THE TRIUMPH OF EQUITY

DOUGLAS LAYCOCK*

I

INTRODUCTION

I sense a certain segregationist spirit in the planning of this symposium. Not only should equity be preserved, but it should be preserved separate and self-conscious. In Delaware they do it right, with a separate court and a high-ranking official called the Chancellor of Delaware. Chancellor Quillen described the office as preserving "a touch of royalty to the judiciary."1 Perhaps it was only sound republican sensibilities that precluded calling this unique judge the Lord High Chancellor of Delaware.2

Of course, Delaware is exceptional; most states have long since merged their courts of law and equity. Most lawyers I meet are incredulous that anyone my age ever taught a course in equity. But I once talked with a practitioner in Mississippi who was incredulous that Illinois had a merged court system. He said, "How does that work? I mean, do they just do everything together, all mixed up?" Indeed they do, except in Cook County, which still has a Chancery Division in its merged Circuit Court.

The segregationist spirit insists that even in a fully merged system, it is important to preserve the separate traditions of equity, to think of equity as a distinct body of law. It may be administered together with other bodies of law in our modern merged court system, but we should always know when we are invoking equity.

I dissent. My instincts are much more integrationist. The distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won. We should stop thinking of equity as separate and marginal, as consisting of extraordinary remedies, supplemental doctrines, and occasional exceptions, as special doctrines reserved for special occasions. Except

Copyright © 1993 by Law and Contemporary Problems

* Alice McKean Young Regents Chair and Associate Dean for Research, The University of Texas School of Law.

I am grateful to Harold Bruff and Linda Mullenix for helpful comments on earlier drafts, to Thomas McGarity, Samuel Issacharoff, Michael Sturley, and Jay Westbrook for bibliographic help in their specialties, and to Jeannie DeArmond-Henselman for research assistance.

After selecting a title for this article, I discovered that Abram Chayes used “The Triumph of Equity” as the heading for one section of his famous article on public law litigation, which of course I had read. Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1292 (1976).


2. Besides, someday a woman will hold the post, and with a form of address that survived by rote repetition, social progress would be a destabilizing novelty. "The Lady High Chancellor" would seem as strangely unfamiliar as "Ms. Justice O'Connor."
where references to equity have been codified, as in the constitutional guarantees of jury trial, we should consider it wholly irrelevant whether a remedy, procedure, or doctrine originated at law or in equity. We should invoke equity just as we invoke law, without explanation or apology and without a preliminary showing that this is a case for equity. Our goal should not be separate courses and conferences on equity, but rather, full recognition in all courses and all conferences of those parts of the law that happen to come from equity.

Equity is ordinary, not extraordinary, in remedies, procedure, and substance. Perhaps most important, the discretion once associated with equity now pervades the legal system. To the extent that debate persists over discretion or other features associated with equity, it is a general debate about the best way to run a legal system. The debate is not about the boundary between law and equity, and it distorts analysis to continue thinking in terms of law and equity.

Parts II through V support these claims by reviewing the contributions of equity to remedies, procedure, and substantive law, and to our attitudes toward discretion and formalism. Parts VI and VII turn to contemporary and future debates that might be misinterpreted as a reaction against equity. I argue that these are simply debates about the best way to run a legal system, and that they no longer have anything to do with the law-equity distinction.

II
Remedies

Much of my scholarly work has been devoted to the claim that there is nothing special about equitable remedies. The principal project began in a short paper presented to the faculty colloquium series at the Duke University School of Law. Eight years later, that short paper had grown into a book that collects, reports, and synthesizes some 1400 injunction cases from every U.S. jurisdiction. I investigated the actual operation of the traditional rule that courts will not grant an equitable remedy if a legal remedy would be adequate, or, in an equivalent formulation, that equity will act only to prevent irreparable injury, where “irreparable” means incapable of being repaired at law. I concluded that this rule is dead, and that if we have to generalize about the choice of remedy, we would do better to say that plaintiff is entitled to choose either specific or substitutionary relief unless there is some articulable reason to override her choice.

When I say that the irreparable injury rule is dead, I do not mean that judges no longer talk about it in opinions. Rather, I mean that the rule is always satisfied, so that it never constrains a court’s decision in any case where the


4. For a showing that the two formulations are equivalent, see IRREPARABLE INJURY, supra note 3, at 8-9, 25-27 nn.9-11.
choice of remedy matters. In those cases where a court says the rule is not satisfied, the court must ignore its main line of precedent about the meaning of the rule. And in those cases, there is always some other reason to deny equitable relief. I think that "dead" is the right word to describe the status of such a rule, but my use of that word may have diverted the issue. An abstract idea is only metaphorically alive in the first place; what does it mean to say it is metaphorically dead? I do not want to spend the rest of my career debating the metaphysics of a metaphor.

I will return to the question of what I meant by "death." But let me avoid that question for a time, and begin by simply summarizing my research on the law of remedies. I will emphasize what courts say when they choose to grant equitable remedies. They sometimes say rather different things when they deny equitable remedies, and this article discusses those cases. But, first, consider the scope of the explanations courts give when they find legal remedies inadequate. The reasons courts have given for holding legal remedies inadequate cover every possible case in which the choice of remedy might matter.

The legal remedy is inadequate unless it is as complete, practical, and efficient as the equitable remedy. This definition of adequacy is virtually universal. Think about the implications of this definition. If the two remedies differ in any way, and if plaintiff prefers the equitable remedy, he simply points to the difference and notes that in that respect, the legal remedy is less complete, less practical, or less efficient. If plaintiff cannot find such a difference, then for all practical purposes, the remedies are the same. This definition of adequacy requires no sacrifice from plaintiffs. We do not require plaintiff to accept a less-than-ideal remedy just because the irreparable injury rule says he should.

The next most important specification of the irreparable injury rule is that damages are inadequate unless they can be used to replace the very thing that plaintiff lost. This means that courts never consider money an adequate remedy in itself. Rather, the only adequate remedy is replacement of the loss in kind, and money is adequate only if it can be used to obtain replacement in kind. This rule is also virtually universal. Sometimes it appears in the guise of the rule that damages are inadequate if they are too difficult to measure. Damages are difficult to measure only when the thing plaintiff lost cannot be exactly replaced in a market transaction.

Even where plaintiff can use money to replace her loss in kind, damages are inadequate if replacement would be inconvenient. This rule is not universal; a significant minority of cases holds that plaintiff must suffer the inconvenience of

6. IRREPARABLE INJURY, supra note 3, at 22-23, 35-36 nn.80-81.
7. Id. at 37-72.
8. Id. at 44-47, 66-71 nn.97-117.
finding her own replacement. This minority line of cases is the principal remnant of the irreparable injury rule.9

There are also narrower reasons for holding legal remedies inadequate: that they would require a multiplicity of suits; that defendant is insolvent; that defendant is immune from damages; that a damage action is not ripe, and that plaintiff will be harmed by legal uncertainty in the interim; or even that plaintiff will lose some tactical litigation advantage.10 The rule about multiplicity of suits has a particularly important implication. One reason legal remedies might require a multiplicity of suits is that damages are too small to deter repeated violations.11 Thus, “irreparable” does not mean “serious”; to the contrary, an injury that is trivial in monetary terms is for that reason an irreparable injury.

The only injury for which damages are an adequate remedy under these rules is loss of fungible goods or routine services in an orderly market. Even in litigation over goods, equitable remedies are far more common than the conventional wisdom would suggest. Almost any aspect or quality of an item sufficiently distinctive to motivate a demand for specific relief is also sufficient to satisfy the irreparable injury rule. Specific performance has been granted to recover a used crane, a better quality of toner, and carrots with red cores instead of yellow.12 Even perfect fungibility is irrelevant if the goods are in short supply.13

Even if fungible replacements are readily available, replevin will lie to recover the goods if plaintiff held a property right in the goods. That is, courts also give specific relief at law without reference to the irreparable injury rule. Thinking in historical categories of law and equity diverts attention from the functional category of specific relief, which is not confined to equity.14 There is no anticipatory version of replevin; in theory, injunctions to prevent defendants from converting or destroying goods are subject to the irreparable injury rule, so an injunction should be denied if the goods are fungible. But most courts enjoin threatened conversions and destruction of property without regard to the irreparable injury rule.15 Despite the rule, courts do not believe that I should be allowed to steal or destroy your property so long as I can pay for it and you can replace it.

As a practical matter, therefore, the irreparable injury rule limits plaintiff to damages only in cases of breach of contract to deliver fungible goods or perform routine services. Fungible goods is the classic category that we all learned in law school, but fungible goods and routine services are categories of trifling importance. If the market is really orderly and the goods or services are really

9. Both the majority and minority lines of cases are reviewed in id. at 42-44, 65-66 nn.86-96.
10. These sources of irreparable injury are reviewed in id. at 73-98.
11. Id. at 73-74.
12. Id. at 56 nn.37-41, 59 n.51.
13. Id. at 100-01, 107-08 nn.9-15.
14. For the significance of replevin and ejectment to understanding our remedial scheme, see id. at 13-15, 18-19, 40-41, 59 n.57.
15. See id. at 40-41, 60 nn.61-62.
readily replaceable, plaintiff is unlikely to sue for injunction or specific performance, and nothing important turns on the choice of remedy if he does. The principal significance of this rule is that it gives rise to cases that are fairly arguable when replacement is possible but inconvenient. These line-drawing arguments lead to unnecessary litigation, occasional unjust results, and difficulties with our civil law trading partners. It is hard to see the benefits.

Compare this narrow category of cases, where the traditional rule precludes equitable relief, to the vast areas of the law where equitable remedies are routine, standard, normal. Injunction or specific performance is the usual remedy in all litigation relating to rights in real estate, including not just specific performance of contracts to sell, but also specific performance of restrictive covenants, condominium restrictions, and lease agreements, and injunctions against encroachments, nuisances, continuous or repeated trespasses, interference with easements, wrongful foreclosure of liens, violations of zoning laws, and removal of timber, minerals, or lateral support.

Injunctions are routine in all environmental litigation, including litigation over air and water pollution, endangered species and destruction of habitat, and environmental impact statements. Injunctions are routine in all civil rights and constitutional litigation, including litigation over discrimination, voting rights, procedural rights, freedom of speech and religion, and threatened searches and seizures.

Injunctions are a routine remedy for misappropriation of trade secrets and infringement of patents, copyrights, or trademarks. Injunctions are routine for other business torts when the harm is not beyond the possibility of reversal—for violations of antitrust laws and covenants not to compete, interference with contract, and other sorts of unfair competition. Damages are inadequate for any wrong that causes loss of profits, including breach of complex or long-term contracts, because lost profits are hard to measure. But the routine recognition that damages are inadequate does not lead to routine specific performance, because of countervailing concerns about the difficulty of supervising complex or long-term contracts.

Injunctions and specific performance are routine in litigation over the ownership and control of business entities, including franchise agreements, contracts to sell businesses or controlling blocks of stock, or even noncontrolling
blocks of closely held stock, and in disputes over the rights and powers of officers, directors, and shareholders. The Delaware Chancery Court serves its function as an expert forum for corporate law precisely because all significant corporate litigation can be brought in equity. If equitable jurisdiction were really extraordinary, the scheme would not work; the court's jurisdiction would have to be redefined in terms of cases arising under the Delaware Corporation Act. That has not been necessary because equity is not extraordinary. With little doctrinal distortion, equitable jurisdiction can be made nearly universal in corporate matters.

The set of cases where equitable remedies are routine is vastly larger and more important than litigation over fungible goods and routine services in orderly markets, the one modest area where equitable remedies are doctrinally precluded.

The largest category of litigation in which damages are the routine remedy is personal injury litigation. But the dominance of legal remedies here has nothing to do with the separation of law and equity. Courts readily enjoin conduct that threatens personal injury when there is opportunity to do so. But in most personal injury cases, the harm has already been irreversibly suffered, and damages are the only possible remedy. The court has no choice of remedies, and the irreparable injury rule is irrelevant. The irreparable injury rule could matter only where some harm will accrue in the future, and the court can choose between preventing the harm or letting it happen and awarding damages.

Many other damage suits arise in similar circumstances: plaintiffs seek damages for breach of contract, injury to land, harm to the environment, violation of civil rights, securities fraud, antitrust violations, and business torts when the harm has been done and can no longer be reversed, or when a self-help remedy such as buying replacement goods, followed by a suit for damages,

24. See id. at 40, 56-57 nn.42-45.
26. The Court of Chancery has jurisdiction over “all matters and causes in equity.” DEL. CODE ANN. tit. 10, § 341 (1975). It is specifically deprived of jurisdiction over “any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.” Id. § 342. There is no additional grant of jurisdiction in the General Corporation Act.
27. A case that successfully tested the limits is Harman v. Masonean Int'l, Inc., 442 A.2d 487 (Del. 1982), where damages were the only feasible remedy. The court held that a claim against corporate management for fraud or breach of fiduciary duty falls within equity's substantive jurisdiction over fraud, without regard to the adequacy of the legal remedy. Id. at 496-99. Alternatively, the court held that the legal remedy was inadequate, because at law the plaintiff would have to prove intent to defraud, would be limited to out-of-pocket damages, and could not sue on behalf of a class. Id. at 499-500.
28. See IRREPARABLE INJURY, supra note 3, at 41-42, 64-65 nn.81-85.
29. On the universe of cases in which choice is possible, see id. at 16-19, 30-33 nn.44-58.
is quicker and more effective than specific performance or injunction. Very few plaintiffs with a choice elect to suffer serious harm and then sue for damages.

Why do so many good lawyers continue to think of damages as the norm and equitable remedies as extraordinary? I think it is because the large number of routine cases in which damages are the only possible remedy seem to confirm the traditional teaching. But the confirmation is only seeming; cases in which there is no real choice of remedy reveal nothing about the rule or the practice in cases where there is a choice. Where the facts permit a choice of remedy, there is nothing extraordinary about equity. Modern U.S. judges have accepted the equitable view that "a remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it."30

Of course, there are cases that present a real choice among remedies, the plaintiff asks for the equitable remedy, and the court denies it. Sometimes the equitable remedy is more costly to the court or to the defendant; sometimes the equitable remedy interferes with other policies in a way that the damage remedy does not. Whenever a court denies an equitable remedy, it is likely to invoke the irreparable injury rule and thereby perpetuate the myth that there is something extraordinary about equitable remedies. But these cases almost never depend on the irreparable injury rule or the extraordinariness of equity.

When I say that these cases do not depend on the irreparable injury rule, I mean to assert two claims that are closely related but logically independent. First, what courts say about irreparable injury in cases denying plaintiff's choice of remedy is flatly inconsistent with what courts say about irreparable injury in cases where injunctions are routinely granted; sometimes, courts denying injunctions say things that are utter nonsense.31 Second, cases denying plaintiff's choice of remedy can always be explained on the basis of some other articulable reason for choosing the less adequate remedy on the facts of the particular case. When a court awards damages for air pollution instead of enjoining operation of a cement plant, it is not because damages are an adequate remedy in pollution cases. It is not because equitable remedies are extraordinary and require special justification. It is simply because, on the particular facts, it would be unduly expensive to close the cement plant.32 The law-equity distinction adds nothing to that explanation. Indeed, the same policy judgment appears in cases where only damages are sought.33

30. 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 1357, at 967 (5th ed. 1941). This statement survives intact from Pomeroy's first edition. 3 id. at 389 (1883).
31. My favorite example is Willing v. Mazzocone, 393 A.2d 1155 (Pa. 1978), holding that a damage judgment against an insolvent defendant is an adequate remedy for continuously repeated defamation, even though the damages could neither be collected nor accurately measured.
33. See Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962) (refusing damages based on cost of performance and awarding damages based on loss of value instead); see infra text accompanying notes 105-07.
By far the most common reason for denying plaintiff's choice of remedy is that the case has not yet been tried. Preliminary relief is granted or denied under a balancing test in which irreparable injury plays a prominent role. Requests for preliminary relief—mostly preliminary injunctions, but also temporary restraining orders and receiverships—account for seventy-five to eighty percent of all West headnotes stating the irreparable injury rule.\textsuperscript{34}

At Duke's Modern Equity symposium, Chancellor Allen said to me that almost none of his cases get to final judgment—that he grants or denies the preliminary injunction and then the case settles. It is therefore not surprising that he thinks the irreparable injury rule is alive and well in his court. But the survival of something like the irreparable injury rule at the preliminary injunction stage implies nothing about my claim that the rule is dead at the final judgment stage.

Note three things about the apparent survival of the irreparable injury rule at the preliminary injunction stage. First, irreparable injury at the stage of preliminary relief means something very different from irreparable injury at the stage of permanent relief. The label is the same, but the rules are very different. Injury that is obviously irreparable at final judgment is often not sufficiently irreparable to justify a preliminary injunction.\textsuperscript{35} Second, the reason for this restriction on preliminary relief is defendant's due process right to a full trial; this reason has nothing to do with the distinction between law and equity. Third, the policy against preliminary relief is by no means limited to equity; for reasons that may be more historical than rational, the restriction on preliminary relief applies much morestringently to damages and other legal relief. Preliminary damages are so extraordinary that there is a virtually absolute prohibition against them, no matter how great plaintiff's need.\textsuperscript{36} Preliminary injunctions are extraordinary only in the limited sense that they require justification. What the preliminary relief cases show is not that equitable remedies are extraordinary but that preliminary remedies are extraordinary. Preliminary relief remains extraordinary in Chancellor Allen's court even though his routine jurisdiction over corporate matters is entirely derived from the routine nature of equity.

Defendant's right to due process is one of many real reasons for constraining plaintiff's choice of remedy. In my book, I attempted to restate these real reasons for decision without reference to the irreparable injury rule. The result was seventeen proposed rules, beginning with a presumption in favor of the plaintiff's preferred remedy.\textsuperscript{37} The other sixteen rules are exceptions dealing with undue hardship, burden on innocent third parties, impracticality, personal service contracts, prior restraints on speech, civil jury trial, equality among creditors, interference with other authorities, interference with other law,
ripeness, mootness, preliminary specific relief, coercive collection of money, sale of fungible goods, preliminary substitutionary relief, and criminal procedure. Only the rule about protecting jury trial, where we are stuck with a law-equity distinction in constitutional text, is stated in terms of law and equity.

My seventeen proposed rules synthesize the actual practice of courts; they attempt to change explanations but not results. These proposed rules show that the existing pattern of decisions can be explained by a rule that treats equity as entirely normal, routine, nonextraordinary.

This next claim is more speculative, but I believe that my proposed rules better fit the actual motivation of judges. When a judge is motivated to deny an equitable remedy, she is likely to invoke the traditional rhetoric about the extraordinary nature of equity. But a judge does not experience that motivation every time she sees a request for an equitable remedy, or even most times. Most requests for equitable remedies seem normal and appropriate. When a judge's initial reaction is that the requested equitable remedy is appropriate, she will ignore the irreparable injury rule or find it obviously satisfied. Judges do not in fact view equitable remedies as extraordinary.

Indeed, judges sometimes comment on the ways in which specific relief is simpler and less expensive to administer than damage remedies. Specific relief is often simpler, but attempts to make sense of the irreparable injury rule obscure that point. Specific relief reduces or eliminates consequential damages, which is better for everyone: The plaintiff does not have to suffer them, the lawyers do not have to litigate them, the court does not have to measure them, and the defendant does not have to pay them. Thus, Judge Friendly wrote that injunctions were "the appropriate remedy" in class actions, and that insurmountable difficulties came from the attempt to award damages. The Supreme Court recently repeated its long-held view that injunctions ordering divestiture are the "simple, relatively easy to administer, and sure" remedy in antitrust merger cases. That is not the conventional wisdom, but the Court is obviously right that divestiture is easier than measuring damages from an anticompetitive merger. The point is not limited to antitrust; specific performance of Pennzoil's contract to acquire an interest in Getty would have been much simpler, and vastly better for Texaco, than the complex damage litigation that actually occurred.

38. Id.
When Abram Chayes wrote that "the old sense of equitable remedies as 'extraordinary' has faded," he offered a tongue-in-cheek qualification: "It is perhaps too soon to reverse the traditional maxim to read that money damages will be awarded only when no suitable form of specific relief can be devised." That time will never arrive, but only because he put the reversed maxim too strongly. The issue is not whether specific relief is possible, but whether there is some reason, other than the irreparable injury rule, to deny specific relief. Except for the fungible goods cases, the old maxim can be reversed to this extent: A plaintiff who requests specific relief will not be remitted to damages unless there is some articulable reason to withhold specific relief.

Let me return briefly to the question whether this means the irreparable injury rule is dead. Gene Shreve dissents from this characterization in his generous review of my book. Perhaps I should have hedged with a term such as moribund, but this refinement would not have reduced Shreve's disagreement. He is not merely quibbling with my use of a metaphor; he and I also disagree over the meaning of the irreparable injury rule and the meaning of the cases. Shreve reads my book as proving that "the rule is in robust (if undeserved) good health."

The most striking thing about the Shreve review is that he has absolutely nothing to say about the cases that grant injunctions. The chapters reviewing these cases are the heart of the book; the rest is incomprehensible without them. These chapters document the routineness of equitable relief; they show that the irreparable injury rule is dead by showing that it does not constrain the choice of remedy. These chapters are like a controlled study: They show what "irreparable injury" means to judges when the choice between law and equity is constrained only by the irreparable injury rule and not by some other sufficient reason to deny injunctive relief.

If you ignore the cases granting injunctions, you can treat any judicial reference to the irreparable injury rule as evidence that the rule is still alive, as Shreve apparently does. But once you absorb the lesson of the cases granting injunctions, it is difficult ever again to take the irreparable injury rule seriously. The rule is always satisfied, and when a judge says that it is not, he is ignoring clearly stated rules and vast quantities of precedent. When it also appears that he has some other reason to deny the injunction, the only plausible inference is that the other reason is the only reason, and that the reference to irreparable injury is a makeweight that did not and could not motivate the decision.

42. Chayes, supra note *, at 1292.
43. Id.
44. Shreve, supra note 5, at 1062.
45. Id. at 1064.
46. These cases are summarized in supra text accompanying notes 6-27, and reviewed in chapters 2 and 3 of IRREPARABLE INJURY, supra note 3, at 37-98. Shreve cites pages in these chapters only twice, once without comment for a definition of "irreparable," Shreve, supra note 5, at 1064 n.4, and once in a collection of my citations to Shreve's earlier work, id. at 1072 n.52.
47. Shreve, supra note 5, at 1064-65.
In Shreve's account, "the rule assigns injunctions an inferior place within a remedial hierarchy by making them more difficult to obtain than damages." This is precisely what I deny. There is no remedial hierarchy, and injunctions are not more difficult to obtain than damages. The existence of rules that sometimes limit equitable relief, as when it is unduly expensive, does not show a remedial hierarchy. Similar rules sometimes limit damages as well.

The most obvious restrictions on damages are immunity rules, and especially those rules that make some defendants immune from damages but not immune from injunctions. Damage remedies are also limited or precluded by rules that make certain elements of damage noncompensable, even when clearly suffered. Examples include the rule against recovery of economic losses in tort in the absence of physical impact, the rules against consequential damages for delay in payment of money or in eminent domain, and the rule against recovery for emotional distress caused by breach of contract. Statutes often limit tort damages to amounts that may be substantially less than the fact-finder's valuation of damages actually suffered. Damages are cut off by statutes of limitation and rules of proximate cause; injunctions sometimes ignore these limits, most notably in the school desegregation cases.

Damages are sometimes effectively limited by the informal practice of judges and lawyers, without the benefit of, or even in defiance of, the formal rules. When I first presented to a faculty colloquium my thesis that the irreparable injury rule was dead, Professor William Van Alstyne asked a converse question: Why are there so few damage claims in civil rights and civil liberties cases? As it happened, the very next day I had a chance to put that question to David Goldberger, a tough and tenacious litigator who for many years ran the ACLU's Chicago office. Goldberger said that causation and quantification of damages are burdensome to litigate, that there is little prospect of substantial recovery, that including a damage claim profoundly irritates the judge, and that he could accomplish all his social policy goals by injunction. Consequently, he always

48. Id. at 1064.
50. See, e.g., Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985).
53. See, e.g., Dean v. Dean, 821 F.2d 279 (5th Cir. 1987).
54. See, e.g., Etheridge v. Medical Center Hospitals, 376 S.E.2d 525 (Va. 1989). Etheridge upheld a $750,000 limit as applied to a $2.75 million verdict. Plaintiff was permanently confined to a nursing home, with a life expectancy of 39.9 years; she claimed over $1.9 million in "economic loss," presumably medical expenses and lost income. Id. at 527.
55. The school desegregation cases have sought to eliminate "vestiges" of discrimination that sometimes occurred decades before the remedy. Neither laches nor statutes of limitations have ever been applied. Paul Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 COLUM. L. REV. 728, 733-34 (1986). I believe the first allusion to proximate cause in a school desegregation case is in Freeman v. Pitts, 112 S. Ct. 1430, 1446 (1992) ("[T]he district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations.")
tried to talk his clients out of asking for damages, and he thought this was a widespread practice among civil liberties litigators.\textsuperscript{56}

I think that Goldberger’s account is still generally accurate, although the civil rights bar has recently put more emphasis on damages in housing discrimination and employment discrimination claims, where juries will sometimes award large verdicts against corporate defendants.\textsuperscript{57} I am not aware of any similar development in cases against public defendants, and I am confident that damages against public defendants will somehow be confined to discrete incidents with individual wrongdoers. For systemic violations of the Constitution, damages are unthinkable and the injunction is de facto the exclusive remedy. For example, I know of no case in which any plaintiff has recovered damages for an unconstitutionally segregated education, and I am confident that judges faced with a class action claiming such damages would find a way to deny it.

These formal and informal limitations on damages in problematic contexts do not make damages an extraordinary remedy, and similar limitations on equitable remedies in problematic contexts do not make equitable remedies extraordinary either. The best summary of the law in practice is that either damages or injunctions are presumptively available at the request of a successful plaintiff, but that either will be denied if there is sufficient reason in a particular case. If the irreparable injury rule means a hierarchy of remedies, and Shreve and I agree that it does, then the irreparable injury rule is dead.

III

PROCEDURE

I am not a procedure scholar; here I must rely on others for details and recent developments. But the main outlines of my claim are clear enough even to a generalist. With the notable exception of jury trial, our procedural rules are mostly derived from equity. Stephen Subrin reviews the history of this derivation, and my title parallels his: \textit{How Equity Conquered Common Law}.\textsuperscript{58}

Subrin treats the defining characteristics of common law procedure as the jury, the writ system, and pleading to a single issue.\textsuperscript{59} Only the jury survives. The modern rules providing for a single form of action merge law and equity and also abolish the last vestige of the writ system.\textsuperscript{60} The modern concept of trans-substantive procedure—a single form of complaint with substantially the same procedural rules for any claim to relief—derives from the bill in equity. This

\begin{itemize}
\item \textsuperscript{56} Personal conversation in Chicago, September 1983, summarized in letter from Douglas Laycock to Thomas D. Rowe, Professor of Law, Duke University (Sept. 27, 1983) (on file with \textit{Law and Contemporary Problems}).
\item \textsuperscript{57} See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 25.3(2), at 25-13 n.63 (1990) (collecting verdicts up to $65,000 and settlements up to $1.1 million).
\item \textsuperscript{59} \textit{Id.} at 914.
\item \textsuperscript{60} See FED. R. CIV. P. 1-2.
\end{itemize}
change is closely related to another: the rejection of technical pleading rules in favor of simple, straightforward pleading, the extreme development of which was captured in the phrase "notice pleading." The pendulum has swung back a bit from each of these developments. Carl Tobias argues that trans-substantive procedure has been irretrievably eroded by an accumulation of special rules for particular claims. Notice pleading has also been eroded, most notably in the implementation of Federal Rule 11 and in the lower court's demand for greater specificity in pleading certain claims that have fallen out of judicial favor. The Supreme Court has now rejected the notion that some claims may be subjected to a "heightened pleading standard," although trial judges may continue to read some pleadings more sympathetically than others regardless of the doctrine. But any imaginable resolution of current controversies over procedure will leave the pendulum far on the other side of the arc from common law technicalities and the rule of pleading to a single issue.

Pleading to a single issue meant no joinder of claims or defenses, extraordinarily limited joinder of parties, and no pleading in the alternative. Equity took the opposite position—that all interested parties should be joined so that complete justice could be done in every case. The uninformative but suggestive maxim was that "Equity delights to do justice and not by halves." Inability to join all parties in a single case rendered the legal remedy inadequate; equity would take jurisdiction to avoid a "multiplicity of suits."

Our modern pleading and joinder rules obviously build on the equity model: related claims can be joined; counterclaims and cross claims can be added; any party can plead in the alternative. Multiple parties with several claims and defenses can be joined on both sides; third and fourth sides can be added through impleader. Specialized joinder devices for larger groups all arose in equity: class actions, consolidation of actions, interpleader, and shareholder's derivative suits.

---

61. See id. at 7-8.
66. 1 POMEROY, supra note 30, § 181, at 258; JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF § 72, at 74 (10th ed. 1892) [hereinafter EQUITY PLEADINGS]; see Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (Rubin, J., concurring).
67. 1 POMEROY, supra note 30, §§ 243-75, at 459-616; 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 64i, at 70-71 (13th ed. 1988) [hereinafter EQUITY JURISPRUDENCE]; see also IRREPARABLE INJURY, supra note 3, at 74-75, 84 n.1, 86 nn.20-21.
69. On the equitable origins of these devices, see EQUITY PLEADINGS, supra note 66, §§ 96-135b, at 101-44 (class actions), § 287, at 284-85 n.a (consolidation), §§ 291-97b, at 286-94 (interpleader); Bert S. Prunty, Jr., The Shareholders' Derivative Suit: Notes on Its Derivation, 32 N.Y.U. L. REV. 980 (1957). For class action antecedents of derivative suits, see EQUITY PLEADINGS, supra note 66, §§ 108-09, at 117.
Equity and common law procedure also differed fundamentally on development of facts. There was no discovery at common law, so the bill of discovery became a fertile source of equitable jurisdiction. All of modern discovery builds on that equitable base, although modern discovery rules now go well beyond pre-merger practice. At common law, a party was not permitted to testify either on his own initiative or in response to questions by the other side. Equity disregarded the second half of that prohibition from the beginning.

The great common law contribution to modern procedure is the jury trial. Jury trial is enshrined in state and federal bills of rights, and while it has its detractors, it also has vigorous defenders. Jury trial remains central to our system of civil justice.

But even here, equity has made its contribution. Subrin argues that the federal rules shifted power from juries to judges in important ways. Bench trial is a universally available alternative if the parties consent. Courts and legislatures plainly believe that some cases are better tried without juries, and they sometimes manipulate the line between law and equity to deny a jury trial even when the parties do not consent. For example, courts and Congress have agreed to treat back pay to victims of racial, sexual, or religious discrimination as equitable restitution, not triable to a jury, originally for fear of jury nullification in the race cases. This rule was constitutionally dubious from the beginning, and it becomes less tenable with every new Supreme Court decision on the Seventh Amendment, but it is still the rule. Plaintiffs in disparate treatment cases now have a choice—bench trial with monetary recovery limited to back pay under Title VII, or jury trial with compensatory and punitive damages under section 1981 or 1981a. Beginning in 1964, and continuing through the debates that produced the awkward compromise of 1991, Congress

70. EQUITY JURISPRUDENCE, supra note 67, §§ 66-74, at 72-81; 2 id. §§ 689-91, at 1-3.
73. Subrin, supra note 58, at 924 n.79.
78. Id. §§ 1981, 1981a. Claims of race discrimination, and some claims of ethnic discrimination, may be brought under § 1981 for full compensatory damages. Other discrimination claims, mostly those involving sex, handicap, and religion, are bifurcated into a back pay claim under Title VII and a claim for all other damages under § 1981a, with the § 1981a damages subject to limits that vary with the size of the employer.
treated equitable remedies for employment discrimination as preferred and nearly automatic, and damages as extraordinary and subject to abuse. Fear of jury nullification gave way to fear of ruinous verdicts, but the common theme is mistrust of jurors and therefore of damage remedies.

The most important example of adjudication without juries is the vast jurisdiction committed to administrative agencies. Like the early chancery court, administrative agencies provide centralized adjudication that bypasses the ordinary courts, and their procedure looks a lot like the chancellor's procedure. Similarly, we have seen a vast expansion in the use of magistrates and alternative dispute resolution, each of which resembles the assistant judge role that began in equity with special masters. The awkward status of bankruptcy judges draws on the same model.  

This shift to alternate modes of adjudication is motivated by many things—often by the desire for expertise in a particular subject matter, sometimes by the desire to circumvent the separation of powers, sometimes by a view that administrative adjudication will be cheaper than judicial adjudication, and, in the federal system, by the desire to appoint judges without giving them life tenure.  

One argument for agencies was that they provided easier access to equity-style remedies—that cease and desist orders were better than damages after the fact.  

Avoidance of juries is only part of the motivation for committing matters to administrative agencies, magistrates, alternative dispute resolution, or bankruptcy judges. But once a matter is so committed, these alternative tribunals exercise their freedom from constitutional jury trial requirements. Even with respect to jury trial, a vast part of our adjudication follows the equity model, and not the common law model.

IV

SUBSTANCE

Our substantive law is derived from common law, from equity, and from statute. Maitland correctly observed that there is no pattern, that it is impossible to generalize about the things that came from equity. He also noted that the most basic rights and legal concepts came from common law. When equity imposed personal duties on fiduciaries, mortgagees, or sellers of land, it presupposed legal rights of property and contract. Equity without common law, Maitland said, would have been "a castle in the air." He was right. But the

81. ROBINSON ET AL., supra note 80, at 8.
82. 1 FREDERICK W. MAITLAND, EQUITY 1 (2d ed. 1936).
83. Id. at 19.
other half of his comparison was equally right: Common law without equity would have been a functioning system, but in many applications it would have been "barbarous, unjust, absurd." 84

It is hardly surprising that we have not abandoned equity and reverted to barbarism. To the contrary, substantive equity is now fully integrated into our substantive law, with or without continued consciousness of its equitable origins. I will mention five of the more prominent examples.

First, the equitable law of trusts has displaced the cumbersome common law of future interests—by statutory abolition in England and by the practice of all competent lawyers in the United States. 85 More important, the concept of fiduciary duty has spread from express trusts to the whole range of principal-agent relationships, and is influencing relationships traditionally thought to be arm’s-length, such as buyer-seller and debtor-creditor. Commercial adversaries are occasionally held to be fiduciaries; 86 more generally, similar conceptions of fairness inform the ever-growing duty of good faith and fair dealing. 87

Second, the law of mortgages now pervades our credit-based economy. The essential rules of foreclosure and redemption, dividing the property between the creditor and the owner while protecting the interests of each, arose in equity. Article 9 of the Uniform Commercial Code, codifying the law of security interests in personal property, united rules derived from both the equitable rules about mortgages and the common law rules about pledges. 88 The equitable origins of modern foreclosure rules are still reflected in financial use of the word “equity” to describe the owner’s interest in property over and above all outstanding liens. But how many securities lawyers, to say nothing of securities brokers, could tell you why common stock is called equity? The equitable origin of these rules has become irrelevant.

Third, most modern real estate development depends on equity’s creation of the equitable servitude. 89 The common law created easements, real covenants, profits a prendre, and irrevocable licenses, but each of these was historically subject to doctrinal limits that were sometimes crippling. Easements could not be “in gross”; covenants were not enforceable against subsequent owners unless they “ran with the land”; and so on. The problem with real covenants was part of a larger problem of common law restrictions on assignment of rights. Much

---

84. Id.
86. See Helen Davis Chaitman, The Law of Lender Liability § 5.03, at 5-11 to 5-26, § 7.02, at 7-9 to 7-32 (1990).
87. Id. §§ 4.01-4.06, at 4-1 to 4-32.
88. For an introduction to the ancient distinctions, see Grant Gilmore, Security Interests in Personal Property § 1.1, at 5-9 (1965).
89. This paragraph and the next are largely based on Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. Calif. L. Rev. 1261 (1982); Uriel Reichman, Toward a Unified Concept of Servitudes, 55 S. Calif. L. Rev. 1177 (1982); Michael F. Sturley, Easements in Gross, 96 Law Q. Rev. 557 (1980).
of the modern law of assignment and transfer of intangibles is traditionally credited to equity.\(^{90}\)

The limits on easements, covenants, profits, and licenses made these devices unequal to such tasks as creating condominiums or permanently enforceable private subdivision restrictions. Equity largely solved the problem by making servitudes enforceable against anyone with notice. This was a critical breakthrough, but once the breakthrough was secure, the distinctions among the various devices became progressively less important. All these devices have expanded until they substantially overlap, but with technical distinctions that create a state of hideous confusion in the formal rules. It now appears likely that the American Law Institute will propose a single unified device for private restrictions on land use, and that it will use the equitable label, servitude.\(^{91}\)

The law of restitution is a fourth example of this integration. Restitution arose partly in equity, through subrogation, constructive trust, equitable lien, and the like, and partly at law, through quasi-contract and the common counts. Both legal and equitable restitutio devices expanded until they were largely overlapping. This divided history dominates the Restatement of Restitution, which is subtitled "Quasi Contracts and Constructive Trusts," and contains two disconnected and sometimes redundant parts, drafted by two different reporters but bound in a single cover.\(^{92}\)

Quasi-contracts and constructive trusts were the principal restitutio devices at law and in equity, respectively. Each was and is a fiction for implying a remedy or a cause of action; neither depends on a real contract or a real trust. Either fiction can be made to fit in most contexts, and results should not depend on the cleverness of the pleader. But a constructive trust generally results in a preference over other creditors, while a quasi-contract does not. That is a real choice, and we should focus our attention directly on when to award the preference. We should not approach the preference question indirectly through supposed limitations on the fictional logic of constructive trust or quasi-contract.\(^{93}\) Here, as in so many other places, thinking in terms of categories derived from law and equity simply distracts us from the real issues.

Some applications of restitution have become entrenched in modern doctrines with names of their own. These largely independent bodies of restitution law include the law of mistake,\(^{94}\) the law of contribution and subrogation,\(^{95}\) and the

\(^{90}\) Gilmore, Security Interests, supra note 88, § 7.3, at 202-03.


\(^{93}\) For a start in this direction, see Emily L. Sherwin, Constructive Trusts in Bankruptcy, 1989 U. ILL. L. REV. 297.

\(^{94}\) See Restatement of Restitution §§ 6-69.

\(^{95}\) Id. §§ 76-102, 162.
law of partly performed contracts. The general adoption of contribution among joint tortfeasors, and then of comparative negligence, has spawned a vast body of law about the rights of defendants against each other and the effect of a plaintiff's settlement with one defendant on her rights against other defendants. We do not usually think of personal injury law as equitable, but nearly all of this law is built on the equitable base of subrogation, contribution, and indemnity. Lawyers applying these doctrines may or may not know they are dealing with restitution; and even if they do, they almost certainly have no idea whether their patch of restitution came from law or equity. Conveniently illustrating the point with the simplest of examples, a scholarly judge recently misdescribed quasi-contract as "an equitable remedy." But this obvious error in an otherwise fine opinion was absolutely harmless, because the common-law origins of quasi-contract were absolutely irrelevant to any issue presented.

Fifth, the equitable defenses are now generally available both at law and in equity. Fraud and estoppel are unambiguously available in both legal and equitable actions. Both the Uniform Commercial Code and the Restatement (Second) of Contracts make unconscionability equally available at law and in equity. Unclean hands has its legal counterpart, in pari delicto, and as Chafee showed, a host of narrower doctrines serve the same purpose. You might think that undue hardship, or balancing the equities, is surely just an equitable defense, but this is not so. In the Restatement's formulation, damages based on the cost of performing a contract will be denied if that cost is "clearly disproportionate" to the benefit; specific performance will be denied if it would impose "unreasonable hardship." The cases use these and similar phrases interchangeably.

Other examples could be offered, but trusts, mortgages, servitudes, restitution, and equitable defenses are five of the most important. In each case

102. U.C.C. § 2-302 (1990); *Restatement (Second) of Contracts* § 208.
105. *Restatement (Second) of Contracts* § 348(2)(b).
106. *Id.* § 364(1)(b).
the point is the same: Equitable doctrine is part of the warp and woof of our substantive law. These doctrines should continue to develop in harmony with related legal doctrines, and on the basis of sound policy in a modern democratic society. I submit that no question concerning the scope or content of these doctrines should any longer depend on whether they historically arose in law or equity. The substantive rules that govern our behavior should not depend on the historical jurisdiction of ancient courts that were merged fifty-five or one hundred forty-five years ago.  

V

DISCRETION

The most general distinction between law and equity in the early days was in the attitudes of the two systems toward formalism and discretion. Law was formal and rigid; equity was flexible, discretionary—a court of conscience. This distinction draws on the equity courts' self-description, and on Aristotle's conception of equity as a source of "correction of law where it is defective owing to its universality."  

I suspect that this historical stereotype is exaggerated, because we also say that the genius of the common law was in its flexible stability and its capacity for growth within a tradition. Patrick Atiyah has described how England in the nineteenth century experienced a relative disappearance of discretion in both the law courts and the equity courts, followed by a resurgence of discretion in the merged courts in the twentieth century.  

Whatever the historical reality, it is clear that discretion has largely triumphed in the modern legal sensibility. Discretion is everywhere; "formalist," "formalism," and the like are epithets, even in the word processors of the most conservative judges.  

Surely there is no one who thinks that discretion of the sort traditionally associated with equity is confined to cases that would have been filed in equity before the merger. If you do not agree that this point is too

108. Law and equity were merged in the federal courts in 1938 by the Federal Rules of Civil Procedure. FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 1.8, at 22 (4th ed. 1992). The first state to merge law and equity was New York, in the Field Code of 1848. Id. § 1.7, at 19.  
obvious to require proof, it would take a much longer article than I intend to 
write to convince you.\textsuperscript{112}

I will confine myself to a single striking illustration, which I largely owe to 
the late Edward Yorio. Courts sometimes say that specific performance is a 
discretionary remedy, and that some contracts are too unfair to be specifically 
enforced, even though they may not be too unfair to support an award of 
damages. This never made sense to me. The economic burden to defendant of 
epectancy damages will be at least as great as the economic burden of specific 
performance. If consequential damages could be avoided by specific perfor-
mance, the burden of expectancy damages will be greater than the burden of 
specific performance. So if courts have the power to set aside unfair contracts, 
they should set aside the whole contract and not just the remedy of specific 
performance.\textsuperscript{113} Or so I once believed.

Yorio’s insight was that the successful plaintiff on an unfair contract will not 
necessarily recover his full expectancy.\textsuperscript{114} To elaborate his point and modify 
it slightly, a great deal of discretion is built into the measure of damages. The 
court might find the consequential damages too remote or uncertain. It might 
find the expectancy too uncertain and award reliance damages instead. It might 
hold down the damages by accepting the defendant’s estimate on all valuation 
questions. It might rely on the jury to nullify the expectancy of overreaching 
plaintiffs. In general, the amount of damages is variable, sometimes continuously 
variable. A court can shave the damages without having to acknowledge that its 
reason for doing so is that it disapproves of the contract.

These techniques of compromise are relatively unavailable with a specific 
performance decree. Specific performance is generally all-or-nothing, full 
performance or no relief. Specific performance can be conditioned on a price 
adjustment or some other concession, but this is rare, and the doctrinal reason 
would usually have to be some open holding of unconscionability or overreach-
ing. The result is that specific performance cases are full of talk about 
conscience and discretion, overtly introducing the discretion that is inherent in 
the more flexible process of measuring damages.

Candor is among the highest judicial virtues; courts should not conceal 
unconscionability holdings in compromise damage judgments. The point here is 
not whether judges should act this way, but simply that they do. There are ways 
in which damage remedies are more flexible than equitable remedies, and

\textsuperscript{112} Chancellor Allen does make the narrower claim that in Delaware’s unmerged courts, discretion 
and a concern for justice in individual cases appear “to a much greater extent” in the equity courts than 
About Our Court of Chancery?}, in \textit{COURT OF CHANCERY OF THE STATE OF DELAWARE 1792-1992}, at 
13 (1992). I am skeptical about the magnitude of this difference, but I am no expert on Delaware, and I 
defer to Chancellor Allen’s judgment and experience. Certainly it is possible that separate courts 
would develop separate traditions. It is much more difficult to imagine judges in merged courts behaving 
in one way in cases that would have been at law before the judges were born, and in a fundamentally 
different way in cases that would have been in equity before the judges were born.

\textsuperscript{113} \textit{DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS} 381 (1985).

modern judges take advantage of that flexibility. A common-law remedy that is more flexible and more discretionary than its equitable alternative is a powerful example of my point: Discretion and flexibility pervade the system and are not limited to the historic confines of equity.

VI

FUTURE DEBATES, OR, IS THE COUNTERREVOLUTION AIMED AT EQUITY?

Some of our law is controversial, and some of what is controversial has roots in equity. Formalism has its virtues and its defenders, at least up to a point.\textsuperscript{115} There is a clear turn to formalism in the Supreme Court, especially with respect to statutory interpretation.\textsuperscript{116}

In some contexts, I am among the defenders of greater formalism. I have argued for greater attention to the text of statutes and constitutions;\textsuperscript{117} I have denied that judges have discretion to pick and choose which rights to enforce.\textsuperscript{118} I have argued that both legal and equitable remedies should be tied to the standard of restoring plaintiff to the position she would have occupied but for the wrong; I have denied that a court of equity has a roving commission to do good once it identifies a threshold violation of law that justifies its intervention.\textsuperscript{119} The inability to convincingly tie constitutional remedies to constitutional rights has undermined the legitimacy of judicial efforts, and may have undermined support for the underlying constitutional rights. On the other hand, I have defended balancing as essential to constitutional adjudication,\textsuperscript{120} and Doug Rendleman thinks I rely too much on balancing in choosing remedies.\textsuperscript{121} Different kinds of legal problems require different legal methods. Formal rules are generally inadequate for complex choices among competing factors; balancing tests are generally inadequate to limit the power of decisionmakers. It is entirely

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Frederick Schauer, Formalism, 97 YALE L.J. 509 (1988).
\item See Thomas D. Rowe, Jr., No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law, 56 LAW & CONTEMP. PROBS. 105 (Summer 1993), and articles cited therein.
\item See LAYCOCK, supra note 113, at 234-81, 318-19. For a conclusory but more explicit statement, see Laycock, supra note 118, at 1730 n.108.
\item Doug Rendleman, Irreparability Irreparably Damaged, 90 MICH. L. REV. 1642, 1654-55 (1992) (book review). Rendleman says that if my book were in a database, he would "count all the times the words balance, balancing, weigh, and outweigh are used." \textit{Id.} at 1654 n.47. I still have the book on disk; the answer is 96 times, including quotations and other people's titles, in 374 pages. If we throw in all other forms and tenses of the two words, including weight of authority, weight loss programs, truck weight limits, and makeweight arguments, we get 129 times. Most of these uses of the words are describing my assessment of what some court or courts actually did in a case or group of cases. But Rendleman does not mischaracterize my own views; I think that balancing interests is generally the right approach to deciding whether to override plaintiff's choice of remedy.
\end{enumerate}
\end{footnotesize}
possible to have an excess of discretion, just as the common law once had an excess of formalism.

Stephen Subrin’s article on the procedural triumph of equity argues that the triumph has gone much too far, and that the current complaints about litigation delay are the complaints one should expect from a procedural system that has entirely abandoned the common law’s attempt to focus litigation on discrete issues.\textsuperscript{122} He does not propose a return to common-law pleading, but he does urge a better balance. More generally, there is a reaction against the litigation system, reflected in proposals for tort reform and procedural reform.\textsuperscript{123} I have already noted the retreat from notice pleading;\textsuperscript{124} more generally, my colleague Linda Mullenix has shown that the Civil Justice Reform Act dramatically amends the Rules Enabling Act and threatens havoc on the various Federal Rules of Procedure.\textsuperscript{125} Command-and-control regulation by administrative agencies is under attack in favor of fees, charges, and financial incentives that create markets.\textsuperscript{126} This can be fairly characterized as a shift from specific relief to monetary relief, although here I think the real objection is to the difficulties inherent in economic central planning when agencies try to control whole industries, or even the whole economy in the case of environmental regulation. This objection has only attenuated relevance to problems of corrective justice arising out of single transactions.

Some of these reform proposals seem to me sensible; some seem ill-disguised attempts to reduce enforcement of certain rights that are unpopular with one or another political faction. We will have to fight these issues out, seeking a

\begin{itemize}
\item Subrin, \textit{ supra} note 58, at 975-1002.
\item See \textit{supra} text accompanying notes 62-65.
\item See, \textit{e.g.}, \textit{Stephen G. Breyer, Regulation and Its Reform} 156-83 (1982); Charles L. Schultze, \textit{The Public Use of the Private Interest} (1977).
\end{itemize}
sensible balance between discretion and formalism, as well as between plaintiffs and defendants. I raise these issues not to propose a resolution, but to ask whether a distinction between law and equity would contribute to their resolution. I am confident that it would not.

We can argue about the right balance between discretion and formalism, but it makes no sense to argue about the right balance between law and equity. If discretion pervades the system, then discretion is no longer equitable in any meaningful sense. If we have too much discretion in the system, we have too much discretion in equitable contexts as well as in legal contexts.

The attack on the litigation system is aimed at least as much at features derived from law as at those derived from equity. The entire tort reform movement is aimed at common-law damage actions and the discretionary power of juries. But the jury is the most prominent procedural survivor from common law, and damages are the quintessential legal remedy.

The view that damages are the more intrusive and troublesome remedy is also widespread in public law. The Supreme Court's immunity rules sharply limit damage suits against public officials but impose little constraint on injunction suits.127 Some conservative justices have dissented bitterly from the Court's decision to imply damage remedies to enforce the Constitution.128 But Chief Justice Rehnquist has acknowledged that courts can imply equitable remedies to enforce the Constitution.129 The new conservative majority has allowed Congress to sharply limit constitutional remedies,130 and the most common statutory limitation is to provide remedies without damages or with sharply limited compensation.131

In the related area of implied rights to enforce federal statutes, the Court has also refused to distinguish damages from injunctions.132 But what is most revealing here is that the governmental defendants, supported by the United States as amicus curiae, argued that the implied right of action should be limited to prospective relief and back pay, and that damages should be precluded. Faced with the defendants' explicit fear of the damage remedy, part of the Court's opinion was nonresponsive to the point of incomprehension:

First, both [the prospective and back pay] remedies are equitable in nature, and it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper

129. Carlson, 446 U.S. at 42 (Rehnquist, J., dissenting).
131. See id. at 415-17, 425-26, 428 (allowing back benefits and procedural reforms, but not consequential damages, for revocation of disability benefits without due process); Bush v. Lucas, 462 U.S. 367, 371-73 (1983) (allowing reinstatement with back pay, but not damages for mental suffering, punitive damages, jury trial, or attorneys' fees, for discharge of federal employee in violation of first amendment).
inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate.\textsuperscript{133}

This reference to the remedial hierarchy was totally irrelevant to the defendants' argument. It was also totally irrelevant to the statute before the Court, Title IX of the Education Amendments of 1972.\textsuperscript{134} If damages were really the "ordinary" remedy, the issue before the Court could not have arisen. Twenty years after the statute was enacted, and thirteen years after the Supreme Court held that private plaintiffs could sue to enforce it,\textsuperscript{135} it was still an open question whether damages could be awarded \textit{at all}. The court of appeals had held that the injunction and back pay remedies were exclusive.\textsuperscript{136} Obviously, damages had not been preferred, ordinary, or routine.

Some limitations on federal remedies—most notably the \textit{Younger} rules that limit federal interference with state judicial proceedings\textsuperscript{137}—were initially justified as limitations on equity. But equity rhetoric was de-emphasized early in the evolution of the \textit{Younger} doctrine.\textsuperscript{138} More important, the equity rationale has been abandoned whenever it mattered; these limitations on federal relief apply to declaratory judgments and damage actions and not just to traditional equitable remedies.\textsuperscript{139} The expansion to legal remedies makes sense, because these are rules about federalism, not rules about equity. The \textit{Younger} episode is simply the most recent repetition of a cycle, in which arguments about the extraordinary and subordinate status of equity are used to bolster or disguise new arguments about federalism or separation of powers.\textsuperscript{140} The equity talk is abandoned when the new arguments are sufficiently established to stand on their own.

On the left, we find the civil rights movement appealing to equitable discretion to fashion expansive remedies. At the same time, it urges special procedural rules for civil rights cases—rejecting trans-substantive procedure and

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} at 1038.
\item \textsuperscript{134} 20 U.S.C. §§ 1681-88 (1988).
\item \textsuperscript{135} Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).
\item \textsuperscript{136} 911 F.2d 617 (11th Cir. 1990). Defendant's fear of damages also got a sympathetic response from Justices Scalia and Thomas and Chief Justice Rehnquist, who nevertheless conurred in the judgment because they found express statutory authority for damages. \textit{Franklin}, 112 S. Ct. at 1038-39.
\item \textsuperscript{137} \textit{See Younger v. Harris}, 401 U.S. 37 (1971).
\item \textsuperscript{138} \textit{See Aviam Soifer & Hugh C. Macgill, The Younger Doctrine: Reconstructing Reconstruction, 55 Tex. L. Rev. 1141, 1178-1213 (1977).}
\item \textsuperscript{139} \textit{See Samuels v. Mackell}, 401 U.S. 66 (1971) (declaratory judgment); \textit{cf.} Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 113-17 (1982) (policy of Tax Injunction Act also precludes suits for damages caused by unconstitutional administration of state tax laws). Whether \textit{Younger} itself applies to damage actions was reserved in \textit{Deakins v. Monaghan}, 484 U.S. 193 (1988). The plaintiff's damage claim in \textit{Deakins} could proceed in federal court even under \textit{Younger}, because the claim could not be asserted in state court in the pending criminal prosecution. \textit{Id.} at 202, 204. The plaintiff agreed to stay the damage claim until the criminal prosecution was concluded. \textit{Id.} at 201-02. The Court referred to this stay as "the comity bargain," plainly implying that it viewed \textit{Younger}'s policies as relevant and applicable. \textit{Id.} at 203.
\item \textsuperscript{140} \textit{See IRREPARABLE INJURY, supra note 3, at 133-59.}
\end{itemize}
implying the beginnings of a new writ system.\textsuperscript{141} If we think of these arguments in terms of law and equity, the civil rights movement is contradicting itself. It wants equitable remedies and legal procedure. But why should we think of it in terms of law and equity? The sensible approach is to consider each proposal on its merits. Both, neither, one, or the other of these proposals may make sense. But nothing could be less relevant than the proposals' similarity to the remedies or procedures of certain courts that had a separate existence in the last century.

The argument over discretionary remedies is revealing in another way as well. Many judges and commentators say that the remedy need not be connected in any logical way to the substantive violation.\textsuperscript{142} The essence of this claim, although it is rarely stated so baldly, is that equity can remedy harms that were not caused by any violation of law. I think this view is mistaken, and that it embodies too much sense of discretion with respect to equitable remedies. The Supreme Court has occasionally said so.\textsuperscript{143}

Think about the argument on this question, first assuming that you agree with me, and then assuming that you disagree. Suppose you want to limit excessive claims of equitable discretion. The solution is not to confine the scope of equity, but rather to confine the discretion within equity. The solution is not to highlight the distinction between law and equity, but rather to highlight the unity of the concept of remedy. Whether at law or in equity, the basic problem of corrective justice is the same, and similar questions arise about causation, proximity, and rightful position. Specific relief should be generally available for proven harms, but specific relief should not be an occasion for a court to remedy harms that it would not compensate with the equivalent damage remedy. If a harm is not sufficiently connected to the wrong to justify submitting a damage issue to the jury, it is hard to see how it justifies an injunction. But if there is a functional reason to reach further with injunctions than with damages, the proponents of such relief should state that reason explicitly. Maybe the reason is distrust of juries; maybe the reason is that we should go further to prevent harm that is still preventable than to compensate harm that has already been suffered or become inevitable. These hypotheses are worthy of debate, but we should debate them explicitly. We should not obscure their merits or demerits with a fog of rhetoric about the traditional discretion of equity.

Now suppose that you want to defend remedial discretion disconnected from substantive violations. Or suppose that you are defending some other feature of present law, or proposing some extension, that draws support from equi-


\textsuperscript{142} The classic citation is Chayes, \textit{supra}, note \textsuperscript{*}, at 1293-94, 1298-1302.

ty—specific performance, or notice pleading and liberal joinder rules, or discretion to take account of the special needs of the weaker party to the lawsuit.

From this strategic posture as well it would be wise to abandon reliance on any strong distinction between law and equity. If you emphasize the separate traditions of equity, then like it or not, you emphasize the separateness and specialness of equity. If equity is something extraordinary, then whatever lessons you choose to draw from it are also extraordinary, confined to special situations. Those who would draw on the traditions of equity would do well to emphasize the pervasiveness and ordinariness of those traditions, but most important, they should emphasize the good sense of those traditions. It should be sufficient to persuade the court that it is a good idea, and within the judicial power, to prevent harm beyond the limits of causation and proximity that apply to compensation. If something that originated in equity makes sense, we are free to use it; we should not have to ask whether this is an appropriate occasion for equity. That is the meaning of the merger of law and equity, and that is the reality of our existing legal system.

If you think of discretion as the essence of equity, then any attack on discretion is an attack on equity. But the attack on discretion is by no means limited to equity, or even directed primarily at equity. Discretion now pervades the legal system, and we are in a new round of the endless debate over how much discretion and in what contexts. Talk of law and equity can only muddle that debate.

VII

EQUITY AS A PROXY

In the previous section, I considered the assumption that the attack on arguably excessive discretion is an attack on equity. This assumption is an example of a more general phenomenon: use of the law-equity distinction as a dysfunctional proxy for a series of functional choices. Before the merger, the choice between equity and law entailed an all-or-nothing choice between all the characteristics of each system: discretion or formalism, specific or substitutionary remedies, personal decrees or impersonal judgments, enforcement by the contempt power or by execution and garnishment, bench trial or jury trial, and the availability or unavailability of preliminary relief.

The merger of law and equity ought to mean that the choice between law and equity is no longer all-or-nothing. In a merged system, these functional choices can be unbundled and considered independently. If we want specific relief without the contempt power or discretion without bench trial, we ought to be able to have it. This unbundling of choices has happened, both before and after the merger, in cases where the need was greatest. That is, courts and legislatures found ways to use equitable features on the law side and legal
features on the equity side. But we have not unbundled these choices conceptually; most lawyers and legal academics still assume that if you choose equity, you must inevitably get the full list of characteristics traditionally associated with equity.

This use of equity as a proxy is the key to my limited disagreement with Doug Rendleman. Rendleman agrees that the irreparable injury rule is at most in a state of "nominal survival," but he worries that I am too casual about the special dangers of injunctions. The power to issue injunctions and then enforce them with coercive contempt enables the trial judge to find the facts, make the law, interpret the law thus made, adjudge violations, and imprison defendants indefinitely to compel compliance. No jury is required; the combination of judicial delay and the collateral bar rule may make appellate review ineffective; and appellate review may be deferential on key issues in any event. When these rules are applied to a structural injunction designed to reform a large institution, the concentration of government power in a single human being is extraordinary.

Rendleman is not the first to note the potential for abuse in the current rules governing contempt, and I do not disagree with these assessments. I do deny that these dangers are reasons for treating equity as extraordinary. That is the fallacy of equity as proxy—all of equity should be limited because, in the last extreme, the method of enforcing equitable decrees is susceptible to abuse.

If the contempt power is susceptible to abuse, we should devise additional limits or safeguards on the contempt power. Many such limits are already in place or in the process of case-law development, and others could easily be drafted. Any legislature or supreme court could repeal or limit the collateral bar rule in its jurisdiction, or require that contempt proceedings be heard by a judge other than the one who entered the injunction. These reforms can be

144. See IRREPARABLE INJURY, supra note 3, at 11-16, 29-30 nn.27-43 (discussing the use of equity as a proxy and collecting examples of legal features in equity and equitable features at law).
146. Rendleman, supra note 121, at 1652, 1671.
147. The most famous example is Walker v. City of Birmingham, 388 U.S. 307 (1967).
151. See, e.g., Bagwell v. United Mine Workers, 423 S.E.2d 349 (Va. 1992) (refusing to apply protections of criminal procedure to collection of coercive civil contempt fines), cert. granted, 61 U.S.L.W. 3799 (June 1, 1993); Simkin v. United States, 715 F.2d 34 (2d Cir. 1983) (holding that coercive imprisonment cannot continue if there is no substantial likelihood that contemnor will succumb to coercion).
debated on their merits. My point here is simply that if our goal is to limit abuse of the contempt power, it is far better to limit the contempt power than to limit the scope of equity.

Rendleman seems to accept this point,152 and is willing to abandon the irreparable injury rule,153 but he still believes that “the injunction requires special handling through principles of containment.”154 Dan Dobbs hints at a similar view.155 What is left unclear is whether they think that principles of containment aimed at the contempt power should limit or contain the occasions for issuing injunctions in the first place. That sort of front-end containment would repeat the error of the irreparable injury rule; it would use equity as a proxy for the worst features of contempt.

We should not deny specific or preliminary relief or other features associated with equity to avoid facing up to the dangers of abuse in the contempt power. Abuse of the contempt power is a problem only in some fraction of those few cases in which the defendant litigates to judgment, loses on the merits, and remains persistently unable or unwilling to comply. Litigants would suffer out of all proportion to any benefits if we seriously limited equitable relief in all cases to avoid judicial abuse in these few cases. A more modest limit on initial issuance of injunctions would not reduce abuse of the contempt power at all. A judge inclined to abuse his power would not be restrained by so gossamer a restriction as the irreparable injury rule, even if that rule retained some life, or by any likely substitute formulation. To treat injunctions as special is wholly illusory as a protection against abuse of the contempt power.

There is also a quaint unreality to the view that injunctions are a remedy especially prone to abuse. There is a full-scale political and legal battle over alleged abuses in damage awards.156 There is no remotely comparable battle over abuses of injunctions or the contempt power. The class of repeat defendants is saying loud and clear that it fears excessive damages far more than it fears excessive injunctions or excessive contempt sanctions. If we were to create a remedial hierarchy based on the risk of abuse, injunctions should be preferred and damages extraordinary. But the solution is not a remedial hierarchy in either direction. The solution is to respond to abuses in either remedy.

152. Rendleman, supra note 121, at 1665 (“we should examine principles of containment directly instead of filtering them through distorting cliches”).
153. Id. at 1653.
154. Id. at 1651.
155. Pessimists doubt the benignant use of power and may mistrust those who favor coercion when other solutions are available. Balancing of equities, hardships, and practicalities, supplemented by a few more particular rules, might suffice. But the critical weight in the balance may turn out to be the weight of one’s attitude about coercion and its intrusive effects. The adequacy test can be discarded, but a pessimistic presumption that disfavors coercion may prove to be a more difficult matter.
156. See supra text accompanying notes 123-36.
VIII

CONCLUSION

Equity has triumphed in the sense that most of its innovations are now accepted parts of our law. They are not necessarily uncontroversial in all their applications and extensions; lawyers and judges will continue to argue over many of these issues. But in most of these disputes, equitable innovations have been carried well beyond what either common law or equity was doing before the merger, and no foreseeable retrenchment is likely to change that. The current line of battle is far beyond the pre-merger line.

My more basic point is that these debates are no longer about law and equity; they are simply debates about our law. We should not view every incremental expansion of a feature once associated with common law or equity as an incremental victory for common law or equity. The one thing we may be sure of is that the legal or equitable origin of the feature does not motivate the decision. Equity is fully accepted; legal and equitable features compete on a level playing field, largely commingled and sometimes indistinguishable. The argument about law and equity is over; now we just argue what the rules ought to be on grounds that are substantive, political, or jurisprudential, but not on the ground of the subordinate status of equity.

One practical implication of this view is that legislatures should quit enacting references to law and equity, and they should eliminate existing references where possible. Because the historic boundary between law and equity was not functional, it rarely captures any sensible distinction the legislature might want to draw. Equally important, judges and lawyers no longer understand what such references mean. The Supreme Court recently provided an unusually clear example.

The Court split five to four on the meaning of “equitable relief” in the Employee Retirement Income Security Act.\(^{157}\) The majority assumed that Congress used the phrase loosely: “As memories of the divided bench, and familiarity with its technical refinements, recede further into the past, [it] becomes increasingly unlikely” that Congress used “equitable relief” to mean “whatever relief a court of equity is empowered to provide in the particular case at issue.”\(^{158}\) The Court thought it more likely that the phrase described “those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).”\(^{159}\) Part of the irony here is that the Court did not even get its loose usage right, because mandamus and much of restitution was legal.\(^ {160}\) But what is most striking is


\(^{158}\) Id. at 4513.

\(^{159}\) Id.

\(^{160}\) THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 173 (5th ed. 1956) (describing origins of mandamus in Court of King’s Bench); see supra text accompanying notes 92-99 (summarizing origins of restitution).
the express assumption that Congress used a technical term inaccurately because lawyers no longer know what it means.

Another practical implication of accepting my view of the matter is that it would discredit one recurring argument that can only confuse and never enlighten—the argument that something cannot be done because it comes from equity, and equity is extraordinary or subordinate to law. It is a safe generalization that whenever a judge or an advocate relies on the claim that equity is extraordinary, he is padding his real argument with a makeweight. Consciously or not, he has some fear that his real argument may not persuade and that he needs to flim flam the gullible. He may be among the gullible himself, and he may be fooling himself. But I am quite certain that neither the history of equity nor a consistent remedial hierarchy is the reason for his decision. Except where references to equity have been codified, as in the constitutional arguments about jury trial, law-equity arguments are always and exclusively a misleading distraction.