

THE TRIUMPH OF EQUITY REVISITED: THE STAGES OF EQUITABLE DISCRETION

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* Huntley Professor, Washington and Lee Law School. Subrin's *How Equity Conquered Common Law* was formative for this Civil Procedure and Remedies professor. My underlining tracks through Steve's article show that during my decades of teaching Civil Procedure and Remedies, I have read it at least three times with different levels of interest and understanding. I am honored and flattered that Jeffrey Stempel and Thomas Main asked me to participate in honoring Steve. Thanks to research assistants Trista Bishop-Watt, Jenna Fierstein, and Scott Weingart, and to the Frances Lewis Law Center for supporting them and for providing a research grant in the summer of 2014.

So we beat on Boats against the Current, borne back ceaselessly into the past.
—*The Great Gatsby* by F. Scott Fitzgerald

PROLOGUE: HOW EQUITY CONQUERED COMMON LAW

Professor Steve Subrin's central ideas in his seminal article *How Equity Conquered Common Law* were that the equity tradition in procedure suppressed the common law tradition in the Federal Rules of Civil Procedure and that the emphasis on equity brought undesirable consequences.

Steve's concluding paragraphs are indispensable to what follows:

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 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. The momentum toward case management, settlement, and alternative dispute resolution represents, for the most part, a continued failure to use predefined procedures in a manner that will try, however imperfectly, to deliver predefined law and rights.

We need judges who judge as well as judges who manage. We need oral testimony, oral argument, and juries to balance documents, judges, and magistrates. This is not a plea for arid formalism that overemphasizes the value of form. Nor is it a plea for uncontrolled juries. This is a reminder that there is another rich tradition to draw upon, that the common law virtues of form and focus are necessary to help us develop methods that can realize our rights. It is a reminder that law and equity developed as companions, and that equity set adrift without the common law may in fact be Maitland's "castle in the air." The cure for our uncontrolled system does not require the elimination of equity. It does require that we revisit our common law heritage.¹

Equity, Steve argued, was too amorphous, too unfocused, and too diffuse, leading to the subject of this modest effort—equitable discretion.

INTRODUCTION

I have taken two cracks at equitable discretion.² If this one differs, it is because over time I came to know my characters a little better.

¹ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 1001–02 (1987) (footnote omitted).

² See generally DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* (2010) [hereinafter RENDLEMAN, *COMPLEX LITIGATION*]; Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63 (2007) [hereinafter Rendleman, *The Trial Judge's Equitable Discretion*].

This article has two parts: it starts in part I with a summary of what we know as equitable discretion. Then, part II surveys decision points in litigation where equitable discretion arises. It concludes that, although the tension in process and ideology is eternal, the legal system's general need for rules and standards supports Steve's views except in measuring the winning plaintiff's remedy where the system needs equitable discretion.

I. EQUITABLE DISCRETION

Our summary begins in ancient Athens with Aristotle. "Equity," which in a common translation of his *Nicomachean Ethics*, "is a rectification of law where it fails through generality."³ To elaborate:

Whenever then the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator's rule is inadequate or erroneous in virtue of its generality, to rectify the defect which the legislator himself, if he were present, would admit, and had he known it, would have rectified in legislating.⁴

Aristotle's *Ethics* continues. "[A]ll law is couched in general terms, but there are some cases upon which it is impossible to pronounce correctly in general terms."⁵ An equitable man is one who will not, in an exceptional situation, insist upon his rights; he will not apply the general rule in its full rigor. Equity is a form of dispensation.⁶

Our path to contemporary equitable discretion shifts to legal historian S.F.C. Milsom's observation about Common Law and Chancery (another word for Equity), the dual court systems of Medieval England. "The discussion about the relative importance in a legal system of certainty and abstract justice is unending," Milsom wrote, "but it begins at a definite stage of development, namely when the law is first seen as a system of substantive rules prescribing results upon given states of fact. In England this discussion was at once institutionalised: certainty resided in the common law courts, justice in the chancellor's equity."⁷

The Court of Chancery embodied equitable discretion as a practice and policy. In 1615, in the Earl of Oxford's Case, the Chancellor wrote that "The Cause why there is a Chancery is, for that Mens Actions are so divers and infi-

³ ARISTOTLE, *NICOMACHEAN ETHICS* 172 (J.E.C. Welldon trans., Macmillan 1912) (c. 384 B.C.E.).

⁴ *Id.*

⁵ *Id.* at 171.

⁶ *Id.* at 172–73. Joe Sachs's more recent translation of Aristotle's *Ethics* uses "decency" instead of "equity" for "epieikeia" because "decency" is, he writes, more accurate. Aristotle is seeking "[a] sense for what is appropriate" in deciding when to depart from a general rule. "Aristotle is describing something that goes beyond what is equitable (*to ison*). Decency is one of Aristotle's most frequent ways of naming human goodness." ARISTOTLE, *NICOMACHEAN ETHICS* 203 (Joe Sachs trans., Focus Publ'g 2002).

⁷ S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 94 (2d ed. 1981).

nite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances,” which led him to conclude that “[t]he Office of the Chancellor is . . . to soften and mollify the Extremity of the Law.”⁸

In the eighteenth century, Blackstone, paraphrasing Aristotle and quoting Grotius, wrote:

[F]rom this method of interpreting laws, by reason of them, arises what we call equity; which is thus defined by Grotius, “the correction of that, wherein the law (by reason of its universality) is deficient.” For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted. And these are the cases, which, as Grotius expresses it “*lex non exacte definit, sed arbitrio boni viri permittit.*”⁹

Medieval Chancery was a court of conscience because its orders to the defendant to “do your duty” expressed the Chancellor’s conscience and operated on the defendant’s conscience. The Chancellor enforced the Maxim that “Equity Acts *In Personam*” through personal or *in personam* orders enforceable by coercive contempt. These included the Chancellor’s power to jail or fine a recalcitrant or stubborn defendant until he obeyed.¹⁰ A “Lost Maxim of Equity” expresses Chancery’s transition from conscience to coercion: “Equity Is Soft and Chewy on the Outside, But Hard and Crunchy on the Inside.”¹¹

“Justice” is an appealing concept. But, following Steve’s analysis, it is an amorphous, unfocused, and diffuse one. Law means that people are governed through a system of rules that judges apply generally to similar disputes. Critics like Steve challenge the Chancellor’s discretion: too much discretion means unequal law, indeed no law at all. John Selden’s widely-quoted comment from the late seventeenth century focused on the Chancellor’s subjectivity:

[E]quity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. “Tis all one, as if they should make his foot the standard for the measure we call a Chancellor’s foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot.”¹²

In the late eighteenth century, Lord Camden’s focus on Chancery and equitable discretion shifted from subjectivity to arbitrariness and corruption. “[T]he discretion of a Judge is the law of tyrants; it is always unknown; it is different

⁸ Earl of Oxford’s Case, 21 Eng. Rep 485, 486 (1615).

⁹ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61 (Oxford, Clarendon Press 2009) (1765).

¹⁰ RENDLEMAN, COMPLEX LITIGATION, *supra* note 2, at 629; SARAH WORTHINGTON, EQUITY 15–16 (2d ed. 2006).

¹¹ Apologies to Gene Volokh for reversing his Lost Maxim. See Eugene Volokh, *Lost Maxims of Equity*, 52 J. LEGAL EDUC. 619 (2002).

¹² *Gee v. Pritchard*, 36 Eng. Rep. 670, 679 n.1 (1818) (quoting JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN 61 (Samuel Harvey Reynolds ed., 1892)).

in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is often times caprice, in the worst it is every vice, folly, and passion to which human nature is liable.”¹³

In the late nineteenth century, after the American Chancellor learned to enjoin strikes in *In re Debs*,¹⁴ a critic of equitable discretion wrote that “[t]he present Chief Justice of the United States, before he became the head of the bench, remarked of a reforming member of the Chicago bar, ‘Brother B. would codify all laws in an act of two sections: 1st, All people must be good; 2d, Courts of equity are hereby given full power and authority to enforce the provisions of this act.’”¹⁵

The late Peter Birks felt so strongly that “discretionary remedialism” was an outrage against certainty and predictability that he advocated dissolving the study of remedies as a separate inquiry and putting the winner’s formerly remedial portion under the appropriate substantive head.¹⁶

Critics move from caprice and corruption to politics in robes. A judicial decision isn’t the inevitable result of adding a column of established legal principles. Discretion allows the judge to implement a political platform. Procedure, context, the events, the litigants, the lawyers’ strategies and tactics, research, and the judge’s disposition affect the result.

A more positivistic approach relies less on the judge’s strength of character and more on developing principles, standards, and rules to structure, confine, and limit the judge’s discretion.¹⁷ An approach that contrasts to Aristotle’s flexibility holds that if “particular injustice sometimes necessarily result[s] from the operation of general rules,” the general rules “cannot be departed from to suit particular cases,” even though moral injustice or disgrace may occur.¹⁸

Beginning with the Field Codes in the United States in the middle of the nineteenth century, the Common Law and Chancery courts were merged.¹⁹ The

¹³ JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 1356 (1992) (quoting *Doe v. Kersey* (1795) (C.P.) (Unreported)); see also BOUVIER’S *LAW DICTIONARY* 328–29 (1839); Richard B. Spindle, *Judicial Discretion in Common Law Courts*, 4 WASH. & LEE L. REV. 143, 143 (1947).

¹⁴ *In re Debs*, 158 U.S. 564 (1895).

¹⁵ Charles Noble Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 510 (1898); see also Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 976–79 (2010).

¹⁶ Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 16–17, 35–36 (2000); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 930 (1999); Thomas D. Rowe, Jr., *No Final Victories: The Incompleteness of Equity’s Triumph in Federal Public Law*, 56 LAW & CONTEMP. PROBS., Summer 1993, at 105, 117–18; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

¹⁷ David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546–47, 589 (1985).

¹⁸ *Mills v. Wyman*, 20 Mass. 207, 209 (1825); but see Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 538 (1988).

¹⁹ Subrin, *supra* note 1, at 932.

Federal Rules of Civil Procedure in the late 1930s were the merger's major milestone. In Steve's story, this is when the redoubt fell—equity conquered the common law.²⁰

Law-equity divisions are fading.²¹ But the divided institutional courts persist. Virginia, a commonwealth that lets others try out innovations for a century or more, waited until 2006 to merge its dual courts.²² Delaware Chancery, the nation's premier business court, will be with us for the foreseeable future. Equity guides boards' and officers' fiduciary duties in corporate law applied in Delaware Chancery and elsewhere.²³

Substantive areas formerly associated with Chancery are trusts, fiduciary relationships, mortgages and liens, wills, estates, and divorce. "Notwithstanding the fusion of law and equity by the Rules of Civil Procedure," the Supreme Court said in 1949, "the substantive principles of Courts of Chancery remain unaffected."²⁴ As the California court put it, "We perceive in this fusing of the two former rescission procedures no intention on the part of the Legislature to disturb, much less eradicate, substantive differences theretofore underlying such procedures."²⁵ Many of these areas of substantive equity have developed into independent substantive-law fields, often heavily statutory today. The statutory systems retain the earmarks of equity, including the absence of a jury, contempt enforcement, and equitable discretion.

Two examples of equitable discretion in statutory substantive equity areas will suffice. First, in family law in *Canavos v. Canavos*, a Virginia court held that the chancellor has discretion to provide that the order for family support payments should not be a lien on the obligor's real estate.²⁶ Second, in property law, the court of Equity can read an absolute deed as a mortgage.²⁷ The judge has broad equitable powers and equitable discretion in a mortgage foreclosure sale.²⁸ For example, a Montana court found the inherent equitable discretion to

²⁰ *Id.* at 925.

²¹ Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1005 (2015).

²² VA. SUP. CT. R. 3:1; *see also* W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77 (2006); Simon H. Scott III & W. Everett Lupton, *Announcing a New Virginia "Civil" Union: The Marriage of Chancery and Law*, VA. LAW., Feb. 2006, at 34, 35.

²³ Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701, 703 (2011).

²⁴ *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949); *see also* *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973–74 (2014).

²⁵ *Runyan v. Pac. Air Indus., Inc.*, 466 P.2d 682, 688 (Cal. 1970).

²⁶ *Canavos v. Canavos*, 139 S.E.2d 825, 828 (Va. 1965).

²⁷ Douglas Rendleman, *Absolute Conveyance as a Mortgage in Iowa*, 18 DRAKE L. REV. 197, 197 (1969); *In re Primes*, 518 B.R. 466, 468 (Bankr. N.D. Ill. 2014).

²⁸ *Ballentyne v. Smith*, 205 U.S. 285, 290 (1907); JOHN RAO ET AL., FORECLOSURES: MORTGAGE SERVICING, MORTGAGE MODIFICATIONS, AND FORECLOSURE DEFENSE § 16.2.3 (2012); David A. Super, *Defending Mortgage Foreclosures: Seeking a Role for Equity*, 43 CLEARINGHOUSE REV. 104 (2009).

set the deficiency judgment in a foreclosure sale at debt minus fair market value.²⁹

“[M]emories of the divided bench, and familiarity with its technical refinements, recede further into the past.”³⁰ Much of non-statutory substantive equity has fallen out of the law school curriculum. These losses include basic distinctions between law and equity and important equitable property interests.³¹ The profession risks losing these distinctions and doctrines altogether. Professor Andrew Kull deplored the “travesty” that equitable discretion overrode forgotten equitable property interests.³²

Features of formerly Chancery procedure are discovery, the class action, the shareholder’s derivative action, and interpleader. These features are part of modern merged civil procedure.³³ Although many equitable defenses like illegality, duress, and fraud were assimilated into the merged court systems, two equitable defenses—laches³⁴ and unclean hands—persist, as we will see below, uneasily unmerged. The litigants’ constitutional jury right requires that part of procedure to remain unmergeable.

This article’s treatment of merger like its treatment of discretion is particularized and eclectic. The dual courts of Common Law and Chancery were a historical accident that defies a logical explanation.³⁵ Scholars of merger whose views have influenced mine vary in their approaches. Professor Lionel Smith emphasizes that, in some respects, complete merger is premature because “common law and Equity remain fundamentally and substantively different.”³⁶ Professor Douglas Laycock and others advocate, or hope for, complete mer-

²⁹ *Trs. of the Wash.-Idaho-Mont. Carpenters-Emp’rs Ret. Trust Fund v. Galleria P’ship*, 780 P.2d 608, 619 (Mont. 1989).

³⁰ *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

³¹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, note e (2011); Andrew Kull, *Common-Law Restitution and the Madoff Liquidation*, 92 B.U. L. REV. 939, 939–40 (2012).

³² Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 300 (2014).

³³ WORTHINGTON, *supra* note 10, at 327. For discussions of judicial discretion that are not uniquely equitable discretion in procedure joinder and aggregate litigation, see Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 297 n.115 (1991); Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683 (2014). Additional areas of procedural discretion are changes of venue, extensions of time, amendments of pleadings, evidence rulings, and setting aside default judgments. Spindle, *supra* note 13, at 147.

³⁴ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973–74 (2014).

³⁵ OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 50–51, 55–58 (1978).

³⁶ Lionel Smith, *Common Law and Equity in R3RUE*, 68 WASH. & LEE L. REV. 1185, 1187 (2011); *see also* GRAHAM VIRGO, *THE PRINCIPLES OF EQUITY AND TRUSTS* 25 (2012). Both scholars emphasize trusts; the express trust with a fiduciary duty based on divided legal and equitable title remains a major part of substantive equity where the Chancellor has no equitable discretion. Smith, *supra*, at 1195.

ger.³⁷ Although my sympathies lie with the latter group, complete merger of United States federal and state systems founders when we consider the litigants' jury rights at common law, but not equity, and statutes that call for equitable remedies. Among substance, procedure, and remedies, procedure is the most merged, remedies the least.

The Big Three equitable remedies are the injunction, the constructive trust, and specific performance. Other equitable remedies include an equitable accounting, the resulting trust, rescission-restitution, subrogation, and the judgment debtor's examination.³⁸ Many statutes call for "equitable" relief. An example is the frequently-litigated Employee Retirement Income Security Act.³⁹ Like litigants' constitutional jury right, a statute that calls for an "equitable remedy" is unmergeable.⁴⁰ These remedies and remedial statutes feature the earmarks of equity: lack of a jury, an *in personam* order enforced by contempt instead of impersonal collection, and equitable discretion.

Legal and equitable remedies take different procedural tracks. A plaintiff's lawsuit for damages, the principal common-law remedy, won't consider Rule 65 or Rule 60(b)(5). A lawsuit for an injunction won't consider jury instructions, Rule 51. In that sense, remedies aren't transsubstantive.

Complete merger has not happened despite the persuasive call for total merger and functional remedies.⁴¹ Substantive areas retain their equitable origins. Administering the constitutional right to a civil jury and statutes that prescribe equitable remedies require attention to law-equity distinctions.

Observers feared that equitable discretion would be lost after merger. "Perhaps most significantly, equitable tribunals either disappeared or lost much of their jurisdiction to hidebound common law courts whose traditions valued technical rules over substantive justice."⁴² However, equitable discretion persists after merger. Professor Samuel Bray has observed that the present Supreme Court didn't get the memo that Law and Equity were merged.⁴³ In decisions that he refers to as "New Equity," the Supreme Court has preserved the law-equity line.⁴⁴

³⁷ Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS., Summer 1993, at 53, 78; see also WORTHINGTON, *supra* note 10, at 325; Andrew Burrows, *We Do This at Common Law But That in Equity*, 22 OXFORD J. LEGAL STUD. 1 (2002).

³⁸ WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY § 103 (2d ed. 1956) (listing equitable remedies).

³⁹ 29 U.S.C. § 1132(a)(5)(B) (2012). Professor Bray lists statutes that specify equitable relief. Bray, *supra* note 21, at 17–18 nn.76, 78.

⁴⁰ Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002); Bray, *supra* note 21, at 4 n.9.

⁴¹ See Laycock, *supra* note 37.

⁴² David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1844 n.460; see also RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 50–51 (1961).

⁴³ Bray, *supra* note 21, at 3–4.

⁴⁴ *Id.* at 55.

Discretion is ubiquitous in legal, and in all, decisionmaking. In considering pardons or commutations for soldiers convicted in courts martial, Lincoln examined the records for sympathetic factors to temper soldiers' sanctions.⁴⁵ Procedure concepts like "proportionality" in discovery are vague and dispense discretion.⁴⁶ Equitable discretion runs through class actions from the judge's decision to certify a class⁴⁷ to her decision to approve a settlement.⁴⁸ Notably, both discovery and class actions originated in equity and were adopted for civil procedure generally. In non-equity adjudication, discretion has flourished where the judge is making contextual and non-precedential decisions from the tort of conversion⁴⁹ to setting the amount of criminal "restitution" that a child victim of internet porn can recover from a viewer.⁵⁰

Is the emphasis on equity, conscience, and equitable discretion anachronistic after merger? Should the idea that the Chancellor applied conscience when the legal rules defeated justice survive the merger of the two systems and the end of the Common-Law writs? Has Chancery emphasized its moral superiority too much? Does emphasis on conscience lead the judge to focus on one aspect of a dispute and ignore the total situation and blur policy? The arguments that conscience and discretion are unique to equitable reasoning are difficult to support.⁵¹

Equitable discretion has formidable defenders. The decisionmaker at the scene has a better sense of the dispute's and the parties' environment and context. For example, Thomas Main, once Steve's student and now Steve's Civil Procedure casebook co-editor, endorsed equitable discretion in terms much like Aristotle's:

[E]quity could offer relief from hardship or mischief created by a particular application of a procedural rule. . . . I advocate that district judges invoke the jurisdiction of equity to avoid the application of procedural rules in those unique circumstances where the outcomes produced by rigid application of the rules are deficient.⁵²

⁴⁵ DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 539, 670–71 (2005).

⁴⁶ Richard Marcus, "Looking Backward" to 1938, 162 U. PA. L. REV. 1691, 1717–18 (2014).

⁴⁷ Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1926–27 (2014).

⁴⁸ *Ayres v. Thompson*, 358 F.3d 356, 368–69 (5th Cir. 2004).

⁴⁹ *Storms v. Reid*, 691 S.W.2d 73, 75 (Tex. App. 1985) ("In conversion cases, the trial court must be given the discretion required to fashion an equitable remedy.").

⁵⁰ *Paroline v. United States*, 134 S. Ct. 1710, 1727–29 (2014).

⁵¹ WORTHINGTON, *supra* note 10, at 329–35.

⁵² Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 432, 497, 504–05 (2003). Another fan of equitable discretion is T. Leigh Anenson. See T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63, 114–17 (2011) [hereinafter Anenson, *Limiting Legal Remedies*]; T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377 (2008); T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*,

A 2009 procedure book for law students maintains that the Federal Rules of Civil Procedure are more of a starting place than rules. “[T]he Rules are intended to be more of a guidepost than the final resting ground for procedural decisions.” Judges, the author maintains, should retreat from formalism and predictability to discretion, leading to “a more flexible system, more uncertain in its application, more demanding in its administration, and ultimately to be judged by how well it yields an efficient version of justice.”⁵³

The U.S. Supreme Court’s leading citation for the Chancellor’s universal equitable discretion is *Hecht v. Bowles*:

We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that “An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.” 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.⁵⁴

There are many others.⁵⁵

The court needs equitable discretion because of its salutary features. But a judge may abuse her equitable discretion. This article turns to two exhibits (both numbered “A”) to show that equitable discretion has the Roman god Janus’s quality, that of facing both ways.

The first Exhibit A, which reveals beneficial equitable discretion, is the Supreme Court’s 2014 decision rejecting a statutory buffer zone for abortion clinic picketing.⁵⁶ The Court struck down a thirty-five-foot no-picketing buffer zone that was enforced through a criminal statute because it forbade too much expression.⁵⁷ The majority’s opinion discussed the alternative of an injunction and the superiority of equitable discretion.⁵⁸ As opposed to the one-size-fits-all technique of the criminal statute, the Court cited the possibility of an injunction as a flexible and contextual remedy that the judge could draft or tailor to fit the actual litigants, their geography, and the events.⁵⁹

45 AM. BUS. L.J. 455, 507 (2008) [hereinafter Anenson, *Treating Equity Like Law*]; Super, *supra* note 42, at 1841–67 nn.440–600.

⁵³ SAMUEL ISSACHAROFF, CIVIL PROCEDURE 36, 39 (2d ed. 2009).

⁵⁴ *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) (citation omitted).

⁵⁵ *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943); *Pennsylvania v. Williams*, 294 U.S. 176, 182 (1935); *Rhode Island v. Massachusetts*, 39 U.S. 210, 251 (1840); *Toledo, A.A. & N.M. Ry. Co. v. Pa. Co.*, 54 F. 746, 751 (N.D. Ohio 1893); *Miner v. Belle Isle Ice Co.*, 53 N.W. 218, 224 (Mich. 1892).

⁵⁶ *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014).

⁵⁷ *Id.* at 2525, 2541.

⁵⁸ *Id.* at 2538.

⁵⁹ *Id.*

The second Exhibit A reveals excessive equitable discretion. The class action originated in equity.⁶⁰ The Exhibit is Judge Weinstein's justification to transfer the class action Rule's power to approve attorney fees to the settlement of a non-class action: "While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court."⁶¹ Although the judge's statement advanced his beneficial goal of protecting claimants, it arrogates equitable discretion and creativity, in effect, to make the law up as it goes along. As Professor Linda Mullenix wrote, "The label quasi-class action is a convenient, lazy fabrication to justify the lawless administration of aggregate claims."⁶² Reciting a conjuration doesn't transmogrify it to law. But "[i]t is almost as if repeated incantation of a phrase can bring an avatar into actuality."⁶³

What does this article mean by equitable discretion? What are the principles of confinement that reduce abuse but allow the judge to exercise her equitable discretion?

First, what do we mean by "equitable"? Out of many definitions of "equity," we select three to discuss: First, the institution, the Court of Equity, which we capitalize and often refer to as Chancery. Second, equitable remedies, chiefly the injunction, but sometimes specific performance or the constructive trust. Equity as fairness is the third part of our analysis as the discussion above shows.

Unfortunately, "discretion" lacks a fixed meaning in the professional vernacular.⁶⁴ My meaning is narrower than that of others. Some definitions include decisions of arbitrary personal whim that do not involve reference to any standard or principle, for example, "red or white?" I don't include these decisions under discretion. Professor Graham Virgo wrote, "[w]hilst the role of judicial discretion involves a choice and is essential to ensure that justice is achieved, if the resort to justice is to be defensible and predictable, there needs to be identifiable principles or recognised factors to guide that discretion and to ensure that

⁶⁰ GEOFFREY C. HAZARD, JR. ET AL., *CIVIL PROCEDURE* § 7.20 (6th ed. 2011); Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 132–33 (2003).

⁶¹ *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006).

⁶² Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 389 (2011); see also Howard M. Erichson, *Judge Jack Weinstein and the Allure of Antiproceduralism*, 64 DEPAUL L. REV. 393, 419 (2015).

⁶³ *Id.* at 398. A more benign view of equitable discretion and class-action judges' ability to invent the law is David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 600–02 (2013).

⁶⁴ Brunet, *supra* note 33, at 298.

like cases are treated alike, for the benefit of the parties, their advisers and, if the case goes to trial, the judge.”⁶⁵

Many scholars include two matters under the head of discretion: first, the development of the law, for example, whether to reverse or extend a common law precedent; and, second, interpretation—the meaning of a contract, will, statute, or constitution.⁶⁶ I consider these decisions to be law-creation that comes under the head of judicial wisdom and judgment, responsibly exercised, not discretion.⁶⁷ Also, supposing distinctions between the fuzzy margins of fact, mixed questions of law and fact, factfinding isn’t discretionary.⁶⁸

Discretion, narrowed to equitable discretion, is the judge’s responsible choice in matters labeled “equitable.” In the course of litigation, many decisions must be made. Those clearly governed by a rule aren’t discretionary. At the other end of the continuum, some decisions cannot be determined in advance by a rule because there is no clear right or wrong. Legislators, rulemakers, and earlier courts cannot formulate a rule, but they can identify factors and formulate guidelines or standards. Factors, standards, or guidelines may exist, but without any clear definition of their relative importance. These identify the questions the judge must ask to focus her judgment on the critical issues without forcing her answer.⁶⁹ Context is crucial, as Roscoe Pound put it, “for putting the human factor in the central place and relegating logic to its true position as an instrument.”⁷⁰ An “equitable” element of ethical override at the margin will allow the judge to suppress sharp practice, form over substance, and opportunism.⁷¹ As Professor Graham Virgo put it, equity “has a distinct identity and function to modify the rigours of the Common Law.”⁷²

Equitable discretion requires the judge to choose between conflicting values, for example, between Rule 1’s “just” and its “speedy.” In *Smith v. Commonwealth*, a Virginia court wrote, “An ideal system of laws would be one in which speedy justice is administered, but justice not speed should be its paramount purpose.”⁷³ The system delegates to the judge on the spot the authority

⁶⁵ Graham Virgo, *Whose Conscience? Unconscionability in the Common Law of Obligations* 25 (unpublished manuscript) (on file with the author).

⁶⁶ Effron, *supra* note 33, at 695 n.35; Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); H. L. A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013); Shapiro, *supra* note 17, at 546.

⁶⁷ Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L. J. 231, 253–54, 274–75 (1990) (arguing that jurisprudential discretion is not discretion).

⁶⁸ Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 657 (1988).

⁶⁹ Hart, *supra* note 66, at 652.

⁷⁰ Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908).

⁷¹ Henry Smith, *Equity as Second-Order Law: The Problem of Opportunism* 42–43 (Harvard Public Law Working Paper No. 15-13, 2015), available at <http://ssrn.com/abstract=2617413>.

⁷² VIRGO, *supra* note 36.

⁷³ Spindle, *supra* note 13, at 148 (quoting *Smith v. Commonwealth*, 156 S.E. 577, 579 (Va. 1931)).

or equitable discretion to choose, and it trusts the judge to make a responsible choice, albeit one that the rule doesn't compel.

Trial judges' on-the-spot decisions won't always serve justice. Professor Charles Yablon's thoughtful article on discretion cites only two examples of equitable discretion, both leading to lawless decisions.⁷⁴ What principles of confinement curb the excess of equitable discretion and prevent abuse? The principles, Graham Virgo wrote, that supply a judge's normative anchor

have emerged over time through the constant evolution of Equity. Such principles are typically founded on what the judge considers to be just and fair, not determined through the exercise of arbitrary choice, but rather as an external normative standard against which the defendant can be judged. Some of these equitable principles can be identified at a high-level of abstraction, such as fair dealing, trust and confidence, but then various sub-branches can be identified from these principles, often influenced by the particular context.⁷⁵

Two of these are below: statements of reasons and appellate review. In the end, a great deal depends on the decisionmaker judge's professional standards. As Professor Tim Dare put it:

No matter how carefully we construct our systems of rules and principles, cases inevitably arise in which we are unsure which rule applies, in which we want to make an exception to an applicable rule, or in which we think an apparently inapplicable rule should after all be applied in a particular case. In such cases, judgement or practical wisdom is required if we are to obtain the benefit of general rules and principles without paying the considerable costs threatened by their mindless application.⁷⁶

Many of the functional reasons to treat equitable and legal remedies differently stem from *in personam* equitable remedies, granting and enforcing the judge's personal order to the defendant. As California Justice Newman put it in his dissent in *C&K Engineering Contractors v. Amber Steel*, "the typically more continuing and more personalized involvement of the trial judge in specific performance and injunctive decrees than in mere judgments for damages."⁷⁷ Professor Henry McClintock wrote, "practical experience has shown that in the administration of specific relief there must be more discretion vested in the judge than in the allowance of money damages for the injury suffered. . . . [B]y the great weight of authority, equity still has discretion in adjusting the relief to be awarded to the needs of the fact situation."⁷⁸

Where does this leave us? The definition and operation of discretion will remain contested and elusive. It is difficult to distinguish discretion from other decisionmaking. Judge Paul Finn quoted Justice Gummow in *Grimaldi v. Cha-*

⁷⁴ Yablon, *supra* note 67, at 275–77 nn.156, 163.

⁷⁵ Virgo, *supra* note 65 (footnote omitted); *see also* Yablon, *supra* note 67, at 256.

⁷⁶ TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 155–56 (2009).

⁷⁷ *C & K Eng'g v. Amber Steel Co.*, 587 P.2d 1136, 1143 (Cal. 1978) (Newman, J., dissenting).

⁷⁸ HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 51 (2d ed. 1948).

meleon Mining: “As Gummow J has indicated (extra-curially), this is not to suggest that ‘the course of decision has rendered discretion in equity so settled as to make it appropriate to speak of “rights” to particular remedies.’”⁷⁹ Discretion isn’t a single subject, as Moses Maimonides wrote in *The Guide for the Perplexed*, “[m]y object in adopting this arrangement is that the truths should be at one time apparent, and at another time concealed.”⁸⁰

II. THE STAGES OF EQUITABLE DISCRETION

A. *Quick March Through a Lawsuit*

A chronological survey of a hypothetical plaintiff’s action for an injunction against a feedlot’s odiferous pollution reveals equitable discretion at numerous points. A farmer, doing business as the Field Family Farm, is suing BeefCo, an out-of-state corporation that maintains an industrial feedlot next door—a neighbor but not a friend. Plaintiff Field alleges the tort of private nuisance because BeefCo’s feeding and finishing five thousand or more steers produces an odor that makes normal farm life impossible. He asks the court to grant an injunction to suppress the nuisance in the future, plus damages for past indignities.⁸¹ The resident farmer sues the out-of-state corporate defendant in federal court pursuant to diversity jurisdiction (the same procedural analysis would exist in a state court in a state that has adopted the Federal Rules of Civil Procedure, with an exception for possible state jury-trial variations). This article will follow Field’s lawsuit with variations through the stages of a lawsuit. Although it focuses on trial Judge Pepper’s equitable discretion, the article wraps up with an appeal and collection of a money judgment.

1. *Pleading, Motions, Discovery*

The parties’ pleading and pleading motions don’t differ much from an action for damages.⁸² Field’s complaint against BeefCo for an injunction will allege the prerequisites for an injunction, inadequate remedy at law, irreparable injury, and favorable balances of hardship and the public interest. The plaintiff’s demand asks for an injunction, interlocutory and permanent, as well as compensatory damages and punitive damages. The absence of a jury for an equitable remedy may affect some of the parties’ discovery, summary judgment,

⁷⁹ *Grimaldi v Chameleon Mining NL (No. 2)* (2012), 200 FCR 296, 403 (Austl.).

⁸⁰ MOSES MAIMONIDES, *A GUIDE FOR THE PERPLEXED* 3 (M. Friedländer trans., 4th rev. ed., 1904); Yablon, *supra* note 67, at 253–54.

⁸¹ *See Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 761 (8th Cir. 2006).

⁸² I agree with Steve and Thom’s critique of the regressive direction that personal jurisdiction, pleading, discovery, summary judgment, and jury trial have taken in procedure’s Fourth Era. I wondered why I haven’t enjoyed my Civil Procedure course as much as I did earlier in my career until I read their article and others they cite. Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

and tactical decisions, but Field is also demanding damages. We return to the plaintiff's motion for a preliminary injunction below.

2. *Substantive Law*

As is true with much of the substantive law leading to an equitable remedy, the substantive doctrine of nuisance is imprecise, hinging as it does on the defendant's unreasonable use of its property.⁸³ Similarly, a plaintiff's claim for an injunction to stop plaintiffs' vote denial under the Voting Rights Act's section 2, is a "totality of the circumstances" test that requires the plaintiff to show a discriminatory burden on the protected class linked to "social and historical conditions" that produce discrimination.⁸⁴

Imprecise and vague substantive law facilitates the judge's discretionary decisionmaking.⁸⁵ For Professor Tobias Wolff, discretion starts when the rules become "indeterminate."⁸⁶ Lord Neuberger's speech in New Zealand relates the discussion in the United Kingdom about whether to retain the property-based institutional constructive trust or to adopt the remedial constructive trust, a debate that hinges on whether to accede to the remedial constructive trust's emphasis on equitable discretion.⁸⁷

3. *Place of Trial*

While it's unlikely in the real world that the defendant, who owns property and allegedly used that property to commit a tort in the same county as the plaintiff, will seek *forum non conveniens* dismissal, suppose it does. Under the doctrine of *forum non conveniens*, the judge has discretion to shed a lawsuit because another forum is more appropriate.⁸⁸ A judge may dismiss a legal or equitable lawsuit even though her court has jurisdiction and proper venue because the appropriate place of trial is elsewhere. This high-discretion doctrine came to us from the court's inherent power, which we claim for equity.⁸⁹

The judge will evaluate a vague, subjective, and contextual nonexclusive list of public and private factors: hardship, inconvenience, choice of law, col-

⁸³ 2 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 401 (2d ed. 2011) [hereinafter DOBBS ET AL., *THE LAW OF TORTS*].

⁸⁴ *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239, 243 (4th Cir. 2014).

⁸⁵ See R. Grant Hammond, *Interlocutory Injunctions: Time for a New Model?*, 30 U. TORONTO L.J. 240, 272 (1980).

⁸⁶ Wolff, *supra* note 47, at 1940 n.224.

⁸⁷ Lord Neuberger, *The Remedial Constructive Trust—Fact or Fiction*, Address at the Banking Servs. & Fin. Law Ass'n Conference, Queenstown (Aug. 10, 2014), available at <http://www.supremecourt.uk/docs/speech-140810.pdf>.

⁸⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947).

⁸⁹ *Id.* at 509.

lection, and the burden on jurors, the court, and the budget.⁹⁰ Returning to our hypothetical, Judge Pepper's decision on BeefCo's *forum non conveniens* motion is a no-brainer. She will deny it because a domestic plaintiff, not forum shopping, sued an out-of-state corporate defendant whose business is located in the forum, forum law governs, local witnesses will testify, and the defendant's forum realty is available for collection.

4. *Interlocutory Equitable Relief*

Farmer Field, who alleges that BeefCo's feedlot has driven him from his home, moves for a preliminary injunction. The preliminary injunction decision is a fertile field for the judge's equitable discretion.⁹¹ "[T]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," said the Supreme Court.⁹² Although the Rules provide for the preliminary injunction's little brother, the temporary restraining order,⁹³ they leave the procedure and standard for a preliminary injunction mostly at large for the courts' common law development.⁹⁴

The court-made standard for a preliminary injunction requires the judge to consider several factors: the likelihood that the plaintiff will prevail on final hearing as well as his lack of an adequate remedy at law, irreparable injury, balancing the hardships, and the public interest. Because of the absence of plenary procedure, a judge may be less willing to grant a plaintiff an interlocutory injunction than a permanent injunction that followed full procedure.⁹⁵

In addition to the factors included in the standard, two principles of confinement circumscribe the trial judge's latitude. First, the Rule tells the judge to respond to the plaintiff's motion for an interlocutory injunction with findings of fact and conclusions of law, on the record or written.⁹⁶ Second, the losing party may appeal the federal judge's preliminary injunction decision.⁹⁷

⁹⁰ *Id.* at 507; *Piper Aircraft Co. v. Renyo*, 454 U.S. 235, 255–56 (1981); Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1528–35 (2013).

⁹¹ Cravens, *supra* note 15, at 974–84.

⁹² *Yakus v. United States*, 321 U.S. 414, 439–40 (1944) (stating that a judge's decision to grant a plaintiff a preliminary injunction is "discretionary," and not a matter of "right"); *see also* *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

⁹³ FED. R. CIV. P. 65(b); 11A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2951 (3d ed. 2015) (discussing temporary restraining orders).

⁹⁴ Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1572 (2003).

⁹⁵ DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* §2.11(2) (2d ed. 1993) [hereinafter DOBBS, *LAW OF REMEDIES*]; JAMES M. FISCHER, *UNDERSTANDING REMEDIES* §33.2 (3d ed. 2014); DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 111–17 (1991).

⁹⁶ FED. R. CIV. P. 52(a)(2). This article discusses reasons for a judge's final decision below.

⁹⁷ 28 U.S.C. § 1292(a)(1) (2012).

The judge's preliminary injunction discretion, Professor Yablon wrote, is specialized discretion.⁹⁸ The trial judge's decision is perforce tentative because it is based on incomplete information and made under conditions of uncertainty. Then appellate courts examines whether the trial judge's decision was "good enough" under the circumstances of limited information and time.⁹⁹

Of the judge's equitable discretion in the preliminary injunction standard, then-Professor Grant Hammond wrote:

A discretionary formula, though fashionable, raises the dangers of potential judicial arbitrariness with respect to a remedy which is often dispositive of litigation and the difficulties of mounting an appeal from a discretion. These difficulties are not really solved by assuming that there will always be a succession of level-headed men called judges on the Clapham omnibus who will exercise considered judgment.¹⁰⁰

The prerequisites for a preliminary injunction are factors that the appellate court can administer. For example, in *Winter v. Natural Resources Defense Council*, the plaintiffs sought a preliminary injunction to stop the Navy's use of sonar off the California coast because it allegedly interfered with pods of whales migrating through the neighboring water. The Supreme Court reversed the lower courts' preliminary injunction maintaining that both lower courts had accorded insufficient weight to the public interest part of the preliminary injunction standard. In particular, the Supreme Court emphasized that, under the public interest inquiry, the lower courts' insufficient consideration of the public interest in national defense was an abuse of discretion.¹⁰¹ The Chief Justice's concurring opinion implemented his earlier statement that the court's discretion might be structured by standards.¹⁰²

Professors Sarah Cravens and Edward Cooper make the point that the factors are imprecise and subjective.¹⁰³ My own view is that the Supreme Court majority in *Winter* over-weighted military training within the public interest factor and de-emphasized environmental concerns. However, making findings on the factors structures the judge's decision, focuses her judgment on the important issues, and provides a basis for appellate review. The judge's preliminary injunction decision has attracted serious scholarly attention.¹⁰⁴

⁹⁸ Yablon, *supra* note 67, at 268.

⁹⁹ *Id.* at 268–74.

¹⁰⁰ Hammond, *supra* note 85.

¹⁰¹ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 26–32 (2008). The Chief Justice's opinion also held that the Ninth Circuit's "possibility" standard for irreparable injury was too relaxed; thus the plaintiff's irreparable injury must be likely. Cravens, *supra* note 15, at 981–82.

¹⁰² *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394–95 (2006) (Roberts, C.J., concurring).

¹⁰³ Cravens, *supra* note 15, at 975; *see also* Cooper, *supra* note 68.

¹⁰⁴ *See* Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005); Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363 (2003); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal*

Applying this to this article's running hypothetical, Judge Pepper, the trial judge grants farmer Field a "standards" preliminary injunction that limits the number of steers on BeefCo's lot to two thousand.

5. *Injunction Bond*

Judge Pepper has granted plaintiff Field a preliminary injunction that limits defendant BeefCo's feedlot to two thousand steers pending discovery and a later plenary evidentiary hearing. That preliminary injunction, the defendant argues, will reduce its profits; if the preliminary injunction turns out to be incorrect, it should recover those profits.

A plaintiff who receives an interlocutory injunction, a temporary restraining order or a preliminary injunction, posts a bond for the benefit of the defendant should the order turn out to be incorrect.¹⁰⁵ The judge's equitable discretion throughout the injunction-bond process is less structured than at other stages of the injunction process. It resembles a sliding scale.¹⁰⁶ The judge's decision points on the bond include discretion to waive the bond altogether, discretion to set a small or nominal bond, discretion to reject a defendant's recovery on the bond, and discretion to set the amount of the defendant's recovery on the bond.

Many courts had read the original injunction-bond Rule's apparently mandatory "shall" to nevertheless grant a judge equitable discretion to dispense with security for an indigent plaintiff.¹⁰⁷ Other courts said that the judge has discretion not to require an injunction bond for a plaintiff suing in the "public interest."¹⁰⁸ Some courts found that the "public interest" militated against a bond because it was particularly strong when the plaintiff was seeking to vindicate a constitutional right.¹⁰⁹ The Rules-restyling project in 2007 replaced "shall" because it is ambiguous.¹¹⁰ The restylers replaced the injunction bond rule's "shall" with "only if."¹¹¹ It remains to be seen whether the courts that

Standard, 22 REV. LITIG. 495 (2003); James M. Fischer, "Preliminarily" Enjoining Elections: A Tale of Two Ninth Circuit Panels, 41 SAN DIEGO L. REV. 1647 (2004); Jean-Philippe Groleau, *Interlocutory Injunctions: Revisiting the Three-Pronged Test*, 53 MCGILL L.J. 269 (2008); Hammond, *supra* note 85, at 278; John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33 (2007); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197 (2003); Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 848 (1989).

¹⁰⁵ FED. R. CIV. P. 65(c).

¹⁰⁶ See, e.g., *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 67 n.6 (1st Cir. 2006).

¹⁰⁷ *Hadix v. Caruso*, No. 4:92-CV-110, 2005 WL 2671289, at *6-7 (W.D. Mich. Oct. 19, 2005).

¹⁰⁸ *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995).

¹⁰⁹ *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 128-29 (D. Mass. 2003).

¹¹⁰ FED. R. CIV. P. 1 advisory committee's note.

¹¹¹ FED. R. CIV. P. 65(c).

earlier found “shall” not to be mandatory will also find that “only if” allows discretion to grant an unbonded interlocutory injunction.

The Rule allows the judge to set “security in an amount the court considers proper to pay the costs and damages” an incorrectly-enjoined defendant sustains.¹¹² Judges have claimed discretion to set a nominal bond for a public interest plaintiff.¹¹³ This de-emphasizes the Rule’s standard that the bond should compensate the defendant’s losses. One court said that a judge setting the amount of an injunction bond should consider several factors: possible harm to the defendant, the plaintiff’s chance of ultimate success on the merits, the plaintiff’s ability to post the bond, and the bond’s effect on enforcement of the plaintiff’s rights.¹¹⁴

In environmental litigation, plaintiffs often seek to enjoin huge construction projects. Requiring an injunction bond for such a preliminary injunction would be so expensive that it may prevent the plaintiffs’ suit. Judges claim equitable discretion in setting the amount of the bond. One judge, for example, set nominal bonds—\$1.¹¹⁵ Another judge used his discretion to reduce a government request of up to \$2,500,000 per month to \$100 total.¹¹⁶ A third bonded a \$387,000,000 project for \$1.¹¹⁷ “[T]he federal courts,” a student note concluded, “are returning to an equity conception of the bond determination. In so doing, courts are assuming broad discretion to except applicants from bonding requirements whenever their imposition would block litigation calculated to advance the public interest.”¹¹⁸

In *Bragg v. Robertson*, a lawsuit we will return to later, Judge Haden claimed discretion to bond a preliminary injunction halting mountain-top-removal coal mining at \$5,000. The judge couldn’t dispense with a bond under his Court of Appeals’ precedent, but he “possesses significant discretion in setting the amount of the bond.”¹¹⁹

A relevant related subject is the discretion a judge exercises in setting the amount of a defendant’s supersedes bond to appeal a money judgment. A federal judge has discretion in setting this amount, but the judge’s discretion is confined by a list of factors for her to consider in setting the bond.¹²⁰ These fac-

¹¹² FED. R. CIV. P. 65(c).

¹¹³ *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002).

¹¹⁴ *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers*, 679 F.2d 978, 1000 & n.25 (1st Cir. 1982).

¹¹⁵ *Alabama ex rel. Siegelman v. EPA*, 925 F.2d 385, 386–87 nn.1, 3 (11th Cir. 1991).

¹¹⁶ *Natural Res. Def. Council, Inc. v. Morton*, 337 F. Supp. 167, 168–69 (D.D.C. 1971).

¹¹⁷ *Envtl. Def. Fund, Inc. v. Corps of Eng’rs of the U.S. Army*, 331 F. Supp. 925, 927 (D.D.C. 1971).

¹¹⁸ Reina Calderon, Note, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. ENVTL. AFF. L. REV. 125, 148 (1985).

¹¹⁹ *Bragg v. Robertson*, 54 F. Supp. 2d 635, 652 (S.D.W. Va. 1999).

¹²⁰ Doug Rendleman, *A Cap on the Defendant’s Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1100 (2006); Jesse Wenger, Comment, *The Applicability of*

tors are too often absent from the judge's consideration of an injunction bond's amount.

In the article's hypothetical case, Field's anti-feedlot lawsuit's land-use and environmental features lead Judge Pepper to consider the "public interest" and to exercise her discretion to bond Field's preliminary injunction at \$1,000, a sum that is probably inadequate to compensate BeefCo for losses if the interlocutory preliminary injunction turns out to be incorrect.

After an interlocutory injunction turned out to be incorrect, one judge discussed the defendant's recovery from the plaintiff's injunction bond:

[T]he court in considering the matter of damages was exercising its equity powers, and was bound to effect justice between the parties, avoiding any result that would be inequitable or oppressive for either party. The Rule was not intended to negate the court's duty in this regard. Thus, we hold that the court had discretion to refuse to award damages, in the interest of equity and justice.¹²¹

In that case, "equity and justice" meant that the defendant, who suffered losses because of an incorrect order, was uncompensated, or, in law-students' vernacular, sucked it up.

Judge Posner disagreed with that court's "open-ended" discretion. Although he said in dicta that the judge has discretion to reverse a preliminary injunction and decline to award the defendant damages on the plaintiff's injunction bond, he confined that discretion by requiring the trial judge to give a "good reason" to refuse the defendant's recovery.¹²²

A Delaware court's approach to the defendant's recovery on the plaintiff's injunction bond begins with a presumption that favors the defendant's recovery.¹²³ The court then listed "objective factors" that might support the chancellor's decision to deny recovery: the "parties' resources, defendants' actions that cause material or unreasonable delay, defendants' efforts or lack of effort to mitigate damages, and changes in applicable law after a preliminary injunction has issued," as well as a finding that defendant engaged in unfair or inequitable conduct during the course of litigation.¹²⁴ "Each case must be assessed on its own merits . . . and the court must be ever mindful of the presumption in favor of awarding [the defendant] damages" on the plaintiff's injunction bond.¹²⁵

If the defendant recovers on the plaintiff's injunction bond, questions abound. For what? And how much? May the defendant recover only damages

State Appeal Bond Caps in Suits Brought in Federal Courts Pursuant to Diversity Jurisdiction, 162 U. PA. L. REV. 979, 986 (2014).

¹²¹ *Page Commc'ns Eng'rs, Inc. v. Froehlke*, 475 F.2d 994, 997 (D.C. Cir. 1973).

¹²² *Coyne-Delany Co. v. Capital Dev. Bd. of Ill.*, 717 F.2d 385, 391-93 (7th Cir. 1983); Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828, 842-46 (1986).

¹²³ *Emerald Partners v. Berlin*, 726 A.2d 1215, 1225 (Del. 1999).

¹²⁴ *Id.* (quoting *Emerald Partners v. Berlin*, No. C.A. 9700, 1998 WL 474195, at *2 (Del. Ch. Aug. 3, 1998)).

¹²⁵ *Id.* (discussing *Coyne-Delany Co.*, 717 F.2d 385).

to compensate loss, or also restitution measured by the plaintiff's gain?¹²⁶ Will recovery include the defendant's emotional distress for example for loss of free speech rights? The law is thin. One example is a disappointed Alabama car buyer who had excoriated the automobile dealer on a website.¹²⁷ The buyer was preliminarily enjoined.¹²⁸ During the injunction period, the dealer's lawyer threatened to have the defendant buyer "jailed and/or fined for contempt."¹²⁹ After dissolving the preliminary injunction, the judge, in addition to \$766.45 of out-of-pocket defense costs, awarded the customer \$4,000 for mental anguish and \$2,000 for loss of free speech rights from the dealer's \$10,000 injunction bond.¹³⁰

6. *Equitable Defenses*

The equitable defenses of laches¹³¹ and unclean hands¹³² defy precise definition.

a. *Laches*

"Equity aids the vigilant, not those who slumber on their rights." The court-made laches rules require both the plaintiff's unreasonable delay and the defendant's prejudice.¹³³ These imprecise factors and the judge's discretion create individualized, flexible, and contextual decisions. On the other hand, the statute of limitations that governs damages litigation is a fixed period, ostensibly a rigid and arbitrary all-or-nothing rule. Laches is an extreme example of substituting discretion and individual justice for a fixed rule.

Returning to the article's hypothetical, suppose Field waited seven years to sue BeefCo. He is demanding damages in addition to an injunction.

Laches and the statute of limitations may both apply in the same lawsuit.¹³⁴ When a plaintiff seeks legal and equitable remedies, either together or in the alternative, laches may bar the equitable relief, but leave the plaintiff free to pursue his legal remedy within the statute of limitations period.¹³⁵ One court, for example, denied plaintiffs specific performance because of their laches but

¹²⁶ Ofer Grosskopf & Barak Medina, *Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits*, 32 SEATTLE U. L. REV. 903, 929–34 (2009).

¹²⁷ *Crown Pontiac, Inc. v. Ballock*, 287 F. Supp. 2d 1256, 1257–58 (N.D. Ala. 2003).

¹²⁸ *Id.* at 1258.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1258–59.

¹³¹ RENDLEMAN, *COMPLEX LITIGATION*, *supra* note 2, at 250–68; DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES: CASES AND MATERIALS* 390–401 (8th ed. 2011).

¹³² RENDLEMAN, *COMPLEX LITIGATION*, *supra* note 2, at 268–71; RENDLEMAN & ROBERTS, *supra* note 131, at 384–90.

¹³³ *Lake Dev. Enters., Inc. v. Kojetinsky*, 410 S.W.2d 361, 367–68 (Mo. Ct. App. 1966).

¹³⁴ *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 234 (6th Cir. 2007).

¹³⁵ *See New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584–85 (2d Cir. 1989).

nevertheless awarded them expectancy damages for the defendants' breach of contract.¹³⁶

The Supreme Court's 2014 laches decision, *Petrella v. Metro-Goldwyn-Mayer*, involved plaintiff's copyright in a screenplay for the movie, "Raging Bull."¹³⁷ The Court held that where each of defendant's copyright infringements starts a new limitations period, laches doesn't bar plaintiff's relief for defendant's alleged infringement within that statutory period.¹³⁸ Plaintiff's eighteen-year delay in suing would not block her claim to recover defendant's profits, an equitable remedy, the Court said, for defendant's infringements within the limitations period.¹³⁹ The majority also said that plaintiff would be entitled to an injunction to forbid defendant's future infringement.¹⁴⁰ By inference from the majority opinion, equitable relief, an accounting for disgorgement of defendant's profits that occurred outside the statute of limitations period, is barred by the three-year statute of limitations.¹⁴¹ According to the dissent, however, which cites Aristotle, laches apparently applies when the plaintiff seeks equitable relief, an injunction only, or an accounting only, for the defendant's alleged infringement outside the statute of limitations.¹⁴²

Courts claim discretion in applying laches.¹⁴³ In 1956, Professor William de Funiak wrote:

[A] court of equity may refuse relief on the ground of laches although the pursuit of a legal remedy on the same cause would not be barred by the applicable statute of limitations, or it may grant relief after the bar of the statute of limitations has been raised against the legal remedy. The discretion of the court, in view of the circumstances of the case, is freely exercised.¹⁴⁴

The Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer* answered neither of de Funiak's questions. It didn't address his first point at all, and the majority and dissent disagree about the majority's decision on the second question. Confusion competes with equitable discretion in clouding our clear view of laches.¹⁴⁵

Despite the Supreme Court's confusion, it seems that, if the statute of limitations begins to run anew on each day of a defendant's temporary or continu-

¹³⁶ Estate of Younge v. Huysmans, 506 A.2d 282, 285–86 (N.H. 1985).

¹³⁷ *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1970 (2014).

¹³⁸ *Id.* at 1969.

¹³⁹ *Id.* at 1971, 1973.

¹⁴⁰ *Id.* at 1979.

¹⁴¹ *Id.* at 1973.

¹⁴² *Id.* at 1979–86 (Breyer, J., dissenting).

¹⁴³ Gardner v. Pan. R.R. Co., 342 U.S. 29, 30–31 (1951); McLean v. Fleming, 96 U.S. 245, 253, 257 (1877); Parker v. Winnipiseogee Lake Cotton & Woolen Co., 67 U.S. 545, 552 (1862).

¹⁴⁴ DE FUNIAK, *supra* note 38, § 24 (footnote omitted).

¹⁴⁵ Douglas Edward Pittman, Note, *Is Time Up for Equitable Relief? Examining Whether the Statute of Limitations Contained in 28 U.S.C. § 2462 Applies to Claims for Injunctive Relief*, 70 WASH. & LEE L. REV. 2449, 2460 (2013).

ing nuisance, plaintiff Field's damages action to recover damages for his losses during the statute of limitations period won't be barred.¹⁴⁶ If the plaintiff sues within the statute of limitations period, the Supreme Court's decision in *Petrella* contemplated an injunction to forbid the defendant's future infringement.

Although the federal rule lists laches as a defendant's affirmative defense, it omits unclean hands, our second equitable defense.¹⁴⁷

b. *Unclean Hands*

Zechariah Chafee wrote, "[t]he most amusing maxim of equity is 'He who comes into Equity must come with clean hands.' It has given rise to many interesting cases and poor jokes. The maxim has been regarded as an especially significant manifestation of the ethical attitude of equity as contrasted with the common law."¹⁴⁸

Chancery courts base the defendant's unclean hands defense on the Chancellor's discretion to decline to grant a plaintiff an equitable remedy.¹⁴⁹ "Like other doctrines of equity, the clean hands maxim is not a binding rule, but is to be applied in the sound discretion of the court. . . . In applying the unclean hands doctrine, courts act for their own protection, and not as a matter of 'defense' to the defendant."¹⁵⁰

Suppose Field has established a website or gripe-site to excoriate BeefCo. The defendant's lawyers tell the CEO that, while not every invective on Field's website is literally true, because of the public interest in pollution and the environment, the corporation is a limited-purpose public figure that will be unlikely to recover for Field's defamation.¹⁵¹ BeefCo interposes plaintiff's falsehoods as unclean hands.

The plaintiff's misconduct that soils his hands may violate statutory or judge-made positive law; for example, it may be fraud. The risk of unconfined equitable discretion emerges when the judge's broad personal version of unclean doesn't coincide with positive law. Section 398 of all five editions of Pomeroy's Equity treatise insisted that the Chancellor could reject a plaintiff's demand for an equitable remedy because the plaintiff had done something that violated a principle of the judge's conscience, although it did not violate posi-

¹⁴⁶ DOBBS ET AL., THE LAW OF TORTS, *supra* note 83, § 404 n.18.

¹⁴⁷ FED. R. CIV. P. 8(c)(1).

¹⁴⁸ ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 1 (1950); Shapiro, *supra* note 17, at 548 (discussing "the strange concept of 'unclean hands'").

¹⁴⁹ Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815 (1945); Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387–88 (1944); Galloway v. Finley, 37 U.S. 264, 288 (1838); JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA; ADAPTED FOR ALL THE STATES, AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 398 (3d ed. 1905).

¹⁵⁰ Green v. Higgins, 535 P.2d 446, 449 (Kan. 1975).

¹⁵¹ DOBBS ET AL., THE LAW OF TORTS, *supra* note 83, § 561.

tive law.¹⁵² “Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim,” the Supreme Court wrote in 1945, “Accordingly one’s misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character.”¹⁵³ In 2008, Professor Leigh Anenson maintained that a plaintiff’s unethical or improper conduct or motive may soil his hands, even when it is not contrary to positive law.¹⁵⁴ In 2011, the Third Restatement of Restitution and Unjust Enrichment said that a plaintiff’s misconduct or unclean hands bars both legal restitution and equitable restitution.¹⁵⁵

Others have criticized the expansive view of unclean hands. “Equity does not demand that its suitors shall have led blameless lives,” observed Justice Brandeis.¹⁵⁶ Critics include Judge Richard Posner.¹⁵⁷ A judge’s opinion of misconduct may be subjective, even idiosyncratic. Chafee favored the same principles in both law and equity. The judge might refuse to grant an injunction or specific performance for reasons related to those remedies, but not solely on the Chancellor’s ethical principles.¹⁵⁸

If the expansive view of unclean hands prevails, a contemporary judge might demand better behavior from a plaintiff seeking an injunction than one demanding damages. Under this view, plaintiff Field’s demand for an equitable injunction may fail because of his inaccurate, but probably not actionable, website. On the other hand, should a judge be able to bar a soiled-handed plaintiff from recovering the legal remedy of damages? Professor Anenson follows the tradition above of arguing that the judge of a merged court ought to have discretion to consider a plaintiff’s unclean hands in damages actions as well as in Equity.¹⁵⁹ Perhaps, if her view prevails, plaintiff Field’s damages or legal relief will fail as well.

But the view that soiled hands bar a plaintiff’s legal relief is far from unanimous. “The unclean hands defense is not available in an action at law,” observed one court.¹⁶⁰ Professor Doug Laycock asked whether the “basic premise” of the unclean hands defense “is unsound” because it is “the same as

¹⁵² Pomeroy, *supra* note 149; *see also* Hardesty v. Mr. Cribbins’s Old House, Inc., 679 S.W.2d 343, 348 (Mo. Ct. App. 1984) (discussing lack of good faith); MCCLINTOCK, *supra* note 78, at 59–62 (“No one can seek affirmative relief in equity with respect to a transaction in which he has, himself, been guilty of inequitable conduct.”).

¹⁵³ *Precision Instrument Mfg. Co.*, 324 U.S. at 815.

¹⁵⁴ Anenson, *Treating Equity Like Law*, *supra* note 52, at 460; *see also* Anenson, *Limiting Legal Remedies*, *supra* note 52, at 64.

¹⁵⁵ RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 63 cmt. a (2011).

¹⁵⁶ *Loughran v. Loughran*, 292 U.S. 216, 229 (1934).

¹⁵⁷ *Byron v. Clay*, 867 F.2d 1049, 1051 (7th Cir. 1989); *Shondel v. McDermott*, 775 F.2d 859, 867–68 (7th Cir. 1985).

¹⁵⁸ CHAFEE, *supra* note 148, at 1, 95–99 & n.65, 102.

¹⁵⁹ *See generally* Anenson, *Treating Equity Like Law*, *supra* note 52.

¹⁶⁰ *RIV VIL, Inc. v. Tucker*, 979 F. Supp. 645, 659 (N.D. Ill. 1997).

saying two wrongs make a right.”¹⁶¹ “If judges,” Professor Dan Dobbs wrote, “had the power to deny damages and other legal remedies because a plaintiff came into court with unclean hands, citizens would not have rights, only privileges.”¹⁶² Thus, Dobbs suggested eliminating unclean hands when it is redundant with another defense and requiring serious misconduct that is sufficiently related to the plaintiff’s claim to have, within the scope of the risk, harmed the defendant or the defendant’s group.¹⁶³

If Laycock’s and Dobbs’s views prevail in our hypothetical, Field’s nuisance action for damages and an injunction survives BeefCo’s unclean hands defense.

7. *Jury Trial*

There will be no jury for an equitable remedy like an injunction or specific performance. This contrasts with the litigants’ constitutional right to a jury in “suits at common law,” usually to recover the plaintiff’s compensatory damages. The Seventh Amendment’s clause guaranteeing trial by jury protects litigants’ right to a jury trial on questions of fact in an action at common law.¹⁶⁴ In the small percentage of lawsuits that reach trial, a jury will limit the judge’s decisions.¹⁶⁵

A non-jury or *ore tenus* equity trial is usually shorter, less expensive, and more informal. The judge will be likely to admit evidence that the evidence rules, designed for a jury trial, would exclude.¹⁶⁶ The Federal Rules authors, Steve concluded, who favored equitable discretion and expertise, tended to subordinate the jury.¹⁶⁷ Steve and Thom have shown how the more recent civil-justice “reformers” built on that foundation in eroding what Chief Justice Burger called the “dubious” Seventh Amendment.¹⁶⁸ Further, one reason to favor judges over juries is that juries tend to favor plaintiffs and claimants.¹⁶⁹

While writing this article, I received a jury questionnaire from the clerk’s office. The civil jury adds community participation and community values to litigation. It augments adjudication’s legitimacy.¹⁷⁰ As I wrote a few years ago:

¹⁶¹ DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 941 (4th ed. 2010).

¹⁶² DOBBS, LAW OF REMEDIES, *supra* note 95, at 69.

¹⁶³ *Id.* at 68–69.

¹⁶⁴ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342, 347–48 (1998); RICHARD D. FREER, CIVIL PROCEDURE § 9.2.2 (2d ed. 2009); HAZARD, JR. ET AL., *supra* note 60, § 12.1.

¹⁶⁵ Marcus, *supra* note 94, at 1569–71.

¹⁶⁶ RENDLEMAN, COMPLEX LITIGATION, *supra* note 2, at 422–23.

¹⁶⁷ Subrin, *supra* note 1, at 937–38, 944, 962–63, 968, 1000.

¹⁶⁸ Subrin & Main, *supra* note 82, at 1863–64.

¹⁶⁹ Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673, 1706 (2013).

¹⁷⁰ Subrin & Main, *supra* note 82, at 1879 & n.230; *see also* RENDLEMAN, COMPLEX LITIGATION, *supra* note 2, at 401–07.

The civil jury . . . reflects a fundamental paradox between authority delegated and authority retained. Ultimate sovereignty resides in the people. In the end, those who look only to results must yield to process values. Juries prevent legalisms from vanquishing justice. The civil jury survives, tarnished but sentient. Within a constitutional framework, officials possess delegated authority. Constitutional government ensures that to the extent possible, people and officials live by the rule of law instead of the rule of a person or group of persons. Judges protect the Constitution from the people. To limit the government, we divide its power with the jury, but the jury may exercise that power irresponsibly. Litigants seek, in particular courtrooms, to secure benefits of substantive rights to which all have an equal but abstract claim. The judge exercises delegated authority; the jury represents retained authority. The courtroom unites dour elitism and zealous populism in intrinsic discord.¹⁷¹

The Seventh Amendment's trial-by-jury clause explicitly looks backward in time. It "preserves" the distinction between a jury trial "at Common Law" and a bench or *ore tenus* trial in Chancery that existed in the early national period. The division between Law and Equity developed historically because of conditions that no longer exist; the distinction is neither logical nor functional, indeed it is often outright irrational.¹⁷² Lawyers and judges study and apply an arcane system that has faded because it was impractical and cumbersome. "Judges," Justice Breyer wrote extra-judicially, "are not expert historians."¹⁷³

In *Feltner v. Columbia Pictures Television*, the Court exhumed the historical evidence on whether statutory damages for defendant's copyright infringement were legal or equitable. It concluded that indeed they were "at common law," and subject to the defendant's jury trial right.¹⁷⁴ Professor H. Tomás Gómez-Arostegui, a legal historian who specializes in copyright, examined the historical evidence. He concluded that the Court reached the correct result in *Feltner*; that result was not exactly "dumb luck."¹⁷⁵ But, because of insufficient research and analysis, defective citations, and misunderstanding of the historical vocabulary, the correct result was "fortuitous."¹⁷⁶ Courts, Professor Gómez-Arostegui concluded, ought to either improve their legal history or give it up altogether.¹⁷⁷

The argument for the historical approach emphasizes that judges should not define their own jurisdiction, but that they need an external test.¹⁷⁸ On the other hand, a more functional approach to the jury trial right emphasizes the remedy

¹⁷¹ Doug Rendleman, *Chapters of the Civil Jury*, 65 KY. L.J. 769, 797–98 (1977).

¹⁷² Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 74–76 (1990).

¹⁷³ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 126 (2005).

¹⁷⁴ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998).

¹⁷⁵ H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit Under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1338 (2010).

¹⁷⁶ *Id.* at 1338–39.

¹⁷⁷ *Id.* at 1338.

¹⁷⁸ Carrington, *supra* note 172, at 73–74.

the claimant seeks. If the plaintiff's demand seeks *in personam* or personal relief instead of *in rem* relief, the jury right isn't present. As quoted above, California Justice Newman's dissent in *C&K Engineering Contractors v. Amber Steel* favored a jury trial because of "the typically more continuing and more personalized involvement of the trial judge in specific performance and injunctive decrees than in mere judgments for damages."¹⁷⁹

Then-Justice Rehnquist's concurring opinion in *Albemarle Paper v. Moody* emphasized equitable discretion as the test for the litigants' jury right:

To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment.¹⁸⁰

With respect, Rehnquist's position seems unsound on both fronts. The litigants' jury right should not vary because of the test the fact-finder applies to award money; a victim of discrimination should "as a matter of course" recover back pay for his loss period. A jury has its discretion to set the amount of a personal injury plaintiff's pain and suffering compensatory damages just as a judge has her equitable discretion to measure a plaintiff's equitable remedy.¹⁸¹

Revisiting, once again, our hypothetical, both a functional and a historical test lead to an equitable approach to nuisance plaintiff Field's injunction. Since he seeks both money damages and an injunction, there may be a jury to decide defendant's liability and plaintiff's damages and a judge to grant or deny an injunction consistently with the jury's verdict on factual issues.¹⁸²

The jury finds the facts from the admitted evidence and applies the law articulated in the judge's instructions. The Seventh Amendment's second clause, referred to as the reexamination clause, protects a jury's factual decision and verdict unless, as a matter of law, a reasonable juror couldn't find for the prevailing party.¹⁸³ Because of the reexamination clause, the trial judge and later the appellate court review a jury's factual decision deferentially: could a reasonable juror reach the jury's decision on the evidence?

¹⁷⁹ *C & K Eng'g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1143 (Cal. 1978); *see also* *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991); *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 574–81 (1990) (Brennan, J., concurring).

¹⁸⁰ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring).

¹⁸¹ Rendleman, *supra* note 171, at 775–76.

¹⁸² *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508–11 (1959); *Power Integrations, Inc. v. Fairchild Semiconductors Int'l, Inc.*, 763 F. Supp. 2d 671 (D. Del. 2010); FREER, *supra* note 164, at 420–24.

¹⁸³ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376–78 (1996); FREER, *supra* note 164, § 9.5.

However, the trial judge in equity has the power to decide factual issues unconstrained by a jury's participation and, usually, the rules of evidence. One judge wrote that "[a]llocati[on] of the burden of proof is also left to the court's discretion."¹⁸⁴ Evidence rules, the tradition holds, are to overcome jurors' cognitive shortcomings, leading to what Professor Frederick Schauer refers to as a profession "clinging to a romantic image of the trial judge as a figure largely free of the cognitive failings we see and appreciate in lay jurors."¹⁸⁵

The judge may pay an onsite visit. In his well-known story of his role in the health department's efforts to ensure healthy conditions at a "hippie" campground, Judge Dave Sentelle toured the Rainbow People's campground before settling the parties down to negotiate a consent decree about the public health and safety in the area.¹⁸⁶ Similarly, in structural litigation about a dystopic residential institution, Judge Frank Johnson visited class plaintiffs.¹⁸⁷ Before granting plaintiffs a preliminary injunction against defendants' mountain-top-removal coal mining in litigation discussed in this article, Judge Haden visited Pigeonroost Hollow and flew over other mining sites.¹⁸⁸ Closer to home, in two Alabama nuisance lawsuits, two trial judges visited stock-feeding operations; the state Supreme Court wrote that one judge's tour augmented his equitable discretion.¹⁸⁹ These differences between a jury trial and a bench trial in equity will increase Judge Pepper's discretion in adjudicating the equitable issues in Field's nuisance lawsuit, should she choose to visit the neighbor's yard, allocate the burden of proof as she sees fit, and selectively heed the rules of evidence.

Steve Subrin's opinion, however, is that a jury's sense of community would temper the judge's equitable discretion and propensity to make an arbitrary decision and improve the administration of justice.¹⁹⁰

If we have been emphasizing the equity judge's discretion, the next subject, reason giving, militates against the judge's unconstrained discretion. The jury need not explain its general verdict, which expresses its conclusion only.¹⁹¹ On the other hand, Rule 52 requires a judge to give reasons in the form of findings of fact and conclusions of law after a non-jury trial.¹⁹² This requirement is a major principle of confinement on the judge's equitable discretion. The pro-

¹⁸⁴ *Omega Indus., Inc. v. Raffaele*, 894 F. Supp. 1425, 1433 (D. Nev. 1995).

¹⁸⁵ Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 202 (2006).

¹⁸⁶ DAVID B. SENTELLE, *JUDGE DAVE AND THE RAINBOW PEOPLE* 29–106, 133–58 (2002).

¹⁸⁷ See Jack Drake, *Judicial Implementation and Wyatt v. Stickney*, 32 ALA. L. REV. 299, 307–08 (1981).

¹⁸⁸ *Bragg v. Robertson*, 54 F. Supp. 2d 635, 645–46 (S.D.W. Va. 1999).

¹⁸⁹ *Parker v. Ashford*, 661 So.2d 213, 215–17 (Ala. 1995); *Baldwin v. McClendon*, 288 So.2d 761, 764, 766 (Ala. 1974) (emphasizing the visiting judge's equitable discretion).

¹⁹⁰ Subrin, *supra* note 1, at 926–28.

¹⁹¹ HAZARD, JR. ET AL., *supra* note 60, § 11.23; Frederic Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634, 637 (1995).

¹⁹² FED. R. CIV. P. 52(a)(1).

cess of professional reasoning forces the judge to consider precedents, alternatives, and others' views. It enhances legitimacy by explaining to the loser why he lost. It should reduce the effects of prejudice and fancy, and militate against arbitrary results.¹⁹³

Requiring reasons is quality control because it trims the chance of unreflective, hasty, biased, and arbitrary decisions. A reason is a result taken to a higher level of generality and a commitment to the future. Professor Schauer wrote, "[r]eason-giving is therefore in tension with and potentially a check on maximal contextualization, on case-by-case determination, and on recognition of the power of the particular. . . . [W]hen context, case-by-case decisionmaking, and flexibility are thought important, the benefits of requiring decisionmakers to give reasons do not come without a price."¹⁹⁴

Whether the requirement of reasons offsets the disadvantages of dispensing with the jury is a question without a fixed answer.

8. *The Equitable Remedy*

The judge's choice of an equitable remedy has been another fertile field for equitable discretion. For example, the Contracts Restatement says that the "granting of equitable relief has traditionally been regarded as within judicial discretion."¹⁹⁵ However, one of the earliest discussions of a judge's discretion, written by an experienced Virginia trial judge, did not discuss judges' decisions to grant equitable remedies, injunctions, and specific performance because they were, he wrote, "analogous to the determination of facts without a jury."¹⁹⁶

In granting an equitable remedy, we assume that the defendant has breached or is about to breach the plaintiff's rights. The judge has no discretion to grant a remedy unless the defendant has violated or predictably will violate the plaintiff's right.¹⁹⁷ Injunctive relief is appropriate where there is a reasonable likelihood that the defendant's wrong will be repeated.¹⁹⁸

We begin with claims that support judges' unlimited equitable discretion, as found in judicial opinions and professors' analysis. "There are," one judge wrote, "no 'established rules and fixed principles laid down' for the application of equity. Rather 'equity depends essentially upon the particular circumstances of each case.' District courts are therefore given broad discretion in modeling

¹⁹³ Effron, *supra* note 33, at 704, 713–14; Rendleman, *The Trial Judge's Equitable Discretion*, *supra* note 2, at 94. In a notable departure from reason-giving, the Supreme Court does not supply reasons for certiorari denials or orders to stay the lower court's mandate. Nor will the justices be named, except in dissent. Adam Liptak, *Justices Drawing Dotted Lines With Terse Orders in Big Cases*, N.Y. TIMES, Oct. 28, 2014, at A19.

¹⁹⁴ Schauer, *supra* note 191, at 658–59.

¹⁹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 357, cmt.c (1981).

¹⁹⁶ Spindle, *supra* note 13, at 144.

¹⁹⁷ *But see* Navajo Acad., Inc. v. Navajo United Methodist Mission Sch., Inc., 785 P.2d 235 (N.M. 1990); RENDLEMAN & ROBERTS, *supra* note 131, at 369–73.

¹⁹⁸ SEC v. Calvo, 378 F.3d 1211, 1216 (11th Cir. 2004).

their equity judgments.”¹⁹⁹ Professors have identified open-ended equitable discretion in adjudicating injunctions against domestic violence²⁰⁰ and to return an abducted child.²⁰¹

To structure our approach to the judge’s equitable discretion at the remedial stage, we will review three kinds of discretionary choices: discretion to dispense with a remedy altogether, discretion to choose the remedy, and discretion to shape the remedy. Choice of remedy—granting an injunction or not—differs from shaping an injunction once granted. These are useful starting places. However, equitable discretion doesn’t fit into pigeonholes, but blends at the margins.

The beginning point is the idealistic Maxim: “equity will not suffer a wrong to be without a remedy,” or “where there is a legal right, there is also a legal remedy,” which, in Latin, translates to “*ubi jus, ubi remedium*.”²⁰²

The Supreme Court has not been completely faithful to no right without a remedy. In doing so, the Court has cited equitable discretion: “An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.”²⁰³ In another opinion, the Court said that “a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.”²⁰⁴ Decisions holding that the plaintiff has a right under substantive law but that the defendant’s violation will not lead to some kind of remedy should, in my judgment, be rare. In public rights litigation, for example, under an environmental statute, the judge’s choice may be injunction or nothing. In private rights litigation like Field’s nuisance, the judge will more often choose between an injunction, an equitable remedy, and the legal remedy—damages.

In *eBay v. MercExchange, L.L.C.*, the Court separated a plaintiff’s right from its remedy.²⁰⁵ The origin of the plaintiff’s substantive right—be it constitution, statute, or common law—affects the judge’s equitable discretion. A judge, Professor Zygmunt Plater wrote, has discretion to withhold an injunction when the defendant has violated a plaintiff’s constitutional rights.²⁰⁶

¹⁹⁹ *Omega Indus., Inc. v. Raffaele*, 894 F. Supp. 1425, 1433 (D. Nev. 1995) (citations omitted).

²⁰⁰ Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1083–84 n.375 (2014).

²⁰¹ Elizabeth A. Rossi & Brett Stark, *Playing Solomon: Federalism, Equitable Discretion, and the Hague Convention on the Civil Aspects of International Child Abduction*, 19 ROGER WILLIAMS U. L. REV. 106, 107 (2014).

²⁰² *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Price v. Hawkins*, 439 S.E.2d 382, 385 (Va. 1994).

²⁰³ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008).

²⁰⁴ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978)).

²⁰⁵ *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006).

²⁰⁶ Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 530–31, 545–46 (1982).

The Court's rule of statutory construction in *Hecht v. Bowles* augments the judge's statutory equitable discretion. The statutory "shall," the Court held, didn't eliminate the judge's equitable discretion to decline to grant an injunction.²⁰⁷ "[I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain."²⁰⁸ Plater argued that a judge cannot refuse to enjoin when the defendant has breached a statute, because separation of powers forbids a judge from overriding the legislature's statute.²⁰⁹

Does the judge have equitable discretion to ignore a statute or rule? The principles of equity, Plater maintained, do not license the judge to detour around a statute or procedural rule that seems to the judge to compel an unsatisfactory result.²¹⁰ "[W]hen," a Court of Appeals wrote, "a plaintiff has prevailed and established the defendant's liability under Title VII [employment discrimination], there is no discretion to deny injunctive relief completely."²¹¹ The judge's discretion is similarly circumscribed in Wage and Hour remedies.²¹² After the trial judge cited "principles of equity" to ignore the statute of limitations, the Montana Supreme Court reversed.²¹³

In environmental decisions under a statute, the judge's choice of remedy will often be between an injunction and no remedy, nothing, in contrast to her choice between an injunction and damages for defendant's nuisance. Professor Farber argued against equitable discretion under modern environmental statutes.²¹⁴ Courts, Farber concluded, should adopt a presumption against equitable discretion because the legislature has considered the factors leading to discretion and a court shouldn't upset that decision.²¹⁵ Instead, in formulating an environmental remedy, a court should examine the duties that the statute creates. Its decision to grant or deny an injunction should turn on the type of duty and injunction the statute creates instead of on the court's equitable discretion.²¹⁶

Another perceptive approach is Judge Posner's: "The fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute

²⁰⁷ *Hecht Co. v. Bowles*, 321 U.S. 321, 327–29 (1944).

²⁰⁸ *Id.* at 330.

²⁰⁹ Plater, *supra* note 206, at 546.

²¹⁰ *Id.* at 530–31, 546, 576–79, 592–94 (1982) (distinguishing constitutional from statutory rights and protesting the Court's decision in *Weinberger*).

²¹¹ *United States v. Gregory*, 871 F.2d 1239, 1246 (4th Cir. 1989).

²¹² *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1335 (10th Cir. 1998); *Donovan v. Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 157 (5th Cir. 1982); *Mitchell v. Pidcock*, 299 F.2d 281, 286–87 (5th Cir. 1962).

²¹³ *Momsen v. Momsen*, 143 P.3d 450, 453 (Mont. 2006).

²¹⁴ Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 513 (1984).

²¹⁵ *Id.* at 545.

²¹⁶ Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 488 (2010) (arguing for the abandonment of equitable balancing).

rights in accordance with his personal views of justice and fairness, however enlightened those views may be.²¹⁷

The bankruptcy court's broad equitable powers, a Court of Appeals observed in 2004, "must and can only be exercised within the confines of the Bankruptcy Code."²¹⁸ A 2014 Supreme Court decision tests the trial judge's ability to subordinate a statute that seemed to lead to a suboptimal result to achieve, instead, an "equitable" result.²¹⁹ A bankruptcy judge overrode a bad faith debtor's statutory homestead exemption; the judge cited the court's inherent power under Bankruptcy Code Section 105, an all-writs act.²²⁰ The Supreme Court held that the judge lacked inherent power to disregard the statute's specific exemption statute.²²¹

Florida decisions under a state constitutional provision that protects a debtor's exemptions present a sharp contrast. In *Palm Beach Savings and Loan v. Fishbein*, the husband had fraudulently obtained a loan and used the money to pay a mortgage on homestead property, which in turn his wife obtained in the couple's divorce settlement.²²² The court granted the defrauded lender an equitable lien—under the doctrine of equitable subrogation—on the wife's homestead property in the amount of the borrowed money her ex-husband, the debtor, had used to pay the mortgage.²²³

A court that adjudicates a remedy under the textual language in a constitution or a statute starts with an externally supplied written baseline premise that may circumscribe discretion. On the other hand, a court that applies the court-made common law to a dispute not controlled by a precedent literally molds and creates the law as it consults existing decisions to decide the plaintiff's remedy.²²⁴ A court's common-law technique includes adjusting common-law rules to the unprovided, unforeseen, and changed. Plater wrote that in a lawsuit governed by common law rules, "abatement was decided anew in each case."²²⁵

The question in private nuisance litigation usually comes under the head of whether the plaintiff's damages remedy is adequate; whether without an injunction he will suffer irreparable injury. The prerequisites of inadequate remedy at law and irreparable injury usually tell the judge to examine whether compensatory damages will suffice for the plaintiff's remedy. The Supreme Court in *eBay v. MercExchange* stated the plaintiff's prerequisites for a permanent in-

²¹⁷ *In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.2d 524, 528 (7th Cir. 1986).

²¹⁸ *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 235–38 (3d Cir. 2004).

²¹⁹ *See Law v. Siegel*, 134 S. Ct. 1188 (2014).

²²⁰ *Id.* at 1193–94.

²²¹ *Id.* at 1194–95.

²²² *Palm Beach Sav. & Loan Ass'n v. Fishbein*, 619 So. 2d 267, 268–69 (Fla. 1993).

²²³ *Id.* at 270–71.

²²⁴ FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 11, 232, ch. 9.5 (1991).

²²⁵ Plater, *supra* note 206, at 543.

junction: inadequate remedy at law, irreparable injury, balancing the hardships, and the public interest.²²⁶ The judge's equitable discretion guides application of these factors.²²⁷ I cite *eBay* as existing positive law, not to endorse it. I have argued elsewhere that, instead of being prerequisites for the plaintiff, the standards of inadequacy, irreparability, balancing, and the public interest should be affirmative defenses for the defendant.²²⁸

Balancing the hardships and the public interest also involve comparisons. Namely, these are between the plaintiff and the defendant in balancing the hardships and between the plaintiff and the public in the public interest. One example illustrates both comparisons. The owners of a Portland, Oregon shopping mall demanded an anti-trespass injunction to forbid canvassers in the mall from soliciting signatures for an initiative petition.²²⁹ Granting a property owner a no-trespass injunction is usually routine.²³⁰ The mall owners sought to enjoin the political activists from even entering the mall to solicit and secure signatures.²³¹ Trespass, the court said, is not always enjoined.²³² The court emphasized equitable flexibility, discretion, balancing the hardships, and the public interest in the political process.²³³ "This court has recognized that equitable remedies against invasions of real property do not follow inexorably when a landowner seeks to deny entry. . . . But an injunction remains discretionary and subject to equitable considerations; it is not available as a matter of right."²³⁴ The court held that while the mall could not exclude the solicitors, the trial judge could employ equitable discretion to shape and define a remedy to impose reasonable restrictions on the canvassers' time, place, and manner.²³⁵

The balancing the hardships or undue hardships inquiry has generated a large amount of literature that includes one of my contributions.²³⁶ This inquiry leads the court to choose between compensatory damages and an injunction, to which we turn.

In our nuisance lawsuit, BeefCo, the defendant, is likely to argue for favorable rulings on balancing the hardships and the public interest: People need

²²⁶ *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

²²⁷ *Id.*

²²⁸ RENDLEMAN, *COMPLEX LITIGATION*, *supra* note 2, at 86; *see also* Douglas Laycock, *Remedies: Justice and the Bottom Line*, 27 *REV. LITIG.* 1, 4 (2007). *Ebay's* latest refutation is Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 *COLUM. L. REV.* 203 (2012).

²²⁹ *Lloyd Corp. v. Whiffen*, 773 P.2d 1294, 1295–96 (Or. 1989).

²³⁰ *Id.* at 1297.

²³¹ *Id.* at 1296.

²³² *Id.* at 1297.

²³³ *Id.* at 1297–300.

²³⁴ *Id.* at 1297.

²³⁵ *Id.* at 1301.

²³⁶ Doug Rendleman, *Rejecting Property Rules-Liability Rules for Boomer's Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral*, in *REMEDIES AND PROPERTY* 43 (Russell Weaver & François Lichère eds., 2013), available at <http://ssrn.com/abstract=2212384>.

beef. Feeding steers close to the corn and the terminal market will hold the consumers' price down. We employ eighteen people. We benefit consumers, farmers, and truckers. And we pay lots of taxes.

The judge choosing between remedies has leeway. The choice of remedies—injunction versus damages—has been a contested issue. Because an injunction is preventive and constitutes *in personam* relief, as distinguished from impersonal collection of a judgment for compensatory damages, there are differences.

The Supreme Court wrote:

[T]he extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court. Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion.²³⁷

In the nuisance case of *Boomer v. Atlantic Cement*, the New York Court of Appeals approved the preceding point when it wrote that “[t]he power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted.”²³⁸

A trial judge who evaluates the balance from BeefCo's perspective may remit farmer Field to recovering permanent damages.²³⁹ On the other hand, a feedlot doesn't require a large capital investment. Defendant BeefCo who neglected to establish a sufficient buffer zone can move its feeding operation elsewhere. One well-known decision went so far as to cite equity to tell the plaintiff who came along after the feedlot was in place to pay the feedlot's moving expenses.²⁴⁰ If Field was there first, we don't recommend this solution to the judge, or, for that matter, to anyone.

BeefCo's feedlot nuisance will impose a large subjective non-pecuniary loss on Field and others. BeefCo may have, as a practical matter, excluded Field from using his property as a home. A judgment for permanent money damages may compensate Field for the decline in market value but ratify BeefCo's pollution and the non-pecuniary loss. Observers prefer an injunction to force the defendant's offensive activity “to either pay for the full losses (objective and subjective) or shut down.”²⁴¹

A judge's injunction decision need not be all or nothing—a shutdown order or a damages award. A judge's intermediate solution is a conditions injunction

²³⁷ *Virginian Ry. Co. v. Sys. Fed'n No. 40, Ry. Emps. Dep't of the Am. Fed'n of Labor*, 300 U.S. 515, 551 (1937) (citations omitted); *Morrison v. Work*, 266 U.S. 481, 490 (1925); *Joy v. St. Louis*, 138 U.S. 1, 47 (1891).

²³⁸ *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 874 (N.Y. 1970).

²³⁹ *Id.* at 875.

²⁴⁰ *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 708 (Ariz. 1972).

²⁴¹ Keith N. Hylton, *The Economics of Public Nuisance Law and the New Enforcement Actions*, 18 SUP. CT. ECON. REV. 43, 65 (2010); Rendleman, *supra* note 236.

that eliminates, or reduces to tolerable, the defendant's harmful activity. Judge Pepper's preliminary injunction that limits BeefCo to two thousand cattle is a conditions injunction, perhaps an experiment for her final order.

An example of the other side of the remedial coin is a court's decision to grant an injunction but to refuse damages. In *Mutual of Omaha Insurance Co. v. Novak*, an anti-nuclear activist marketed t-shirts and coffee mugs bearing the caption "Mutant of Omaha" along with a logo that resembled Mutual of Omaha's trademark. One of the shirts read, "When the world's in ashes, we'll have you covered." The court held that the defendant's shirts and mugs infringed Mutual's registered trademark. It enjoined the defendant from using "Mutant." However, the court said, "Because the parties sell non-competing goods, and because the Court is satisfied that the injunction will satisfy the equities of this case, no further award shall be made."²⁴² Thus, the judge wields equitable discretion when she decides whether to grant other equitable remedies.

While we are at it, we will summarize the trial judge's equitable discretion in choosing and measuring several other equitable remedies.

a. Receiver

Suppose for a variation on an injunction, that Judge Pepper visits BeefCo's feedlot and finds that the overcrowding is so unhealthy that it borders on violation of a cruelty-to-animals statute. If the defendant cannot be relied upon to clean the mess up, the judge may consider a judicial takeover of BeefCo's feedlot, putting it in the control of an appointed receiver.²⁴³ Although the judge's equitable discretion applies to appointment or a receiver, a "humanitarian" receiver to preserve the nonparty cattle may fail. Courts appoint receivers to protect the plaintiff who has a right of some kind in the property from a defendant who is endangering or mismanaging that property. Field needs to argue for a receiver on the premise that the unhealthy state of the herd is endangering him because it reduces BeefCo's ability to pay a money judgment.²⁴⁴

b. Specific Performance

Before the merger of Law and Equity, courts were emphatic that a plaintiff's demand for specific performance of a contract to sell land was subject to the court's equitable discretion.

To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been

²⁴² *Mut. of Omaha Ins. Co. v. Novak*, 648 F. Supp. 905, 912 (D. Neb. 1986); *see also* *El Greco Leather Prods. Co. v. Shoe World, Inc.*, 726 F. Supp. 25, 29 (E.D.N.Y. 1989); RENDLEMAN, *COMPLEX LITIGATION*, *supra* note 2, at 139.

²⁴³ *McCLINTOCK*, *supra* note 78, at 557–62 (discussing the appointment of receivers and the administration of receivership suits).

²⁴⁴ *W.E. Erickson Constr., Inc. v. Cong.-Kenilworth Corp.*, 445 N.E.2d 1209, 1211–12 (Ill. App. Ct. 1983). A Rule 23(b)(2) class action on behalf of the steers will fail.

the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law.²⁴⁵

Courts seemed to approach specific performance differently after Law and Equity were merged. For example, when a buyer seeks to enforce a seller's breached contract to buy land, a judge's specific performance order is typical. The judge will consider each parcel of land to be unique, presume that damages for the buyer will be an inadequate remedy, and routinely order the breaching seller to convey the property to the buyer.²⁴⁶

c. *Constructive Trust*

After the injunction and specific performance, the third major equitable remedy is the constructive trust. The constructive trust is defined generally to afford judges equitable discretion to wield it when they uncover new forms of misconduct that merit relief.²⁴⁷ The restitution remedy of constructive trust includes the judge's equitable discretion to withhold that remedy even when the plaintiff shows he is otherwise qualified because the constructive trust's tracing feature will impose a hardship on third parties.²⁴⁸

d. *Salvor*

The maritime court's restitution award for a "salvor," who rescues another's craft at sea sets up a seven-factor analysis without a precise formula for the trial judge to calculate the salvor's salvage award.²⁴⁹ The judge has sole discretion to award a salvor title.²⁵⁰

²⁴⁵ *Haffner v. Dobrinski*, 215 U.S. 446, 450 (1910) (quoting *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236 (1892)); *Hennessy v. Woolworth*, 128 U.S. 438, 442 (1888) (citing *Willard v. Tayloe*, 75 U.S. 557, 567 (1869)); *Marble Co. v. Ripley*, 77 U.S. 339, 357 (1870); *Willard v. Tayloe*, 75 U.S. 557, 565 (1869); *King v. Hamilton*, 29 U.S. 311, 328 (1830); *Hepburn & Dundas' Heirs & Ex'rs v. Dunlop & Co.*, 14 U.S. 179, 203 n.d (1816); *Buxton v. Lister*, 26 Eng. Rep. 1020, 1022, (1746); *Seymour v. Delancy*, 3 Cow. 445 (N.Y. Sup. Ct. 1824); *Simmons v. Hill*, 4 H. & McH. 258 (Md. 1798); EDWARD YORIO & STEVE THEL, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* § 1.3 n.52 (2d ed. 2014).

²⁴⁶ DOBBS, *LAW OF REMEDIES*, *supra* note 95, §§ 12.8(1), 12.11(3).

²⁴⁷ *Simonds v. Simonds*, 380 N.E.2d 189, 193–94 (N.Y. 1978); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (2011).

²⁴⁸ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. d (2011); *see also United States v. Andrews*, 530 F.3d 1232, 1237 (10th Cir. 2008).

²⁴⁹ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 742 F. Supp. 2d 784, 794 (E.D. Va. 2010); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 cmt. e, n.e (2011).

²⁵⁰ *R.M.S. Titanic, Inc.*, 742 F. Supp. 2d at 808. Title was awarded in that case. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 804 F. Supp. 2d 508, 509 (E.D. Va. 2011).

e. Rescission-restitution

The judge's equitable discretion in equitable rescission-restitution is said to include whether to grant it at all. "The granting or withholding [of] rescission is not a matter of right but rather one of grace, and lies largely within the court's discretion."²⁵¹

f. Legal and Equitable Restitution

The differences between Law and Equity fade when the judge chooses between legal restitution and equitable restitution. An earlier court might have been more influenced by the dual systems of Law and Equity. It might have held that a plaintiff's money judgment for legal restitution, money had and received, is an adequate remedy at law that prevents Chancery from granting the plaintiff a constructive trust.²⁵² A contemporary court would be more likely to treat the choice as a more functional one and to focus on whether the plaintiff requires a feature of equitable restitution like the constructive trust's tracing feature.²⁵³ Professor George Palmer discussed the "erosion" of the inadequacy test when a plaintiff who could recover legal restitution seeks an equitable remedy. He noted that "[r]emedial law can be applied both more easily and more sensibly when courts are able to give the relief called for by the facts."²⁵⁴

g. Subrogation

The Chancellor's equitable discretion in the equitable remedy of subrogation includes discretion to adjust measurement. In the widely cited New Jersey decision in *Gaskill v. Wales' Executor*, the court wrote, "The principle of subrogation is one of equity merely, and it will accordingly be applied only in the exercise of an equitable discretion, and always with a due regard to the legal and equitable rights of others."²⁵⁵

A United Kingdom treatise articulated the equitable discretion in subrogation in common-law jurisdictions.

²⁵¹ *Bechard v. Bolton*, 24 N.W.2d 422, 423 (Mich. 1946); *see also* *Suburban Properties, Inc. v. Hanson*, 382 P.2d 90, 94 (Or. 1963) ("The equitable remedy of rescission is not one enforceable as a matter of right . . ."); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 54, cmts. b–c (2011).

²⁵² *Waters v. Boyden*, 176 N.E. 535, 536 (Mass. 1931).

²⁵³ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 (2011).

²⁵⁴ 1 GEORGE PALMER, *THE LAW OF RESTITUTION* § 1.6 (1978).

²⁵⁵ *Gaskill v. Wales' Ex'r*, 36 N.J. Eq. 527, 533 (1883); *see also* *St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc.*, 37 S.W.3d 180, 183 (Ark. 2001); *Sperry v. Butler*, 53 A. 899, 900 (Conn. 1903); *Opp v. Ward*, 24 N.E. 974, 975 (Ind. 1890); *First Nat'l Bank v. Plante*, 235 N.W. 135, 138 (N.D. 1931); *Garvin v. Garvin*, 4 S.E. 148, 151 (S.C. 1887); *Dixon v. Morgan*, 285 S.W. 558, 560–61 (Tenn. 1926); *Centreville Car Care, Inc. v. N. Am. Mortg. Co.*, 559 S.E.2d 870 (Va. 2002) (subrogation is equitable, not a strict right; it depends on facts and circumstances, not an all-purpose test).

[E]ven where the claimant's payment is wholly responsible for discharging the defendant's liability to the creditor, it does not inexorably follow that the appropriate measure of the defendant's resulting liability to the claimant must be the whole of the liability discharged. It may only be some lesser proportion. The reason is that the ground of restitution on which the claimant relies may be such that the claimant can only demonstrate that some lesser proportion of the defendant's discharged liability to the creditor is an unjust enrichment of the defendant at the claimant's expense.²⁵⁶

h. Declaratory Judgment

A declaratory judgment is a remedy that allows the court to tell the parties what their rights are under the governing law.²⁵⁷ Although we shouldn't always think of it as an equitable remedy, the declaratory judgment as a foundation for an injunction is a major equitable feature. The federal Declaratory Judgment Act says that a court "may declare the rights and other legal relations of any interested party,"²⁵⁸ not that it must do so. Courts understand this text "to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants."²⁵⁹ We have found it "more consistent with the statute," however, "to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp."²⁶⁰

9. The Injunction's Terms

We turn from the judge's discretion to choose the remedy to her discretion in formulating and measuring the remedy she picked. The remedy's size and shape offer the trial judge copious equitable discretion and leeway.²⁶¹ The judge, the Supreme Court said, has equitable discretion to enter any available remedy necessary to afford full relief for the defendant's invasion of the plaintiff's legal rights.²⁶² Another court wrote that "[t]he trial court is vested with a

²⁵⁶ CHARLES MITCHELL & STEPHEN WATTERSON, SUBROGATION: LAW AND PRACTICE § 8.152 (2007).

²⁵⁷ Samuel L. Bray, *The Myth of Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1105, 1141 (2014).

²⁵⁸ 28 U.S.C. § 2201(a) (2012).

²⁵⁹ *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); see also Bray, *supra* note 257, at 1101 n.53 (2014). Professor Bray wrote that mandamus is a discretionary legal remedy; he lists the declaratory judgment along with it and other "legal" remedies that have been historically defined as "equitable" remedies. Bray, *supra* note 21, at 52–53.

²⁶⁰ *Wilton*, 515 U.S. at 289.

²⁶¹ *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); *SEC v. Materia*, 745 F.2d 197, 200–01 (2d Cir. 1984); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983); *YORIO & THEL*, *supra* note 245, § 1.3 n.55.

²⁶² *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16, 25 (1971); *SEC*, 745 F.2d at 200; *Cox v. Cox*, 704 S.W.2d 171, 173 (Ark. Ct. App. 1986); *Gotham Partners, L.P.*, 817 A.2d at 176; *Weinberger*, 457 A.2d at 714.

broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that discretion."²⁶³

In protecting plaintiffs' constitutional rights, the judge should examine defendant's violation²⁶⁴ and seek a solution that situates the plaintiffs in "the position they would have occupied in the absence of" the defendant's violation.²⁶⁵ The reasonable observer may inquire whether the statements are legal rules or aspirations and whether they are consistent with countervailing considerations like separation of powers, federalism, and logistics expressed as "all deliberate speed," discussed below.

In a contextual decision, the wisest course is to hear from and defer to the decisionmaker on the scene. "On such a highly particular question, we are compelled," the California Supreme Court observed, "to defer to the superior knowledge of the trial judge, who is in a better position than we to determine what conditions 'on the ground' . . . will reasonably permit."²⁶⁶ The trial judge possesses ample equitable discretion even when a buffer zone that limits the defendant's free speech rights to picket an abortion clinic are at issue.²⁶⁷ "Although one might quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access [to the clinic], we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear."²⁶⁸

The buffer zone illustrates another point: a judge may draft an injunction that regulates the defendant's conduct that isn't otherwise regulated by positive law. An abortion clinic buffer zone may forbid the defendant's protest on the public sidewalk in front of the clinic—ancillary, preparatory, and related activity that, except for the injunction, would be legal, perhaps constitutionally protected expression.²⁶⁹ Professor Tracy Thomas has advocated for broad and specific "prophylactic" injunctions that forbid "the facilitators of harm in order to prevent continued illegality."²⁷⁰

John Norton Pomeroy's equity treatise includes a lengthy quotation from a federal court's decision that defined and praised equitable discretion to tailor the remedy to the plaintiff's injury and a sensible solution:

There is a very great difference between seeking to recover damages at law for an injury already inflicted by several parties, acting independently of each other,

²⁶³ *Brown v. Voss*, 715 P.2d 514, 517 (Wash. 1986) (emphasis omitted).

²⁶⁴ *Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995).

²⁶⁵ *United States v. Virginia*, 518 U.S. 515, 547 (1996) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)) (internal quotation marks omitted).

²⁶⁶ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 616 (Cal. 1997).

²⁶⁷ *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377–81 (1997).

²⁶⁸ *Id.* at 381.

²⁶⁹ Rendleman, *The Trial Judge's Equitable Discretion*, *supra* note 2, at 88–98.

²⁷⁰ Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 *REV. LITIG.* 99, 99 (2007).

and restraining parties from committing a nuisance . . . in the future. In equity the court is not tied down to one particular form of judgment. It can adapt its decrees to the circumstances in each case, and give the proper relief as against each party, without reference to the action of others, and without injury to either. Each is dealt with with respect only to his own acts, either as affected or unaffected by the acts of the others. It is not necessary, for the purpose of prevention of future injury, to ascertain what particular share of the damages each defendant has inflicted in the past, or is about to inflict in the future. It is enough to know that he has contributed, and is continuing to contribute, to a nuisance, without ascertaining to what extent, and to restrain him from contributing at all. But if otherwise, I do not perceive why the proportion of the injury inflicted by each may not be ascertained when practicable, and the decree adapted to give a proper remedy as to each. The greater elasticity in the forms and modes of proceedings in equity enables the court to so mold its decrees as to meet the special circumstances of each defendant, and thus do entire justice to many parties, under circumstances wherein a judgment at law would be wholly inadequate—circumstances which would render it impracticable to unite them in one action in that form of proceeding. And this is the foundation of the well-established distinction between law and equity with reference to the joinder and non-joinder of parties in the same proceeding. The very object of establishing courts of equity was to furnish a tribunal adapted to do complete justice in complex cases, often involving many parties, in which the courts of law, by reason of their restricted powers resulting from their modes of proceeding, could not afford adequate relief.²⁷¹

A lawsuit in early 2015 between states in the Supreme Court's original jurisdiction is a contemporary illustration that a court's equitable discretion to mould the remedy's specific terms has continuing vitality. In *Kansas v. Nebraska*,²⁷² the Supreme Court dealt with equitable apportionment of streams and rivers between the States of Kansas and Nebraska. The Court based its decision on the newly minted section 39 of the Restatement (Third) of Restitution and Unjust Enrichment that established the remedy of a defendant's disgorgement of gains from its opportunistic breach. The Court approved the Special Master's equitable discretion to impose a flexible remedy in light of the facts and their context and to award Kansas partial, instead of full all-or-nothing, disgorgement.²⁷³

The trial judge can have too much equitable discretion.²⁷⁴ The judge's equitable discretion to shape the plaintiff's relief will include logistics and specific context. But how and when to vindicate the plaintiff's right, what to order or forbid, and when to forbid it may be affected by the well-known, or notorious, "all deliberate speed" standard, articulated in the Supreme Court's remedial de-

²⁷¹ *Woodruff v. N. Bloomfield Gravel Mining Co. (The Debris Case)*, 16 F. 25, 29–30 (C.C.D. Cal. 1883).

²⁷² *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015).

²⁷³ *Id.* at 1058–59; see also Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 552 (1980).

²⁷⁴ *Doelle v. Mountain States Tel. & Tel.*, 872 F.2d 942, 948 (10th Cir. 1989).

cision in *Brown II* regarding school desegregation.²⁷⁵ In that case, without ordering any relief for the named plaintiffs, the Supreme Court remanded the solution to the trial judges with the following instructions:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. 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. . . . [T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.²⁷⁶

Desegregation wasn't immediate. Its pavané lasted fifteen years through individual solutions under "freedom of choice" before advancing to specific districts and busing. Although we cannot attribute the entire course of school desegregation to "all deliberate speed," it symbolized a lack of serious resolve and urgency to move from principle to implementation.²⁷⁷ While avoiding "immediate confrontation," the standard was "ultimately unrealistic."²⁷⁸

After Judge Pepper found that BeefCo's feedlot was a nuisance, Field moved for an injunction. The remedy the judge selected is a conditions injunction: Defendant BeefCo may continue its feedlot, but it is limited to five hundred steers in residence.

Even after the judge decides to grant the plaintiff an injunction, the question of timing remains: when will the injunction become effective? The logistics and timing of reducing the herd are matters within the judge's equitable discretion. BeefCo favors a "practical" injunction that allows it to finish feeding all the cattle now on the lot until they are ready for the terminal market but

²⁷⁵ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

²⁷⁶ *Id.* at 300–01 (footnotes omitted) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)).

²⁷⁷ Doug Rendleman, *Brown II's "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 *SAN DIEGO L. REV.* 1575 (2004). *But see* Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 598–606 (1983) (finding it proper for a court to decline full enforcement of plaintiffs' constitutional rights).

²⁷⁸ BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* 29–33, 58–59 (1997). For Justice Frankfurter's pivotal role in "all deliberate speed," the "touchstone of liberal criticism," see NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* ch. 42 (2010).

that forbids it from adding any new steers to the lot. Although Field agrees that BeefCo can't move 1,500 steers overnight, he thinks that a fortnight is enough time. Judge Pepper gives BeefCo sixty days to reduce its herd.

10. Attorney Fee

Suppose that, after Judge Pepper grants Field's motion for a permanent injunction, Field looks around the neighborhood, figures out that every farmer in the range of BeefCo's odor benefits from the injunction's odor-reduction, concludes that he has litigated successfully and created a significant public benefit that transcends his individual benefit, and moves to recover his attorney fee under the state-law private-attorney-general doctrine.²⁷⁹ "[I]n the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity."²⁸⁰ Once the judge has decided to award an attorney fee, her decision setting their amount, like many contextual and fact-specific decisions, is grounded in broad discretion if she follows proper procedure, applies the appropriate standards, and makes no clearly erroneous factual mistakes.²⁸¹

But federal Judge Pepper declines to grant attorney fees under the state-law exception to the American Rule.

11. Contempt for Violation of the Injunction

Suppose BeefCo is out of compliance with the injunction because it is feeding seven hundred steers in violation of the injunction's five hundred-steer cap.

A federal judge's discretion in criminal contempt is limited because the district attorney will usually exercise prosecutorial discretion before maintaining criminal contempt.²⁸² How to enforce an injunction with civil contempt involves a sense of the context, the people involved, and the situation. The two forms of civil contempt are compensatory contempt and coercive contempt. In compensatory contempt, the judge orders the defendant to pay the plaintiff for the harm its violation caused the plaintiff.²⁸³ In coercive contempt, the judge undertakes to secure for the plaintiff the substantive interest the defendant

²⁷⁹ *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977); *Utahns for Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 175 P.3d 1036 (Utah 2007). The United States Supreme Court rejected this court-made equitable doctrine for federal courts in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Following this decision Congress enacted the Civil Rights Attorney's Fees Act of 1976 to allow the judge to award statutory attorney fees under the federal civil rights acts. 42 U.S.C. § 1988(b) (2012).

²⁸⁰ *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 782 (Utah 1994).

²⁸¹ *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299 (3d Cir. 2005); *In re Dairy Farmers of Am., Inc.*, No. 09-cv-3690, 2015 WL 753956 (N.D. Ill. Feb. 20, 2015) (finding it discretionary for choice of lodestar or percentage measurement and amount of attorney fee).

²⁸² *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987).

²⁸³ RENDLEMAN, *COMPLEX LITIGATION*, *supra* note 2, at 834–71.

threatens or violates; the judge coerces the defendant with daily fines or imprisonment until the defendant relents and obeys.²⁸⁴

Beginning with compensatory contempt, would the judge have equitable discretion to find that the defendant has violated the injunction, harming the plaintiff, and that it is in “contempt,” but then to decline to order the defendant to pay the plaintiff compensation? Leaving the plaintiff with his rights violated but without a remedy is a serious step. On this matter, the Supreme Court has said:

In the determination of the question whether an injunction has been violated and, if so, whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts.²⁸⁵

Later courts have held that the judge lacks discretion not to employ compensatory contempt.²⁸⁶ We think that, under the circumstances, Field will be entitled to a decree of compensatory contempt.

The trial judge’s discretion in employing coercive contempt measures present a more mixed picture. The trial judge “has broad discretion to design a remedy that will bring about compliance.”²⁸⁷ A judge’s discretion in selecting a coercive contempt sanction is limited to using “the least possible power adequate to the end proposed.”²⁸⁸ Judge Robert Carter freed two contemnors, observing the following:

A district judge has wide latitude in a civil contempt situation in determining whether to order coercive incarceration at all, and if incarceration is deemed warranted, the length of incarceration imposed is within his sound discretion as long as it does not extend beyond the grand jury term. . . . Having ordered coercive incarceration for a certain period, surely the judge may in his discretion modify his judgment, based upon whatever rational considerations appeal to him, including ordering that the coercive incarceration be terminated short of the time originally fixed without the contemnor having complied with the court’s order.²⁸⁹

Suppose Judge Pepper orders BeefCo’s CEO confined until the feedlot’s census is five hundred or less. The Second Circuit Court of Appeals decided *Simkin v. United States* in 1983, several years after Judge Carter’s decision in

²⁸⁴ *Id.* at 691–833.

²⁸⁵ *Union Tool Co. v. Wilson*, 259 U.S. 107, 112 (1922) (citations omitted).

²⁸⁶ *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946); *Nat’l Research Bureau, Inc. v. Kucker*, 481 F. Supp. 612, 614 (S.D.N.Y. 1979); *Thompson v. Johnson*, 410 F. Supp. 633, 643 (E.D. Pa.1976).

²⁸⁷ *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir. 1982).

²⁸⁸ *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quoting another source) (internal quotation marks omitted).

²⁸⁹ *In re Cueto*, 443 F. Supp. 857, 863 (S.D.N.Y. 1978).

the paragraph above to free the contemnors.²⁹⁰ The court stated a “no realistic possibility” of obedience test for release and made two points that are not easy to reconcile.²⁹¹ First, the trial judge has “virtually unreviewable discretion” in setting and ending coercive contempt.²⁹² Second, because of the Recalcitrant Witness statute’s eighteen-month cap on confinement of a contemnor for coercive contempt, “in the absence of unusual circumstances” a reviewing court should not “conclude, as a matter of due process, that a civil contempt sanction has lost its coercive impact at some point prior to the eighteen-month period prescribed as a maximum by Congress.”²⁹³ The *Simkin* test and its mixed standards of review have created confusion that has exacerbated an already difficult inquiry.²⁹⁴

Because of the judge’s equitable discretion under opaque doctrine, we stand nonplused, unable to answer the question of whether Judge Pepper should terminate coercive contempt and release BeefCo’s CEO. We return to his appeal below.

12. *Motion to Modify or Dissolve the Injunction*

Suppose that after time passes, defendant BeefCo thinks the five hundred-steer injunction is obsolete because the law or the facts have changed. Maybe the legislature has passed or amended a “right-to-farm” tort-reform statute. Maybe a genius has invented cattle feed that eliminates cow manure’s odor.

Whether the judge should modify or dissolve an injunction turns on a Rule that is explicitly equitable: the judge may grant the defendant’s motion for relief from an injunction if “applying it prospectively is no longer equitable.”²⁹⁵ Reopening and dissolving an injunction was a practice that was formerly under the court’s inherent equitable power.²⁹⁶ The Federal Rules converted it into a Rule.

In *Rufo v. Inmates of Suffolk County Jail*, the Supreme Court construed this Rule. It held that “a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree” and that “the proposed modification is suitably tailored to the changed circumstance.”²⁹⁷ Justice O’Connor thought that the majority’s test

²⁹⁰ *Simkin v. United States*, 715 F.2d 34 (2d Cir. 1983).

²⁹¹ *Id.* at 37–39.

²⁹² *Id.* at 38.

²⁹³ *Id.* at 37.

²⁹⁴ *Sanchez v. United States*, 725 F.2d 29, 31 (2d Cir. 1984).

²⁹⁵ FED. R. CIV. P. 60(b)(5).

²⁹⁶ *United States v. Swift & Co.*, 286 U.S. 106, 113–15 (1932); Marcus, *supra* note 94, at 1572.

²⁹⁷ *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992). The leading scholarly article is David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L.Q. 579, 584–85 (1993).

didn't add much, if anything, to the Rule: "I am not certain that the product of this effort . . . makes matters any clearer than the equally general language of Rule 60(b)(5)."²⁹⁸

The Court's 2009 majority opinion in *Horne v. Flores* on whether to modify or dissolve the injunction was unsympathetic to the structural injunction under review. The majority opinion's close factual examination and emphasis on federalism militated against the trial judge's equitable discretion.²⁹⁹ This left open for the future the scope of the trial judge's equitable discretion to dissolve or modify a large-scale or structural injunction.

In the unlikely event of odorless manure, BeefCo's motion to dissolve the feedlot injunction will succeed because of a change in the facts. The right-to-farm statute as a change in the law presents a closer issue.

13. Stay of an Injunction on Appeal

Suppose the trial judge granted plaintiff Field a permanent injunction that orders BeefCo's feedlot to be reduced to five hundred within sixty days. BeefCo's appeal with briefing, argument, and an appellate opinion will likely take at least a year. Either the trial judge or the court of appeals may stay an injunction or the court of appeals may grant an appellate injunction pending review.³⁰⁰

What role does equitable discretion play in the decision on whether to stay an injunction? In *Hovey v. McDonald*, in 1883, the trial judge had dismissed the plaintiff's bill in equity and ordered a court-appointed receiver to pay disputed funds to the defendants. The plaintiff appealed, but the judge did not stay the decree pending appeal. The Supreme Court affirmed. It explained that the decision whether to stay an equitable decree pending appeal rested with the discretion of the trial court. "The court below, it is true, in view of the appeal, might have made an order to continue the injunction and to retain the property in the receiver's hands; but that was a matter of discretion, to be exercised according to the justice of the case."³⁰¹ The judge's equitable discretion continues today. In 2009, the Supreme Court said that a "stay is not a matter of right, even if irreparable injury might otherwise result" but, is instead "an exercise of judicial discretion."³⁰²

A recent example of equitable discretion to stay a preliminary injunction is Judge Haden's opinion in *Bragg v. Robertson*, a lawsuit we discussed above with his on-site visit and the injunction bond. The judge had granted environmentalist plaintiffs both a preliminary injunction and a final injunction forbidding mountain-top-removal mining.³⁰³ The injunction brought the Mountain

²⁹⁸ *Rufo*, 502 U.S. at 394 (O'Connor, J., concurring).

²⁹⁹ *Horne v. Flores*, 557 U.S. 433, 459–70 (2009).

³⁰⁰ FED. R. CIV. P. 62(c); FED. R. APP. P. 8(a)(2).

³⁰¹ *Hovey v. McDonald*, 109 U.S. 150, 158 (1883).

³⁰² *Nken v. Holder*, 556 U.S. 418, 433 (2009).

³⁰³ *Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D.W. Va. 1999).

State's Congressional delegation into an alliance with both the United Mine Workers and the coal companies.

Although the appealing defendants failed to present arguments that met the established standard for a stay, Judge Haden quenched the "firestorm" of misunderstanding and misrepresentation.³⁰⁴ He quoted the Supreme Court: "the traditional stay factors contemplate individualized judgments in each case, [and] the formula cannot be reduced to a set of rigid rules."³⁰⁵ Judge Haden concluded that:

[T]he shrill atmosphere of discord must subside so that our Court of Appeals and this Court are able to address the crucially important legal issues [T]he Court believes it preferable to attempt to defuse invective and diminish irrational fears so that reasoned decisions can be made with all deliberate speed, but with distractions minimized. Accordingly, and of its own volition and discretion, the Court GRANTS Defendants' motion to stay the permanent injunction pending appellate action.³⁰⁶

In short, the trial judge's standardless, open-ended equitable discretion governed. The observer can imagine school desegregation's snail's pace if District Court judges in the Deep South had stayed their orders because of public opposition.

Judge Pepper, citing her equitable discretion, grants BeefCo's motion to stay the five hundred-steer permanent shutdown injunction, but she continues in place the two thousand-steer preliminary injunction.

14. *Collecting the Money Judgment*

Collection is statutory; courts construe the technical statutes strictly. However, equitable discretion exists even in judgment collection. Under Federal Rule 69(a), the judgment creditor's federal court discovery in aid of execution uses either federal or state procedure. The debtor's examination emerged from the equitable creditor's bill.³⁰⁷ As the Supreme Court said in 2014, discovery in aid of execution is discretionary. The Court then held that the judgment creditor's discovery of judgment debtor Argentina's assets in banks was not limited by the judgment debtor's sovereign immunity.³⁰⁸

Suppose that, in addition to a prospective injunction, Field won a \$275,000 money judgment. Collection may be routine because the farmer as judgment creditor can either file his judgment for a judgment lien or garnish BeefCo's bank account; if the defendant appeals and posts an appeal or supersedeas bond, the plaintiff can collect from the bond if the appellate court affirms. Sup-

³⁰⁴ *Bragg v. Robertson*, 190 F.R.D. 194, 196 (S.D.W. Va. 1999).

³⁰⁵ *Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

³⁰⁶ *Id.*

³⁰⁷ VERN COUNTRYMAN, *CASES AND MATERIALS ON DEBTOR AND CREDITOR* 90–91 (2d ed. 1974); STEFAN A. RIESENFELD, *CASES AND MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTION* 266–67 (4th ed. 1987).

³⁰⁸ *Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256–58 (2014).

pose, however, that Field has the sheriff levy execution on the feedlot's steers and buys them in a rushed auction for 25 percent of their market value.³⁰⁹

A New Jersey court claimed inherent equitable authority in the absence of statute to prevent a windfall and unjust enrichment. The court held that if an unsecured judgment creditor like farmer Field purchases the judgment debtor's property at a sheriff's execution sale for a nominal amount and is able to resell it for market value, then to prevent the judgment creditor's windfall and double recovery, the judgment debtor is entitled to a fair market value credit and to a restitution judgment for the excess.

[A] judgment creditor's efforts to satisfy the judgment by execution upon the debtor's property is subject to the court's inherent equitable authority "to prevent a potential double recovery or windfall to the judgment creditor." In our view, this equitable authority may extend to entry of an affirmative money judgment in the debtor's favor if necessary to prevent a windfall to the judgment creditor.³¹⁰

Restitution to the rescue for BeefCo to recover Field's unjust enrichment.

On a related issue, the Supreme Court stated:

Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.³¹¹

15. The Appeal and the Scope of Review on Appeal

The trial judge shares decisionmaking authority with the appellate court.³¹² The loser's appeal is a crucial principle of confinement on the trial judge's equitable discretion. The skirmish line where discretion ameliorates the rigorous application of general rules isn't erased on appeal. The Fifth Circuit, which reversed the trial judge below it, observed that one area where tension occurs is between trial judges and appellate courts:

[I]t may not be amiss to observe that we entirely sympathize with the desire of the [trial] court to amend its judgment to bring about substantial justice in the case before it. Trial judges are more directly and immediately confronted by the demands of doing justice, case by case, than are we; indeed, this is their primary

³⁰⁹ DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA §§ 3.5(E), 3.6 (3d ed. 2014).

³¹⁰ *MMU of N.Y., Inc. v. Grieser*, 999 A.2d 1204, 1211 (N.J. Super. Ct. App. Div. 2010) (citation omitted); *Hornbuckle v. Harris*, 686 P.2d 418, 420 (Or. Ct. App. 1984).

³¹¹ *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944); *Bornman v. Gordon*, 527 A.2d 109, 111 (Pa. Super. Ct. 1987) (stating equitable standard to set aside a sheriff's sale).

³¹² *See generally* PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* (1976).

office and duty. Yet it is the considered judgment of our polity that in the long run—if not perhaps in the given case—justice is better served by adherence to general rules. Today we address that rare case in which, it well may be, the trial court has done better justice in the case but, in doing so, has gone beyond the powers granted it by such rules.³¹³

As then-District Judge Sentelle explained the Rainbow People’s consent decree, context matters. “To act as I did—result-oriented, doing equity according to my own conscience, with questionable basis in law—is not consistent with my judicial philosophy. A judicial philosophy may sustain a court of appeals judge or a supreme court justice.” While, on the other hand, “[a] trial judge has to deal not just with the law, but with people. . . . [S]ometimes the judge must rise above his philosophy.”³¹⁴

In our feedlot-nuisance lawsuit, suppose that the trial judge refused defendant BeefCo’s proffered jury instruction based on the state’s right-to-farm statute. The trial ended with a general jury verdict and judgment for plaintiff Field for \$275,000 damages for past injury that included an undetermined amount for pain and suffering and emotional distress. After the trial, Judge Pepper rejected BeefCo’s post-trial motions and granted Field’s motion for a permanent injunction that limited BeefCo’s feedlot to five hundred steers, which she stayed on appeal at two thousand. BeefCo appeals both liability and remedy.

A federal court of appeals reviews the trial court’s final judgments.³¹⁵ At final judgment, many of the trial judge’s procedural decisions, for example, setting the date of trial within wide limits, will be moot and insulated from appellate examination, correction, and meddling.

Appellate courts check trial court decisions. Appellate decisions refine and clarify the law, limiting trial judges’ discretion in future lawsuits.³¹⁶

The standard of review defines and measures the scrutiny that an appellate court wields.³¹⁷ We will examine three standards of review: *de novo*, clearly erroneous, and abuse of discretion.³¹⁸

Federal Rule 50 governs the verdict loser’s motion for judgment as a matter of law (“JMOL”), which, after trial, and on appeal, tests the jury’s finding of fact at trial.³¹⁹ Because of the Seventh Amendment’s reexamination clause, the

³¹³ Trahan v. First Nat’l Bank of Ruston, 720 F.2d 832, 834 (5th Cir. 1983); SCHAUER, *supra* note 224, at ch. 8.6.

³¹⁴ SENTELLE, *supra* note 186, at 157.

³¹⁵ 28 U.S.C. § 1291 (2012).

³¹⁶ See Anthony Mason, *The Place of Equity and Equitable Remedies in the Contemporary Common Law World*, 110 LAW Q. REV. 238, 258 (1994).

³¹⁷ Cravens, *supra* note 15, at 953.

³¹⁸ There are other standards of review. In the Supreme Court’s original jurisdiction, which is equitable, the master receives respect and a tacit presumption of correctness, but the Court reviews the record independently and looks at everything. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1051 (2015).

³¹⁹ FED. R. CIV. P. 50.

federal trial judge and appellate court review a jury's factual decisions on credibility of witnesses, weighing conflicting evidence, and drawing inferences deferentially. Could a reasonable juror reach that decision on the evidence? A question of fact becomes a question of law when the substantive law requires a particular finding on clear facts.

The verdict-loser's post-trial motion will usually ask for a JMOL, and, in the alternative, a new trial.³²⁰ Short of granting a final judgment, or JMOL, the trial judge can express uncertainty about the jury's factfinding by granting the verdict loser's motion for a new trial.

A federal court of appeals applies the same deferential standard, and reviews the trial judge's decision on the verdict loser's motion for judgment as a matter of law *de novo*.³²¹

The chief factual questions for the jury in our nuisance trial were whether BeefCo was liable under substantive nuisance law and, if so, the amount of Field's damages. These findings seem safe on appeal.

The judge's decision on a question of law receives plenary, *de novo*, right-or-wrong review. In granting a defendant's motion to dismiss because the plaintiff's complaint fails to state a claim, motion for summary judgment, or motion for judgment as a matter of law, a judge's incorrect decision of law treads on the jury's constitutionally fortified factfinding role. The trial judge decided to reject defendant BeefCo's arguments that the state right-to-farm statute barred Field's recovery or that, at least, the jury should be instructed to apply the statute were questions of law. The Court of Appeals will reverse her decision if she got that legal issue wrong.

In deciding a substantive equity issue or an equitable remedy, the trial judge decides factual issues of credibility, weighing, and drawing inferences. With no Seventh Amendment, the Court of Appeals reviews the judge's finding of fact after a bench trial a little less deferentially than it reviews a jury's decision: the appellate court asks whether the facts the lower court judge found are "clearly erroneous."³²²

In addition, in contrast to most juries' general verdicts, the trial judge must "find the facts specially."³²³ Unlike the jury, the judge must think through the factual issues carefully enough to articulate a decision that provides the court of appeals a satisfactory way to review it. Although the trial judge makes findings of fact, factfinding isn't part of the appellate court's function of developing and administering the law. An appellate court's review of a trial judge's factfinding is to correct errors. The court of appeals will reverse the trial judge's factual

³²⁰ FED. R. CIV. P. 50(b); FED. R. CIV. P. 59.

³²¹ HARRY T. EDWARDS ET AL., *FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* ch. III D. (2013); FREER, *supra* note 164. The JMOL standard resembles the standard to grant a motion for summary judgment before trial, which is no GIMF—genuine issue of material fact.

³²² FED. R. CIV. P. 52(a)(6).

³²³ FED. R. CIV. P. 52(a).

decision if, with deference to the judge's ability to evaluate the witnesses' credibility, her finding is "clearly erroneous." It is difficult to compare review of the motion for JMOL with the clear-error test because "[e]ach standard is shifting and fugitive."³²⁴ Clearly erroneous review is, nevertheless, less deferential than review of a jury's finding of fact.³²⁵ If the feedlot-nuisance trial had been before the judge *ore tenus*, we still think that her factual findings would be safe.

The trial judge's equitable discretion may be circumscribed by a standard of de novo factual review.³²⁶ An example is the Iowa Supreme Court's unfortunate and notorious opinion in *Painter v. Bannister*. The appellate court reversed the trial judge's decision that, in his best interests, a little boy's widowed father should not have custody of him. Instead the appellate court awarded custody to the child's grandparents (his deceased mother's parents).

The [grandparents'] home provides Mark with a stable, dependable, conventional, middleclass, middlewest background and an opportunity for a college education and profession, if he desires it. It provides a solid foundation and secure atmosphere. In [his father's] home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable. . . . We believe it would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating.³²⁷

As part of the appellate court's factual review, it also rejected the trial judge's evaluation of an expert witness.³²⁸

An appellate court's de novo factual review erodes the trial judge's equitable discretion and moves much of it to the appellate court. If the appellate court follows that standard in our feedlot trial, it may reverse the trial judge if the appellate judges think the trial judge's factfinding was mistaken.

The standard of review that comes closest to equitable discretion is abuse of discretion. The appellate court's review for abuse of discretion governs many issues between the trial judge and the court of appeals.³²⁹ When there is

³²⁴ Cooper, *supra* note 68, at 650.

³²⁵ EDWARDS ET AL., *supra* note 321, at ch. IV; Cooper, *supra* note 68, at 660.

³²⁶ Nichols v. City of Evansdale, 687 N.W.2d 562, 567 (Iowa 2004) (finding de novo review qualified for the trial judge's credibility decisions); Ficke v. Wolken, 858 N.W.2d 249, 254 (Neb. Ct. App. 2014) (giving weight to the trial judge's finding of credibility).

³²⁷ Painter v. Bannister, 140 N.W.2d 152, 154, 156 (Iowa 1966).

³²⁸ *Id.* at 156. The opinion contains no statement of its de novo factual review, but its result and its citations make clear that it is evaluating the facts anew. *See id.* (citing Finken v. Porter, 72 N.W.2d 445, 446 (1955)). The Iowa Supreme Court treats a habeas corpus action for child custody as equitable; the Supreme Court reviews the trial judge's factual findings de novo, according the judge's findings substantial weight because of the better opportunity to weigh testimony. Then-Iowa Rule 344(f) was: 7. "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court; but is not bound by them." Note, *Judicial Rule Making: Propriety of Iowa Rule 344(f)*, 48 IOWA L. REV. 919, 926-27 n.47 (1963).

³²⁹ *But see* Brunet, *supra* note 33, at 301 ("[T]he undefined and sketchy nature of this review reduces the remedy to a seemingly contradictory discretionary check on discretionary action.").

more than one “correct” decision, the trial judge has discretion and, on appeal, the court of appeals will inquire whether the trial judge’s discretion was abused instead of whether the judge’s decision was “correct.” The court of appeals judges may approve, or not disapprove, even when the trial judge decided differently than they would have.³³⁰

The leading treatise on the federal standard of review distinguishes two types of appellate review for a trial judge’s abuse of discretion, which I will stay with our rural hypothetical and call loose-rein and tight-rein review.³³¹ The treatise puts supervision of litigation in the loose-rein type. The trial judge’s supervision of litigation, including discovery and evidence rulings, is accorded wide discretion. For example, if Judge Pepper had set the date for trial of Field’s feedlot nuisance for either thirty days or five years after defendant BeefCo answered Field’s complaint, that would probably have been an abuse of discretion. But the trial judge has ample discretion in the midrange between the extremes. The judge must consider and evaluate the factors. Of course, the judge has no discretion to apply an erroneous legal standard. Nor may the judge make a palpable mistake of judgment.³³²

The trial judge’s decisions on remedy seem to be in the treatise’s category of more tight-reined and closely confined discretion. The judge should examine and apply the appropriate standards. The remedy should fall within the “range of choices permitted.” “Discretion is not whim,” Chief Justice Roberts quoted himself, “and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.”³³³

For example, in *Albemarle Paper Co. v. Moody* the Supreme Court reviewed a decision where the trial judge had granted the claimant an injunction, but had declined to award back pay.³³⁴ After finding employment discrimination, the trial judge reinstated the plaintiff, an injunction.³³⁵ But the judge declined to award the plaintiff back pay because the defendant had not acted in bad faith and because the plaintiff had waited too long to file suit.³³⁶ The Supreme Court rejected the judge’s reasoning.³³⁷ In view of Congress’s statutory purposes—compensation and deterrence (specifically, deterring continued discrimination)—the judge’s equitable discretion and power weren’t open end-

³³⁰ Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 650–53 (1971).

³³¹ EDWARDS ET AL., *supra* note 321, at ch. V. Professors Rosenberg and Marcus also distinguish tight- and loose-reined discretion. Marcus, *supra* note 94, at 1565–67. Professor Cravens wrote that abuse of discretion has no single meaning. Cravens, *supra* note 15, at 949–51.

³³² EDWARDS ET AL., *supra* note 321, at ch. V.

³³³ *eBay v. MercExchange*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)).

³³⁴ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408–10 (1975).

³³⁵ See RENDLEMAN, *COMPLEX LITIGATION*, *supra* note 2, at 412.

³³⁶ *Albemarle Paper Co.*, 422 U.S. at 410.

³³⁷ *Id.* at 435–36.

ed.³³⁸ In particular, the trial judge, the Court held, cannot refuse to award a successful plaintiff back pay simply because the defendant had not acted in bad faith, for that would undermine both compensation and deterrence.³³⁹ Judges' decisions refusing to award a plaintiff back pay should, the Court said, be rare and the judge must state reasons to decline back pay.³⁴⁰

Thus, a trial judge's equitable decisions on the plaintiff's remedy are not open-ended, but they are subject to standards and to congressional purpose. A uniform approach to review for abuse of discretion cannot, however, be discovered. Review for abuse of discretion is not one but several tests.³⁴¹

In *Rufo*, summarized above, Justice O'Connor, concurring, argued for a permissive procedural definition of abuse of discretion:

Determining what is "equitable" is necessarily a task that entails substantial discretion, particularly in a case like this one, where the District Court must make complex decisions requiring the sensitive balancing of a host of factors. As a result, an appellate court should examine primarily the method in which the District Court exercises its discretion, not the substantive outcome the District Court reaches. If the District Court takes into account the relevant considerations (all of which are not likely to suggest the same result) and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance.³⁴²

This deferential standard resembles other extremely permissive standards of review. The first is the business-judgment rule that a court applies in litigation about board and director strategic decisionmaking. The second is a college's procedural review committee's standard for review of a department's decision not to renew or deny tenure.³⁴³ It may be too deferential if it nearly eliminates appellate review. Several thoughtful scholars favor a procedural

³³⁸ *Id.* at 417.

³³⁹ *Id.* at 422–23.

³⁴⁰ *Id.* at 421 n.14. The decision assumes that back pay is equitable, a position that isn't analytically sound. Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 ALA. L. REV. 119, 155–56 (2006); Doug Rendleman, *supra* note 171, at 772–78; see also Carrington, *supra* note 172, at 83–84. On a related issue, in *Lussier v. Runyan*, the Court of Appeals found that "front" or future pay for employment discrimination is also "equitable" and within the district judge's equitable discretion. Also within the trial judge's discretion is "whether a front pay award, if granted, may be tailored to take collateral benefits into account." A successful employment-discrimination plaintiff is usually entitled to reinstatement, an equitable remedy, instead of front pay, so the front pay fallback may take on the equitable color of reinstatement. A successful employment-discrimination plaintiff is presumptively entitled to back pay, apparently because back pay is less speculative and lacks front pay's predictive quality. *Lussier v. Runyan*, 50 F.3d 1103, 1108–10 (1st Cir. 1995).

³⁴¹ Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 783 (1982).

³⁴² *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 393–94 (1992) (O'Connor, J., concurring).

³⁴³ AAUP, POLICY DOCUMENTS AND REPORTS 94–98 (11th. ed. 2015).

standard of review that is tempered by requiring the trial judge to apply overarching principles and articulate reasons for the appellate court to review.³⁴⁴

On the other hand, the Supreme Court's decision in *Horne v. Flores* also dealt with review of a defendant's motion to dissolve or modify an injunction. The majority's skeptical analysis and factual review led the dissent to argue, cogently, it seems to me, that the majority hadn't really reviewed for abuse of discretion.³⁴⁵

The judge's injunction-drafting decisions are decisions where the judge's equitable discretion is copious. The scrutiny with which the appellate court views Judge Pepper's five-hundred-steer permanent injunction depends on that court's attitude toward the lawsuit viewed through the lens or kaleidoscope of abuse of discretion. That review can be too aggressive as in *de novo* factual review, or too lenient as in procedural review. Review in the midrange leads to affirmance.

Appellate review of contempt may be more intrusive. Suppose, in the feedlot scenario, that the trial judge has ordered BeefCo's CEO to be confined to coerce him to obey an order to reduce the feedlot's census to five hundred. The trial judge has rejected his motion to be released. He appeals. How much should an appellate court defer to a trial judge's decision to continue a contemnor's coercive confinement?

The trial judge's decision on whether to release a contemnor who is incarcerated for coercive contempt involves the contemnor's liberty, which was taken under a civil standard and procedure. Given the possibility that the trial judge's emotional commitment to her order has clouded her judgment, it seems to be a propitious time for a second eye or eyes. The court of appeals will review coercion by asking whether the judge's measures were reasonable and not arbitrary.³⁴⁶

The *Simkin* court stated a "no realistic possibility" test for a confined contemnor's release and granted "virtually unreviewable discretion" to the trial judge.³⁴⁷ Although trial judges chafe at the test,³⁴⁸ it does grant them considerable autonomy. Perhaps too much.

Such a deferential standard of review may be inappropriate when a long-distance contemnor appeals a trial judge's decision to continue her confinement. In Jean Elizabeth Morgan's coercive-contempt appeal, the District of Columbia court explicitly rejected the *Simkin* court's standard: "We cannot settle

³⁴⁴ See, e.g., Cravens, *supra* note 15, at 947; Effron, *supra* note 33; Yablon, *supra* note 67, at 256; see also OWEN FISS, *THE LAW AS IT COULD BE* 54 (2003).

³⁴⁵ *Horne v. Flores*, 557 U.S. 433, 493 (2009) (Breyer, J., dissenting).

³⁴⁶ *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 56–57 (2d Cir. 1982).

³⁴⁷ *Simkin v. United States*, 715 F.2d 34, 37–39 (2d Cir. 1983).

³⁴⁸ *In re Grand Jury Proceedings*, 994 F. Supp. 2d 510, 516 (S.D.N.Y. 2014).

for a ‘virtually unreviewable’ exercise of trial court discretion when due process of law is at stake.’³⁴⁹

We suggest other measures than coercive confinement to cull BeefCo’s herd, perhaps a receiver or master to sell its excess steers.

CONCLUSION

How well do Steve Subrin’s concerns about equitable decisionmaking hold up? Steve’s too-much-discretion agenda considered the entire Federal Rules of Civil Procedure. It is both broader and narrower than mine, which examines discretion in things named equity both in and out of the Rules.

Discretion generally, including equitable discretion, is a concept much in need of refinement.³⁵⁰ Our survey gives us reasons to agree with Steve. As we have seen, courts claim equitable discretion across a broad spectrum of decisions: substantive, choice of remedy, equitable defenses, and measurement of a remedy. In substantive choice of remedy and equitable defenses decisions, courts’ declarations of equitable discretion often overreach.

Courts claim broad discretion; for example, “there are no established rules and fixed principles laid down for the application of equity. Rather, equity depends essentially upon the particular circumstances of each individual case.”³⁵¹ One of Steve’s points, and mine, is that the judge’s discretionary decisionmaking ought to yield to her attention to rules, precedents, and standards keeping her pragmatic eye on consequences.³⁵² A court should eschew the guise of ancient language to cloak unprincipled discretion. “The law and Judges should avoid arcane interpretations and debates about law but should instead judge the overall equity or justice of a situation and decide accordingly,” Professor Graham Virgo wrote, quoting Sir Thomas More’s *Utopia*.³⁵³

An appellate court should not substitute statements of equitable discretion for developing standards and precedent. Nor should it allow a trial judge to ignore substantive law or the basic remedial rules. If courts were to reduce their use of the language of equitable discretion, develop rules and standards, and decide discrete remedial issues according to uniform remedial criteria, then much progress would occur.

Statutes affect equitable discretion.³⁵⁴ The Norris-LaGuardia Act forbids a federal judge from granting an injunction against a strike in all but very limited

³⁴⁹ *Morgan v. Foretich*, 564 A.2d 1, 7 n.5 (D.C. 1989); Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 190 (1991).

³⁵⁰ Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 470 (1986).

³⁵¹ *Omega Indus., Inc. v. Raffaele*, 894 F. Supp. 1425, 1433 (D. Nev. 1995) (citations omitted) (internal quotation marks omitted).

³⁵² Shapiro, *supra* note 17, at 546–47, 589; *see also* Wolff, *supra* note 47.

³⁵³ Virgo, *supra* note 65, at 21.

³⁵⁴ Shapiro, *supra* note 17, at 580.

circumstances.³⁵⁵ The Prison Litigation Reform Act limits prison conditions injunctions.³⁵⁶ Aside from the idea above that, when a statute provides for an injunction, a judge should be generous, the way a statute affects a judge's equitable discretion isn't always clear, indeed sometimes it is frankly a muddle.³⁵⁷ The preliminary injunction standard isn't governed by a rule, the injunction bond is.³⁵⁸ Yet, while courts of appeals have established standards for preliminary injunctions, albeit not always satisfactory ones, courts' injunction bond decisions wander over discretion on several points.

In measuring and defining a winning plaintiff's equitable remedy, a trial judge has the discretion of an initial decisionmaker. The judge's remedy is individualized to the dispute and the litigants; it gives the winner what the law says he is entitled to receive. A decision about specific measurement does not lend itself to logical reasoning from a rule. It is context-specific, and, in the case of a personal order, managerial. While the decision is made under general rules, the context-specific nature of a solution militates against uniformity and adherence to or creation of precedent. Within a range of acceptable solutions, the trial judge's judgment and range of experience determines the answer. After the decision, the measurement of a specific remedy for a specific dispute isn't precedent, but guidance or a rule of thumb for a later decision. These considerations muffle Steve's cry to curb discretion when the judge is measuring a plaintiff's remedy.

An impious question is whether the Chancellor's equitable discretion is, or ought to be, identical to a Common-Law decisionmaker's discretion. How does equitable discretion compare to other primary decisionmakers' discretion, a jury in a damage trial or a judge in a non-equity case? On one matter of choice of remedy the jury's discretion resembles the judge's broad equitable discretion. In *Smith v. Wade*, the Supreme Court said that punitive damages are discretionary with the factfinder, and "are never awarded as of right, no matter how egregious the defendant's conduct."³⁵⁹

The historical record shows that juries tried lawsuits leading to discretionary monetary relief.³⁶⁰ The jury has ample discretion in setting the amount of a plaintiff's damages, which is a contextual and fact-specific decision. The jury's discretion is particularly broad for a plaintiff's nonpecuniary damages for pain and suffering. "Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the

³⁵⁵ 29 U.S.C. §§ 101–15 (2012).

³⁵⁶ 18 U.S.C. § 3626 (2012).

³⁵⁷ See generally James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1 (2013) (discussing the Anti-Injunction Act and its affect on the allocation of decision-making authority between lower federal courts and state courts).

³⁵⁸ FED. R. CIV. P. 65(c).

³⁵⁹ *Smith v. Wade*, 461 U.S. 30, 52 (1983).

³⁶⁰ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998).

judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury.”³⁶¹ Similarly, valuing a deceased minor child’s services to her parents “is left to the sound judgment, experience, and conscience of the jury without any proof thereof whatever The value of a child’s services may be determined from all the evidence, including evidence as to the age and precocity of the child, its earning capacity, and the services rendered by it, the circumstances of the family and the living conditions, and from experience and knowledge of human affairs on the part of the jury.”³⁶²

An appellate court won’t upset a jury’s verdict setting the amount of a plaintiff’s compensatory damages unless it shows “passion or prejudice” or “shocks the judicial conscience.”³⁶³

In our nuisance trial, is the jury’s pain and suffering or emotional distress verdict entitled to as much respect and deference as Judge Pepper’s five-hundred-steer permanent injunction? A few years ago, I thought so.³⁶⁴ Although I had good company in equating the two,³⁶⁵ my earlier answer isn’t easy for me to affirm at the conclusion of this article. In my present analysis, I think it is nettlesome to answer this question because it compares two different things.

The more general question is how to divide decisionmaking between the jury, the trial judge, and the appellate court. The jury decides questions of fact in trials “at common law.” The judge is the factfinder in equity. On the one hand, Professor Andrew Hessick wrote that damages follow the more rigid rules, while equity is flexible.³⁶⁶ On the other hand, the Supreme Court quoted Justice Brandeis that “the grant or withholding of remedial relief is not wholly discretionary with the judge.”³⁶⁷ Judge Posner’s observation that “the proposition that equitable relief is ‘discretionary’ cannot be maintained today without careful qualification,” goes a little farther.³⁶⁸

³⁶¹ *Beagle v. Vasold*, 417 P.2d 673, 675 (Cal. 1966) (quoting McCormick on Damages, § 88, pp. 318-319); Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 317 (1998).

³⁶² *Collins v. McPherson*, 85 S.E.2d 552, 554 (Ga. Ct. App. 1954) (internal quotation marks omitted).

³⁶³ RENDLEMAN & ROBERTS, *supra* note 131, at 101. On the other hand, a federal court of appeals reviews a jury’s punitive damages verdict de novo. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436–37 n.9 (2001).

³⁶⁴ Rendleman, *The Trial Judge’s Equitable Discretion*, *supra* note 2, at 97.

³⁶⁵ Laycock, *supra* note 37, at 71–73; Shapiro, *supra* note 17, at 571.

³⁶⁶ F. Andrew Hessick, *The Challenge of Remedies*, 57 ST. LOUIS U. L.J. 739, 745 (2013).

³⁶⁷ *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

³⁶⁸ *Shondel v. McDermott*, 775 F.2d 859, 867–68 (7th Cir. 1985).

My earlier article emphasized the functional differences between remedies, principally between damages and an injunction. The damages jury goes home. It leaves the successful claimant to collect impersonally from the judgment debtor's property. On the other hand, calculations about real-life context perforce enter the judge's decisions to choose, shape, and administer personal relief. The judge who enters *in personam* equitable relief that requires the defendant's conduct must stick around to administer and enforce it. The judge's duty is to secure the plaintiff's substantive rights, perhaps with civil contempt.

As trial judge Pepper watched and listened to the witnesses, she absorbed the context of the dispute. She may have visited BeefCo's feedlot. The appellate court should respect most of her factual and measurement decisions.

In the end, in this process of interaction between positivism and realism, rules and context, we cannot answer the questions finally. My conclusion is untidy with loose ends. Lord Neuberger's words about the United Kingdom's constructive trust carry over to our general topic:

The argument . . . is but one battle in a never-ending war. That war is between those who advocate the notion that equity should have rules which are clear and principled, so that outcomes can be predicted with confidence, and those who support the view that equity is concerned to be flexible and fair, so that outcomes in individual cases can be seen to be just.³⁶⁹

The tension between fidelity to a general rule, on one hand, and, on the other, equity as an ethical default from positive law to create justice in a discrete dispute, will continue to be the steady diet of law practice, adjudication, law school classrooms, and law school exams.

³⁶⁹ Neuberger, *supra* note 87, § 39.

