 272 (N.D. Ill. 1983), *vacated and remanded*, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2358 (1985).

In *Chicago*, the Chicago Board of Education had entered into a consent agreement with the United States obligating both parties to make every good faith effort to find and provide funds adequate to implement

the city's school desegregation plan. The Board then alleged that the United States had failed to provide its share of adequate funding to implement the desegregation plan, and petitioned the court for an order directing the government to comply with the decree. Over the United States' objections, the district court construed the decree to require the government to provide whatever funding was necessary to implement the decree. The court thereupon determined the level of funding necessary under the plan ($103 million for the first year), and enjoined the United States from spending or obligating millions of dollars in various Department of Education accounts until such time as the funds determined by the court were made available to the Board. The order was later vacated by the Seventh Circuit.

3. *Liddell v. Board of Education*, 567 F. Supp. 1037 (E.D. Mo. 1983), *aff'd in part and remanded in part*, 731 F.2d 1294 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 816 (1984).

In *Liddell*, U.S. District Judge William Hungate ordered the St. Louis Board of Education ("City Board") to implement a specific financing plan to fund its obligations under a desegregation suit settlement agreement mandating massive suburban-inner city busing, a plan lauded by Judge Hungate as one of the "most creative social experiments of our time." 567 F. Supp. at 1041. Judge Hungate ordered the City Board to submit a bond issue to the voters sufficient to meet the costs of the plan, and enjoined the Board — pursuant to the settlement agreement between the Board and plaintiffs — from complying with a State law recently enacted through a public referendum ("Proposition C") rolling back property taxes. *Id.* at 1054. The Judge ordered that the revenues so retained were to be allocated to the costs of the plan, and additionally warned the voters of St. Louis that if these measures failed to raise the necessary revenues, he would enter an appropriate order raising property taxes as necessary to meet the shortfall. *Id.* Judge Hungate also took the time to berate state officials for providing inadequate funding for public schools: "While the state claims it is experiencing financial constraints, it has not responded historically to the educational needs of its school age children . . . . " '[O]nly one state in the country appropriates less funds than the State of Missouri for its educational system.' " *Id.* at 1052. The judge then ordered the state to pay one-half of the cost of various capital improvements in the St. Louis school system, even though he made no finding that the condition of the physical plant of St. Louis schools was in any way related to the previously found constitutional violations by the State or City Board.

On appeal to the U.S. Court of Appeals for the Eighth Circuit, the Court en banc upheld Judge Hungate's order requiring the State to fund capital improvements, but ruled that he erred in authorizing the City Board to fail to comply with the statutorily mandated rollback in property taxes absent a finding "that all other fiscal alternatives were unavailable or insufficient." 731 F.2d at 1323. Judges Gibson and Bowman dissented from, *inter alia*, the majority's upholding of the order to the State mandating capital improvements and its willingness to countenance, even in limited circumstances, a federal court decree authorizing noncompliance with State law requiring tax reductions. As to the latter issue, Judge Bowman decried the "singular inappropriateness in our Constitutional system of a federal court's ordering state and local authorities to impose specific tax increases." 731 F.2d at 1294.

4. *United States v. City of Parma*, 504 F. Supp. 913 (N.D. Ohio 1980), *rev'd in part*, 661 F.2d. 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

In *Parma*, a district court found that the City of Parma, Ohio was engaging in discriminatory housing practices in violation of the Fair Housing Act. After the parties were unable to agree on remedial action, the court formulated its own "comprehensive remedial plan" which included an order that the city enact a specific fair housing resolution "welcoming persons of all races, creeds and colors to reside in Parma." The court essentially became both legislature and administrator of public housing.

5. *Kite v. Marshal*, 494 F. Supp. 227 (S.D Tex. 1980), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982).

In *Kite*, the plaintiffs challenged a Texas high school athletic association rule suspending from varsity athletics for one year any high school student who attended a special summer training camp. U.S. District Judge George Cire declared that the rule infringed a parent's fundamental constitutional right "to send a child to summer basketball camp," 494 F. Supp. at 231, applied the strict scrutiny standard of review, and struck down the rule as unconstitutional. On appeal, the Fifth Circuit reversed, holding that the rule had not been shown to be "wholly arbitrary and totally without value in the promotion of a legitimate state objective." 661 F.2d at 1030.

6. *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

In *Penick*, the Supreme Court upheld the affirmation by the court of appeals of a district court's complete reorganization of the Columbus, Ohio school system. Upon finding that the school system was racially segregated in violation of the Equal Protection Clause of the Fourteenth Amendment, the district court ordered 42,000 of the system's 96,000 students reassigned to new schools. Reassignment of teachers, staff, and administrators was ordered, together with reorganization of the grade structure of virtually every elementary school in the system. Thirty-three schools were ordered closed, and 37,000 children were required to be bused to their new schools. Finding it "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system," 443 U.S. at 489, Justices Rehnquist and Powell dissented.

7. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in relevant part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977).

This case consolidated a variety of actions brought by inmates of Alabama penal institutions for declaratory and injunctive relief with regard to alleged deprivations of their Eighth and Fourteenth Amendment rights. The court entered judgment for the plaintiffs and established a full panoply of constitutional rights for the inmates, including minimum requirements with regard to cell space, lavatory facilities, food service, vocational and recreational activities, medical and mental treatment schedules, and staffing directives. The court went so far as to specify that prisoners have a constitutional right to receive postage and paper for five letters per week, razor blades, and lockers to place their possessions in (complete with locks to assure privacy). The court further retained jurisdiction to regularly inspect the various prison facilities and order further modifications if necessary. In this manner, the court effectively became the supervisor of the day-to-day operations of the entire Alabama prison system.

8. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086.

In *Washington*, the district court essentially took over the business of running the commercial fisheries of the State of Washington. In finding that the state's fishing regulations could not be applied to variety of Indian tribes without violating federal treaty rights, the court decided

to retain continuing jurisdiction to provide *advance* judicial review of all future state regulations affecting those rights. It entered a the series of orders and established a variety of regulations enabling it (with the aid of the U.S. Attorney for the Western District of Washington and various federal law enforcement agencies) directly to operate major portions of the state's fisheries. The court went so far as to devise a seven page salmon fishing management plan, which allocated all of the varieties harvestable salmon between treaty and non-treaty fisherman, calculated on the basis of complicated maximum harvest rates, run size estimations, and geographic regions of origin. *United States v. Washington,* 459 F. Supp. 1020 (W.D. Wash. 1978).

9. *Wyatt v. Stickney,* 323 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974).

In *Wyatt,* a district court ordered three state mental institutions to provide specified levels of psychiatric care and treatment to persons directly committed to those institutions. The court ordered implementation of a number of what it called "constitutional minimums" ranging from specific staffing ratios and area specifications per patient for various rooms (bedrooms, dining rooms, dayrooms), to detailed requirements for individualized treatment plans. In addition, the court designated and appointed members of human rights committees to "review all research proposals and all rehabilitation programs, to ensure that the dignity and human rights of the patients are preserved." *Id.* at 376. While the court reserved ruling that defendant Mental Health Board be directed to sell or encumber portions of its land holdings in order to raise funds, the court stated that "failure by defendants to comply with his decree cannot be justified by a lack of operating funds." *Id.* at 377.

10. *Davis v. Watkins,* 384 F. Supp. 1196 (N.D. Ohio 1974).

In *Davis,* patients of a state mental hospital brought a class action to secure the right to receive treatment while confined in the hospital's facilities. The district court concurred, finding that upon committing an individual to the hospital until such time as he regains his sanity, the state incurs a responsibility to provide care reasonably calculated to achieve that goal. After granting plaintiffs' motion for summary judgment, the court then issued a fifteen page order detailing the future method of operation of the hospital, including specifying the duties of all professional and non-professional staff members, outlining every conceivable phase of administrative operating procedure from admissions

through discharges, establishing minimum constitutional requirements for individual treatment plans, specifying methods of treatment, particularized patient rights, physical facilities requirements (including a directive that the dishwasher be supplied with 180° water), and dietary regulations.

11. *Mills v. Board of Education*, 348 F. Supp. 886 (D.D.C. 1972).

In *Mills*, a district court addressed the question of the rights of school-age children who have been diagnosed as mentally retarded, emotionally disturbed, hyperactive, or as having behavioral problems. The District of Columbia Public School Board had allegedly failed to provide adequate specialized instruction for these children in violation of the District of Columbia Code. In granting summary judgment for the school children in a class action suit, the court ordered the public schools to construct individualized special educational programs for each such child, and submit to the court the proposed curriculum, educational objectives, teacher qualifications, and relevant hearing and administrative procedures to be followed with respect to such proposed program. The court retained the authority to approve or disapprove each such plan, and stated that it would indefinitely retain jurisdiction to deal with the educational placement and proposed academic program of each child in the certified class.

Appendix B

The Advantages of Justice According to Law

In the early years of this century, Roscoe Pound, dean of the Harvard Law School and one of the dominant figures in American law of his time, published several essays on the function, method, and role of the judiciary. In three essays published in the *Columbia Law Review* in 1913-14,[644] he undertook an extended analysis of judgment according to discretion and judgment according to rules. Pound was a strong advocate of equitable discretion, and he regretted the systematization of equity that occurred in the Eighteenth and Nineteenth Centuries.[645] Nevertheless, the excerpt from one of his essays[646] is presented below because he lays out with succinctness and clarity the practical rationale for a judiciary that operates according to law.

> Administration of justice according to law has six advantages: (1) Law makes it possible to predict the course which the administration of justice will take; (2) law secures against errors of individual judgment; (3) law secures against improper motives on the part of those who administer justice; (4) law provides the magistrate with standards in which the ethical ideas of the community are formulated; (5) law gives the magistrate the benefit of all the experience of his predecessors; (6) law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty, immediate interests.
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> It is unnecessary to say that the first of these advantages is decisive in the modern world. The social interests in security of acquisitions and security of transactions demand not only a peaceable ordering of society but quite as much certainty and uniformity of magisterial and judicial action. Where law brings about this certainty and uniformity, labor and capital may be spent upon great undertakings of a permanent

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[644] Pound, *Justice According to Law I*, 13 Colum. L. Rev. 696 (1913); *II*, 14 *Id.* 1 (1914); *III*, 14 *Id.* 104 (1914).

[645] *See* Pound, *The Decadence of Equity*, 13 Colum. L. Rev. 696 (1913).

[646] Pound, *Justice According to Law I*, 13 Col. L. Rev. 696, 709-12 (1913) (Footnotes omitted).

character with assurance of the course which the state will pursue and will compel others to pursue with respect thereto. Hence in the history of law, as Montesquieu pointed out, periods of commercial and industrial development make for certainty." The industrial and commercial world demand rules. No one devotes his life to a specialized bit of labor, becoming a minute cog in an industrial machine, or engages in complex commercial undertakings, or makes large investments trusting to uniform exercise of discretion or to free judicial search for the rights.

The second and third advantages are no less decisive in modern society. Political experience has made clear abundantly the truth of Stammler's axiom of justice through law: "One will must not be subject to the arbitrary will of another.' The individual interest in personality and the social interest in the individual moral and social existence require precise delimitation of interests of personality and judgment of conduct by standards applied in accordance with principles of reason. If rules and over-rigid standards sometimes hinder the judge and prevent the best solution of which he is capable, they secure us against the well-meant ignorance of the weak judge and are our mainstay against improper motives on the part of those who administer justice. Oriental judges, bound by little or no law, are notoriously corrupt. A judge tied down on every side by rules of law and the necessity of publicly setting forth his reasons upon the basis of such rules, cannot do much for a corrupter, if he would. In consequence, highly formal and technical systems are often prized as bulwarks of liberty, and necessary liberalizations which involve judicial discretion are looked upon with suspicion by those who would be expected to stand for progress.

Although less important, the fourth and fifth advantages are very real. Even where detailed rules are impossible from the nature of the case, if we are to prevent arbitrary subjection of the will of one to the will of another, something more than a general reference to the social standard of justice or the ethical notions of the community is required. The law may furnish standards where it cannot furnish rules, and these standards may formulate the social standard of justice or the ethical notions of the community so as to guide the magistrate. More

than this, the rules and principles of the law contain the experience of the past in administering justice. No judge can hope to have the experience which they involve and make available. In this respect the law has been compared aptly to the rules and formulas of the engineer. The engineer finds the wisdom and experience of his predecessors summed up in these formulas. He has only to apply them. He may never be able to discover all of them independently for himself. He may never have seen some of them exemplified. He may never have worked out a single formula. Yet by means of these formulas he can work swiftly and surely. In the same way the judge can dispatch a large part of the great mass of litigation that comes before him in the modern court with assured confidence by applying formulas which he has no time to work out anew, which, moreover, he need not know how to reach independently.

Finally, administration of justice according to law insures that in the weighing or balancing of conflicting interests, the more valuable ultimate interests, social and individual, will not be sacrificed to immediate interests which are more obvious and pressing but of less real weight. It provides a standard, determined in advance of controversy upon deliberate and dispassionate review of all the interests to be secured and the relative importance of each in the long run, and thus opposes an effective check to the natural human impulse to yield future interest to apparent present advantage. In this way the law secures social interests, such as the interest in security of social institutions and the interest in the use and conservation of natural media which, if controversies were adjusted by the unfettered will of the magistrate in each case, might be made to yield continually to the more immediately urgent interests of individuals.