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TRADITIONAL EQUITY AND CONTEMPORARY PROCEDURE

Thomas O. Main*

Abstract: This Article offers extensive background on the development and eventual merger of the regimes of law and equity, and suggests that the procedural infrastructure of a unified system must be sufficiently elastic to accommodate the traditional jurisdiction of equity. As the Federal Rules of Civil Procedure become increasingly more elaborate and technical, strict application of those procedural rules can generate mischievous results and hardship. This Article suggests that equity remains a source of authority for district judges to avoid the application of a procedural rule when technical compliance would produce an inequitable result. A separate system of equity provided a forum for hardship created by the procedures of the common law system. Because the jurisdiction of equity was preserved by the procedural merger of law and equity, mischief and hardship created by the contemporary procedures of a unified system of law and equity need not be tolerated and may be corrected in a manner consistent with traditional principles of equity.

"Let judgment run down as waters, and righteousness as a mighty stream."¹

Much of the grand history of Anglo-American law could be characterized as an epic struggle between the regimes of law and equity.² The roots of this conflict run deep and straight—to Aristotle, who recognized that universal laws could promote injustice as well as justice,

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1. *Amos* 5:24. See also WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1, lines 184–87 ("The quality of mercy is not strain'd / It droppeth as the gentle rain from heaven / Upon the place beneath. It is twice blest: / It blesseth him that gives and him that takes."); 2 *THE WORKS OF JOHN MILTON* 307 (F. Patterson ed., 1931) ("temper . . . Justice with Mercie").

2. See generally ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 54 (rev. ed. 1954) ("Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."); KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 17 (1969) ("Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been a government of laws and of men."); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 24–25 (1990) ("[F]or more than two millennia, the field of jurisprudence has been fought over by two distinct though variegated groups. One contends that law is more than politics and in the hands of skillful judges yields . . . correct answers to even the most difficult legal questions. The other contends that law is politics through and through and that judges exercise broad discretionary authority."). See also BARBARA J. SHAPIRO, *PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE* 163–93 (1983).

and thus fashioned a notion of juridical equity to temper the strict application of laws.³ Equity moderates the rigid and uniform application of law by incorporating standards of fairness and morality into the judicial process.⁴ Equity assures just results in each application of strict law and eliminates the need for elaborate legislative drafting to contemplate all conceivable applications.⁵ Naturally, there exists some tension between the two regimes: law ensures strict uniformity and predictability, while equity tempers law to offer relief from hardship.⁶ Yet although there is tension between the two regimes, they are also

3. Aristotle's jurisprudential philosophy of equity unfolds in a sequence of his ethical works: *Magna Moralia*, in *THE WORKS OF ARISTOTLE* (W.D. Ross trans., Oxford at the Clarendon Press 1925); *Nicomachean Ethics*, in *THE WORKS OF ARISTOTLE* (W.D. Ross trans., Oxford at the Clarendon Press 1925); and *Art of Rhetoric*, in 2 *THE WORKS OF ARISTOTLE* 593–675 (W. Roberts trans., Encyclopedia Britannica 1952). See generally Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 NOTRE DAME L. REV. 119 (1942–1943); MAX HAMBURGER, *MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY* 96 (1965); HENRY SUMNER MAINE, *ANCIENT LAW* 62 (E.P. Dutton & Co. 1910) (1861); GEORGE C. CHRISTIE, *JURISPRUDENCE* 4–77 (1973). The roots of a broader concept of equity, of course, run deeper still: notions of mercy, grace, clemency and forgiveness have existed throughout recorded history. See generally *History of the Peloponnesian War*, in 3 THUCYDIDES 37–40 (Richard Crawley trans., Encyclopedia Britannica 1952); *The Laws*, in *THE DIALOGUES OF PLATO* 757d–e, 736d–e, 875c (Benjamin Jowett trans., Encyclopedia Britannica 1952); *The Statesman*, in *THE DIALOGUES OF PLATO* 294a (Benjamin Jowett trans., Encyclopedia Britannica 1952); GEORGE SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 326 (1846) (associating the royal prerogative with sovereignty itself).

4. Equity presupposes that certain applications of law can frustrate the laws of nature, the administration of "justice," or the common good. See Anton-Hermann Chroust, *The "Common Good" and the Problem of "Equity" in the Philosophy of Law of St. Thomas Aquinas*, 18 NOTRE DAME L. REV. 114, 117 (1942–1943) ("Equity does not intend to set aside what is right and just, nor does it try to pass judgment on a 'strict Common Law rule' by claiming that the latter was not well made. It merely states that, in the interest of a truly effective and fair Administration of Justice, the 'strict Common Law' is not to be observed in some particular instance."); Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 111 (1903) (Equity can "recognize and enforce principles which actually govern society in general, whether embodied in the so-called rules of law or not."). See also *infra* notes 87–98 and accompanying text.

5. See generally Campbell, *supra* note 4, at 111–12 ("No set of prohibitive or declaratory words which the ingenuity of legislatures or courts can devise will do justice in all cases or will provide for all situations. Hence, both the statutes and the opinions must some time fall short in future cases of that which the peculiar demand of the occasion requires."). See also ROSCOE POUND, "TOWARD A NEW JUS GENTIUM," *IDEOLOGICAL DIFFERENCES AND WORLD ORDER* 1, 9 (1949) ("Men with very different conceptions of the social order, groups of men with one ideal or picture of what ought to be and other groups with wholly divergent pictures, must live together and work together in a complex social organization.").

6. See *infra* notes 86–90 and accompanying text.

complementary, and for centuries separate systems of law and equity combined to administer the laws with both certainty and discretion.⁷

The image of separate systems of law and equity is, however, an increasingly fading memory. In the middle of the nineteenth century, procedural codes merged law and equity into a single unified system in most American state courts.⁸ The Judicature Acts of 1873 and 1875 accomplished much the same for law and equity courts in England.⁹ Since 1938 the federal district courts of the United States have recognized one merged form of action under the Federal Rules of Civil Procedure.¹⁰ Under these unified systems, memories of a divided bench have receded into the past.¹¹ Law schools have eliminated the separate course in Equity,¹² and all that remains of separate systems of law and

7. See FREDERIC WILLIAM MAITLAND, *EQUITY AND THE FORMS OF ACTION* 17 (Chaytor ed. 1909) (“[F]or two centuries before the year 1875 the two systems had been working together harmoniously.”). See also *infra* notes 81–85 and accompanying text.

8. See *infra* notes 213–34 and accompanying text.

9. See 1873, 36 & 37 Vict., c. 66 (Eng.); 1875, 38 & 39 Vict., c. 77 (Eng.). See also *infra* notes 284–88 and accompanying text.

10. See FED. R. CIV. P. 2 (“There shall be one form of action to be known as ‘civil action.’”). See also *infra* notes 235–83 and accompanying text.

11. See generally *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256–57 (1993) (construing a statutory reference to “equitable remedies” and stating “memories of the divided bench, and familiarity with its technical refinements recede into the past”). See also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–17 (2002) (discussing legal and equitable origins of restitution).

12. See generally Walter Wheeler Cook, *The Place of Equity in Our Legal System*, 3 AM. LAW SCH. REV. 173 (1912) (urging the elimination of equity as a separate law school course); Ralph E. Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE L. REV. 186, 186 (1949) (discussing Harvard Law School’s decision to abolish the course in Equity and to teach those principles instead in Contracts, Torts, Procedure and other courses); Jerome Frank, *Civil Law Influences on the Common Law—Some Reflections on “Comparative” and “Contrastive” Law*, 104 U. PA. L. REV. 887, 895 (1956) (“In several of our leading university law schools, there is now no course on ‘equity.’ I teach a course on the subject at Yale Law School, but until June 1956, I have been required to call it ‘Procedure III.’ One of my esteemed colleagues, Judge Charles Clark, has been a leader in this sort of eradication of the word ‘equity’ from the law school curriculum, rejecting it almost as if it were an obscene term.”); Lester B. Orfield, *The Place of Equity in the Law School Curriculum*, 2 J. LEG. EDUC. 26, 27 (1949–1950) (“The movements to abolish Equity as a separate course have appeared at twenty-year intervals, first in 1909, then in 1930, and now following World War II when so many law schools are revising their curricula.”); Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 53 (1993) (“Most lawyers I meet are incredulous that anyone my age ever taught a course in equity.”); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 272 (1991) (“equity was taught as a separate course until the 1950s”); Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397 (1998); Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1292 (2000) (civil procedure teachers instead have long filled their courses with a heavy diet of constitutional topics, such as choice of law and personal

equity are a few vestigial distinctions and labels, such as joining claims for legal and equitable relief in a single action,¹³ or determining the availability vel non of a jury trial.¹⁴

This Article argues that in merging the regimes of law and equity, reformers may have swept away part of the wisdom that had guided the development and operation of dual systems. One virtue of an autonomous system of equity was its authority to act in opposition to the strict law when the unique circumstances of a particular case demanded intervention.¹⁵ The architects of the merger took great pains to sustain this virtue by preserving the substantive principles of both law and equity; only the procedure was modified, they insisted.¹⁶ But even assuming that the antagonistic substantive regimes of law and equity can co-exist and be applied contemporaneously within a single unified procedural system, a fundamental flaw inheres in the procedural infrastructure of a merged system. In denying equity any structural autonomy, there remains no relief from the procedures of the merged system itself when the modes of proceeding in that system are inadequate.¹⁷ Indeed, the jurisdiction of equity is impaired if equity cannot operate as a check upon the “strict law” that is codified in the procedures of the merged system.¹⁸

Parts I, II and III of this Article are but a history lesson. “People need not so much to be told as to be reminded,”¹⁹ and the reminder is essential context for my thesis. Part I discusses the development of law and equity as separate systems from the Middle Ages through the eighteenth

jurisdiction). For a statement in support of a separate course in equity, see Robert S. Stevens, *A Brief on Behalf of a Course in Equity*, 8 J. LEGAL EDUC. 422 (1956).

13. See generally FED. R. CIV. P. 18(a) (“A party asserting a claim to relief . . . may join . . . as many claims, legal [or] equitable . . . as the party has against an opposing party.”). See also FED. R. CIV. P. 1–2.

14. See generally *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558 (1990); *Ross v. Bernhard*, 396 U.S. 531 (1970); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963); John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967). See also *infra* notes 289–90 and accompanying text.

15. See *infra* notes 88–98 and accompanying text.

16. See *infra* notes 221, 278–81, 288 and accompanying text.

17. See *infra* notes 306–84 and accompanying text.

18. See *infra* notes 385–400 and accompanying text.

19. Melvin M. Johnson, Jr., *The Spirit of Equity*, 16 B.U. L. REV. 345, 345 (1936) (quoting “a former president of the United States” without further attribution). See also *infra* notes 289–90 and accompanying text.

century. I emphasize the utility and uniqueness of having complementary and rival systems effect the “wise adjustment of law to experience.”²⁰ Part II focuses primarily on the publication of Sir William Blackstone’s *Commentaries on the Laws of England*.²¹ Blackstone recognized substantive rights apart from procedural remedies and, in doing so, marginalized the law/equity distinction by suggesting that the difference between the two systems was merely procedural.²² A substance/procedure distinction assumed primary significance, with substance as the actual rules that we apply; and procedure no more than a practical and ancillary means to an end.²³ The perceived elasticity of procedure made change in the light of practical details inevitable, if not noble. Broad acceptance of this paradigm ultimately paved the way for the so-called merger of law and equity, beginning in the mid-nineteenth century.²⁴ In Part III, I present the history of that merger, which purported to fuse only the procedure of law and of equity, while leaving the substance of each regime otherwise intact. The reformers envisioned a unified procedural apparatus that would permit judges to jointly administer the jurisprudence of both law and equity.²⁵

In Part IV, I argue that an important ingredient of the jurisprudence of equity was displaced by the procedural merger of law and equity in the federal courts. A merged system offers no recourse from insufficiency created by the procedural apparatus of the merged system.²⁶ The argument for institutional autonomy is compelling even though unified Federal Rules of Civil Procedure incorporated much of the philosophy

20. Sidney Smith, *The Stage of Equity*, 11 CAN. B. REV. 308, 311 (1938).

21. 1–4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769).

22. See *infra* notes 183–88 and accompanying text.

23. Put another way: in the household of the law, procedure ceased to be the *materfamilias* and became the handmaiden. See *In re Coles* 1 (King’s Bench 1907) (Collins, M.R.). See also Roscoe Pound, *Some Principles of Procedural Reform*, 4 U. ILL. L. REV. 388, 402 (1910); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 4–5 (1952); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 381 (5th ed. 1956); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 929 (1987).

24. See *infra* notes 195–212 and accompanying text.

25. See *infra* notes 211–88 and accompanying text.

26. See *infra* notes 349–83 and accompanying text. Cf. *infra* notes 385–400 and accompanying text (discussing the traditional role of equity in curing procedural insufficiencies).

and practices of equity procedure.²⁷ First, the Federal Rules have not been immune to the complication, trivialization and ossification pathogens that have plagued earlier procedural systems.²⁸ Second, procedural rules featuring discretion and flexibility within a unified system cannot replicate the administration of justice pursuant to a separate system of equity. The Federal Rules, like any codification, are unavoidably a product of experience developed by reason, and reason tested by experience.²⁹ Yet generalizations in laws cannot always be completely general, and human calculations are imperfect.³⁰ Indeed, the unimaginable is inevitable and, when the unexpected occurs, some authority must stand in the breach and supply that which prevents the general rules from meeting the immediate necessity.³¹ A separate system of equity viewed each lawsuit from the standpoint of the “wrong” presented.³² The powers of that court were as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex relations could demand.³³ By contrast, the common law system

27. For a description of the equitable origins of the Federal Rules, see *infra* notes 262–77 and accompanying text.

28. See *infra* notes 307–48 and accompanying text. For a contrary view, expressed by the current Reporter to the Advisory Committee on Civil Rules, see Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002), stating that “It may be inevitable that a continuing revision process lengthens the rules and adds complexity to them. Doubts grow up around old solutions, and new problems appear. The Civil Rules have not escaped this effect. Yet time and again, the Rules adhere to a pervading characteristic. The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis. Many a district judge may view one provision or another as an unwarranted intrusion on the proper sovereignty of a trial court, but vast discretion remains at virtually every turn. It does not seem fair to charge the revision process with a descent into the nagging detail and sterile ossification that have overtaken earlier procedural systems.”

29. See generally POUND, *supra* note 5, at 2.

30. Aristotle was quick to point out that such imperfection is not the fault of the law or of the legislature. Rather “the law is no less correct on this account; for the source of the error is . . . the nature of the object itself, since that is what the subject-matter of actions is bound to be like.” *Nicomachean Ethics*, *supra* note 3, at 17–19. See generally Eric G. Zahnd, Note, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 LAW & CONTEMP. PROBS. 263 (1996). See also *supra* note 5.

31. See generally Campbell, *supra* note 4, at 111–12.

32. See Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, 22 CASE & COMMENT 403, 410 (1915). See also *supra* notes 173–82, 385–400 and accompanying text.

33. See *Toledo, A.A. & N.M. Ry. Co. v. Pa. Co.*, 54 F. 746, 751 (C.C.N.D. Ohio 1893) (quoting *Chicago, R.I. & P. Ry. Co. v. Union Pac. Ry. Co.*, 47 F. 15 (C.C. Neb. 1891)) as cited in Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 623 (1990).

viewed every lawsuit as a test of the existence and scope of the alleged “right.”³⁴ Whether by design or by unfortunate evolution, the procedural infrastructure of the unified system today increasingly resembles the latter vision, compromising fair and just results at the behest of formalism.³⁵

I offer contemporary procedure in mass tort cases as an illustration of the problem. The impact of mass torts on the justice system has been labeled “overwhelming,”³⁶ “elephantine,”³⁷ “unprecedented,”³⁸ “bizarre,”³⁹ “pathological,”⁴⁰ and an “emergency.”⁴¹ Mass tort cases may be especially likely to present new and unforeseeable challenges for trial courts trying to process these cases fairly and efficiently.⁴² Yet the administration of these cases is governed largely by the procedural templates that also govern all other types of civil cases.⁴³ As applied in

34. See Frierson, *supra* note 32, at 410. See also *infra* notes 156–72 and accompanying text.

35. See *infra* notes 307–48 and accompanying text.

36. *In re Johns-Manville Corp.*, No. 90-3973, slip op. at 61–63, 1991 WL 86304 (E.D.N.Y. May 16, 1991).

37. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (Souter, J.).

38. Weinstein & Hershenov, *supra* note 12, at 270.

39. Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 450 (1986).

40. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi Billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 395 (1993).

41. *In re Joint E. & S. Dists.*, 769 F. Supp. 85, 87 (E.D.N.Y. & S.D.N.Y. 1991). See generally John Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 991–92 (1995).

42. See, e.g., Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943, 1944 (2000) (“It is often observed that each new mass tort presents different problems, requiring different procedural solutions than any of its predecessors.”); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2019 & n.51 (1997) (discussing mass torts and the traditional model of adjudication); Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1160 (1995) (suggesting that resolution of mass torts presents novel issues). See also *infra* notes 349–84 and accompanying text. But see Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 581 (1994) (“[T]he essential mass tort case is nothing more or less than an injured plaintiff, represented by a personal-injury, contingency-fee lawyer, suing the product’s manufacturer.”); Siliciano, *supra* note 41, at 991 (noting there are “few interesting or novel questions of doctrine” in mass tort cases and the problems attributed to the size of such cases are not unique).

43. See FED. R. CIV. P. 1 (“[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity”). For background on the transsubstantivity of Federal Rules, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801 (1995); Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113 (1994); Jeffrey Stempel, *Halting Devolution or Bleak to the Future*, 46 FLA. L. REV. 57 (1994); Richard Marcus, *Of Babies and*

certain circumstances, then, existing procedural rules may be inefficient, too complicated, or otherwise deficient for the unique circumstances presented in some mass tort cases.⁴⁴

In the current system, the procedural rules typically are applied as drafted, and the response to the procedural mischief is to amend the rules specifically to address that problem. But amendment, if any,⁴⁵ may come too late for the problem that occasioned the amendment.⁴⁶ Furthermore, the amended language itself may become the “strict law” that, in turn, creates the insufficiency for the next generation of mass tort.⁴⁷ Because equity traditionally complemented the administration of justice by

Bathwater: The Prospects for Procedural Progress, 59 BROOK. L. REV. 761 (1993); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); Subrin, *supra* note 23, at 929–30; and Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

44. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (Souter, J.) (“this litigation defies customary judicial administration”). See also *infra* notes 349–84 and accompanying text.

45. The amendment reflex consistently leads to reform proposals, even if not to procedural amendment. The history of Federal Rule 23, for example, is largely a narrative recounting decades of unsuccessful reform efforts. The most concentrated of these efforts have originated from one of three sources: the United States Department of Justice, the American Bar Association, or the United States Judicial Conference. See generally ARTHUR MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 58–59 (1977) (reviewing criticisms and proposed reforms); *Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules*, reprinted in 5 CLASS ACTION REP. 3, 10, 17 (1978) (reporting results of survey suggesting that a majority of practitioners and judges favored prompt revision of Rule 23); Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299 (1980) (surveying flaws and suggesting reforms to Federal Rule 23); *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 199 (1986); Elizabeth Barker Brandt, *Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23*, 1990 B.Y.U. L. REV. 909 (1990); Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990); Mark W. Friedman, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 YALE L.J. 745 (1990); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27–33 (1991); *Report of Advisory Committee on Civil Rules*, 167 F.R.D. 535, 537 (1996); George F. Sanderson, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 315 (1999); Thomas Merton Woods, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U. L. REV. 507 (2000). See also *infra* notes 385–400 and accompanying text.

46. See Cooper, *supra* note 42, at 1944 (referring to “statutes and rules framed for the last war”).

47. See generally *id.*

offering, as an independent ground for equitable relief, relief from such procedural insufficiencies,⁴⁸ I argue here that the tradition of equity is impaired in a merged system if the trial judge cannot escape the rigors of that infrastructure in the exercise of her magisterial good sense and offer relief from such hardship.

Finally, in Part V, I offer a proposal to resurrect the curative purpose of equity in circumstances when the procedural apparatus of our merged system fails to provide plain, adequate and complete relief. I urge judges to use and credit equity as a source of authority to avoid applications of the Federal Rules that, although achieving technical compliance, result in inequitable outcomes in violation of the spirit of the Rules. Also, I urge procedural rulemakers to draft amendments to the Federal Rules that better accommodate the enduring jurisprudence of equity.

I. THE DEVELOPMENT OF COMPLEMENTARY SYSTEMS OF LAW AND EQUITY

Much has been written about the origins of law and equity.⁴⁹ We know that both of these legal systems are derived from the royal prerogative of English kings to interfere with the ordinary legal processes of the communal courts.⁵⁰ The ultimate and supreme power of kings to do

48. See *infra* notes 385–400 and accompanying text.

49. For a more complete discussion of the history of law and equity, see generally PLUCKNETT, *supra* note 23; SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* (1895); WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (7th ed. 1956) [hereinafter HOLDSWORTH, *ENGLISH LAW*]; JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA* (12th ed. 1877); Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21 (1919–1920); D.M. KERLY, *AN HISTORICAL SKETCH OF THE JURISDICTION OF THE COURT OF CHANCERY* (1890); Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195 (1914) [hereinafter Pound, *The End of Law*]; George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87 (1916); Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696 (1913) [hereinafter Pound, *Justice*]; William Searle Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293 (1915) [hereinafter Holdsworth, *Equity*]; Wesley Newcomb Hohfeld, *The Relations Between Law and Equity*, 11 MICH. L. REV. 537 (1913); Robert L. Munger, *A Glance at Equity*, 25 YALE L.J. 42 (1915); and Henry H. Ingersoll, *Confusion of Law and Equity*, 21 YALE L.J. 58 (1911).

50. Until the latter part of the twelfth century, ordinary law and justice in England was governed by custom and was administered rather informally (if not crudely) by the shire courts and the courts of the hundred moots (in the time of Saxons and Danes, dating back to the seventh century) and by the county, borough and manor courts (in the early Norman period beginning with the Norman Conquest in 1066). The forms of trial were, in large part, appeals to the supernatural. See generally 1 POLLOCK & MAITLAND, *supra* note 49, at 14–22; 1 HOLDSWORTH, *ENGLISH LAW*, *supra* note 49, at 40; GEORGE L. CLARK, *PRINCIPLES OF EQUITY* 3 (1948); Adams, *supra* note 49, at 91 & n.10

justice in any case between their subjects extended, of course, to any matter brought to their attention.⁵¹ To exercise that authority, kings issued brevia or writs which had the effect of removing the cause directly to the king's court or council.⁵² The repeated issuance of writs based upon similar circumstances led an astute King Henry II⁵³ to realize that certain standardized writs could be issued.⁵⁴ He established a *Curia Regis* to administer a national law based on these writs.⁵⁵ The Chancellor was then the king's secretary, and Chancery was the secretariat of the state.⁵⁶ Writs, like all other state papers, were prepared there, and the clerks in Chancery issued the standardized writs whenever a complainant

(discussing the king's "prerogative machinery"); Frederick Pollock, *English Law Before the Norman Conquest* 14 L.Q. REV. 291, 297 (1898).

51. The operative principle was that the king was the fountainhead of all justice, and in him, resided the final power to do whatever was just and righteous. See MILLAR, *supra* note 23, at 12–13; WILLIAM F. WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW 69–70 (1923). The king, of course, was the source of all power and authority—whether legislative, executive or judicial—and the sovereign lord of all land; he was the state. See Kittle, *supra* note 49, at 23 ("It was the firm policy of the Norman kings to concentrate all power within themselves."); 1 POLLOCK & MAITLAND, *supra* note 49, at 85–87; KERLY, *supra* note 49, at 13–14. The administration of justice in England was originally confided to the *Aula Regis*, or great Court or Council of the King. See 1 STORY, *supra* note 49, § 39, at 30.

52. See Adams, *supra* note 49, at 89 (discussing the new "judicial machinery" brought into England at the Norman Conquest); Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 760 (1945) ("Justice did open the door, of course, and it was the royal hand that was on the knob."); W. R. Vance, *Law in Action in Medieval England*, 17 VA. L. REV. 1, 9–10 (1930) (discussing writ to gain seisin of land held by the King in reversion); MAITLAND, *supra* note 7, at 4–5.

53. Henry II (Curtmantle) reigned from 1154–1189. For relevant background on King Henry II, see GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 82–121 (1990); 1 POLLOCK & MAITLAND, *supra* note 49, at 138–46; WILLIAM F. WALSH, A TREATISE ON EQUITY 2 (1930).

54. Petitioners generally had to *purchase* writs from the king's secretary, the Chancellor. The writs constituted the king's law, derived personally from his power and authority as the fountain of all justice. Accordingly these were not natural rights. See Adams, *supra* note 49, at 89 (noting the new procedure and the new machinery were "the king's private property"); William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 3 (1916) (discussing writs *de cursu* "which any litigant could purchase").

55. The judges of the *Curia Regis* (court of the king) were the king's councilors and advisors, a group of secular and ecclesiastical dignitaries. See Kittle, *supra* note 49, at 25 (the *curia regis* "may be regarded as the parent stem from which the courts of law and equity have sprung").

56. See William F. Walsh, *Equity Prior to the Chancellor's Court*, 17 GEO. L.J. 97, 100 (1928–1929) (discussing role of the Chancellor); William Q. deFuniak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54, 55–56 (1948–1949) (same).

presented facts contemplated by a writ.⁵⁷ Forms of action developed around the writs.⁵⁸

The writs largely displaced the customary laws of the different parts of the country and became the foundation of our common law actions.⁵⁹ In the earliest stage of this new common law, writs were construed liberally to apply to new cases where justice seemed to require that an action be allowed.⁶⁰ Many forms of action and relief, including those that we would now label “equitable,” were administered by the king’s judges as part of the common law during this period.⁶¹ However, this dynamic vision of justice threatened the power of entrenched English barons, and later the Parliament, who perceived the power to issue writs as a power

57. See Walsh, *supra* note 56, at 100–01; MAITLAND, *supra* note 7, at 3; Robert Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 CHI.-KENT L. REV. 81, 92 (1934) (“[B]y the end of the thirteenth century the number of petitions had become very large and the work of reading them was onerous.”); see also *infra* notes 157–61 and accompanying text. For a sampling of early writs, see JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 437–47 (2d ed. 1979).

58. See Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 10–11 (1926). See also *infra* notes 162–72 and accompanying text.

59. See BAKER, *supra* note 57, at 49; WALSH, *supra* note 51, at 86–88; POLLOCK & MAITLAND, *supra* note 49, at 129–130. See also JOSEPH H. KOFFLER & ALISON REPPY, *COMMON LAW PLEADING* 18 (1969) (“Substantive law grew out of procedure. Courts were organized to handle a series of specific cases, the division of which gradually developed theories of rights and liabilities. Our rights and liabilities as defined by substantive law, then, had their origin in and developed out of procedural law.”). Of course, it bears emphasis that the rights that were recognized were almost exclusively property rights; there were no personal rights, political rights, civil rights as we understand them. See deFuniak, *supra* note 56, at 56.

60. Henry de Bracton described a class of writs, *breve magistralia*, that were very freely issued. See MILLAR, *supra* note 23, at 18 (1952). See also 2 HOLDSWORTH, *ENGLISH LAW*, *supra* note 49, at 245 (use of these writs was the immediate and effective cause of the rapid development of the law during this period).

61. See Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 834 (1918) (“It is now more than thirty years since Justice Holmes in a brilliant and daring essay set on foot an inquiry which has revealed the remote beginnings of English equity. Equity and common law originated in one and the same procedure and existed for a long time, not only side by side, but quite undifferentiated from each other There was no equity as a separate body of law; for the king’s justices felt themselves able to dispense such equity as justice required.”); Adams, *supra* note 49, at 91–92 (recognizing common law and equity as an “undifferentiated system in the effort of the king to carry out his duty of furnishing security and justice”); Holdsworth, *supra* note 54, at 1 (accumulating evidence that common law judges in the twelfth through fourteenth centuries “administered both law and equity”); Aaron Friedberg, *The Merger of Law and Equity*, 12 ST. JOHN’S L. REV. 317, 318 n.2 (1938) (“during the reign of Henry II, both equity and common law were administered under the same system of procedure and were quite undistinguishable from each other”); Severns, *supra* note 57, at 91 (“It is obvious that in the thirteenth and fourteenth centuries, no distinction can be drawn between common law and equity.”).

to make new law.⁶² To limit the king's authority, the common law system became "a hard and fast system with certain clearly defined things which it could do and with equally clearly defined things which it could not do."⁶³ The universe of writs was fixed and their construction by law judges narrowly circumscribed;⁶⁴ precise and technical rules of pleading, procedure and proof cabined judicial discretion within the form of action.⁶⁵ The only remedy that the law courts could award in personal actions was monetary damages.⁶⁶

The common law courts gradually became an institution that was separate from the king,⁶⁷ but the royal prerogative endured.⁶⁸ Litigants

62. See Holdsworth, *supra* note 54, at 3. See also Adams, *supra* note 49, at 96, n.27, n.28 (discussing various attempts to regulate and limit the issue of writs); PLUCKNETT, *supra* note 23, at 26.

63. Adams, *supra* note 49, at 96. See also deFuniak, *supra* note 56, at 57 ("A growing worship of formalism and technicality also began to obsess the courts of law."); George Palmer Garrett, *The Heel of Achilles*, 11 VA. L. REV. 30, 30 (1924-1925) ("The common law made a fetish of procedure.").

64. For example, a provision in Magna Charta (1215) significantly diminished the scope of the royal writ in respect to titles to land. Also, the Provisions of Oxford (1258) expressly forbade the Chancellor to issue any new writs "without the commandment of the King and his council who shall be present." The Provisions were annulled five years later, but the common law courts nevertheless were transformed during the 13th century into a rigid system of formal actions. See 1 HOLDSWORTH, ENGLISH LAW, *supra* note 49, at 196; 2 HOLDSWORTH, ENGLISH LAW, *supra* note 49, at 291; MILLAR, *supra* note 23, at 18 (citing FREDERIC WILLIAM MAITLAND, THE FORMS OF ACTION 41 (1936); 1 HOLDSWORTH, ENGLISH LAW, *supra* note 49, at 58-59).

65. See Steele, *supra* note 58, at 10-11 ("In accordance with its technical mode of procedure, every species of legal wrong was supposed to fit into some one of a limited number of classes; for each class an appropriate remedy was provided, obtainable only by the use of some one of a limited number of 'forms of action.' An action was begun by the issuance of a writ appropriate to the form of action; in time these writs became standardized, and, where the facts of a case were without precedent, no writ to cover them was found, and hence no action could be brought."); Garrett, *supra* note 63, at 31 (discussing "form-mad common lawyers"); JAMES FOSDICK BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 61-62 (1913) (referring to the common law's "formulaic procedure"); Holdsworth, *supra* note 54, at 22 (discussing the "complicated machinery" of the law courts). See also *infra* notes 156-72 and accompanying text.

66. See ELIAS MERWIN, THE PRINCIPLES OF EQUITY AND EQUITY PLEADING 17 (1895) (discussing inability of common law courts to compel the performance of duties); Kittle, *supra* note 49, at 28 ("[T]he remedies which the law courts gave were often wholly inadequate. They were as bad as no remedy at all.").

67. See Adams, *supra* note 49, at 96, n.27, n.28 (discussing the multiplication and classification of writs in the thirteenth and fourteenth centuries as an indication of this separation); Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 246 (1945) (noting independence of common law courts as of the fourteenth century); Holdsworth, *Equity*, *supra* note 49, at 294 ("In the latter half of the 14th and in the 15th centuries the common law tended to become a fixed and rigid system. It tended to be less closely connected with the king, and therefore less connected with, and sometimes even opposed to, the exercise of . . . royal discretion.").

confronting the power of a great lord who could unduly influence the regular common law officials, juries and judges continued to petition the king for relief.⁶⁹ The Crown remained the only source of relief for circumstances that did not fit within the narrow range of available writs.⁷⁰ As England transitioned from an agricultural to a commercial nation, the more frequent became situations involving rights not previously contemplated and for which no writ and, thus, no remedy, was available.⁷¹

Appeals to the king, instead of to his courts, became numerous, and about the time of Edward I,⁷² it became usual to refer such petitions for consideration and disposition to the Lord Chancellor.⁷³ As “the keeper of the king’s conscience,” the Lord Chancellor was a churchman who was familiar with both the ecclesiastical and the civil or Roman law.⁷⁴ The

68. See HENRY L. MCCLINTOCK, HANDBOOK OF EQUITY § 2 at 3 (1936) (“As the common-law courts came to be recognized more clearly as separate legal institutions . . . [t]he justices in eyre, who were the king’s representatives, as well as legal judges, continued to exercise the[ir] power.”); Friedberg, *supra* note 61, at 318 n.2 (“[T]he provisions of Oxford in 1258, by forbidding the Chancellor to frame new writs without the consent of the king and Council, drew a definite line of demarcation between the two systems of law.”).

69. Common law writs were expensive luxuries for individuals too poor to avail themselves of the remedy. See *supra* note 54. Further, the adversary could be so rich and powerful that it would be hopeless to proceed in the law courts. See Barbour, *supra* note 61, at 856 (reprinting sample petitions filed in chancery). See also Hohfeld, *supra* note 49, at 547, n.9 (noting until nearly the end of the fifteenth century, most petitions to the king were founded on some suggestion of inequality between the parties); Oliver Wendell Holmes, *Early English Equity*, 1 L. QUART. REV. 162–63 (1885) (discussing different substantive doctrines developed in chancery); Glenn & Redden, *supra* note 52, at 763–69 (reprinting and translating sample bills filed in Chancery). There was no charge for obtaining a bill in equity. See Severns, *supra* note 57, at 88.

70. See Glenn & Redden, *supra* note 52, at 760 (discussing the limited range of the law courts); MAITLAND, *supra* note 7, at 3 (“Though these great courts of law have been established (King’s Bench, Common Pleas, etc.) there is still a reserve of justice in the king.”).

71. See deFuniak, *supra* note 56, at 56.

72. Edward I reigned from 1272–1307. For relevant background on King Edward I, see SMITH, *supra* note 53, at 162–187.

73. See Glenn & Redden, *supra* note 52, at 760–61 (describing that the Chancellor took over the task of reviewing the petitions and ultimately had them addressed to him directly); Walsh, *supra* note 56, at 106 (same).

74. See Glenn & Redden, *supra* note 52, at 760–61 (1945). According to Professor Glenn, much pomp accompanied the early chancellors when they marched in state. A graphic description appears in GEORGE CAVENDISH, THE LIFE OF THOMAS WOLSEY (1893), which was written by a gentleman usher of a chancellor. See also Walter E. Sparks, *The Origin, Growth, and Present Scope of Equity Jurisprudence in England and the United States*, 16 W. JURIST 473, 475 (1882) (“From the time of the reign of Henry VI [chancery] constantly grew in importance, and in the reign of Henry VII it expanded into a broad and almost boundless jurisdiction under the fostering care and ambitious wisdom and the love of power of Cardinal Wolsey.”).

Chancellor unrolled a vast body of legal principle that we know as “equity” to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the common law, there was no “plain, adequate and complete” remedy otherwise available.⁷⁵ Equity channeled extraordinary powers to afford relief when there were procedural or substantive deficiencies of the law courts.⁷⁶ Intervention was premised on the notion that justice incorporated the moral sense of the community, existing as a function not only of a community’s technical rules, but also of “magisterial good sense, unhampered by rule.”⁷⁷ The Chancellor had “the right and the powers, in fact, to do as he likes, whatever hard law and still harder practice may dictate.”⁷⁸

In the fourteenth and fifteenth centuries, the Court of Chancery developed into a distinct court.⁷⁹ There were no writs and no forms of

75. See MILLAR, *supra* note 23, at 24 (1952); 1 STORY, *supra* note 49, § 33, at 22-26. See also *infra* notes 385-400 and accompanying text.

76. Severns, *supra* note 57, at 84.

77. See Pound, *Justice*, *supra* note 49, at 701-02 (“[O]ne function of the administration of justice is to adjust the relations of individuals to each other so as to accord with the general moral sense. Rules in many of these matters are needed to guide the weak judge and to save us from his lack of will and lack of judgment. But these same rules may serve only to hamper the strong judge and to prevent application of the full measure of his good sense and sound judgment to the case in hand.”). See also *infra* notes 173-82 and accompanying text.

78. Severns, *supra* note 57, at 89.

79. See Steele, *supra* note 58, at 11 (the “practice of referring to the Chancellor all of these special appeals to the kind led to the establishment of a tribunal which by the time of Edward III (1327-1377) had become recognized as a distinct and permanent court, with its separate jurisdiction and mode of procedure and its seat at Westminster”); Holdsworth, *supra* note 54, at 6 (describing that all cases which called for equity were “handed over to a tribunal which, in time, came to be perfectly distinct from any of the common law courts”); Walsh, *supra* note 56, at 107 (suggesting that Chancery as a court of equity was taking form “around the 14th century”); Adams, *supra* note 49, at 97 (dating origins of a separate system of equity to the fourteenth century); George Burton Adams, *The Continuity of English Equity*, 26 YALE L.J. 550, 556 n.17 (1917) (“The chancellor’s court had become distinct from the Council before the end of the 15th century.”); 1 HOLDSWORTH, ENGLISH LAW, *supra* note 49, at 404 (suggesting that the Chancellor first made a decree on his own authority in 1474); Severns, *supra* note 57, at 96 (“It was not until the end of the fifteenth century that purely equity matters go to the chancellor alone.”); Sparks, *supra* note 74, at 474 (quoting the proclamation of 22 Edward III addressed to the sheriffs of London “commanding them that, whatsoever business relating as well to the common law of our kingdom, as our special grace, cognizable before us, from henceforth to be prosecuted as followeth; viz., The common law business before the Archbishop of Canterbury, elect, our chancellor, by him to be dispatched, and the other matters grantable by our special grace be prosecuted before our special chancellor, or our well beloved clerk, the keeper of the privy seal, so that they, or one of them, transmit to us such petitions of business which, without consulting us, they cannot determine, together with their advice thereupon, without any further prosecution to be had before use for the same.”). In an effort to date the commencement of a court of

action.⁸⁰ Equity as administered by this court served as both an “appendix” and a competitor for the common law.⁸¹ On one hand, as already described above, Chancery was doing some convenient and useful works that could not be done, or could not easily be done by the law courts.⁸² By requiring the specific performance of contracts, developing a law for vendors and purchasers of land, enjoining some of the more common torts such as waste, trespass, and nuisance before they were committed in the first instance, and by reforming or rescinding contracts that were tainted by fraud and mistake, equity supplemented the common law.⁸³ Chancery could “adjust their decrees so as to meet most, if not all, of these exigencies; and they [would] vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties.”⁸⁴ In these instances, the “appendix” characterization is especially appropriate, because equity also served as a catalyst for significant reforms to the common law.⁸⁵

Yet in every case in which the result reached in equity differed materially from the judgment a court of law would give, there was a rival

chancery, it bears mention that the earliest writers of the common law, such as Bracton, Glanville, Britton and Fleta make no reference to an equitable jurisdiction of a court of chancery. *See also* 10 SELDEN SOCIETY, SELECT CASES IN CHANCERY A.D. 1364 TO 1471 (William Paley Baildon ed., London, Bernard Quaritch 1896); *id.* at xix (“It seems clear that the Chancellor had and exercised judicial functions of his own as early as the reign of Richard II if not Edward III.”). *See generally* JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY (1828).

80. *See* Severns, *supra* note 57, at 88 (“No form was necessary and no strict procedure had to be followed.”); Walsh, *supra* note 56, at 106 (“Relief was given without a writ. The bill [in equity] was generally in simply form, without formality, and free from the technical rules which applied to writs.”); Barbour, *supra* note 61, at 854 (“Less exactness of pleading was required than by the law, and even if a bill were ‘misconceived’ the complaint was not out of court.”); *see also infra* notes 173–82 and accompanying text.

81. *See* MAITLAND, *supra* note 7, at 19 (“I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection.”).

82. *See supra* notes 69–71 and accompanying text.

83. *See* WALSH, *supra* note 53, at 28 (describing purpose of uses was to avoid the rigors of the common law which forbade testamentary gifts of land as well as *inter vivos* transfers except by livery of seisin); MAITLAND, *supra* note 7, at 4–7; Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171 (1936).

84. 1 STORY, *supra* note 49, § 28, at 19.

85. For example, although law courts initially would not enforce instruments that had been lost or destroyed, they ultimately adopted the equity practice of admitting secondary evidence of contents. *See generally* Glenn & Redden, *supra* note 52; MAITLAND, *supra* note 7, at 6–7; William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 483–86 (1938) (discussing “the reforming influence of equity”). *See also infra* note 297.

system.⁸⁶ Broad categories of cases fared differently in the two systems.⁸⁷ Equity also incorporated standards of morality into the calculus of resolving *any* dispute. Indeed, equity *corrected* the law by applying, in circumstances where the ordinary rules would lead to unwarranted hardship, considerations of what was fair and just.⁸⁸ “[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of larger ends.”⁸⁹ The regimes of law and equity thus approached a given set of facts from opposite angles—invoking distinctive traditions, applying different reasoning, and pursuing separate aims.⁹⁰

The principles of equity are, of course, merely a part of the larger concept of fairness and justice upon which all law must be based.⁹¹ The law’s dilemma long has been to develop a jurisprudence that recognizes when unique circumstances justify a departure from rigid rules.⁹² On the one hand, there is no more fundamental social interest than that law should be uniform and impartial.⁹³ Commenting upon Lord Mansfield’s statement that “we must act alike in all cases of like nature,” Judge Henry J. Friendly termed this “the most basic principle of jurisprudence.”⁹⁴ Indeed, “the normal and necessary marks, in a civilized community, of justice administered according to law, are generality, equality, certainty.”⁹⁵ At the same time, however, hardly any two cases

86. See Holdsworth, *supra* note 54, at 15 (referring to law and equity as rival systems); Smith, *supra* note 53, at 211 (crediting Professor A.B. White’s characterization of equity as “the upstart jurisdiction”).

87. See Barbour, *supra* note 61, at 834 (“[E]quity is outside the common law, even antagonistic to it.”). See also *infra* note 191.

88. See Holdsworth, *Equity*, *supra* note 49, at 293 (“the root . . . of equity [is] the idea that the law should be fairly administered and that hard cases should as far as possible be avoided”).

89. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 65 (1921).

90. See Frierson, *supra* note 32, at 411.

91. See Campbell, *supra* note 4, at 110 (noting the intimacy of the relations among the basic principles of “natural justice, equity, honesty, generosity and good conscience”).

92. RALPH A. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 19–20 (1961). See also *supra* note 2.

93. CARDOZO, *supra* note 89, at 112.

94. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

95. NEWMAN, *supra* note 92, at 19–20 (quoting FREDERICK POLLOCK, *JURISPRUDENCE* 37 (5th ed. 1923)). See also GIORGIO DEL VECCHIO, *JUSTICE* 173 n.13 (Edinburgh ed., 1952) (“the worst misfortune of a civilized people is doubt about the impartiality of justice”) (internal citation and quotation omitted); GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 25–27 (1988); *infra* note 436.

are the same:⁹⁶ every case presents a moral problem,⁹⁷ and almost all moral problems are unique.⁹⁸

The expanding role of equity in the broader administration of justice was controversial, yet constant.⁹⁹ The early chancellors decided cases with little or no regard for precedent,¹⁰⁰ basing their decisions largely upon their idiosyncratic ideas of “conscience.”¹⁰¹ The applicable rule depended upon the notions of right and wrong possessed by each chancellor, leading to Selden’s well-known aphorism: “Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. Tis all one as if they should make the standard for the measure a Chancellor’s foot.”¹⁰² Echoing the institutional resistance centuries

96. ROSCOE POUND, *LAW AND MORALS* 65 (1924) (“Cases are seldom exactly alike.”).

97. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COL. L. REV.* 809, 833 (1935) (“Every case presents a moral question to the court.”).

98. NEWMAN, *supra* note 92, at 20. See *Johnson v. United States*, 186 F.2d 588, 590 (2d Cir. 1951) (Hand, L., J.) (“Nor is it possible to make use of general principles, for almost every moral situation is unique; and no one could be sure how far the distinguishing features of each case would be morally relevant to one person and not to another.”).

99. See Severns, *supra* note 57, at 82 (“no court has been so vigorously hated as the system called Equity and the tribunal known as the High Court of Chancery”); Sparks, *supra* note 74, at 473 (as equity “slowly but surely [was] enlarging and extending its mighty arm . . . the encroachments it was making . . . seemed almost sacrilegious, so detestable, owing to the fact that its principles were largely derived from the Roman or civil law, and its chancellors were generally ecclesiastics, and the people generally did not desire to have the church gain so strong a hold upon their courts of justice or the affairs of State, and it was evident the Court of Chancery was gaining, for fear that the church would eventually assume control, dictate to the people, usurp their rights, and virtually subject to them to the Church of Rome”).

100. See Severns, *supra* note 57, at 99 (at least through the Fifteenth century, “the Chancellor did not consider himself bound by any sort of fixed principles . . . [T]here was no tendency, as in the common law courts, to feel bound by precedent.”). See generally W.H.D. Winder, *Precedent in Equity*, 57 *L.Q. REV.* 245 (1941).

101. See 1 JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 385, at 524 (2d ed. 1892) (“[I]t is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith.”); Pound, *Justice*, *supra* note 49, at 698, n.9; Vidal v. Girard’s Exrs., 42 U.S. (2 How.) 127, 193 (1846) (Justice Story describing the Chancellor’s reports as “shadowy, obscure and flickering”); see also 3 JOHN REEVES, *HISTORY OF ENGLISH LAW* 384–85 (2d ed. 1880) (“[i]ts jurisdiction did not comprehend a great extent and the exercise of it was feeble and imperfect”). Cf. Barbour, *supra* note 61, at 840 (suggesting that such a contemptuous view was erroneous); Glenn & Redden, *supra* note 52, at 758, n.15 (chancellors were guided by a system of law); Walsh, *supra* note 85, at 481, n.4 (discussing the jurisdiction of equity); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999) (Scalia, J.) (suggesting that equity is flexible but not omnipotent).

102. JOHN SELDEN, *THE TABLE-TALK* 64 (The Legal Classics Library 1989). See also 6 BULSTRODE WHITELOCKE, *COMMONS JOURNALS* 373 (1650) (“The proceedings in Chancery are

earlier to the establishment of the common law courts,¹⁰³ Parliament again was threatened and—with the *support* of the common law judges¹⁰⁴—resisted the kings’ and chancery’s discretionary exercise of power under the guise of equity and natural law.¹⁰⁵

Jealousy and conflict persisted until the relative authority of the two rival systems was decided in the early seventeenth century, in a contest between two of the great lawyers of all time, Coke and Bacon, in a drama that could carry an opera.¹⁰⁶ Throughout his career, Coke had defended his venerable law—what he called “the perfection of reason”—against the encroaching jurisdiction of equity.¹⁰⁷ The contest began with the entry of a judgment in an action before Coke, apparently because the defendant’s material witnesses were somehow detained at an inn by agents of the plaintiffs. Defendant thereafter sought relief in equity, and Coke induced the plaintiffs to secure indictments against their opponents for attacking a judgment of the King’s Court.¹⁰⁸ The case was referred to

secundum arbitrium boni viri, and this *arbitrium* differeth as much in several men as their countenances differ. That which is right in one man’s eyes is wrong in another’s.”); Severns, *supra* note 57, at 82 (mocking the jurisprudence of equity as “some sort of Philosopher’s Stone by which injustice is whisked into justice by the simple method of preparing a form of petition lately called a ‘bill’”).

103. See *supra* notes 57–66 and accompanying text.

104. See Sparks, *supra* note 74, at 477 (noting that equity was “strenuously opposed by the courts of common law and its hosts of disciples, who, with watchful and jealous eyes, were the first to see the encroachments [equity] was making”).

105. Shortly after Edward III (1327–1377) had issued an ordinance directing that matters of grace be referred to the Chancellor, Parliament denounced with severe penalties those “who so sue in any other court to defeat or impeach the judgment given in the King’s [common law] Court.” 27 Edw. III, c. 1. (1353). See Severns, *supra* note 57, at 88 (“[C]riticism came from the ruling class . . . [In the fourteenth century,] the bitterest criticism comes from the very defendants before the chancellor.”); EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 82–84 (1797). The House of Commons petitioned against Chancery ten times between the reigns of Richard II (1377–1399) and Henry VI (1422–1461). In 1653, the House of Commons voted that the High Court of Chancery of England should be eliminated. See generally ALFRED HENRY MARSH, *HISTORY OF THE COURT OF CHANCERY* (1890); Munger, *supra* note 49, at 52 (linking the resistance to equity with a greater respect for English constitutional law and *lex scripta*); Pound, *Justice*, *supra* note 49, at 711, n.48 (suggesting that rigid laws discourage corruption); CHARLES E. PHELPS, *JURIDICAL EQUITY* § 10 (1894); Holdsworth, *Equity*, *supra* note 49, at 297 (suggesting that progress of equity was hindered by Parliament).

106. Cf. W. S. GILBERT & ARTHUR SULLIVAN, *IOLANTHE*, act I (1882) *reprinted in* W. S. Gilbert, *THE SAVOY OPERAS* 212 (1926) (“The Law is the true embodiment/Of everything that’s excellent/It has no kind of fault or flaw./And I, my Lords, embody the Law.”). See generally Joseph Z. Fleming, *The Privatization Precedent Set by the Lord Chancellor in Iolanthe: An Analysis of Walker v. McKnight*, 30 URB. LAW 233 (1998).

107. See Munger, *supra* note 49, at 45–46.

108. See *id.* at 46.

the law officers who, under the leadership of Bacon in 1616, sustained Chancellor Ellesmere.¹⁰⁹ Recognizing that justice required not only the certainty of law but also the discretion of equity, King James I¹¹⁰ established both the legitimacy and the primacy of equity within a dual system.¹¹¹

Shortly thereafter, in 1618, Bacon became the Lord Chancellor, and a fundamental transformation of chancery was underway.¹¹² For many centuries the sweeping jurisdiction of equity had been untrammelled by any definite rule.¹¹³ But chancery could not remain a “fountain of unlimited dispensations.”¹¹⁴ To reform the “heterogeneous medley of empirical remedies,”¹¹⁵ Bacon issued one hundred rules of equity that were “wisely conceived, and expressed with the greatest precision and perspicuity.”¹¹⁶ Continuing thereafter, particularly under the

109. King James I had little inclination to act otherwise since upholding the authority of the chancellor was consistent with the royal prerogative. This finally settled the power of Chancery to make good its decree, though directly opposed to the results in the same controversy at law, by the exercise of its power *in personam* over the parties to the litigation. See Munger, *supra* note 49, at 45–46. See also Glenn & Redden, *supra* note 52, at 777 (contrasting Coke with Sir Thomas More who, nearly a century earlier, averted such conflict by “inviting the judges to dinner, so that the matter could be pleasantly discussed”).

110. James I reigned from 1603–1625. For relevant background on King James I, see SMITH, *supra* note 53, at 303–18.

111. See Munger, *supra* note 49, at 45–46.

112. Barbour, *supra* note 61, at 858–59 (dating “the change” in equity to the era of James I). See generally Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U. L. REV. 483 (1997); Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245 (1996).

113. See *supra* notes 72–90 and accompanying text. See also 1 JOHN FONBLANQUE, A TREATISE OF EQUITY § 3 (London, A. Strahan & W. Woodfall, 1st ed. 1793) (“So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law And thus in chancery every particular case stands upon its own particular circumstances; and, although the common law will not decree against the general rule of law, ye chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here.”).

114. Frederick Pollock, *The Transformation of Equity*, in FREDERICK POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS 293 (1882) (Chancery became “as regular a court of jurisdiction as any other”); MAITLAND, *supra* note 7, at 9 (“In the second half of the sixteenth century the jurisprudence of the court is becoming settled.”).

115. Smith, *supra* note 20, at 315.

116. 2 JOHN LORD, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 134 (5th ed. 1868) (“They are the foundation of the practice of the Court of Chancery, and are still cited as authority.”).

Chancellorships of Lord Nottingham and Lord Hardwicke,¹¹⁷ the exercise of equity became more circumscribed, if not predictable.¹¹⁸ Chancery no longer “decide[d] every individual case according to the result of a sort of ransacking search for the particular set of conscientious principles applicable to the case.”¹¹⁹ Indeed, as Nottingham and Hardwicke “deliberately set out to reduce equity to a system of rules established by precedent,”¹²⁰ the jurisdiction of equity “crystallized.”¹²¹

But one commentator’s crystallization is another’s ossification. As the jurisdiction of equity lost its youthful exuberance, so also its freedom, elasticity and luminance.¹²² The administration of equity, much like the administration of law became bound and confined by the channels of its own precedents and the technicalities of its own procedures.¹²³ Chancery,

117. Lord Nottingham served as Lord Chancellor from 1673 to 1682. *See generally* 4 CAMPBELL, *supra* note 116, at 236–79. Lord Hardwicke served from 1736 to 1756. *See generally* 6 CAMPBELL, *supra* note 116, at 158–304.

118. *See* Sparks, *supra* note 74, at 477 (“as time passed on . . . opposition gradually diminished”). *See, e.g.,* *Bond v. Hopkins*, 1 Sch. & Lef. 413, 428 (1802) (“The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided, and may then illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed.”).

119. H.G. Hanbury, *The Field of Modern Equity*, 45 L.Q. REV. 196, 205 (1929).

120. *Severns*, *supra* note 57, at 105–06. For an example of Chancery recognizing a doctrine of stare decisis, *see Cook v. Fountain*, 3 Swans. 585, 591 (1672). Hardwicke “labored indefatigably to forge those positive precepts which in his estimation would best ‘externalize the traditional philosophy of Chancery.’” Brendan F. Brown, *Lord Hardwicke and the Science of Trust Law*, 11 NOTRE DAME L. REV. 319, 319 (1935–1936).

121. *See* Hanbury, *supra* note 119, at 205 (Nottingham “stiffened and rationalized old ideas and turned them to permanent and practical use.”); *id.* at 196 (detailing “the transformation from a heterogenous medley of isolated, empirical beliefs into a stable and increasingly rigid system of rules.”). *See also* James O’Connor, *Thoughts About the Common Law*, 3 CAMBRIDGE L.J. 161, 164 (1928) (referring to the “crystallized conscience” of equity). *See generally* MAITLAND, *supra* note 7, at 9 (noting that during the sixteenth century, “[t]he day for ecclesiastical Chancellors is passing away”); Paul Vinogradoff, *Reason and Conscience in Sixteenth Century Jurisprudence*, 24 LAW Q. REV. 373 (1908); SHAPIRO, *supra* note 2.

122. *See* Johnson, *supra* note 19, at 345 (“Equity became handcuffed by a rigorous body of rules and concepts.”); *see also id.* at 351 (“The times were not suitable for reasoned discretion. The public demanded certainty.”).

123. *See* Charles Synge Christopher & Baron Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 529 (1907) (“‘No man, as things now stand,’ says in 1839 Mr. George Spence, the author of the well-known work on the equitable jurisdiction of the Court of Chancery, ‘can enter into a Chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary.’”). A vivid picture of the technicalities, delays, and expense involved in a suit in chancery is to be found in the case of *Jarndyce v. Jarndyce*, as related in Charles Dickens’ *BLEAK HOUSE* (Houghton Mifflin Co. 1956) (1853). Some have suggested that Dickens’ negative depiction is exaggerated. *See*

too, became a *jus strictum* differing little from the common law except in point of identity of the judicial decisions it had made its own.¹²⁴ Indeed, by the first quarter of the nineteenth century, equity had become “so fixed, so certain, that lawyers could say, ‘There is nothing new in equity.’”¹²⁵

Meanwhile, the early American courts were modeling the English method of complementary systems of law and equity.¹²⁶ Even prior to the American Revolution, “courts of chancery had existed in some shape or other in every one of the thirteen colonies.”¹²⁷ Pursuant to Article III,

generally WILLIAM SEARLE HOLDSWORTH, *CHARLES DICKENS AS A LEGAL HISTORIAN* (Yale Univ. 1929).

124. See Douglas M. Gane, *The Birth of a New Equity*, 67 THE SOLICITORS’ JOURNAL 572, 572 (1923). See also Brown, *supra* note 120, at 325 (“In the eighteenth century . . . not only was Chancery following the law, but the Common Law in turn was becoming more and more equitized.”); 1 HOLDSWORTH, *ENGLISH LAW*, *supra* note 49, at 74–75.

125. Severns, *supra* note 57, at 106.

126. See MILLAR, *supra* note 23, at 39–42; 1 STORY, *supra* note 49, § 56, at 46–48; WILLIAM F. WALSH, *The Growing Function of Equity in the Development of Law*, in *LAW: A CENTURY OF PROGRESS, 1835–1935* (N.Y.U. Press 1937); WALSH, *supra* note 51, at 69–70; *Ingersoll*, *supra* note 49, at 65; Glenn & Redden, *supra* note 52, at 757. See also *United States v. King*, 48 U.S. (7 How.) 833, 846–47 (1849) (“The distinction between law and equity is recognized everywhere in the jurisprudence of the United States.”); *Livingston v. Story*, 26 U.S. (1 Pet.) 351, 394 (1835) (“The separation of cases in law, from those in equity, is a necessary incident of the common law.”).

127. Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, in 2 SELECT ESSAYS, *supra* note 123, at 779. For the early history of equity in the United States, see also Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287 (1927). Cf. Joseph H. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 23 (1923) (“In New England there was no equity jurisdiction and very little admixture of equity in the law. The law administered was the strictly legal portion of the law; and the books cited, when they came to cite books, were the reports of the common law courts Pennsylvania never had any court of equity. The law, however, had more of what they regarded as equitable doctrines in it than the law of Massachusetts In New Jersey and Delaware, however, and throughout the South, there was set up at the time of our Revolution a separate Court of Chancery, sitting beside the Common Law Court and administering the principles of English equity.”). There was some hostility to the notion of equity and discretion, which ran counter to the notion of certain Puritan ideals. See generally WILLIAM HENRY LOYD, *THE EARLY COURTS OF PENNSYLVANIA* CH. 4 (1910); Sydney George Fisher, *The Administration of Equity Through Common Law Forms in Pennsylvania*, in 2 SELECT ESSAYS, *supra* note 123, at 810, 811 (detailing particular objections raised by members of the Quaker faith); Edwin H. Woodruff, *Chancery in Massachusetts*, 5 L.Q. REV. 370 (1889); Wilson, *supra*, at 795; von Moschzisker, *supra*, at 288–89 (describing hostility toward equity, which was perceived “as an appendage of the Crown’s prerogative”); Sparks, *supra* note 74, at 478 (“In New York the first court of chancery was established in 1701; but it was so unpopular, from its powers being vested in the governor and council, that it had very little business until it was reorganized in 1778 Courts of chancery did not make much progress in this country until after the Revolution, and even after this period they did not increase in number in a very rapid manner, the people in our own country looking upon it with suspicion and jealousy, the idea generally prevailing that it was a court arbitrary in its nature.”); cf. ZECHARIAH CHAFEE & JOHN P. MALONEY, *CASES ON EQUITY* 9 (2d ed. 1946) (suggesting that the failure to

Section 2 of the United States Constitution, the jurisdiction of the federal courts could extend to certain cases “in Law and Equity.”¹²⁸ Although Congress did not create a separate court of equity in the Judiciary Act of 1789, it contemplated that the federal court system would administer law and equity on different “sides” of the court and by different procedures.¹²⁹ The federal courts tried cases at law and suits in equity within a “temple of justice . . . [metaphorically] constructed with a partition extending from the foundation to the roof.”¹³⁰ Federal judges thus alternately played the role of common law judge or of chancellor.¹³¹ Suits in equity were decided in accordance with the principles and practice of equity jurisdiction as established in the High Court of Chancery in England.¹³²

embrace equity was the result primarily of practical difficulties, not hostility); deFuniak, *supra* note 56, at 58 (noting the financial strain on states that could not afford to establish and maintain two sets of courts).

128. U.S. CONST. art. III, § 2. *See generally* *Kansas v. Colorado*, 206 U.S. 46, 64 (1907) (federal judicial power extends to cases in law and in equity). *See also* U.S. CONST. amend. XI (declaring that judicial power shall not be construed to extend to any suit in law and equity prosecuted against the States).

129. *See Schurmeier v. Conn. Mut. Life Ins. Co.*, 171 F. 1, 16 (1909) (Sanborn, J., dissenting) (“The union of legal and equitable causes of action in one suit is prohibited by § 913, Revised Statutes (United States Comp. St., 1901, at 683), and in removal cases, when such a union is permitted in the state courts from which they come, the causes of action must be separated into distinct actions at law and suits in equity in the national courts.”). *See generally* *Ingersoll*, *supra* note 49, at 63–65 (recognizing two sides to the court “and between them there is no possible connection”); Glenn & Redden, *supra* note 52, at 757 (“the same judge would do equity work one day and sit as a common law judge on another”); U.S. COMP. STAT. § 913 (1901) (the forms and mode of procedure in equity shall be according to the rules and usages of courts of equity); *id.* § 917 (authorizing Supreme Court to prescribe rules of practice in courts of equity); JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES 2–4* (7th ed. 1930).

For cases discussing a separate jurisdiction in equity, see, e.g., *Fenn v. Holme*, 42 U.S. (1 How.) 484, 485, 487 (1858) (distinction explicitly declared in the constitution and separate jurisdiction carefully defined and established); *Berkey v. Cornell*, 90 F. 717, 718 (1898) (separate equitable jurisdiction extends to cases involving purely legal rights); *Thompson v. Central Ohio Railroad*, 73 U.S. (6 Wall.) 134, 137 (1867) (law and equity not to be blended together in one suit); and *Noonan v. Lee*, 67 U.S. (2 Black) 499, 509 (1862) (separate jurisdiction is constitutionally required). *See also* *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684, 690–91 (1927).

130. Gustavus Ohlinger, *Problems of Jurisdiction and Venue*, 26 CORNELL L.Q. 240, 255 (1944).

131. *See* Charles T. McCormick, *The Fusion of Law and Equity*, 6 N.C. L. REV. 283, 284 (1928).

132. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. at 318 (citing *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939)); *Alger v. Anderson*, 92 F. 696, 700 (1899) (stating foundation of equity jurisprudence lies in the system of the English court of chancery); *Blackburn v. Selma, M. & M. R. Co.*, 3 F. 689, 692–93 (1880) (citing Federal Equity Rule 90); *Pennsylvania v. Wheeling & B. Bridge Co.*, 54 U.S. 518, 563 (1851) (stating usages of High Court of Chancery govern); *Miss. Mills v. Cohn*, 150 U.S. 202, 205 (1893) (setting forth that equity jurisdiction is the same authority possessed by high court of chancery in England and is

The test of equitable jurisdiction long has been whether the law courts could provide “plain, adequate and complete” relief.¹³³ Whenever a court of law was competent to take cognizance of a right and had the power to proceed to a judgment that afforded plain, adequate and complete relief, the plaintiff had to proceed at law because, *inter alia*, the defendant had a right to a trial by jury, which was available only in the law courts.¹³⁴ Courts of equity thus steadily refused to entertain jurisdiction of actions where the law courts both recognized a right and offered a remedy.¹³⁵ In order to deny the jurisdiction of equity the remedy at law had to be as “plain,”¹³⁶ “certain,”¹³⁷ “prompt,”¹³⁸ “adequate,”¹³⁹ “full,”¹⁴⁰ “practical,”¹⁴¹

subject neither to limitation nor restraint by state legislation, and is uniform throughout the United States).

133. See Kittle, *supra* note 49, at 29 (“It was not . . . until the law courts began to administer justice in a more fixed and certain manner that the equity courts adopted the rule that they would not take jurisdiction where there is a complete, adequate and plain remedy at law.”); 1 STORY, *supra* note 49, § 33, at 22–26; GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 128–29 (1813); MERWIN, *supra* note 66, at 17 (“equity will not take jurisdiction whenever there is a plain, adequate, and complete remedy at common law”). See, e.g., Earl of Oxford’s Case, 1 Ch. Rep. 1 (1615). See also U.S. COMP. STAT. § 723 (1901); Jones v. Mut. Fid. Co., 123 F. 506, 517 (1903); Thompson v. Cent. Ohio R.R., 73 U.S. (6 Wall.) 134, 137 (1867); Farwell v. Colonial Trust Co., 147 F. 480, 482–83 (1906); Williams v. Neely, 134 F. 1 (1904); Brown v. Arnold, 131 F. 723, 727 (1904); Wiemer v. Louisville Water Co., 130 F. 246, 250 (1903); Monmouth Invest. Co. v. Means, 151 F. 160, 165 (1906); Miller v. Steele, 153 F. 714 (1907); Wolf v. Lovering, 159 F. 91 (1908); Root v. Lake Shore & M.S.R. Co., 105 U.S. 207, 215–16 (1881); Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 F. 151, 155 (1890); McMullen Lumber Co. v. Strother, 136 F. 295, 302 (1905); Payne v. Kan. & Ark. Valley R.R., 46 F. 546, 552 (1891); Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874); Pennsylvania v. Wheeling & B. Bridge Co., 59 U.S. (18 How.) 460, 462 (1855); Grether v. Wright, 75 F. 742, 749 (1896).

134. See, e.g., Hipp v. Babin, 60 U.S. (19 How.) 271, 277 (1856); Smyth v. Banking Co., 141 U.S. 656, 660 (1891); Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884). The right to a jury trial remains “the sword in the bed that prevents the complete union of law and equity.” EDWARD D. RE & JOSEPH R. RE, REMEDIES 47 (5th ed. 2000) (quoting an unpublished lecture of Professor Zechariah Chafee, Jr.). See also Liberty Oil Co. v. Condon Nat’l Bank, 260 U.S. 235, 242 (1922) (“The most important limitation upon a federal union of the two kinds of remedies in one form of action is the [jury trial] requirement of the Constitution.”); Chauffeurs, Teamsters & Helpers Local 391, 484 U.S. 558 (1990) (describing two-fold inquiry for determining whether action is legal or equitable, and thereby determining the availability *vel non* of a jury trial right: first, locating an eighteenth century analog in the courts of England; and second, examining the remedy).

135. See, e.g., Jenkins v. Hannan, 26 F. 657, 663–64 (1885) (no equity jurisdiction where plain and adequate remedy at law by an action of ejectment for the recovery of the possession of the lands the mesne profits); Lacassagne v. Chapuis, 144 U.S. 119, 124–25 (1892).

136. Barber v. Barber, 62 U.S. (21 How.) 582, 591 (1858); Tyler v. Savage, 143 U.S. 79, 95 (1892); Smith v. Am. Nat’l Bank, 89 F. 832, 839 (1898); W. Assurance Co. v. Ward, 75 F. 338, 342 (1896); Brewster v. Lanyon Zinc Co., 140 F. 801, 816 (1905); Kilbourn v. Sunderland, 130 U.S. 505, 505–15 (1889).

137. Brun v. Mann, 151 F. 145, 154 (1906); *Brewster*, 140 F. at 816.

“just,”¹⁴² “final,”¹⁴³ “complete,”¹⁴⁴ and “efficient”¹⁴⁵ as the remedy in equity.¹⁴⁶ Naturally, this language left much to the discretion of the chancellor, and consistent with the general principle of equity to address new or unforeseen circumstances,¹⁴⁷ the equities in each case controlled the court’s exercise of that broad discretion.¹⁴⁸

138. *Tyler*, 143 U.S. at 95; *Am. Nat’l Bank*, 89 F. at 839; *W. Assurance Co.*, 75 F. at 342; *Brun*, 151 F. at 154; *Brewster*, 140 F. at 816; *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 12 (1898); *Springfield Mill Co. v. Barnard & L. Mfg. Co.*, 81 F. 261, 266 (1897).

139. *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *Am. Nat’l Bank*, 89 F. at 839; *W. Assurance Co.*, 75 F. at 342; *Mann*, 151 F. at 154; *Brewster*, 140 F. at 816; *Walla Walla*, 172 U.S. at 12; *Sunderland*, 130 U.S. at 505–15; *Springfield Mill Co.*, 81 F. at 266.

140. *Brewster*, 140 F. at 816.

141. *Tyler*, 143 U.S. at 95; *Payne*, 74 U.S. at 430; *Am. Nat’l Bank*, 89 F. at 839; *W. Assurance Co.*, 75 F. at 342; *Walla Walla*, 172 U.S. at 12; *Springfield Mill Co.*, 81 F. at 266.

142. *Brun*, 151 F. at 154.

143. *W. Assurance Co.*, 75 F. at 342; *Springfield Mill Co.*, 81 F. at 266.

144. *Tyler*, 143 U.S. at 95; *Payne*, 74 U.S. at 430; *Am. Nat’l Bank*, 89 F. at 839; *W. Assurance Co.*, 75 F. at 342; *Brun*, 151 F. at 154; *Brewster*, 140 F. at 816; *Walla Walla*, 172 U.S. at 12; *Kilbourn*, 130 U.S. at 505–15; *Springfield Mill Co.*, 81 F. at 266.

145. *Barber v. Barber*, 62 U.S. (21 How.) 582, 591 (1858); *Tyler*, 143 U.S. at 95; *Payne*, 74 U.S. (7 Wall.) at 430; *Am. Nat’l Bank*, 89 F. at 839; *W. Assurance Co.*, 75 F. at 342; *Brun*, 151 F. at 154; *Brewster*, 140 F. at 816; *Walla Walla*, 172 U.S. at 12; *Kilbourn*, 130 U.S. at 505–15; *Springfield Mill Co.*, 81 F. at 266.

146. See generally *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improv. Co.*, 96 F. 34, 55 (1899); *Bank of Ken. v. Stone*, 88 F. 383, 390 (1898); *Am. Nat’l Bank*, 89 F. at 839; *Schmidt v. West*, 104 F. 272, 273 (1900); *Beloit v. Morgan*, 74 U.S. (7 Wall.) 619, 623 (1868).

147. See, e.g., *Watson v. Sutherland*, 72 U.S. (5 Wall.) 74, 79–80 (1866); *Boyce v. Grundy*, 28 U.S. (3 Pet.) 210, 218–20 (1830); *Sullivan v. Portland & K. R. Co.*, 94 U.S. 806, 811–12 (1876); *Mut. Life Ins. Co. v. Pearson*, 114 F. 395, 396 (1902). See also *Toledo, A.A. & N.M. Ry. v. Penn. Co.*, 54 F. 746, 751 (C.C.N.D. Ohio 1893) (“[T]he powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex . . . relations and the protection of rights can demand.”) (quoting *Chicago, R.I. & P. Ry. v. Union Pac. Ry.*, 47 F. 15 (C.C. Neb. 1891)), cited in *Wasserman*, *supra* note 33, at 623. This same principle is reflected centuries later in the legislation enabling the Supreme Court to promulgate rules of equity procedure. See U.S. COMP. STAT. § 913 (1901) (“The forms and modes of proceeding in suits of equity . . . shall be according to the principles, rules and usages which belong to courts of equity . . . except when it is otherwise provided by statute or by rules of court made in pursuance thereof.”).

148. See *supra* notes 84 and 101.

II. THE DISAGGREGATION OF SUBSTANCE AND PROCEDURE

In 1753, with the process of transforming equity into a regular system of settled principles and rules well underway,¹⁴⁹ Sir William Blackstone, in opening the first course on English law ever offered in an English university said that “law is to be considered not only as a matter of practice but also as a rational science.”¹⁵⁰ Blackstone undertook to discern these scientific principles in four immensely influential volumes of *Commentaries on the Laws of England* published from 1765 to 1769.¹⁵¹ We might have expected the *Commentaries* to provide as valuable a picture of the condition of equity as Blackstone has given us of the condition of other parts of English law at the same period.¹⁵² Yet that expectation is not realized. In fact, Blackstone largely ignored equity,¹⁵³ finding the law/equity distinction to be superficial.¹⁵⁴ The scientific approach advanced by Blackstone placed a

149. See *supra* notes 113–25 and accompanying text.

150. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 442–43, n.8 (1996) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1st ed. 1766); WILLIAM BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND (1756)). See generally William Searle Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 10 (1929–1930). See also *infra* note 194 and accompanying text.

151. See *supra* note 21. See generally JEREMY BENTHAM, COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND (C. Everett ed., 1928); William Blake Odgers, *Sir William Blackstone* (Part 1), 27 YALE L.J. 599 (1918); William Blake Odgers, *Sir William Blackstone* (Part 2), 28 YALE L.J. 542 (1919); Holdsworth, *supra* note 150; William Searle Holdsworth, *Some Aspect of Blackstone and His Commentaries*, 4 CAMBRIDGE L.J. 261, 263 (1932); LEWIS C. WARDEN, THE LIFE OF BLACKSTONE (1938); DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE (1938); DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (1958); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 735 (1976); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); John W. Cairns, *Blackstone, An English Institution: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318, 327 (1984); DAVID LIEBERMAN, FROM BLACKSTONE TO BENTHAM: COMMON LAW VERSUS LEGISLATION IN EIGHTEENTH-CENTURY BRITAIN (1989); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996); David Lemmings, *Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth Century England*, 16 L. & HIST. REV. 211 (1998); Douglas H. Cook, *Sir William Blackstone: A Life and Legacy Set Apart for God's Work*, 13 REGENT U. L. REV. 169 (2000–2001).

152. See Holdsworth, *supra* note 150, at 1.

153. See Munger, *supra* note 49, at 49 (“Writing his treatise in 1765 in volumes comprising more than a thousand pages, [Blackstone] finds room only for a scant eight pages for a discussion of equity.”).

154. See *infra* notes 186–88 and accompanying text.

substance/procedure dichotomy as the fundamental elements of law worthy of attention.¹⁵⁵ The new paradigm had a significant effect on both the law courts and the equity courts, where substance and procedure long had been inextricably intertwined.

A. *The Integration of Substance and Procedure Prior to Blackstone*

For centuries prior to Blackstone the substance of the English common law had been buried in the cumbersome procedure of the law courts—and particularly in its pleading rules.¹⁵⁶ The two defining characteristics of common law pleading were its processes of issue formation and its system of forms of action.¹⁵⁷ Regarding the former, the parties by successive pleadings conceding or contesting the various contentions would reduce the dispute to a single issue then to be tried—often by a jury.¹⁵⁸ Single-issue pleading precluded the joinder of multiple claims or defenses, the joinder of multiple parties, and pleading in the alternative.¹⁵⁹ The system required an intricate network of highly

155. See *infra* notes 183–93 and accompanying text; see also Subrin, *supra* note 23, at 929–30 (“Blackstone atomized the study of law by separating not only rights from wrongs, but also the methods of enforcement from both. He treated English law as a rational, objective science, congruent with natural law. Blackstone, thus, disassociated the learning of rights, wrongs, and methods of enforcement from the socioeconomic-political environment.”).

156. For general background on the role of pleading in procedure, see HENRY JOHN STEPHEN, *PRINCIPLES OF PLEADING IN CIVIL ACTIONS* 7 (2d ed. 1901) (“The subjects of Pleadings, Practice and Evidence comprise what is commonly called the law of procedure.”); Henry R. Gibson, *The Philosophy of Pleading*, 2 *YALE L.J.* 181 (1893).

157. For the historical significance and uniqueness of single-issue pleading and the forms of action, see STEPHEN, *supra* note 156, at § 132 (“As the object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an *issue*. And this appears to be peculiar to that system. To the best of the author’s information, at least, it is unknown in the present practice of any other plan of judicature. In all courts, indeed, the particular subject for decision must, of course, be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law.”); and KOFFLER & REPPY, *supra* note 59, at 32 (“The Common-Law Forms of Action had their Origin in the Action and Inter-action which took place between the Chancellor and the Three Royal Courts, King’s Bench, Exchequer and Common Pleas, whereby individual litigants applied to the chancery for Original Writs authorizing one of the three Courts to try a Specific Action.”).

158. See generally STEPHEN, *supra* note 156; BENJAMIN SHIPMAN, *HANDBOOK OF COMMON-LAW PLEADING* (1894); R. ROSS PERRY, *COMMON-LAW PLEADING* (1897); KOFFLER & REPPY, *supra* note 59, at 532 (“The reduction of the controversy to Issues is the great Object of Pleading.”).

159. See *supra* note 62; see also S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 70–81 (2d ed. 1981); PERRY, *supra* note 158, at 109 (“No action could be grounded on two original writs, nor could one writ be in two forms. Consequently only such counts could be joined as could properly be grouped under one and the same original writ.”).

technical rules designed to aid or force the parties' dispute to converge upon a single issue of law or fact.¹⁶⁰ These rules earned common law pleading the dubious distinction as "the most exact, if not the most occult, of the sciences."¹⁶¹

The other distinguishing feature of common law pleading was the form of action. Each writ incorporated a distinct method of procedure adapted to that particular form of action.¹⁶² The writ governed the whole course of litigation from beginning to end, and the plaintiff selected the most appropriate writ at his peril.¹⁶³ Comparing litigation to battle and

160. There are three fundamental rules to single-issue pleading. First, after a declaration, the parties must at each stage (i) demur; (ii) plead by way of traverse; or (iii) plead by way of confession and avoidance. Second, upon a traverse issue must be tendered. And third, the issue when well tendered must be accepted. Either by virtue of the first rule a demurrer takes place which is a tender of an issue in law, or, by the joint operation of the first two rules, the tender of an issue in fact. And then, by virtue of the second and third rules, the issue so tendered, whether in fact or in law, is accepted and becomes finally complete. It is by these rules that the production of an issue is effected. See generally STEPHEN, *supra* note 156, at § 136. Encyclopedic volumes of supplemental rules and principles ensure the production of an issue that is truly but one issue, see, e.g., *id.* §§ 137–69, 264–339, that is material, see, e.g., *id.* §§ 170–74, 340–45, and is unified, see, e.g., *id.* §§ 175–90, 346–71, and is certain, see, e.g., *id.* §§ 191–228, 372–430, and is neither obscure nor confusing, see, e.g., *id.* §§ 229–43, 431–52, and will lead to neither prolixity nor delay in pleading, see, e.g., *id.* §§ 244–49, 453–65. See also *id.* §§ 250–59, 466–81 ("Certain Miscellaneous Rules"); PERRY, *supra* note 158, at 231–81 (explaining the rules and mechanics of issue pleading).

161. 2 POLLOCK & MAITLAND, *supra* note 49, at 612. See also 1 POLLOCK & MAITLAND, *supra* note 49, at 559 (explaining that, within this system "the whole fate of a lawsuit depends upon the exact words that the parties utter when they are before the tribunal"); MILSOM, *supra* note 159, at 335 ("it is only by confusing the issues that legal development becomes possible"); *supra* notes 63–66. For a more positive depiction of the common law writ system, see Robert Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 20–21 n.41 (1989).

162. See MAITLAND, *supra* note 7, at 3 ("a form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment"); 2 SAMUEL WARREN, A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES, 759 (3d ed. London 1863) (a form of action is the "technical mode of framing the writ, and pleadings appropriate to the particular injury"); KOFFLER, *supra* note 59, at 66 ("[A] form of Action" may be defined as a Procedural Device whereby the primitive mind gave concrete expression to a theory of liability; it is a mechanism through which the doctrine or principle of Law applicable to the Statement of a Plaintiff's Cause of Action may be enforced.").

163. See BAKER, *supra* note 57, at 52; KOFFLER, *supra* note 59, at 39 ("When the plaintiff petitioned the Chancellor for an Original Writ, he was under great pressure to select the right Writ for the facts of his case . . . If he selected a Form of Writ which did not fit his case . . . he could not succeed."); CHARLES HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 46 (1897) ("If a wrong action was adopted, the error was fatal to the whole proceeding, however clearly the facts of the controversy might have been brought before the proper court . . . It was not enough that he stood within the temple of justice, he must have entered through a particular door.").

the forms of action to an armory, Pollock and Maitland offer this vivid imagery:

[The system of common law forms of action] contains every species of medieval weapon from a two handed sword to the poniard. The man who has a quarrel with his neighbor comes hither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace.¹⁶⁴

The procedural apparatus was fundamental to the common law, not simply because lawyers were more punctilious about forms than they now are, but also because the procedural institutions preceded the substantive law as it is now understood.¹⁶⁵ Indeed, this glorification of form led Sir Henry Maine to suggest “that substantive law has at first the look of being gradually secreted in the interstices of procedure.”¹⁶⁶ Prior to Blackstone, these forms of action were the objects of both legal reform and legal study.¹⁶⁷ The principles of the common law had not been mapped out in the abstract, but instead grew around the forms by which justice was centralized and administered by the law courts.¹⁶⁸ “There was no substantive law to which pleading was adjective. These were the terms in which the law existed and in which lawyers thought.”¹⁶⁹

164. 2 POLLOCK & MAITLAND, *supra* note 49, at 559. See also HEPBURN, *supra* note 163, at 47–48 (using the same metaphor, “[a]ll the weapons of juridical warfare are here”).

165. See BAKER, *supra* note 57, at 49. See also *supra* note 59 and accompanying text.

166. HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (Arno Press 1975) (1886). For a broader discussion of the procreative significance of procedure vis-à-vis substance, see PLUCKNETT, *supra* note 23, at 379–81; MILLAR, *supra* note 23, at 3 (“Procedure belongs to the institutions of earliest development At a time when substantive legal conceptions are visible only in the faintest of outline, procedure meets us as a figure already perfected and exact.”); MAITLAND, *supra* note 7, at 3.

167. See Steele, *supra* note 58, at 10–11; 2 POLLOCK & MAITLAND, *supra* note 49, at 559 (“Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials; they are institutes of the law; they are, we say it without scruple, living things.”); PERRY, *supra* note 158, at 3 (“It may be thought these are extravagant expressions of men who were educated to see excellence in anything that was technical and abstruse. When Littleton says that the law is proved by the pleading, and when Coke adds, approvingly, ‘as if pleading were the living voice of the law itself,’ they are not using mere figures of rhetoric.”); see also *infra* note 170.

168. See PLUCKNETT, *supra* note 23, at 380–81 (discussing efforts of Glanville, Bracton and Littleton). See also BAKER, *supra* note 57, at 49–52.

169. MILSOM, *supra* note 159, at 59.

Accordingly, a substantive law of, say, torts, could only be explained through the actions of trespass, case and trover.¹⁷⁰ “[O]ne could say next to nothing about actions in general, while one could discourse at great length about the mode in which an action of this or that sort was to be pursued and defended.”¹⁷¹ The common law “became so interested in forms that they allowed the substance to escape.”¹⁷²

Meanwhile in equity courts, for centuries prior to Blackstone, procedure had been consumed by a broad substantive mandate. Whereas the common law over-emphasized form, chancery historically had eschewed it.¹⁷³ There were no forms of action nor emphasis upon the formation of a single issue.¹⁷⁴

In the equity procedure one encounters no bewildering rules as to the name or classification of the particular suit, or according to the nomenclature at law, “*forms of action*.” When from an investigation of the law and facts, counsel has determined that the client has a good cause for equitable relief, he is saved the problem of wasting brain-sweat in deciding whether he shall sue in debt, *assumpsit*, or covenant, in trover or replevin, in trespass *vi et armis* or trespass on the case. He simply decides to file a “bill in equity.”¹⁷⁵

The bill in equity was to perform only two functions: to state the facts upon which the claims were based and to outline the discovery sought

170. See KOFFLER, *supra* note 59, at 65 (“The Law was required to express itself through the Limited System of Writs and Forms of Action sanctioned by precedent.”).

171. MILLAR, *supra* note 23, at 3–4 (quoting 2 POLLOCK & MAITLAND, *supra* note 49, at 562).

172. Garrett, *supra* note 63, at 31.

173. See *supra* note 80. See also Garrett, *supra* note 63, at 33, 36 (with its “crazy-quilt of allegation and counter-allegation . . . procedure is, to Chancery, the vulnerable spot in an otherwise almost perfect legal system”).

174. In its earliest stages, a bill could be filed informally and there were no technical rules of pleading. See, e.g., the bills contained in SELDEN SOCIETY, *supra* note 79. See generally Holdsworth, *supra* note 54, at 12–14 (discussing procedure on bills in chancery). Over time, equity procedure became rather technical, drawing upon the principles of the English ecclesiastical courts. See JOSEPH STORY, COMMENTARIES ON EQUITY PLEADING § 13 (1857); see also *supra* notes 122–25. Because the pleadings were sworn statements providing the facts upon which the case was decided, they tended to be quite detailed. See CHARLES A. KEIGWIN, CASES IN EQUITY PLEADING (2d ed. 1933); MAITLAND, *supra* note 7, at 6; Kittle, *supra* note 49; CHRISTOPHER COLUMBUS LANGDELL, SUMMARY OF EQUITY PLEADING 9–11 (2d ed. 1883).

175. EDWIN B. MEADE, LILE’S EQUITY PLEADING AND PRACTICE § 95, at 59 (3d ed. 1952).

from the defendant.¹⁷⁶ After the filing of the answer by the defendant, the only other pleading was a formal replication by the plaintiff.¹⁷⁷ Indeed, animated by the juristic principles of discretion, natural justice, fairness and good conscience,¹⁷⁸ the essence of a jurisprudence of equity is somewhat inconsistent with the establishment of formal rules.¹⁷⁹ Efforts to define the jurisdiction of equity surrendered to circularity—e.g., “that body of rules which is administered only by those courts which are known as Courts of Equity.”¹⁸⁰ Hence the characterization of equity as

176. See LANGDELL, *supra* note 174, at 9–11.

177. See *id.*; see also MEADE, *supra* note 175, § 93, at 58 (explaining that the replication is “[t]he very brief pleading by which the plaintiff takes issue on the facts set up in defendant’s plea or answer. It is a bare denial of such facts, and its purpose is simply to put the defendant on notice that his defensive allegations of fact are not admitted, but must be established by evidence. On the filing of the replication, the parties are supposed to be at issue, and the cause matured and ready for the taking of testimony.”); MILLAR, *supra* note 23, at 25–26 (explaining procedure); W. S. SIMKINS, A FEDERAL EQUITY SUIT 462–64 (2d ed. 1911) (same). See generally Richard Marcus, *Completing Equity’s Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 726 (contrasting trial practices of law and equity courts).

178. See Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 20 (1905); see also *supra* notes 86–92 and accompanying text.

179. See generally MAITLAND, *supra* note 7, at 12–22; JOHN SALMOND, THE FIRST PRINCIPLES OF JURISPRUDENCE 1 (1893) (suggesting there is no body of rules for equity). See BALDWIN, *supra* note 65, at 64 (equity a court “of indefinite powers and unrestricted procedure”). This same principle is reflected centuries later in the legislation enabling the Supreme Court to promulgate rules of equity procedure. See U.S. COMP. STAT. § 913 (1901) (“The forms and modes of proceeding in suits of equity . . . shall be according to the principles, rules and usages which belong to courts of equity . . . except when it is otherwise provided by statute or by rules of court made in pursuance thereof.”).

180. MAITLAND, *supra* note 7, at 1. See also 1 POMEROY, *supra* note 101, § 67, at 70–71 (defining equity as “those doctrines and rules, primary and remedial rights and remedies, which the common law, by reason of its fixed methods and remedial system, was either unable or inadequate, in the regular course of its development, to establish, enforce, and confer, and which it therefore either tacitly omitted or openly rejected”); EDMUND H.T. SNELL, THE PRINCIPLES OF EQUITY 2 (18th ed. 1920) (“Equity . . . may be defined as that portion of natural justice which, though of such a nature as properly to admit of being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the Common Law Courts—an omission which was supplied by the Court of Chancery.”); MELVILLE M. BIGELOW, ELEMENTS OF EQUITY 9 (1879) (“The jurisdiction of courts of chancery now extends to all civil cases proper in good conscience and honesty for relief or aid as to which the procedure of the common-law courts is unsuited to give an adequate remedy, or as to which the common-law courts, when able to extend their aid, have refused to do so.”); PHELPS, *supra* note 105, at 192 (“By juridical equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent and by positive provisions of law.”); 1 STORY, *supra* note 49, § 25, at 18 (“[E]quity jurisprudence may . . . properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial

“loose and liberal, large and vague.”¹⁸¹ The broad substantive mandate dominated the jurisprudence of equity much as the procedural forms captured the jurisprudence applied in the law courts.¹⁸²

B. *Blackstone Introduces the Substance/Procedure Paradigm*

Against this backdrop, Sir William Blackstone introduced a new paradigm for understanding English law. Blackstone restated the entire corpus of English law in the form of substantive rules that he derived from fundamental principles through “solid, scientific method.”¹⁸³ The *Commentaries* purport to expose and then resolve a discontinuity between fundamental moral principles, on one hand, and certain technicalities of the legal system, on the other. Blackstone constructed “a general map of the law,” connecting its “primary rules” with “the law of nature” and “the civil transactions of the kingdom.”¹⁸⁴ Setting to one side the maze of legal precedents and modern procedure, Blackstone focused on the fundamental moral rights that, he argued, represented the wisdom of the ages and underlay all of English law.¹⁸⁵

According to Blackstone, these moral rights transcended the boundaries of the traditional court systems of law and of equity:

Equity then, in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed, and *rational* law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of

justice, which is exclusively administered by a court of common law.”); GEORGE TUCKER BISPHAM, *THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY* 1 (11th ed. 1931) (1874) (“[equity] is that system of justice which was administered by the high court of chancery in England in the exercise of its extraordinary jurisdiction”).

181. Holdsworth, *Equity*, *supra* note 49, at 295 (quotation omitted). See also Steele, *supra* note 58, at 13 (“The process of delimiting the jurisdiction of chancery was largely one of self-determination.”).

182. See JOHN SALMOND, *JURISPRUDENCE* 1–5 (13th ed. 1906) (suggesting that the true and original distinction between law and equity is one, not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a competing system governed solely by judicial discretion). See also MILLAR, *supra* note 23, at 25–26 n.29.

183. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *34, at 18 (Cooley ed. vol. 1 1872) (1765). See also 3 BLACKSTONE, *supra*, *115, at 71 (Cooley ed. vol. 2 1872) (1768) (“I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury; and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.”).

184. Lemmings, *supra* note 151, at 226.

185. See Holdsworth, *supra* note 150, at 5–6.

equity, and a court of *law*, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree.¹⁸⁶

Indeed, he attempted to demonstrate that the rules administered by the courts of law and of equity were substantially the same.¹⁸⁷ The difference between the two systems, he argued, was not in their primary rules but rather in their judicial machinery: "Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief."¹⁸⁸

Blackstone may have underrated the effect of these procedural differences upon the substantive rules of the two systems.¹⁸⁹ The procedural differences had "given rise to many substantial differences, which tended to grow more fundamental, as the variant effects of the procedures were worked out in detail."¹⁹⁰ By taking sides on the heady jurisprudential question about the role of equity vis-à-vis law,¹⁹¹

186. 3 BLACKSTONE, *supra* note 183, *429, at 269 (emphasis added).

187. See Holdsworth, *supra* note 150, at 5–6.

188. 3 BLACKSTONE, *supra* note 183, *436, at 272.

189. See generally James Barr Ames, *Law and Morals*, in LECTURES ON LEGAL HISTORY 435, 443–44 (1913) ("Blackstone has asserted that the common-law judges, by a liberal interpretation of the Statute of Westminster, by means of the action on the case, might have done the work of a court of equity. Such an opinion betrays a singular failure to appreciate the fundamental difference between law and equity, namely, that the law acts in rem, while equity acts in personam. The difference between the judgment at law and the decree in equity goes to the root of the whole matter.").

190. Holdsworth, *supra* note 150, at 14.

191. For support of the Blackstone vision, see, e.g., HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY 42 (2d ed. 1767) ("equity commences at the limits of the common law, and in certain circumstances neglected by common law And thus a court of equity, accompanying the law of nature in its general refinements, enforces every natural duty that is not provided for by common law"); MAITLAND, *supra* note 7, at 17 (equity came "not to destroy the law but to fulfil it"); E. C. CLARK, PRACTICAL JURISPRUDENCE 1 (1883) (equity "supplements" existing rules of law by reference to current standards of morality); Christopher Columbus Langdell, *Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 58 (1887) ("Equity cannot therefore, create personal rights which are unknown to the law . . . nor can it impose upon a person or a thing an obligation which by law does not exist To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law."); JOHN ADAMS, JR., THE

Blackstone offered little guidance on vexing if practical questions presented by separate systems of law and equity. Even if, at some level of abstraction, equity and law were the same or, at least, consistent, at a practical level, the discretionary nature of equity lacked the formal characteristics that made the common law rationally separable into parts substantive and procedural. Indeed, as a practical matter, the jurisdiction of equity could not even be defined,¹⁹² much less parsed. In Blackstone's defense, it may be important to note that his *Commentaries* were intended for teaching purposes, and were not necessarily intended as a blueprint for reform.¹⁹³

C. *The Substance/Procedure Dichotomy Finds Traction*

Blackstone's systematic exposition resonated with the scientific rationalism of the eighteenth century.¹⁹⁴ Moreover, by downplaying the significance of any meaningful conflict between law and equity,

DOCTRINE OF EQUITY: A COMMENTARY ON THE LAW AS ADMINISTERED BY THE COURT OF CHANCERY xxix (8th ed. 1890) ("The principle by which [the chancellor's authority] was regulated appears to have been . . . that of affording an effectual remedy when the remedy at common law was imperfect, but not, as has sometimes been erroneously supposed, that of creating a right which the common law denied."); and Henry Schofield, *Discussion*, 3 AM. LAW SCH. REV. 178, 178 (1912) ("The idea of equity as a system distinct from law is, and always has been, of course, a wrong idea.").

And for the contrary view, see, e.g., Hohfeld, *supra* note 49, at 543 ("[W]hile a large part of the rules of equity harmonize with the various rules of law, another large part of the rules of equity . . . conflict with legal rules and, as a matter of substance, annul or negative the latter *pro tanto* . . . [T]here is . . . a very marked and constantly recurring conflict between equitable and legal rules relating to various jural relations; and whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative."); Wesley Newcomb Hohfeld, *Supplemental Note on the Conflict of Equity and Law*, 26 YALE L.J. 767, 770 (1917) (referring to the denial of conflict as a "venerable fiction"); Pound, *Justice*, *supra* note 49, at 696 (referring to the technical and the discretionary—or the "legal" and "non-legal" elements of judicial administration—as "antagonistic ideas."); Pound, *supra* note 178, at 20 (acknowledging discretion, natural justice, equity, and good conscience to be "anti-legal" elements); 1 AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* 4 (1939) (recognizing conflict in substance, if not in form); Harlan F. Stone, *Book Review*, 18 COLUM. L. REV. 97, 97 (1918) ("it seems extraordinary that any writer should ever have asserted broadly that there was no conflict between the doctrines of law and equity, and that anyone should have found it necessary or desirable to have written a book to assert the contrary doctrine"); SPENCE, *supra* note 3, at 326; and JOSEPH HENRY BEALE, *CONFLICT OF LAWS* 151 (1916).

192. See *supra* notes 173–82 and accompanying text.

193. See Alan Watson, Comment, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 810 (1988).

194. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES* 20 (1941) ("Everywhere in English law 'principles' were waiting to be found."); SHAPRIO, *supra* note 2.

Blackstone's approach had the additional virtue of imparting coherence and simplicity, familiar touchstones of successful reform efforts.¹⁹⁵ One may fairly question whether the substance/procedure dichotomy is primarily theoretic,¹⁹⁶ but the theory was well-received, and the consequences of its broad acceptance were very real.¹⁹⁷ Blackstone demoted "procedure" to secondary status within a new hierarchy of legal precepts.¹⁹⁸ Procedure was a conceptually separate apparatus, and one that was neither sacred nor fundamental.¹⁹⁹ Procedure was but a set of practical and ancillary functional rules designed to remedy the *wrongs* that transgressed substantive *rights*.²⁰⁰ Commentators often credit Blackstone for liberating the substance of law from the antiquated procedural machinery that stunted the growth and progress of substantive law.²⁰¹ True though that may be, it is procedure that was then destined to be transformed. The perceived elasticity for procedure made change in the light of practical details inevitable, if not noble. In this view procedure could be based on the experience of the ages, but unlike

195. See generally Janice Toran, "Tis a Gift to Be Simple": *Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 353–54 (1990) (discussing aesthetic appeal of simplicity); Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules*, 46 VILL. L. REV. 311, 311–12 (2001); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002–05 (1989).

196. See generally Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1411–12 (1997) (arguing that substance and procedure fundamentally are inseparable); Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 643 (1932) ("The difference between procedure and substantive law is a movable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1701 (1976) (arguing from a critical perspective that form and substance are linked in subtle ways); Alan Watson, Comment, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 804–05 (1988) (discussing Blackstone's largely unsuccessful effort to disentangle substantive and adjective law).

197. See generally JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985); Subrin, *supra* note 23, at 929 n.110, n.111; Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 325–26 (1988/1989) (noting that the separation of substance and procedure aided formation of the adversary system).

198. See PLUCKNETT, *supra* note 23, at 381 (discussing the lowly status of procedure); Pound, *The End of Law*, *supra* note 49, at 204–08.

199. See generally Lemmings, *supra* note 151.

200. See generally *id.*; see also Watson, *supra* note 196, at 811, n.62.

201. See, e.g., MILLAR *supra* note 23, at 4; PLUCKNETT, *supra* note 23, at 381.

substance, aged procedure is more likely to be viewed as senility, rather than wisdom.²⁰²

As noted above, early American federal jurisprudence modeled the English experience. Consistent therewith, the early American court structure recognized substantive and procedural categories throughout the new systems of law and equity.²⁰³ The power was expressly conferred upon the Supreme Court to promulgate rules of procedure for equity cases,²⁰⁴ and Chief Justice Marshall upheld the delegation of powers to the courts to make rules in regulation of their practice.²⁰⁵ The Court exercised this procedural rule-making power, and the equity rules were subject to several revisions.²⁰⁶ By the Act of 1792, commonly known as the “Process Act,” Congress confirmed the modes of common law proceeding then used in the federal courts.²⁰⁷ Subsequent process and conformity acts repeated the pattern of requiring federal trial courts to apply the procedure of the state in which the federal court sat.²⁰⁸ Formal substantive and procedural differences were recognized throughout the regimes of law and equity, and the substance-procedure dichotomy became a fundamental characterization issue for many legal doctrines.²⁰⁹

202. See Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 643 (1932).

203. See FRIEDMAN, *supra* note 197, at 56–57. See also *Thomson v. Wooster*, 114 U.S. 104, 119–20 (1885) (discussing English authorities for applying the adopted English practice). For a general discussion of the reception of the Commentaries in America, see Nolan, *supra* note 151; Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 U. ILL. L. REV. 629 (1932).

204. See 28 U.S.C. § 723 (“The forms and modes of proceeding in suits of equity . . . shall be according to the principles, rules and usages which belong to courts of equity . . . except when it is otherwise provided by statute or by rules of court made in pursuance thereof.”); *id.* § 730. See also Act of September 30, 1789, c. 21, 1 Stat. L. 93; Act of May 8, 1792, c. 36, 1 Stat. L. 276.

205. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22–23 (1825).

206. See generally HOPKINS, *supra* note 129 (reprinting and discussing the equity rules of 1822, 1842, 1866 and 1912); von Moschzisker, *supra* note 127, at 294 (explaining that equity rules always reflected the original assumption of Chief Justice John Jay, in 1792, that such procedure would be guided by the great tradition of equity jurisprudence as developed in the English chancery courts).

207. See REV. COMP. STAT. § 913.

208. See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 509–51 (1971) (discussing the process acts of the 1780s and 1790s); HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17–18, 581–86 (1963) (discussing the repeated pattern of state law governing unless superseded by federal law in the process and conformity acts of the 1700s and 1800s) *cited in* Subrin, *supra* note 23, at 930 n.114.

209. For early cases recognizing the substantive, formal and procedural differences of law and equity, see, e.g., *Green v. Mills*, 69 F. 852, 857 (1895) (jurisprudence of the United States has always recognized substantive and procedural distinctions between common law and equity); *Owens v. Heidbreder*, 78 F. 837, 839 (1897) (distinction between actions at law and suits in equity is one of

Reinforcing Blackstone's vision, scholars have referred to the disaggregation of substance and procedure as a sign of the "maturity" of a legal system.²¹⁰

III. THE PROCEDURAL MERGER OF LAW AND EQUITY

The perception that parallel court systems were applying substantially similar substantive rules of law under different procedural schemata led inevitably to the notion of merger. There was no tolerance for the delays, the expense, and the technical complications that resulted from the separation of the courts of law and equity.²¹¹ Widespread and escalating contempt for procedure suggested that any distinctions were impractical and unnecessary. Procedure could better fulfill its functional and secondary role if a single set of procedural rules facilitated the joint administration of the substantive principles of both law and equity.²¹² This Part briefly details the experience of the merger of law and equity in American state and federal courts, as well as in the English courts. My effort here is a modest one, with a limited focus on establishing the procedural nature of these mergers. I demonstrate here that in each of these instances merging law and equity, the merger purportedly left the substantive principles of both law and equity in each jurisdiction intact.

Beginning in the middle of the nineteenth century, a reform effort to simplify legal procedure originated in the State of New York.²¹³ The

form and of vital substance); *Gravenburg v. Laws*, 100 F. 1, 4 (1900) (distinction between common law and equity must be maintained); and *Berkey v. Cornell*, 90 F. 711, 717 (1898) (principle that legal and equitable claims cannot be blended together in one suit is well established). For a general discussion of the divisibility of substance and procedure, see *supra* note 196; see also Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19 (1995); Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935 (1991); Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937 (1988); Alfred Hill, *The Erie Doctrine and the Constitution, Part 2*, 53 NW. U. L. REV. 541 (1958); D. Michael Risinger, "Substance" and "Procedure" Revisited, 30 UCLA L. REV. 189 (1982); and Lehan Kent Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad Co. v. Tompkins*, 34 U. ILL. L. REV. 271 (1939).

210. See, e.g., PLUCKNETT, *supra* note 23, at 381 ("the power to think of law apart from its procedure . . . can only develop when civilisation has reached a mature stage"). See Pound, *The End of Law*, *supra* note 49, at 204-08.

211. See Holdsworth, *supra* note 150, at 7.

212. See *infra* notes 214-18 and accompanying text.

213. Texans may disagree. See Emmerglick, *supra* note 67, at 244-45 (upon being admitted into the Union in 1845, Texas provided in its constitution that jurisdiction in equity would be exercised by its law courts); SIMKINS, *supra* note 177, at 7 (referring to Texas as "a pioneer in this blended

reformers were frustrated with the practical and theoretical complexities of parallel systems of law and equity.²¹⁴ Enticed by the rhetoric of uniformity,²¹⁵ these reformers sought to unify law and equity into a single system of codes.²¹⁶ Such codes offered a simple set of uniform rules better suited for the practical task of procedure to efficiently process the more important issues of substantive law.²¹⁷ One commentator described the technicalities of common law pleading as “needless distinctions, scholastic subtleties and dead forms which have disfigured and encumbered our jurisprudence.”²¹⁸ The reform effort was successful, as Section 62 of the new New York Code of Civil Procedure declared for New York state courts:

The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.²¹⁹

procedure”). Nevertheless, credit for the reform generally is accorded David Dudley Field, a New York City commercial lawyer and legal reformer. *See generally* Stephen N. Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311 (1988) (discussing the roles of Field and another New Yorker, Aprhaxed Loomis, who also played a prominent role in drafting the original code); Subrin, *supra* note 23, at 928; Mildred Coe & Lewis Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942); Kharas, *supra* note 12, at 186; CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 15 (1928) (“In 1848 came the first of the American reforms of pleading with the adoption of the New York Code.”). For an account of the nearly simultaneous English reform effort, see *infra* notes 284–88 and accompanying text.

214. *See generally* Subrin, *supra* note 213; ALISON REPPY, *DAVID DUDLEY FIELD: CENTENARY ESSAYS* (1949).

215. For a discussion of the rhetoric of procedural uniformity, see *supra* note 195 and accompanying text.

216. *See generally* Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 10 & n.39 (1925) (“The union of law and equity is justly considered to be the foundation principle of the Code reform.”). *See also* JOHN NORTON POMEROY, *CODE REMEDIES* §§ 4–5 (4th ed. 1904); Edward Taylor, *The Fusion of Law and Equity*, 66 U. PA. L. REV. 17, 17 (1917); Edward Taylor, *Law Reform*, 11 U. ILL. L. REV. 402, 405 (1917); James Edward Hogg, *Law and Equity—The Test of Their Fusion*, 22 JURID. REV. 244, 246 (1910).

217. For a discussion of the subservience of procedure to substance, see *supra* notes 198–200.

218. John Worth Edmonds, *An Address on the Constitution and Code of Procedure*, in 11 LAW REP 232–35 (1848), cited in CARL SWISHER, *THE TANEY PERIOD* 349 n.39 (1974).

219. N.Y. LAWS, c. 510 § 62 (71st Sess., Apr. 12, 1848).

The Field Code abolished the common law forms and merged law and equity in a greatly simplified procedure.²²⁰ Code reformers took great pains to emphasize that the new codes reorganized only the procedure of law and equity.²²¹ Accepting Blackstone's view that substance and procedure were conceptually distinct,²²² the Field Code took the additional step of recognizing the divisibility in fact of substance and procedure: "The legislative mandate of the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law."²²³

The merged procedure of the codes borrowed heavily from equity practice.²²⁴ Much like the old bills in equity, the Field Code provided that the pleadings should state the facts;²²⁵ thus the codes, like equity, de-emphasized the importance of framing an issue.²²⁶ The Code adopted for all actions numerous equity practices and processes, including latitude in the joinder of claims and parties.²²⁷ Further, echoing King James I's

220. *Id.* See N.Y. CONST. art. VI, § 27 (1846) (commission appointed to "revise, reform, simplify, and abridge the rules of practice, pleading, forms, and proceedings of the courts of record of this state, and to report thereon to the legislature."). See also Bone, *supra* note 161.

221. See Kharas, *supra* note 12, at 187. See also PHILEMON BLISS, A TREATISE UPON THE LAW OF PLEADING 15 (3d ed. 1894) (codes "affect modes of procedure"); Coe & Morse, *supra* note 213, at 240–43; Subrin, *supra* note 213, at 329–30.

222. See *supra* notes 183–93 and accompanying text.

223. FIRST REPORT OF THE COMMISSION ON PRACTICE AND PLEADINGS 74 (1878). See also Kharas, *supra* note 12, at 187; Walsh, *supra* note 85, at 488 ("Law and equity are simply brought together in code merger, without changing equity and without changing law, except that in cases of former conflict the equity rule necessarily displaces the legal rule."); Gould v. Cayuga County Nat'l Bank, 86 N.Y. 75, 83 (1881) ("The distinctions between legal and equitable actions are as fundamental as that between actions ex contractu and ex delicto, and no legislative fiat can wipe it out.").

224. Walsh, *supra* note 85, at 497 (emphasis added) ("Code merger makes equity far more important than before. Instead of eliminating equity or converting it into law, code merger has brought it into the modern legal system freed of the old restraints, with all its principles and practices unchanged and unimpaired, and operating directly in all cases.").

225. The Field Code complaint was to provide "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." N.Y. LAWS., c. 379 § 120(2) at 521 (71st Sess., Apr. 12, 1848) (reorganized in 1849 as N.Y. LAWS., c. 438 § 142 (1849)). See also N.Y. LAWS., c. 479 § 1 (1851) ("A plain and concise statement of the facts showing a cause of action without unnecessary repetition.").

226. CLARK, *supra* note 213, at 23 ("Instead of the issue pleading of the common law there was to be fact pleading."); Subrin, *supra* note 213, at 327–38.

227. Under the Field Code, plaintiffs could be joined if they had "an interest in the subject of the action, and in obtaining the relief demanded," and defendants if they had "an interest in the controversy, adverse to the plaintiff." N.Y. LAWS., c. 379 §§ 97–98 (1848). Several identified causes

resolution of the dispute between Bacon and Coke three centuries prior,²²⁸ any conflict between the substantive doctrines of law and equity was to be resolved in favor of equity.²²⁹

The innovative codes proved popular elsewhere and were adopted in most states. The system inaugurated by the New York Code of 1848 was adopted promptly by Missouri and Massachusetts in 1849 and 1850, respectively.²³⁰ In 1851, California adopted a version of the Field Code, and prior to the outbreak of the Civil War, Iowa, Minnesota, Indiana, Ohio, the Washington Territory, Nebraska, Wisconsin and Kansas likewise enacted similar procedural codes.²³¹ Within twenty-five years, procedural codes had been adopted in a majority of the states and territories.²³² Additionally, the Field Code had at least some influence in all states, as all states departed somewhat from the common law system of pleading in response to the proliferation of the codes.²³³ For example, some of the states that did not model the codes nevertheless modified their pleading rules by statutes, allowing the assertion of equitable defenses in actions at law.²³⁴

Nevertheless, the reform effort that was remarkably successful in the state courts initially drew only skepticism from the federal courts. Although law and equity were administered on different “sides” of the

of action could be joined if the “causes of action . . . equally affect[ed] all the parties to the action.” *Id.* § 143. See O.L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 624–26 (1925); Subrin, *supra* note 213, at 332.

228. See *supra* notes 106–11 and accompanying text.

229. See Ingersoll, *supra* note 49, at 70 (“whenever there is a conflict between Law and Equity, the doctrines and maxims of the latter are dominant in all civil controversies in all their courts”). See also *supra* note 223. See generally MAITLAND, *supra* note 7, at 17 (in matters of conflict or variance, “the rules of equity shall prevail”).

230. See Timothy Walker, *Law Reform in Missouri*, 6 W. LAW JOURNAL 431 (1849); see also SWISHER, *supra* note 218, at 349; *Report of Commissioners Appointed to Revise and Reform the Procedure in the Courts of Justice of this Commonwealth*, in 2 BENJAMIN R. CURTIS, A MEMOIR OF BENJAMIN ROBINS CURTIS 149 (1879) (discussing a partial merger of law and equity under procedural codes). But see CLARK, *supra* note 213, § 8 (classifying Massachusetts as a “quasi-code” state, and admiring a system that “may serve as a model for code pleaders”).

231. See FRIEDMAN, *supra* note 197, at 394; HEPBURN, *supra* note 163; MILLAR, *supra* note 23. In 1861 Nevada adopted the Field Code, and by the end of the century so had the Dakotas, Idaho, Arizona, Montana, the Carolinas, Wyoming, Utah, Colorado, Oklahoma and New Mexico. See FRIEDMAN, *supra* note 197, at 394; CLARK, *supra* note 213, § 8.

232. See CLARK, *supra* note 213, at 19–20 (detailing the spread and contemporary extent of code pleading).

233. See *id.* at 20–22; see also Subrin, *supra* note 23, at 938–39.

234. See CLARK, *supra* note 230, at 19–20. See generally E.W. Hinton, *Equitable Defenses*, 18 MICH. L. REV. 717 (1920); Walter Wheeler Cook, *Equitable Defenses*, 32 YALE L.J. 645 (1923).

same federal courts,²³⁵ a commitment to the formal separation of law and equity was venerated and, arguably, constitutionally grounded. Justice Grier emphasized the significance of the separation in an 1858 opinion of the Court:

This [dual] system, matured by the wisdom of ages, founded upon principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sociologists, who invest new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts.²³⁶

Bolstered by constitutional references to systems of law and of equity,²³⁷ commentators long sustained the argument that “the Federal courts cannot adopt the blended system, nor can Congress change the present Federal system, because it is fixed by the Constitution of the United States.”²³⁸

However, the resolve for separate systems weakened as popular confusion and dissent mushroomed. A primary source of the confusion and dissent was federal procedure, which, both prior and subsequent to state adoption of the procedural codes, followed state procedure in law

235. See *supra* notes 126–32 and accompanying text.

236. *McFaul v. Ramsey*, 61 U.S. 523, 525 (1858).

237. See *supra* note 128; see also *Bennett v. Butterworth*, 52 U.S. 669 (1850). See THE FEDERALIST NO. 83, at 569 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (advocating separate equity courts, he wrote “to unify the [equity] jurisdiction . . . with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination; while a separation of the one from the other has the contrary effect of rendering one a sentinel over the other”) (emphasis added).

238. SIMKINS, *supra* note 177, at 3. See also Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CAL. L. REV. 127, 130 (1942–1943) (“While the explanation for the separation is to be found in what may be called accidents of history rather than any *a priori* reasoning, this circumstance does not detract from the conclusion that the distinction between substantive rules of law and equity is so much a part of the warp and woof of our jurisprudence and is so deeply imbedded in it, that the classification cannot be discarded without completely demolishing some of the foundation stones of our legal system. It is clear that no such result was intended by the draftsmen of the rules.”).

cases and a uniform federal procedure in equity cases.²³⁹ Thus, there was a uniform simplified procedure in equity for the federal courts throughout the country. Yet in law cases the various federal courts were applying the procedure of the corresponding state court.

Federal equity practice was a model of simplicity and uniformity. Somewhat paradoxically, federal procedure in equity cases was actually a product of a certain hostility toward equity among the early colonists.²⁴⁰ Conformity to state practice seems to have been demanded, but it became necessary to follow the English equity procedure because a number of the states adopted no equity procedure to which conformity could be had.²⁴¹ The first set of Federal Equity Rules, promulgated by the Supreme Court in 1822, contained thirty-three very concise rules of practice and procedure.²⁴² A few of the rules were mandatory,²⁴³ but most generously accorded federal judges with broad discretionary authority.²⁴⁴ Moreover, after the extension of the doctrine of *Swift v. Tyson*,²⁴⁵ to equity cases in 1851, the federal courts enunciated their own views of the principles of equity jurisprudence, without restriction by the decisions of state courts.²⁴⁶ The Federal Equity Rules proved quite durable and were

239. Prior to the proliferation of the codes, federal procedure in law cases was governed by Congressional enactments that adopted the corresponding state court procedure as a given date; this static conformity usually was keyed to the date of the state's admission to the union. To address some of the confusion caused by the codes, Congress passed the Conformity Acts, which required federal procedure in law cases to conform dynamically with the corresponding state procedures. See generally Subrin, *supra* note 23, at 957–58, n.284; Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1038–42 (1982). See also *supra* note 208 and accompanying text.

240. See generally von Moschzisker, *supra* note 127. See also *supra* note 127 and accompanying text.

241. See Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 425–27 (1930).

242. See *Miller v. Kerr*, 20 U.S. (7 Wheat.) 1, 5 (1822).

243. See, e.g., Federal Equity Rule V (1822) (“The plaintiff may amend his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.”); *id.* Rule XV (“If upon argument the plaintiff’s exceptions shall be overruled, or the defendant’s answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the court.”).

244. See, e.g., *id.* Rule XXX (1822) (“The courts, in their sittings, may regulate all proceedings in the office, and may set aside an dismissions, and reinstate the suits on such terms as may appear equitable.”); *id.* Rule XXXII (“The Circuit Courts may make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion.”).

245. 41 U.S. (16 Pet.) 1 (1842).

246. See, e.g., *Russell v. Southard*, 53 U.S. (12 How.) 139 (1851). But see *Guar. Trust Co. v. York*, 326 U.S. 99 (1945).

substantially revised only twice in the succeeding century—in 1842 and in 1912.²⁴⁷ The latter revision was a comprehensive reform that modeled many of the provisions of the Field Code, especially those dealing with the joinder of parties.²⁴⁸

Meanwhile, the procedure in law cases was controlled by congressional legislation requiring the federal courts to follow state procedure “as near as may be.”²⁴⁹ The Conformity Act was unpopular and true conformity seemed largely unobtainable.²⁵⁰ Noting the success of equity procedure,²⁵¹ the American Bar Association blamed legislative control of federal practice for the problem and proposed that the power to promulgate federal rules of procedure for law cases be turned over to the United States Supreme Court.²⁵² After years of debate and struggle,²⁵³ Congress passed a bill providing:

[T]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.²⁵⁴

The legislation further provided that “[t]he court may at any time unite the general rules prescribed by it for cases in equity with more in actions at law as to secure one form of civil action and procedure for both”²⁵⁵ However, the Court did not rush to the task; an advisory

247. See 1 Howard xli (1842) (92 equity rules); 226 U.S. 627 (1912) (81 equity rules). See also *infra* notes 332–48.

248. See CLARK, *supra* note 213, at 23.

249. The text of one of the Conformity Acts appears in the Act of June 1, 1872, ch. 255 §§ 5–6, 17 Stat. 196, 197.

250. Most people agreed that the Conformity Act was a failure. See, e.g., Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 401–11 (1935); Thomas Wall Shelton, *Uniformity of Judicial Procedure and Decision*, 22 LAW STUDENT’S HELPER 5, 5 (1914). See also *supra* note 239.

251. See Clark & Moore, *supra* note 250, at 435 (Federal Equity Rules of 1912 were “the substantial model for the new Federal procedure of the future”).

252. William D. Mitchell, *The Federal Rules of Civil Procedure*, in REPPY, *supra* note 214, at 75. Of course, the Supreme Court already possessed the authority with regard to equity procedure. See *supra* notes 204–05 and accompanying text. Moreover, the Supreme Court had rulemaking authority for actions at law pursuant to 1842 legislation, but the Court never exercised that authority. See Act of August 23, 1842, ch. 188 § 6, 5 Stat. 516, 518.

253. See Subrin, *supra* note 23, at 957–58, n.284.

254. 28 U.S.C. § 723(b) (1934).

255. *Id.* § 723(c).

committee was appointed the following year.²⁵⁶ Two years thereafter, a set of uniform rules was promulgated, eliminating the distinction between procedures for cases in equity and in law.²⁵⁷ “Under the new rules the hideous Conformity Act [wa]s relegated to the limbo of ‘old unhappy, far off things.’”²⁵⁸ In his address to the American Law Institute Chief Justice Hughes stated the objective of the new rules:

It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity.²⁵⁹

Carrying the torch lit by Blackstone 150 years earlier, the reformers argued that procedure had a tendency to be obtrusive, and that it should be restricted to its proper and subordinate role.²⁶⁰ The Chief Justice transmitted the Rules to Congress over the dissent of Justice Brandeis, and in 1938 the new uniform Federal Rules of Civil Procedure went into effect.²⁶¹

The philosophy and procedures of equity heavily influenced the tenor of the new Federal Rules.²⁶² One general and generous sentence

256. See William D. Mitchell, *The Federal Rules of Civil Procedure*, in REPPY, *supra* note 214, at 79.

257. See generally Subrin, *supra* note 23; Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057 (1955).

258. Armistead Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 262 (1939). See also Edson Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 6 (1938) (“I think no tears will be shed by the bar of this country over the fact that the immense body of judicial decisions as to what matters are or are not controlled by the conformity act no longer have any value except for the legal historian.”).

259. Charles Evan Hughes, *Address Before American Law Institute*, cited in 55 S. Ct. 35 (1935). See also Clark, *supra* note 23.

260. For a description of Blackstone’s vision, see *supra* notes 184–88 and accompanying text.

261. 308 U.S. 645 (1938).

262. See Subrin, *supra* note 23, at 970–82; Marcus, *supra* note 177, at 725 (“[A]s to the pretrial portion of litigation, equity conquered law.”); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (the relaxed procedures of equity allow activist judges to take control of litigation throughout the pretrial stage); Weinstein & Hershenov, *supra* note 12, at 278–81 (offering examples of how equity has dominated legal system through “modes of proof and trial,” and the “varied circumstances in which courts today turn to equitable remedies” in mass tort cases); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 542–51 (2002) (discussing equity’s triumph in mass tort trial

applicable to all types of cases established a fluid standard of pleading.²⁶³ Parties could plead alternative theories.²⁶⁴ Plaintiffs were able to pursue novel theories of relief.²⁶⁵ Related and unrelated claims could be joined in a single action.²⁶⁶ Judges could hear the counterclaims and cross-claims of parties already joined in the filed action.²⁶⁷ As in equity, there were numerous specialized devices through which judges could allow the lawsuit to expand further in order to develop a more efficient litigation unit—e.g., impleaders,²⁶⁸ interpleaders,²⁶⁹ interventions,²⁷⁰ and class

procedures); Laycock, *supra* note 12 at 53–54 (“The war between law and equity is over. Equity won.”). See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–96 (1976) (discerning in public law litigation the “triumph of equity”); 1 CHARLES E. CLARK, *CASES ON PLEADING AND PROCEDURE* Pref. (1930) (among other highlights of the volume were “[t]he history of equity, and its triumph over law”).

263. See FED. R. CIV. P. 8(a)(2) (1938) (“A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .”). Cf. Federal Equity Rule 25 (1912) (“[h]ereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption . . . a short and simple statement of the ultimate facts upon which the plaintiff asks relief”).

264. See FED. R. CIV. P. 8(e)(2) (1938) (“A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses . . . [A] party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.”); *id.* 8(a) (“Relief in the alternative or of several different types may be demanded”). Cf. Federal Equity Rule 18 (1912) (“Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.”); *id.* Rule 30 (“The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.”).

265. See Subrin, *supra* note 23, at 974 (placing the Federal Rules in the context of New Deal legislation).

266. See FED. R. CIV. P. 18(a) (1938) (“The plaintiff in his complaint . . . may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.”). Cf. Federal Equity Rule 26 (1912) (“The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant.”).

267. See FED. R. CIV. P. 13(a) (1938) (“A pleading shall state as a counterclaim any claim . . . which at the time of filing the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim . . .”); *id.* 13(b) (“A pleading may state as a counterclaim any claim against an opposing party . . .”). Cf. Federal Equity Rule 30 (1912) (“The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit . . .”).

268. See FED. R. CIV. P. 14 (1938) (“[A] defendant may move . . . for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff’s claim against him.”). The Advisory Committee Note to Rule 14 suggests that the impleader was a modern innovation developed in England. See 1937 Adv. Comm. Note to FED. R. CIV. P. 14 (citing *English Rules Under the Judicature Act* (The Annual Practice, 1937)).

269. See FED. R. CIV. P. 22(1) (1938) (“Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability.”). See WILLIAM W. DAWSON, *PROCEEDINGS OF THE*

actions.²⁷¹ Complementing the new pleading regime were new liberal rules of discovery,²⁷² and judges were vested with the authority to “manage” the case through pretrial conferences²⁷³ and special masters.²⁷⁴

The Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules.²⁷⁵ Indeed, Rule 1 articulated this

INSTITUTE ON FEDERAL RULES 262 (1938) (tracing the chronology of interpleader from the “old equitable action” through state codes).

270. See FED. R. CIV. P. 24(a) (1938) (“[A]nyone shall be permitted to intervene in an action when the representation of the applicant’s interest by existing parties is or may be inadequate.”); *id.* 24(b) (“[A]nyone may be permitted to intervene in an action . . . when an applicant’s claim or defense and the main action have a question of law or fact in common.”). *Cf.* Federal Equity Rule 37 (1912) (“Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention . . .”).

271. See FED. R. CIV. P. 23 (1938) (detailing prerequisites and types of maintainable class actions). *Cf.* Federal Equity Rule 38 (1912) (“When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”).

272. See FED. R. CIV. P. 26–37 (1938) (discovery rules). *Cf.* Federal Equity Rules 47–58 (1912) (discovery rules). There was no discovery at common law, where the courts typically relied on the oral testimony of witnesses. See Marcus, *supra* note 177, at 726 (contrasting trial practices of law and equity courts).

273. See FED. R. CIV. P. 16 (1938) (“in any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conferences to consider (1) The simplification of the issues; (2) The necessity or desirability of amendments to the pleadings; (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (4) The limitation of the number of expert witnesses; (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury; (6) Such other matters as may aid in the disposition of the action.”). Compare the English procedure known as the “summons for directions,” in ENGLISH RULES UNDER THE JUDICATURE ACT (The Annual Practice, 1937).

274. See FED. R. CIV. P. 53(a) (1938) (“[T]he court in which any action is pending may appoint a special master therein.”). *Cf.* Federal Equity Rules 59–69 (1912) (discussing appointment and powers of masters). See generally Resnik, *supra* note 262.

275. See, e.g., Pound, *supra* note 23, at 402 (“It should be for the court, in its discretion, not the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals; and such discretion should be reviewable only for abuse.”); CLARK, *supra* note 213, at 31 (“The rules of practice should simply point out the purpose to be subserved, leaving the application thereof to the discretion of the trial judge.”). *Cf.* Charles E. Clark & James William Moore, *A New Federal Civil Procedure II. Pleadings and Parties*, 44 YALE L.J. 1291, 1323 (1935) (“In fact if the vital provisions for a completely unified procedure with clear specifications as to jury trials and waiver thereof are adopted, and if flexible rules as to pleadings and parties, leaving much to the discretion of the trial court, are drafted, we feel that the reform is assured of success, whatever the detailed provisions may be.”); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 404–06 (1906); Clark, *supra* note 23, at 308; Charles E. Clark, *The Challenge of a*

very purpose: “[The Federal Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”²⁷⁶ Commenting generally on the philosophy and durability of discretionary rules, Professor Carrington mellifluously recites: “Tight will tear. Wide will wear.”²⁷⁷

Like the Field Code, the reforms were directed exclusively to the procedural problem: the 1934 enabling legislation provided that “said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.”²⁷⁸ The Supreme Court later confirmed that “[t]he Rules have not abrogated the distinction between equitable and legal remedies. Only the procedural distinctions have been abolished.”²⁷⁹ The fundamental substantive characteristics that distinguished the regimes of law and equity remained intact.²⁸⁰ Again, in the event of any substantive conflict between law and equity, the latter was to prevail.²⁸¹

New Federal Civil Procedure, 20 CORNELL L.Q. 443, 443–45 (1935) [hereinafter, Clark, *The Challenge*]; Charles E. Clark, *Procedural Fundamentals*, 1 CONN. BAR J. 67, 70 (1927); Charles E. Clark, *The Code Causes of Action*, 33 YALE L.J. 817, 830–31 (1924). *See generally* Bone, *supra* note 161, at 62–66 (emphasizing the integration of equity into the Federal Rules of Civil Procedure); Marcus, *supra* note 177, at 725; Subrin, *supra* note 23, at 982–91 (federal rules modeled on discretionary and flexible notions of equity practice).

276. FED. R. CIV. P. 1. *See also infra* notes 422–27 and accompanying text.

277. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 949 (1996) (quoting FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 195 (William G. Hammond ed., 1880)). *See also* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 316 n.10 (1999) (describing a system of laws as “those wide restraints that make us free”) (quoting COMMENCEMENT OFF., HARVARD UNIV. FORM OF CONFERRING DEGREES 12 (1998)).

278. 28 U.S.C. § 2072 (1934).

279. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 & n.26 (1949). *See also* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999); Holtzoff, *supra* note 238, at 130 (“[A]bolition of the procedural distinction . . . does not extend to abrogating the differentiation and demarcation between the substantive rules of equity and the substantive common law.”); Percy Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741, 750 (1934) (“The abolition of the common-law forms of action was not intended to change the substantive law There was no desire to destroy a single equity which anyone had had before the reform. There was a desire to abolish a red-tape which seemed intolerable.”); Dobie, *supra* note 258, at 262 (“Of course, [the Federal Rules of Civil Procedure are] applicable only to procedure. It is still quite proper to speak of equitable rights, equitable remedies and equitable titles.”).

280. *See* Palmer D. Edmunds, *The New Federal Rules of Civil Procedure*, 4 JOHN MARSHALL L.Q. 291, 293–94 (1938) (discussing the practical significance of the distinction between law and equity); James Pike, *Current Trends in the Construction of the Federal Rules of Civil Procedure*, 16 CALIF. ST. B. J. 118, 120 (1941) (identifying three fundamental differences of law and equity).

281. *See* MAITLAND, *supra* note 7, at 16–22 (in matters of conflict or variance, the rules of equity shall prevail); Pound, *supra* note 178, at 29 (equity should prevail “statute or no statute”); JOHN

Many states, in turn, modeled the federal rules for their state court procedures. In 1960, in the first comprehensive survey of state adoption of the Federal Rules, Professor Charles Alan Wright concluded that, after twenty years of operating under the Federal Rules, state procedural systems were approximately evenly divided among procedural systems modeled on the Federal Rules, the common law and the Field Code.²⁸² Decades later, Professor John Oakley detailed “the pervasive influence of the Federal Rules on at least some part of every state’s civil procedure.”²⁸³

Although the remainder of this essay focuses exclusively on American courts, it bears mention that the English likewise have effected a procedural merger of law and equity.²⁸⁴ Deconstruction of the historic separation between law and equity in England has been traced from Blackstone to an 1828 speech by Lord Brougham,²⁸⁵ and a series of royal commissions that led to a partial procedural fusion effected by the Common Law Procedure Act of 1854.²⁸⁶ Over the course of the two

FOREST DILLON, *LAWS AND JURISPRUDENCE ENGLAND AND AMERICA* 1, ch. 368 (Da Capo Press 1970) (1895); Bordwell, *supra* note 279, at 742.

282. See WILLIAM M. BARRON & ALEXANDER HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* §§ 9.1–9.53 (Wright ed., 1970) (describing civil procedure reform in variety of states).

283. John Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1368 (1986). *But see id.* at 1369 (discussing lack of widespread textual identity between state and federal models); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1159 (1993) (describing “recent blow[s] to uniformity” in procedural requirements among states); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2002/2003) (documenting erosion to fundamental principles of procedural uniformity) (draft manuscript on file with author); Carl Tobias, *Charles Alan Wright and the Fragmentation of Federal Practice and Procedure*, 19 YALE L. & POL’Y REV. 463, 464 (2001). *See also infra* notes 330–31 and accompanying text.

284. For additional comparative materials, see Walter Wheeler Cook, *Equity in the Canadian Courts*, in *CASES ON EQUITY* 9–10 (4th ed. 1948) (describing origins of law and equity and the successful effort to fuse of law and equity procedures); Raymond Evershed, *Is Equity Past Child-bearing?*, 1 SYDNEY L. REV. 1, 4 (1953) (“the truth of the matter is, I am sure, that the so-called ‘fusion’ of law and equity was a procedural matter and (save incidentally and because procedural matters cannot under our system sensibly be divorced from substantive law) the function of equity in relation to the common law was not thereby changed”).

285. Lord Chancellor Brougham’s six-hour speech entitled “The Present State of the Law to the Commons” raised numerous reform proposals. *See generally* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435, 486–88 (2000); G.T. GARRATT, *LORD BROUGHAM* (1935). On the reactions to Brougham’s speech, see PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 244 (1965).

286. *See* 1954, 17 & 18 Vict., c. 125 (Eng.). *See generally* Holdsworth, *supra* note 150; NEWMAN, *supra* note 92, at 52; ROSCOE POUND & THEODORE F. T. PLUCKNETT, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* 142 (3d ed. 1937)).

subsequent decades, and coincident with the proliferation of codes in the United States, the English Court of Chancery was abolished and thereafter equity was administered in a division of a single court, the High Court of Justice.²⁸⁷ As with the Field Code and the Federal Rules of Civil Procedure, the Judicature Acts of 1873 and 1875, fused only the procedure of law and equity, leaving the substance of equity both intact and predominant: “generally in all matters not herebefore mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.”²⁸⁸

IV. THE IMPAIRMENT OF EQUITY IN THE UNIFIED SYSTEM

The sesquicentennial of the merger of law and equity passed several years ago without honorable mention.²⁸⁹ Most lawyers and law students seem to be unfamiliar even with the factual underpinnings, much less the significance of the merger of law and equity.²⁹⁰ Nevertheless, equity enjoys a potent, even if unappreciated legacy in our unified procedural system. Many statutes and common law doctrines have incorporated the fundamental equitable principle of individualized justice. This principle is reflected in the evolution of broad principles as opposed to narrow

287. See Supreme Court Judicature Act of 1873, reprinted in SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 543–50 (George Burton Adams & H. Morse Stephens, eds., 1930). See generally HEPBURN, *supra* note 163; A. H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750–1950 (1980).

288. 1873, 36 & 37 Vict., c. 66, §. 25 (11) (Eng.); 1875, 38 & 39 Vict., c. 77 (Eng.). See generally Mr. Justice Lurton, *The Operation of the Reformed Equity Procedure in England*, 26 HARV. L. REV. 99, 100–01 (1912) (explaining that reforms made procedure distinctly subservient to the demands of the substantive law); *Britain v. Rossiter*, 11 Q.B.D. 123, 129 (1882) (the Judicature Act neither creates new rights nor alters existing rights but merely changes procedure); see also Hogg, *supra* note 216, at 245; DILLON, *supra* note 281, at 1, c. 368.

289. I could find no symposia celebrating (or lamenting) the anniversary. See also *supra* note 12 and accompanying text.

290. I make this assertion with confidence, but with merely anecdotal data. For example, I teach the procedural history of law and equity in my first-year Civil Procedure course. See STEPHEN N. SUBRIN, ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 274–96 (2000) (recounting historical background of civil procedure). However, my impression is that the students view it as a passion peculiar to my historical perspective, rather than something intimately related to the course. The same pattern holds true in my Remedies course, where I use the historical relationship of law and equity to contextualize the doctrine. Cf. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 7 (3d ed. 2002) (“The line between law and equity is largely the result of a bureaucratic fight for turf; each set of courts took as much jurisdiction as it could get. Consequently, the line is jagged and not especially functional; it can only be memorized.”).

rules,²⁹¹ broad grants of discretionary authority,²⁹² variable standards of conduct,²⁹³ balancing tests,²⁹⁴ lee ways of precedent,²⁹⁵ and the acceptance of legal fictions.²⁹⁶ Many of our fundamental legal principles originated in equity.²⁹⁷ That equity intervenes when there is *no adequate remedy at law* is a most familiar refrain.²⁹⁸ Courts routinely grant preliminary and permanent injunctions to protect legal rights when there

291. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 98, 158–62 (1991); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

292. See P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1251–59 (1980); ALAN PATERSON, *THE LAW LORDS* 123–24 (1982).

293. See generally Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); James Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); Aaron Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

294. See generally Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995).

295. See generally Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't: When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605 (1990); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

296. See generally LON FULLER, *LEGAL FICTIONS* 9 (1967); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990); MAINE, *supra* note 3, at 17–36.

297. “[L]et us not forget that the court of chancery was the first to ignore the absence of a seal; the first to recognize the discharge of a specialty by anything less than a specialty; the first to permit a recovery on a lost instrument; the first to enforce a moral view of penalties; the first to treat a mortgage as a mere lien; the first to hold anyone estopped by his falsehoods from proving a contrary truth; the first to recognize any ownership in the beneficiary of a trust; the first to adopt the doctrine of notice now enacted into recording statutes; the first to force parties to testify; the first to ignore form for substance; the first to disregard all contracts and even judgments when procured by fraud; and certainly the first and last court in historic times to devise remedies at all adequate for the redress of wrongs.” Frierson, *supra* note 32, at 412. See also *supra* note 85.

298. See, e.g., *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002); *United Airlines v. Int’l Ass’n of Machinists & Aerospace Workers*, 2001 WL 320870 (N.D. Ill. Mar. 22, 2001); *Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000); *Reform Party of U.S. v. Gargan*, 89 F. Supp. 2d 751 (W.D. Va. 2000). See also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992). See generally JAMES WILLIAM MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 65.06 (3d ed. 1999) (“A court ordinarily will grant injunctive relief only if another adequate remedy at law is unavailable.”); ROBERT N. LEAVELL ET AL., *EQUITABLE REMEDIES, RESTITUTION & DAMAGES* 11–12 (5th ed. 1994).

is no adequate remedy at law.²⁹⁹ Courts frequently exercise their broad discretion to award various equitable remedies such as specific performance,³⁰⁰ rescission,³⁰¹ subrogation,³⁰² disgorgement,³⁰³ and restitution.³⁰⁴ Occasionally, courts have used the awesome power of equity to create entirely new rights.³⁰⁵

Yet the legacy of equity is unfulfilled in a unified procedural system if the procedural apparatus administering jointly the substantive principles of law and equity is not itself subject to the moderation and correction of the jurisdiction of equity. In this Part I demonstrate, first, that the “all-

299. See generally Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990); Daniel J. Morrissey, *S.E.C. Injunctions*, 68 TENN. L. REV. 427 (2001).

300. See generally E. ALLAN FARNSWORTH, *CONTRACTS* § 12.6, at 826 (3d ed. 1999) (contemporary approach is to compare damages and specific performance to determine which is more effective in affording suitable protection to the injured party's legally recognized interest). See, e.g., *Aeronautical Indus. Dist. Lodge 91 v. United Tech. Corp.*, 87 F. Supp. 2d 116 (D. Conn. 2000).

301. See generally EDWARD SAMPSON THURSTON, *CASES ON RESTITUTION* (1940); Howard W. Brill, *Equitable Remedies for Common Law*, 1999 ARK. LAW NOTES 1, 7 & n.97 (citing *Kennedy v. Strout Realty Agency, Inc.*, 490 S.W.2d 786 (Ark. 1973) (buyer entitled to rescind purchase of rental property because of misrepresentation as to the water supply; buyer recovered all payments made on the purchase price, together with compensation for improvements made on the property in good faith)). See, e.g., *Roberts v. Sears, Roebuck & Co.*, 617 F.2d 460 (7th Cir. 1980).

302. See generally 1 DAN B. DOBBS, *LAW OF REMEDIES* § 4.3(4), at 604 (2d ed. 1993) (“Subrogation is another equitable remedy in which tracing is used to prevent unjust enrichment and to give effective relief to the plaintiff.”); RESTATEMENT (THIRD) OF PROP. *Mortgages* § 7.6 cmt. a (1997) (subrogation is an equitable remedy).

303. See generally Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879, 1908 (2001). See, e.g., *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 184 (3d Cir. 2001); *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1095–96 (7th Cir. 1994).

304. See generally Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001). See, e.g., *Reich v. Cont’l Cas. Co.*, 33 F.3d 754, 755–56 (6th Cir. 1994) (declaring that restitution is a historical remedy in law and in equity), *cert. denied*, 513 U.S. 1152 (1995). See also Smith, *supra* note 20, at 314 (“The remedies of cancellation, rectification and specific performance were created in the Court of Chancery.”).

305. See generally William T. Quillen, *Constitutional Equity and the Innovative Tradition*, 56 LAW & CONTEMP. PROBS. 29 (1993). See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971) (Burger, C.J.) (invoking the “judiciary’s historic equitable remedial powers” in the school desegregation context to require busing). See generally FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); MALCOLM M. FEELY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (2000); GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION* (1982) (criticizing the Supreme Court’s use of equity to implement a political vision that is inconsistent with positive law). *But see* *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (limiting scope of substantive equity to rights existing in 1789).

equity” characterization of the Federal Rules of Civil Procedure³⁰⁶ may be overstated because, in fact, the Federal Rules increasingly bear resemblance to a strict law model. Second, I demonstrate an unfortunate consequence of a strict law paradigm: procedural insufficiency and hardship. I use recent mass tort cases to illustrate the mischief that can be created by elaborate legislative drafting that fails to contemplate all conceivable applications. Finally, I emphasize that procedural hardships were not tolerated under dual systems of law and equity, because procedural insufficiency in the law courts was a permissible basis for the exercise of equitable jurisdiction.

A. *The Complication, Trivialization and Ossification of the Federal Rules of Civil Procedure*

Centuries of legal history confirm that flexible and discretionary rules and standards of any form tend to rigidify over the course of time.³⁰⁷ Professor Bayless Manning recognized this general trend more than two decades ago, and coined the term “hyperlexis” to capture this “pathological condition caused by an overactive law-making gland.”³⁰⁸ Moreover, “[i]t appears to be of the essence of procedure that it tends to harden and solidify.”³⁰⁹ Procedural rules may develop in a dialectic, and short simple rules expand as they become “more nuanced, textured and complex.”³¹⁰ It is hardly surprising, then, that the discretion and flexibility featured in the Federal Rules could suffer such an ignominious fate at the hands of complication, trivialization and ossification—the familiar pathogens of strict law.³¹¹

306. For sources detailing the equitable origins of the Federal Rules of Civil Procedure, see *supra* notes 262–67 and accompanying text. See also *infra* note 323.

307. See MAINE, *supra* note 3, at 19–21 (equity is a stage in the growth of law, whereby it is expanded and ultimately fossilized). See generally Pound, *Justice*, *supra* note 49, at 711 (comparing law to the rules and formulas of the engineer, where the engineer is informed by the wisdom and experience of predecessors); Evershed, *supra* note 284, at 9–13 (discussing equity and modern legislation).

308. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767 (1977).

309. Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 507 (1950).

310. Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 2–3 (2001); see also *id.* at 3 (referring to “textual sprawl”).

311. See Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137, 157 (1994) (describing prolixity of 1993 amendment to FED. R. CIV. P. 16).

The most compelling evidence of this trend toward a model of strict law is the number, pattern, and length of amendments to the Federal Rules. Amendments are not intrinsically maleficent,³¹² but their prevalence is consistent with a paradigm of strict law. Indeed, one way of testing the amount of discretion and flexibility that is built into a rule is to test its durability. Presumably, a rule that is written without much technical content and instead incorporates more generalized principles that can be adjusted with each application could evolve over time with a certain amount of resistance to wear and tear.³¹³ The reverse is true with strict laws because the task of drafting is much more exact; the law must contemplate all conceivable applications.³¹⁴ The virtue of "strict law" is certainty in definition and application, creating predictability.³¹⁵ Yet the passage of time leads to circumstances that were not initially contemplated, and the law must be modified to some extent to retain its certainty in definition and application.

The number of amendments to the Federal Rules is striking and is increasing. Much, if not most contemporary procedural scholarship focuses on the need for some procedural reform.³¹⁶ And all indications suggest that a good portion of these reform efforts have been successful. Indeed, the original Federal Rules of Civil Procedure enacted in 1938

312. Several commentators, however, have called for a moratorium on procedural reform efforts. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841 (1993) (Symposium); Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857, 859-60 (1993) (Symposium) (citing Letter from Edwin J. Wesely, Chair, Advisory Group for the Eastern District of New York, to Robert Keeton, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 3, 1992)); Bryan J. Holzberg, *Judicial Conference Approves Amendments to Civil Rules*, 18 LITIG. NEWS 10, 10 (Dec. 1992) (ABA Litigation Section recommendation calling for moratorium)).

313. See *supra* notes 173-82, 262-77 and accompanying text. See also Johnson, *supra* note 19, at 352-53.

314. See generally *supra* note 5.

315. See *supra* notes 156-72 and accompanying text.

316. See, e.g., Paul V. Niemeyer, *Here We Go Again: Are The Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 521 (1998); Symposium, *Turbulence in the Federal Rules of Civil Procedure: The 1993 Amendments and Beyond*, 14 REV. LITIG. 1 (1994) (dealing with 1993 amendments to Federal Rules of Civil Procedure); Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AMER. B. FOUND. RES. J. 217, 219-51; Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465 (1993); Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals To Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 191 (1992) (proposing reforms to eliminate incentives for lawyers to engage in discovery abuse); Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988) (analyzing prospects for FED. R. CIV. P. 4 reform).

included eighty-six rules—combinations of which were substantially amended in each of 1948, 1961, 1963, 1966, 1970, 1980, 1983, 1985, 1991, 1993, 2000, 2001 and 2002.³¹⁷ Another set of amendments is already in the queue and will likely take effect on December 1, 2003.³¹⁸ And the best may be yet to come.³¹⁹ Only ten of the original Federal Rules of Civil Procedure have never been amended.³²⁰ Twenty six of the original rules—nearly one-third of the original 1938 set—have been amended at least five times.³²¹ Fifty one rules—approaching two-thirds of the original 1938 set—have been amended at least three times.³²² Trends in the number and frequency of amendments suggest a rapidly decreasing shelf-life for Federal Rules of Civil Procedure. They also suggest that the Federal Rules may not be as discretionary and flexible as many suggest.³²³

A second and related attribute of strictness is the length of the text of the mandate. The task of developing a scientific and complete body of rules that can be applied universally requires elaborate legislative

317. See FEDERAL RULES OF CIVIL PROCEDURE AND SELECTED OTHER PROCEDURAL PROVISIONS (Foundation 2003).

318. For the full text of the amended rules, see 71 U.S.L.W. 4253 (2003). The amendments were transmitted to Congress pursuant to 28 U.S.C. §§ 2072–2075 (2000). Unless altered by Congress, the amended rules will take effect December 1, 2003.

319. See generally Cooper, *supra* note 28 (contemplating a set of more detailed pleading, enhanced disclosure obligations, and restricted discovery rules for simple cases).

320. See FED. R. CIV. P. 2, 3, 10, 21, 39, 40, 61, 64, 70 and 85.

321. See FED. R. CIV. P. 4, 5, 6, 9, 12, 14, 15, 17, 23 (see also 23.1 and 23.2), 24, 26, 28, 30, 32, 34, 37, 41, 45, 50, 52, 53, 54, 65, 71 (see also 71A), 77 and 81.

322. See FED. R. CIV. P. 1, 4, 5, 6, 7, 9, 11, 12, 14, 15, 16, 17, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 43, 44, 45, 50, 52, 53, 54, 56, 58, 59, 60, 62, 65, 68, 69, 71 (see also 71A), 72, 73, 77, 79, 81, 82 and 86.

323. For sources describing the discretionary nature of the Federal Rules of Civil Procedure, see, e.g., Subrin, *supra* note 23, at 970–82 (Federal Rules modeled on discretionary and flexible notions of equity practice); Burbank, *supra* note 43, at 715 (noting trend toward delegating discretion instead of making policy choices); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1769, 1975 (1989) (asserting that one of drafters' key goals was to increase flexibility of trial judges); Carrington, *supra* note 43, at 2082 (stating Rules Committee intentionally conferred discretion on trial judges); Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 793 (1989) (noting 1983 amendments to Rules increased trial judges' involvement and discretion in managing cases); Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 936 (1991) (asserting 1983 amendments greatly enhanced trial courts' discretion and substantially increased their control over litigation); Subrin, *supra* note 195, at 2023 (stating 1980 amendments to Federal Rules provided judges with responsibility to control discovery on a case-by-case basis); Bone, *supra* note 161, at 62–66 (emphasizing the integration of equity into the Federal Rules). See also *supra* notes 262–77 and accompanying text.

drafting to contemplate all future applications of that law.³²⁴ Again the evolutionary pattern of the Federal Rules is consistent with these generalizations about strict law paradigms; the many amendments described above are leading to more and longer rules.³²⁵ The original 1938 set of eighty-six Federal Rules of Civil Procedure contained approximately 29,000 words.³²⁶ The current version of the Federal Rules of Civil Procedure includes eighty-nine rules and nearly 45,000 words—more than half again as many words as the 1938 version.³²⁷ A few of the Federal Rules have become dramatically longer through the course of amendments,³²⁸ but the trend is certainly not attributable only to a few outliers: the median length of a 1938 Federal Rule was two hundred and forty seven words; the median length of a current Federal Rule is four hundred and six words.³²⁹

Of course, these measures do not really even begin to capture the contrast between the original and current procedural infrastructures. For, as Professor Carl Tobias describes:

Federal civil procedure is now Byzantine [T]here are strictures in the Federal Rules of Civil Procedure as well as Title 28 of the United States Code and dozens of substantive statutes. A stunning array of local measures—including local rules; general, special, and scheduling orders; individual-judge practices; and mechanisms that courts adopted under the Civil Justice Reform Act of 1990 to reduce cost and delay—also govern cases in all ninety-four districts. Many of the provisions are inconsistent or duplicative, while a significant percentage are difficult to discover, master, and satisfy The developments mean that federal practice is more

324. See generally *supra* note 5.

325. See Tigar, *supra* note 311.

326. My exact count is 28,883 words.

327. My exact count for the set of Federal Rules of Civil Procedure effective through (and including) the December 1, 2001 amendments is 44,695 words.

328. See, e.g., FED. R. CIV. P. 16 (the current version contains 1,005 words, nearly 4.5 times the length of the original (1938) version); *id.* 23, 23.1, 23.2 (the current version of these rules combined contain 1,300 words, well over three times the length of the original (1938) version of Rule 23); *id.* 26 (the current version contains approximately 3,484 words, well over four times the length of the original (1938) version); *id.* 32 (the current version contains approximately 1,059 words, more than three times the length of the original (1938) version).

329. The ratio at the median, then, is 1.65 times the original (1938) length.

fractured than at any time since the Supreme Court prescribed the original federal rules during 1938.³³⁰

This “bewildering panorama of requirements” exacerbates the hypertechnicality of federal practice.³³¹

Complexity is a characteristic of strict law that is inconsistent with a set of truly equitable rules. Importantly, neither prolixity nor complexity is “inevitable.”³³² A comparison of the history of the Federal Rules of Civil Procedure to the evolutionary pattern of the Federal Equity Rules, which governed federal procedure in equity cases for well over a century, is instructive. In stark contrast to our experience under the Federal Rules of Civil Procedure, the pattern of the Federal Equity Rules demonstrates substantial periods of durability and resistance to prolixity. The original set of Federal Equity Rules, effective in 1822, contained thirty-three rules and a total of only slightly more than 2,500 words.³³³ Soon thereafter, in 1842, the Equity Rules were substantially revised into a set of ninety-two rules containing a total of 9,202 words. In the succeeding seventy years of practice under the Equity Rules, only seven of these rules were amended, and only one rule was amended more than once.³³⁴ Only three new rules were added.³³⁵

In 1912, the equity rules were reorganized and substantially revised.³³⁶ The 1912 set of Equity Rules contained only eighty-one rules and a total

330. Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 533 (2002) [hereinafter, Tobias, *Local Federal Civil Procedure*]. See generally Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547 (1998); Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565 (1997).

331. Tobias, *Local Federal Civil Procedure*, *supra* note 330, at 533.

332. See generally Cooper, *supra* note 28, at 1795 (“It may be inevitable that a continuing revision process lengthens the rules and adds complexity to them. Doubts grow up around old solutions, and new problems appear. The Civil Rules have not escaped this effect.”). But see *id.* at 1795 (“It does not seem fair to charge the revision process with a descent into the nagging detail and sterile ossification that have overtaken earlier procedural systems.”).

333. My exact count is 2,525 words.

334. Rule 13 was amended in 1875; Rules 18 and 19 were amended in 1878; Rule 40 was amended in 1859; Rule 41 was amended in 1871; Rule 67 was amended in 1861, 1869, 1892 and 1892; and Rule 82 was amended in 1894. See generally HOPKINS, *supra* note 129.

335. Rules 92, 93 and 94 were added in 1863, 1878 and 1881, respectively. See generally HOPKINS, *supra* note 129.

336. Professors Tidmarsh and Trangsrud have suggested that the 1912 rules were very different from traditional equity practice, because the 1912 rules had been greatly influenced by common law procedure, code pleading, and notice pleading. See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 59 (1998). Such an evolutionary pattern for the Federal Equity Rules would be consistent with the ossification attributed to flexible and

of only 9,442 words.³³⁷ Thus, over the course of these seventy years, the procedure in equity cases experienced a decline in the number of rules and a negligible increase of less than three percent in the total number of words. The Equity Rules of 1912 remained in effect until 1938 when they were replaced by the new Federal Rules of Civil Procedure, which purported to model the procedure of equity.³³⁸ Remarkably, the original set of Federal Rules was more than three times the length of their 1912 mold.³³⁹ The current Federal Rules are nearly five times the length of the Equity Rules of 1912.³⁴⁰

To be sure, generalizations about the number of amendments to and the textual girth of the Federal Rules cannot prove the emergence of a strict law paradigm. However, the content of these amendments further substantiates the hypothesis.³⁴¹ The contemporary class action is one of the many procedures of the merged system borrowed from equity.³⁴² In 1842, the Supreme Court enacted Equity Rule 48, which provided *in its entirety*:

Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in

discretionary rules generally and to procedural rules in particular. *See supra* notes 307–10 and accompanying text. And their suggestion that the Federal Rules may not be as “all equity” as we long have thought advances considerably my thesis here.

337. The 1912 Federal Equity Rules contained 81 rules and 9,442 words.

338. *See supra* notes 240–277 and accompanying text.

339. The ratio is approximately 3.06.

340. The ratio is approximately 4.73.

341. *See* Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1778 (1998) (“For much of this century, the prevailing view has been that change in procedure tends always toward the more relaxed and away from the more rigid. That certainly describes the Federal Rules’ treatment of pleadings. But one may doubt the universal attractiveness of unbridled flexibility. More to the point, what goes up can come down, and change may move toward constraint rather than latitude. In many ways, the last quarter century has produced changes in the rules that sought to constrain rather than to liberate.”).

342. *See supra* note 271 and accompanying text. *See also infra* notes 394–97 and accompanying text.

such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.³⁴³

This Rule was not amended for seventy years, until it was refined in 1912 by Equity Rule 38, which provided, in full, the following forty words:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.³⁴⁴

The original drafters of the Federal Rules of Civil Procedure “adopted” this device of equity, but drafted a rule of three hundred and ninety three words, nearly ten times longer than its model.³⁴⁵ Many decades and amendments later, Federal Rule 23 and its textual progeny currently bespeak 1,300 words, more than thirty times the length of its primogenitor.³⁴⁶ The evolution has added prerequisites to, a typology for, and limitations upon a trial judge’s discretion to certify a class.³⁴⁷ Further, earlier this year, the Court approved amendments to Rule 23 that

343. Equity Rule 48 (1842). See generally HOPKINS, *supra* note 129. This codification announced a pre-existing rule of equity that was not codified at all. See, e.g., *West v. Randall*, 29 F. Cas. 718, No. 17,424, 2 Mason 181 (1820).

344. The rule promulgated in 1842 was not amended prior to this revision in 1912.

345. See *supra* note 271. See generally John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705 (1997); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. L. REV. 21 (1996); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

346. See generally John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453 (1997); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923 (1998).

347. See HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS 867 (3d ed. 1992); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615 (1997); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996); Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186 (1996); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257 (1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L. J. 561 (1987); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664 (1979).

would revise and lengthen two of the existing sections and add two new sections.³⁴⁸

B. *Procedural Mischief in Mass Tort Cases*

In this section I offer an example of procedural mischief occasioned by a textual rule that increasingly may leave too little discretion for judges to reach the fair, just and efficient result. The dynamics of certain mass tort claims can impose extraordinary demands on the judicial system.³⁴⁹ The challenges presented by cases involving millions of plaintiffs can place strains on existing mechanisms to effect consolidation for discovery and pretrial management, and resolution by trial or settlement.³⁵⁰ Included among the Federal Rules of Civil Procedure that are bursting at their seams are Rules 19, 20, 22, 23, 24, 42, 49, 51, and 53.³⁵¹ I focus on only one of these Rules here, but the problem is—or, at least is becoming—endemic to the broader procedural infrastructure. The problem is this: “a court facing a complex case must choose the most efficient procedure that violates no normative

348. See *supra* note 318.

349. There is much literature about mass tort actions. See Shapiro, *supra* note 347, at 915 n.2 (listing dozens of significant works in the field); Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 913 (1998); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983 (1999); Roger Transrud, *Federalism and Mass Tort Litigation*, 148 U. PA. L. REV. 2263 (2000); Cooper, *supra* note 42; Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000); Richard A. Nagareda, *Future Mass Tort Claims and the Rule-Making/Adjudication Distinction*, 74 TUL. L. REV. 1781 (2000); Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 (2000); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000); Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910 (2001); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001); Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871 (2001); Waters, *supra* note 262; Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002).

350. See generally Paul Niemeyer, *Report on Mass Tort Litigation*, 187 F.R.D. 293, 304–05 (1999); see also *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990) (if the district court could close “thirty cases a month, it would [still] take six and one-half years to try these cases and [due to new filings] there would [still] be pending over 5,000 cases”).

351. See generally *supra* notes 349–50.

component of adjudication.”³⁵² But the existing adjudicatory system is structured in a way that, for the most part, contemplates the individualized resolution of disputes.³⁵³ To be sure, there are numerous aggregation mechanisms, including class actions, which contemplate a certain collective justice.³⁵⁴ According to many commentators, the procedural prerequisites drafted to identify those actions where the rule might be most efficiently used are now a major source of inefficiency, unfairness and uncertainty.³⁵⁵ Indeed, the undesirable outcomes flowing from flaws inherent in the existing structure of Federal Rule 23 have satisfied few if any of the constituencies affected by class action procedure.³⁵⁶

In the context of mass tort class actions, the procedural questions are truly extraordinary. Yet no matter how bizarre or unprecedented the phenomenon,³⁵⁷ empirically or theoretically unsound the technique,³⁵⁸ or inefficient or unfair the application,³⁵⁹ the certification of a mass tort class action can focus on the particulars of a Federal Rule to the exclusion of these contextual factors.³⁶⁰ For example, in *Ortiz v.*

352. Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1804–05 (1992). See also *Ortiz v. Fibreboard*, 527 U.S. 815, 867 (1999) (Breyer, J., dissenting) (“judges can and should search aggressively for ways within the framework of existing law . . . to avoid a massive denial of justice.”).

353. See Niemeyer, *supra* note 350, at 303. See also *supra* notes 42–43.

354. See Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 783–84 (1985); Rosenberg, *supra* note 347; Cooper, *supra* note 42.

355. See generally Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595 (1997); Trangsrud, *supra* note 354, at 793; PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1987).

356. See generally Richard L. Marcus, *Benign Neglect Reconsidered*, 148 U. PA. L. REV. 2009 (2000); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179 (2001); Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), a Good Rulemaking*, 69 TENN. L. REV. 97 (2001); Victor E. Schwartz, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483 (2000); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000); Leubsdorf, *supra* note 346.

357. See *supra* note 39.

358. See generally Amy Gibson, *Cimino v. Raymark Industries: Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 BAYLOR L. REV. 463 (1994).

359. See *infra* note 379.

360. I am not suggesting that all mass tort cases turn on procedural technicalities. Nor am I suggesting that all procedural issues involve the interpretation of Federal Rules. Indeed, mass tort cases can raise thorny issues of personal jurisdiction, subject matter jurisdiction, venue, conflict of laws. Technical issues do arise, however, and attention here is given how courts address those issues.

Fireboard Corp.,³⁶¹ the Supreme Court for the second time in three years rejected a settlement in a class action case “prompted by the elephantine mass of asbestos cases.”³⁶² The opening line of Justice Souter’s majority opinion declared: “This case turns on the conditions for certifying a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B).”³⁶³ As it did in *Amchem Products, Inc. v. Windsor*,³⁶⁴ the Court methodically and strictly applied the prerequisites for certification, and ultimately rejected the class action settlement, notwithstanding its acknowledgment that the settlement was both substantively and procedurally fair.³⁶⁵

Of particular interest, the *Ortiz* Court acknowledged that “this litigation defie[d] customary judicial administration.”³⁶⁶ Ironically, custom prevailed nevertheless. Chief Justice Rehnquist joined the Court’s decision and, in a separate opinion, acknowledged the insufficiency of the outcome but demurred to creativity: “Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims. But we are not free to devise an ideal system for adjudicating these claims Unless and until the Federal Rules of Civil Procedure are revised, the Court’s opinion correctly states the existing law.”³⁶⁷

In *Amchem* and *Ortiz*, the Court upheld the general principle that Rule 23 requires structural protections for absent class members that class action settlements and their proponents must respect. More specifically, the Court in *Ortiz* held that for a class action settlement to qualify as a “limited fund,” the settlement proponents must prove the limits of the

361. 527 U.S. 815 (1999).

362. *Id.* at 821. For articles discussing this decision in depth, see Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899 (2002) (symposium); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; George M. Cohen, *The “Fair” is the Enemy of the Good: Ortiz v. Fibreboard Corporation and Class Action Settlements*, 8 SUP. CT. ECON. REV. 23 (2000); Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001).

363. See *Ortiz*, 527 U.S. at 821; see also *id.* at 830 (“The nub of this case is the certification of the class under Rule 23(b)(1)(B).”). See Marcus, *supra* note 356, at 2028, n.102.

364. 521 U.S. 591 (1997).

365. See *Ortiz*, 527 U.S. at 821. See generally Cohen, *supra* note 362.

366. *Ortiz*, 527 U.S. at 821; see also *id.* at 866 (Breyer, J., dissenting) (quoting a Judicial Conference report that referred to the mass of asbestos cases as “having ‘reached critical dimensions’ threatening ‘a disaster of major proportions’”).

367. *Id.* at 865 (Rehnquist, C.J., concurring).

fund by more than their agreement, protect class members from the class counsels' conflict of interest in settling the claims of their clients outside the class, create separately represented subclasses for serious conflicts of interest among class members, and justify the failure to exhaust the entire fund.³⁶⁸ The rule of law exists in the class action setting, the Court essentially says, despite the enormous pressures to bend, skirt, or ignore the rules.³⁶⁹ But when does attention to the rule of law become a preoccupation, a fetish?

As the majority in *Amchem* and *Ortiz* took pains to note, the issues before the Court in the two cases arose out of "near-heroic efforts" by the plaintiffs' lawyers, defense counsel, and district court judges to resolve litigation and thereby to make the best of a bad situation.³⁷⁰ The class action settlement that the district judge had approved in *Georgine v. Amchem Products, Inc.*,³⁷¹ would have settled all future asbestos personal injury claims, except the claims of those who chose to opt out, against the consortium of asbestos defendants.³⁷² The class-action settlement that was approved by the district judge in *Ahearn v. Fibreboard Corp.*³⁷³ and later challenged in *Ortiz* would have settled virtually all future asbestos personal injury claims against the defendant Fibreboard on a mandatory basis.³⁷⁴ Notwithstanding their sympathies with the district courts' efforts, in both cases the majority concluded that Rule 23 does not permit the resolutions that the parties had negotiated and the district court judges had approved.³⁷⁵

The Federal Rules, thus, may constrain judicial inventiveness. Courts generally accord the Federal Rules of Civil Procedure the binding status of statutes.³⁷⁶ Judges may apply the letter of the rule notwithstanding

368. Cohen, *supra* note 362, at 25.

369. *Id.*

370. *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring). See Hensler, *supra* note 362, at 1903.

371. 157 F.R.D. 246, 337 (E.D. Pa. 1994).

372. Hensler, *supra* note 355, at 1903–04.

373. 162 F.R.D. 505 (E.D. Tex. 1995).

374. *Ahearn*, 162 F.R.D. at 517.

375. Hensler, *supra* note 355, at 1904.

376. See, e.g., *Beasley v. United States*, 81 F. Supp. 518, 527 (E.D.S.C. 1948) ("Of course, the Court and all the parties are bound to follow the Rules of Civil Procedure just the same as they would be required to obey a statute."); *Bardney v. United States*, 959 F. Supp. 515, 525 (N.D. Ill. 1997) ("the Federal Rules of Civil Procedure are not rules that a district judge may opt to disregard"); *Winkelman v. Gen. Motors Corp.*, 48 F. Supp. 504, 515 (S.D.N.Y. 1942) (rules have the same effect as a statute and are as binding upon the courts as upon counsel), *affirmed*, 136 F.2d 905 (2d Cir. 1943).

“worthy goals and loftily-stated purposes” supporting a contrary result.³⁷⁷ They may even celebrate an insistently narrow construction.³⁷⁸ Judges may admit of “inefficiencies” or “frustration” generated by the application of rules.³⁷⁹ They may distance themselves from—or even apologize for—results that they suggest are foreordained.³⁸⁰ Or courts may express a preference for a result that “must be obtained by the process of amending the Federal Rules, not by judicial interpretation.”³⁸¹ Courts generally seem reluctant to use their equitable powers to correct procedural insufficiencies.³⁸² The notable exceptions here help to prove the rule.³⁸³

377. *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) (applying the letter of Rule 15).

378. *See, e.g., Healy v. Pa. R.R.*, 181 F.2d 934, 937 (3d Cir. 1950) (“[I]t cannot be gainsaid that certain formalities are indispensable to ‘just, speedy, and inexpensive’ litigation, and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules.”), *cert. denied*, 340 U.S. 935 (1950); *Pan Am World Airways v. U.S. Dist. Ct., Cent. Dist. of Cal.*, 523 F.2d 1073, 1082 (9th Cir. 1975) (Schackne, J., dissenting) (criticizing the majority for an “overly technical” reading of Rule 42 and for “contemplat[ing] the wrong question. The question is not whether some rule permits the action proposed, but whether any rule, statute or logical concept forbids it”).

379. *See Henderson v. Zurn Indus., Inc.*, 131 F.R.D. 560, 565 (S.D. Ind. 1990) (recognizing “virtue” of more expansive reading of Rule 34, but declining since “text cannot be rewritten to avoid inefficiencies that they might produce”); *Kapco Mfg. Co., Inc. v. C & O Ent., Inc.*, 1986 WL 13753 (N.D. Ill. 1986) (expressing “frustration” that process due under Federal Rules of Civil Procedure “epitomizes litigation run amuck”); *Tuke v. United States*, 76 F.3d 155, 157 (7th Cir. 1996) (Easterbrook, J.) (“The Supreme Court insists that federal judges carry out the rules of procedure, whether or not those rules strike the judges as optimal.”).

380. *See Tuke*, 76 F.3d at 157. *See also Amchem*, 521 U.S. at 620.

381. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (“Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”).

382. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (relying on FED. R. CIV. P. 8(a) concerning denial of motion to dismiss); *Guthrie v. Am. Broad. Co.*, 733 F.2d 634, 637 (4th Cir. 1984) (“Whatever inherent powers the district courts may once have had, they now have no power to issue a deposition subpoena unless expressly or impliedly so authorized by the Rules. Neither plaintiff nor the District Court has identified any authority in support of such an extraordinary notion of ‘inherent power’ exceeding the scope of the Rules.”); *Guilford Nat’l Bank v. S. R.R.*, 297 F.2d 921, 925 (4th Cir. 1962) (“The Federal Rules of Civil Procedure should be liberally construed, but they may not be expanded by disregarding plainly expressed limitations. We are not prepared to depart from the explicit language of Rule 34 when viewed in the context of the entire discovery section.”).

383. *See Schuck, supra* note 349, at 974 n.148 (speculating that “some judges in mass tort cases, such as Jack Weinstein, Robert Parker, and Thomas Lambros, sometimes compete to be the most innovative”); *Waters, supra* note 262, at 552–53, n.104 (“By employing an amazing variety of

Courts are more inclined to wait for Congress or other rulemakers to find solutions.³⁸⁴ Accordingly, either the insufficiency persists or it leads eventually to an amendment which, in turn, tends to make the rule even longer, more specific, and more likely to work a hardship when it, in turn, is applied in a particular situation. As this pattern of hardship-and-amendment repeats, the Federal Rules of Civil Procedure increasingly resemble a strict law paradigm, and the impairment of equity becomes even more pronounced.

C. *The Traditional Model for Correcting Procedural Insufficiencies*

In addition to the more conventional forms of relief,³⁸⁵ traditional equity interfered to offer relief in cases where common law processes were defective or too complicated.³⁸⁶ “Situations too complicated for the

flexible and innovative approaches to both procedural and substantive law, these specialists have become ‘adept at routinizing the extraordinary.’”) (quoting Schuck, *supra* note 349, at 956).

384. See *supra* notes 376–83 and accompanying text. See also *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999) (“When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy.”).

385. For a discussion of the doctrine and cases where the cause of action involved the maintenance or protection of an equitable right, estate, or interest, see, e.g., JARIUS PERRY, TRUSTS § 22 (1874) (*cestui que trust*); 2 LEONARD JONES, A TREATISE ON THE LAW OF MORTGAGES § 1093 (1881) (mortgagor’s equity of redemption); POMEROY, *supra* note 216, § 124 (rights of assignees of choses in action); CHARLES BEACH, MODERN EQUITY JURISPRUDENCE § 287 (1892) (rights of equitable lienors). There were (and are) also purely equitable remedies, which were (and are) administered by courts of equity, and not by courts of law. These remedies do not necessarily depend upon the estate involved for their equitable character. They are equitable because they can only be obtained in courts of equity. A suit for quieting title, or for removing a cloud upon title by the cancellation of an adverse instrument, may result in the establishment of a legal estate; but the remedy nevertheless is within the exclusive jurisdiction of a court of equity. A suit for the specific performance of a contract is within this exclusive jurisdiction, although an action might be maintained at law for the recovery of damages for the breach of the contract sought to be enforced. See JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE § 7, 30–31 (1901). See also *supra* notes 80–85 and accompanying text.

386. In addition to circumstances discussed *infra* in the text, there are many situations where procedural insufficiency justified equitable intervention. For example, equity would interfere where the plaintiff had a valid defense at law, but it was doubtful whether he could plead it in an action at law. See, e.g., *Davis v. Wakelee*, 156 U.S. 680, 692 (1895) (sustaining a suit in equity on a void judgment where defendant was estopped to question the judgment, but where it was doubtful whether that issue could be raised by the pleadings in an action at law). When parties were not competent witnesses in common law courts, equity might give relief because of the difficulty of proof caused thereby. See, e.g., *Taylor v. Merchs. Fire Ins. Co.*, 50 U.S. (9 How.) 390 (1850) (addressing a suit to enforce a contract to issue a fire insurance policy after the loss had occurred where proof of the terms of the proposed policy would be difficult at law, though the court also relied on the fact that specific performance would clearly have been decreed before the loss and that

common law were easily amenable to the procedural devices of equity.”³⁸⁷ Even after the crystallization of equity jurisprudence in the nineteenth century,³⁸⁸ in order to deny the jurisdiction of equity, the remedy at law had to be as plain, certain, prompt, adequate, full, practical, just, final, complete, and efficient as the remedy in equity.³⁸⁹ For example, equity interfered in the name—and with the imprimatur—of efficiency to avoid the injurious effects of a multiplicity of actions.³⁹⁰ Describing the contrast between law and equity in these instances, Professor Chafee wrote:

A common-law action soon came to be a two-sided affair, usually with only one plaintiff and one defendant but sometimes with several plaintiffs or defendants tightly bound together as joint obligees or obligors, etc. Except in such joint situations, however, a dispute of one person against many persons usually had to come before the law courts, if at all, in the form of many separate actions. Hence it was far cheaper and more convenient to have a single suit

event did not defeat equity jurisdiction). Where a purchase of land was, after the conveyance, rescinded for fraud, equity might give relief by allowing the purchaser to recover the price paid, because the common law court had no means of revesting the title in the vendor. *See, e.g.*, *Bullard Shoals Mining Co. v. Spencer*, 95 So. 1 (Ala. 1922). Equity could also aid in enforcing a common law judgment against equitable or concealed assets. *See, e.g.*, *Overmire v. Haworth*, 51 N.W. 121 (Minn. 1892); *State Bank of Ceresco v. Belk*, 94 N.W. 617 (Neb. 1903).

387. *Barbour*, *supra* note 61, at 854.

388. *See supra* notes 112–25.

389. *See supra* notes 136–46.

390. The reference to a “multiplicity of actions” can be confusing because equity exercised jurisdiction in four types of cases involving a multiplicity of actions—(i) where the nature of the wrong is such that at law it would be necessary for the injured party, in order to obtain complete relief, to bring a number of actions, arising from the same wrongful act against the same wrongdoer; (ii) where a party institutes, or is about to institute, a number of successive or simultaneous actions against another party, all depending upon the same legal questions and similar issues of fact; (iii) where a party claims a common right against a number of persons, the establishment of which would require a separate legal action brought by him against each of such persons, and which are of such a nature that they might be determined in a single suit in equity brought against all of such persons; and (iv) where a number of persons have separate and distinct rights of action against the same party, arising from the same cause, governed by the same legal rule, and involving similar facts, and the circumstances are such that the rights of all may be settled in a single suit. *See generally* 1 POMEROY, *supra* note 101, §§ 243–275, at 318–377. References herein to a “multiplicity of actions” refer to group (iv). *See also* HENRY L. MCCLINTOCK, HANDBOOK ON THE PRINCIPLES OF EQUITY § 178 (2d ed. 1948) (“the plight of a defendant at law, subjected to one hundred and ten separate actions arising from the same accident, many of the actions being brought in different counties and some of them set for trial in the different counties at the same time, so that it would be impossible for the witnesses for the defense to attend each trial, is one that calls for some sort of relief if it can be given”) (citing *S. Steel Co. v. Hopkins*, 47 So. 274 (1908)).

in chancery, which was accustomed to handle polygonal controversies [I]t was an obvious waste of time to try . . . common question[s] of law and fact over and over in separate actions at law It was much more economical to get everybody into a single chancery suit and settle the common questions once and for all.³⁹¹

Thus, a court of equity would hear a controversy to prevent a multiplicity of suits, even if the exercise of such jurisdiction called for adjudication on purely legal rights and to confer purely legal relief.³⁹² Moreover, when the number of plaintiffs or defendants were too numerous to join in a single suit, equity would permit a few of the litigants to represent the many in connection with an equitable bill of peace, the ancestor of the contemporary class action.³⁹³

Of course, Professor Yeazell's remarkable historical inquiry suggests that today's class actions are not true lineal descendants of the English equity devices.³⁹⁴ Although Chancery intervened to prevent a multiplicity of suits at common law, for the most part, these aggregations were in the

391. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 200–01 (1950).

392. See *Oelrichs v. Spain* (*Oelrichs v. Williams*), 82 U.S. (15 Wall.) 211, 227 (1872) (an adequate remedy at law does not exist where a multiplicity of actions are required to obtain complete relief). See also *Mut. L. Ins. Co. v. Blair*, 130 F. 971, 977 (1904); *Mills v. Chicago*, 127 F. 731, 735 (1904); *Smith v. Bivens*, 56 F. 352, 353 (1893); *Sanford v. Poe*, 69 F. 546, 546–48 (1895); *Preteca v. Maxwell Land Grant Co.*, 50 F. 674, 676 (1892); *Dinsmore v. S. Exp. Co.*, 92 F. 714, 720–21 (1899); *Bausman v. Denny*, 73 F. 69, 70 (1896); *Grand Trunk W. R. Co. v. Chi. & E. I. R. Co.*, 141 F. 785, 795 (1905); *Gen. Elec. Co. v. Westinghouse Elec. & Mfg. Co.*, 144 F. 458, 468 (1906); *Tift v. S. R. Co.*, 123 F. 789, 790–95 (1903); *Del., L. & W. R. Co. v. Frank*, 110 F. 689, 695 (1901); *Tex. & P. R. Co. v. Kuteman*, 54 F. 547, 553 (1892).

393. See POMEROY, *supra* note 101, § 269, at 367–68 (“[T]he jurisdiction may *and should be* exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no ‘common title,’ nor ‘community of right’ or of ‘interest in the subject-matter,’ among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body.”). See generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); CHAFEE, *supra* note 391, at 200. See also *Watson v. Nat’l Life & Trust Co.*, 162 F. 7, 7–12 (1908); *United States v. Old Settlers*, 148 U.S. 427, 480 (1893); *Barnes v. Berry*, 156 F. 72, 73 (1907); *Am. Steel & Wire Co. v. Wire Drawers’ & Die Makers’ Union Nos. 1 & 3*, 90 F. 598, 606 (1898); *Soc’y of Shakers v. Watson*, 68 F. 730, 741 (1895); *McArthur v. Scott*, 113 U.S. 340, 404–06 (1885); *Ayres v. Carver*, 58 U.S. (17 How.) 591, 593–96 (1854); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302 (1850); *Scott v. Donald*, 165 U.S. 107, 108 (1897); *United States v. Coal Dealers’ Assoc.*, 85 F. 252, 260 (1898); *Bailey v. Tillinghast*, 40 C.C.A. 93, 99 F. 801, 807 (1900).

394. See generally YEAZELL, *supra* note 393.

nature of declaratory judgments, rather than damage actions.³⁹⁵ Further, virtually all of the ancient collective litigation cases concerned disputes about some traditional duty owed by one party to the other.³⁹⁶ Professor Yeazell thus contends that courts tolerated early group litigation solely because it assisted in reinforcing social norms between and among preexisting social groups.³⁹⁷ One might argue, then, that the class suit was developed in English chancery primarily to enable the plaintiff to obtain relief for himself, and not as an all-purpose technique to cure procedural insufficiencies presented in the law courts.

Yet the relevance of the history of equity here is not about finding a specific analogue. Rather we must consider what the equity courts would have done had they been faced with the contemporary crises.³⁹⁸ Indeed, the procedural devices in equity were descriptive, not technical, and a precise statement of their scope is impossible.³⁹⁹ Most important, to some extent or other, procedural insufficiency was an independent ground for equitable action.⁴⁰⁰ Accordingly, if procedural insufficiency is no longer

395. *See id.* at 148–51.

396. *See, e.g.*, *Brown v. Booth*, 23 Eng. Rep. 720 (Ch. 1690) (suit by vicar against parish miners); *How v. Tenants of Bromsgrove*, 23 Eng. Rep. 277 (Ch. 1681) (suit by lord of manor against tenants). *See also* *Tribette v. R.R.*, 70 Miss. 182, 188 (1892) (“There must be some recognized ground of equitable interference, or some community of interest in the subject matter of the controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there is a community of interest, merely, in the questions of law or fact involved.”); *Lehigh Val. R. Co. v. McFarlan*, 31 N.J. Eq. 730 (1879); *Nat’l Park Bank of N.Y. v. Goddard*, 131 N.Y. 494 (1892); *Hanstein v. Johnson*, 17 S.E. 155 (1893); *N. Pac. R.R. v. Amacker*, 46 F. 233 (1891).

397. *See* Stephen Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 877 (1977). *See also* Bone, *supra* note 161, at 32, n.86.

398. In fact, part of Yeazell’s thesis is that the modern-day class action developed in response to changing social and economic issues that accompanied industrialization and the entrepreneurial nature of society. *See* YEAZELL, *supra* note 394, at 39–40 (asserting that the evolution of the modern day class action device over the past eight centuries was not a consistent and unified development, but rather a fragmented and broken one). *Cf.* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 222–26 (1990).

399. *See* CHAFEE, *supra* note 391, at 149–295. *See also* *Wyman v. Bowman*, 127 F. 257, 264 (1904) (equity court’s broad discretion re multiplicity suits to be exercised upon consideration of, *inter alia*, “the substantial convenience of all parties”) (emphasis added); *Hosmer v. Wy. R. & I. Co.*, 129 F. 883, 888 (1904) (citing authorities); *Hale v. Anderson*, 188 U.S. 56, 77 (1903); *Buchanan Co. v. Adkins*, 175 F. 692, 791 (1909); *Hyman v. Wheeler*, 33 F. 629, 630 (1888); *De Forest v. Thompson*, 40 F. 375, 377 (1889).

400. *See supra* notes 75–78, 146–48 and accompanying text.

an independent ground for invoking the moderating and corrective function of equity, the jurisdiction of equity is impaired.

V. THE RESURRECTION OF EQUITY TO CURE PROCEDURAL INSUFFICIENCIES

The moderating force of equity ensures just results in each application of the strict law and also fulfills an essential role in the dialectic evolution of the law.⁴⁰¹ The legal historian John Millar captured this idea well:

Law and equity should be in continual progress, with the former constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.⁴⁰²

As the procedural infrastructure of our unified system grows increasingly formulaic and prescriptive,⁴⁰³ judges can and should supply any deficiencies created or ignored by strict applications of that procedural law.⁴⁰⁴ Further, the fair, just and efficient application of substantive law should be accommodated by procedural rules that feature broad judicial discretion, rather than elaborate legislative drafting that is undertaken to contemplate all conceivable applications.

401. See Beale, *supra* note 127, at 25 (“In a system which has, separately, law and equity, the doctrines of equity represent the real law.”). See also Mullenix, *supra* note 310, at 2–3 (referring to the dialectic of complexity and simplicity in procedural reform).

402. 2 JOHN MILLAR, AN HISTORICAL VIEW OF THE ENGLISH GOVERNMENT 358 (1789). See also Munger, *supra* note 49, at 50–51 (discussing the history and progress of equity “from conscience to precedent”); Bordwell, *supra* note 279, at 749 (“The equity of today becomes the right of tomorrow.”); FREDERIC R. COUDERT, CERTAINTY AND JUSTICE 1 (1914) (“On the one side is made an appeal to progress, on the other to precedent.”).

403. See *supra* notes 307–48.

404. Cf. Bordwell, *supra* note 279, at 749 (expressing “hope for a militant equity that will repeat the conquests of former days”).

A. “Mildening” the Application of Procedural Rules With Equity⁴⁰⁵

Since its beginnings, equity has been the extraordinary justice administered to enlarge, supplant, or override strict law that has become too narrow and rigid in its scope. A separate system of equity was free to exert this reforming purpose, and for centuries prior to the merger, “the two systems had been working together harmoniously.”⁴⁰⁶ Some commentators have suggested that equity requires structural autonomy to perform this “high office”—to act “as a check upon strict law and in opposition to it.”⁴⁰⁷ For example, Pomeroy demonstrated that, in merged systems:

The tendency . . . has plainly and steadily been towards the giving an undue prominence and superiority to purely legal rules, and the ignoring, forgetting, or suppression of equitable notions In short, the principles, doctrines, and rules of equity are certainly disappearing from the municipal law of a large number of the states, and this deterioration will go on until it is checked either by a legislative enactment, or by a general revival of the study of equity throughout the ranks of the legal profession.⁴⁰⁸

Arguments for a separate system of equity likely are antediluvian,⁴⁰⁹ but the virtues of equity should not require the formal establishment of dual

405. The corrective function of equity is a power that the Anglo-Saxons called “mildening law.” See SMITH, *supra* note 53, at 209.

406. See MAITLAND, *supra* note 7, at 17.

407. Emmerglick, *supra* note 67, at 255.

408. POMEROY, *supra* note 101, at ix. See also *Cooth v. Jackson*, 6 Ves. Jr. 39 (Lord Eldon). See generally Frierson, *supra* note 32, at 411 (expressing doubt about “whether the fullest benefit of the principles of equity has ever been attained under the amalgamated system”).

409. Of course, three states currently maintain separate law and equity courts. The Delaware constitution vests the state’s judicial power in several courts, including “a Court of Chancery.” DEL. CONST. art. 4, §1. The constitution of the State of Mississippi provides for a chancery court with jurisdiction in equity cases. See MISS. CONST. art. 6, § 159. And under the Tennessee constitution, the judicial power is vested “in such Circuit, Chancery, and other inferior Courts as the Legislature shall from time to time ordain and establish” TENN. CONST. art. 6, § 1. In November 2000, Arkansas voters approved Amendment 80, which rewrote virtually the entire judicial article of the state Constitution of 1874. One of the amendment’s “fundamental purposes [was] the merger of law and equity.” *In re Implementation of Amendment 80: Admin. Plans Pursuant to Admin. Order No. 14*, 345 Ark. Adv. App. (June 28, 2001) (per curiam).

My limited and preliminary inquiry into the systems of these states suggests, however, that none of the three operate dual systems in the traditional sense. See John J. Watkins, *Law and Equity in Arkansas—Or, Why to Support the Proposed Judicial Article*, 53 ARK. L. REV. 401, 436, n.421 (2000) (suggesting that, in Delaware, the chancery court is largely but a specialized tribunal for

systems.⁴¹⁰ Query whether a more sophisticated understanding of the origins of equity and the mechanics of the merger could cure some of the insufficiencies that inhere in the unified system. Indeed, we await the “revival of the study” urged by Pomeroy, as doctrinal infidels further subjugate equity within a paradigm of strict procedural law.⁴¹¹ 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.

More prominent use of the term “equity” may restore the dialectic with strict law that should inhere in the procedural infrastructure.⁴¹² That dialectic has faded, as reformers seem resigned, if not committed to the assumption that all innovation must occur from within the infrastructure of the Federal Rules. Notwithstanding the procedural merger of law and equity, federal judges are vested with the equity jurisdiction that was exercised by the English Court of Chancery at the time the Constitution

corporate law matters; in Mississippi, “the division between law and equity has little jurisdictional significance”; and in Tennessee, “the chancery and circuit courts have concurrent jurisdiction in most civil cases by virtue of a statute that dates to 1877”). The State of New Jersey also maintains a separate chancery division of its superior court. *See* N.J. CONST. art. IV, § 3. But as in the state of Delaware, the structure is driven by an effort to “develop[] special expertise and abilities with regard to complex corporate law matters.” AMERICAN BAR ASSOCIATION, AD HOC COMM. ON BUS. COURTS, THE STATUS OF BUSINESS COURTS IN THE UNITED STATES (Nov. 4, 1999), *available at* <http://www.abanet.org/buslaw/buscts/ctsurvey.html>.

410. *See generally* POMEROY, *supra* note 101, §§ 40–42, 41–43. *See also* *Livingston’s Lesse v. Moore*, 32 U.S. (7 Pet.) 469, 547 (1833) (“It is true that the separation of common law from equity jurisdiction is peculiar to Great Britain; no other of the states of the Old World having adopted it.”); DILLON, *supra* note 281, at 386 (“The separation of what we call equity from law was originally accidental, or at any rate was unnecessary; and the development of an independent system of equitable rights and remedies is anomalous and rests upon no principle.”).

411. For sources suggesting a declining interest in the study of equity, *see supra* notes 12 and 290. For sources suggesting the trend toward certainty in procedural reform, *see supra* notes 289–348 and accompanying text. *Cf. Procedure in the Federal Courts: Hearing Before House Comm. on the Judiciary on H.R. 2377 and H.R. 90*, 67th Cong., 2d Sess. 28 (1922) (Statement of Thomas W. Shelton) (“I want to suggest that one of the great criticisms of our present system is that it is utterly impossible for a client, in many instances, when his case is thrown out on a technicality to understand why. That is an important thing. As I said over in the Senate the other day, when arguing this matter, this is one of the things that is making Bolsheviks in this country.”), *cited in* Subrin, *supra* note 213, at 320 n.78. *But see* Cooper, *supra* note 42, at 1944 (“[I]t may be better to leave judges free to adapt to the challenges without interference from statutes and rules framed for the last war by Congress and the rulemaking committees.”).

412. *See* Frank, *supra* note 12, at 895 (The word equity “instills in the judge a different mood, one of elasticity and fairness. Nothing is more absurd than the saying: ‘A rose by any other name is just as sweet.’ If the rose were called the ‘bloody-nose flower,’ it might well be odious.”).

was adopted and the Judiciary Act of 1789 was enacted.⁴¹³ This jurisdiction included the authority to offer relief when the cumbersome procedures of the law courts were defective or when the procedural system itself was administratively overwhelmed.⁴¹⁴ The mandate permitted equity to consider not only the interests of the plaintiffs, but also the defendants and the judicial system.⁴¹⁵ The merger of law and equity was only procedural,⁴¹⁶ and the Federal Rules of Civil Procedure neither abridged nor modified the substantive rights in equity.⁴¹⁷ Yet the substance of equity, which has pervasive even if subtle influence throughout the substantive law,⁴¹⁸ is largely quiescent in the procedural context.⁴¹⁹

Using equitable discretion to avoid the application of a Federal Rule raises two bundles of structural issues that I can only identify here, but then must take a wide arc around and save for another day. First, there are separation of powers issues presented if a federal court does not defer

413. See *supra* notes 75–78, 130–46, 278–81 & 385–400 and accompanying text. See also *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 335 (1999) (recognizing preservation of substantive equity rights existing in 1789).

414. See *Barbour*, *supra* note 61, at 858 (equity could overcome defects that inhered in the procedure of the law courts and “dealt easily with situations which baffled the common law”); JOHN MITFORD (LORD REDESDALE), *PLEADINGS IN CHANCERY* 112 (New York, John S. Voorhies, 3d ed. 1833) (jurisdiction of equity exercised where, *inter alia*, “the principles of law, by which the law courts were guided, give a right, but the powers of those courts were not sufficient to afford a complete remedy, or their modes of proceeding were inadequate to the purpose . . . [or] where the courts of ordinary jurisdiction were made instruments of injustice”).

415. See, e.g., *Polaroid Corp. v. Casselman*, 213 F. Supp. 379, 381 (D.N.Y. 1962) (“A law suit is not a game but a search for truth. The ends of justice are served, not by giving one side a vested right to exhaust the other, but by affording both an equal opportunity to a full and fair adjudication on the merits.”); *Gen. Mill Supply Co. v. S.C.A. Serv., Inc.*, 697 F.2d 704, 711 (6th Cir. 1982) (“The parties might jointly desire a trial by ordeal or trial by battle, but the public interest would not allow this. The public interest demands a seemly and efficient use of judicial resources towards the just, speedy, and inexpensive remedy spoken for in FED. R. CIV. P. 1.”); *Active Prods. Corp. v. A.H. Choitz & Co.*, 163 F.R.D. 274 (D. Ind. 1995) (relying upon Rule 1 to implement an electronic filing system called “Complex Litigation Automatic Docket” in complex superfund litigation); *In re Paris Air Crash of March 3, 1974*, 69 F.R.D. 310, 322 (C.D. Cal. 1975) (decision on the claims of plaintiffs on issue of products liability alone would avoid prejudice to any party and was the best way to secure the just, speedy, and inexpensive determination of the whole cluster of controversies and lawsuits). See also *supra* notes 385–400 and accompanying text.

416. See *supra* notes 211–88 and accompanying text.

417. See 28 U.S.C. § 2072 (1934).

418. For a discussion of the potent legacy of equity on the development of substantive law, see *supra* notes 291–305 and accompanying text. See also *Bordwell*, *supra* note 279, at 750.

419. See generally Deborah A. DeMott, *Foreword*, 56 LAW & CONTEMP. PROBS. 1 (1993) (“Equity, however large its triumphs, has long been trailed by challenges to its legitimacy.”).

to procedural rules that have been adopted pursuant to the Rules Enabling Act.⁴²⁰ Second, there are *Erie* issues presented if, in a diversity case, the source of law upon which a federal court relies to invalidate the operation of a Federal Rule is a general federal common law of equity.⁴²¹

Neither of these structural issues, however, spoils the role for equity that I propose. Indeed, the very essence of the tradition of equity is incorporated within the mandate of Federal Rule 1: that the Federal Rules of Civil Procedure “be construed and administered to secure the just, speedy, and inexpensive determination of every action.”⁴²² Thus the equitable discretion to avoid the application of a Federal Rule is contemplated by the procedural infrastructure itself. Reference to the *construction* of the Federal Rules suggests some flexibility in interpreting the applicable language of the rules. The reference to the *administration* of the Federal Rules invites even more flexibility—suggesting a more fundamental or threshold inquiry into the relevance of a Federal Rule.⁴²³ Yet courts invoke Rule 1 rather infrequently. Occasionally Rule 1 is cited in the context of resolving a lacunae or

420. See Carrington, *supra* note 277, at 967 (concluding that Congress’ power over the federal courts is limited both by inherent powers and by the constitutional requirement that they be independent in “perform[ing] the core judicial function of applying law to fact in . . . cases and controversies”) (citing Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995)). See generally Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001). See also *Link v. Wabash R.R.*, 370 U.S. 626 (1962) (Rule 41 did not abrogate the federal courts’ inherent authority to dismiss for failure to prosecute); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); cf. Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) (“[W]hen the Supreme Court has exercised the power delegated by Congress to prescribe uniform Federal Rules, we should regard those Rules, if valid, as if they were acts of Congress.”). See also *Chambers v. NASCO*, 501 U.S. 32 (1991) (recognizing some inherent power of the federal courts but declining to define that power or identify extent to which Congress may limit it).

421. Like common law, federal courts in equity lost the power to define substantive rights, but retained the power to regulate procedure. See *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945). The conundrum here, of course, is that the segment of equity that intervened to cure procedural insufficiencies of the law courts is neither procedural nor substantive, but falls somewhere between the two. See generally John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173 (1999). For the status of general federal common law, see Stephen B. Burbank, *Semtek, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027 (2002).

422. FED. R. CIV. P. 1. See also *supra* notes 3–8, 385–400 and accompanying text.

423. See BLACK’S LAW DICTIONARY (6th ed. 1990) (defining “administer” as to “manage or conduct . . . discharge . . . [or] execute”).

nonexistent norm.⁴²⁴ Rule 1 is also cited intermittently as an additional justification for the straightforward application of another procedural rule.⁴²⁵ Similarly, courts also will justify particular applications of procedural rules by referring to the “spirit” of the Federal Rules.⁴²⁶ But

424. See, e.g., *D.L. v. Unified Sch. Dist.*, No. Civ.A. 00-2349-CM, 2002 WL 31296445, at *2 (D. Kan. Oct. 1, 2002) (“Though Rule 59(e) is silent as to whether the court may order such relief on its own initiative, the Eleventh Circuit has interpreted the rule’s silence to be without significance, given the court’s inherent powers FED. R. CIV. P. 1”); *W. Res., Inc. v. Union Pac. R. Co.*, No. 00-2043-CM, 2002 WL 1822432, at *2 (D. Kan. Jul. 23, 2002) (“given the textual ambiguity of Rule 45 combined with the repeated attempts of the Plaintiff to effectuate personal service, and the cost and delay that would result by requiring further attempts at such service, this Court thus joins those holding that effective service under Rule 45 is not limited to personal service”) (citing FED. R. CIV. P. 1); *United States v. Star Scientific, Inc.*, 205 F. Supp. 2d 482, 484–85 (D. Md. 2002) (“The language of Rule 45 clearly contemplates that the court enforcing a subpoena will be the court that issued the subpoena. However, this language must be read in light of the underlying purposes of the rule, which include ‘protect[ing] . . . persons who are required to assist the court by giving information and evidence’”) (quoting FED. R. CIV. P. 45, Advisory Committee Notes, 1991 Amendment, citing FED. R. CIV. P. 1).

425. See, e.g., *Wells v. Greyhound Lines, Inc.*, No. Civ. A. 1:02CV130GR, 2002 WL 1610902, at *3–4 (S.D. Miss. June 25, 2002) (citing FED. R. CIV. P. 1 in support of its conclusion to transfer pursuant to 28 U.S.C. § 1404); *Menasha Corp. v. News Am. Mark. In-Store, Inc.*, 2002-1 Trade Cases ¶ 73,676, 2002 WL 664067, at *1 (N.D. Ill. Apr. 23, 2002) (“apply[ing] FED. R. CIV. P. 24 in light of Fed. R. Civ. P. 1’s mandate”). The U.S. Supreme Court cited Rule 1 in this context in *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’ FED. R. CIV. P. 1”). The vast majority of contemporary citations to Federal Rule 1 are quotations of this portion of the *Celotex* opinion. See, e.g., *Bombard v. Gen. Motors Corp.*, 238 F. Supp. 2d 464, 469 (N.D.N.Y. 2002); *Lupo v. Voinovich*, 235 F. Supp. 2d 782, 788 (S.D. Ohio 2002); *FDIC v. Schuchmann*, 224 F. Supp. 2d 1332, 1336 (D.N.M. 2002).

426. See, e.g., *United States on behalf of Mar. Admin. v. Cont’l Ill. Nat’l Bank & Trust Co.*, 889 F.2d 1248, 1254 (2d Cir.1989) (discretion of the Court with regard to motions seeking leave to amend “must be exercised in terms of a justifying reason or reasons consonant with the liberalizing ‘spirit of the Federal Rules’”); *Nieto v. Kapoor*, 210 F.R.D. 244, 246 (D.N.M. 2002) (“outright refusal to grant the leave [to amend] without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules”) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *Hurlburt v. Zaunbrecher*, 169 F.R.D. 258, 260 (N.D.N.Y. 1996) (putting defendant on notice “that, although she is technically entitled to insist upon service in strict compliance with Rule 4(e), in the opinion of the court such insistence violates the spirit of the Federal Rules as expressed in Rules 1 and 4(d)”; *Hartley & Parker, Inc. v. Fl. Beverage Corp.*, 348 F.2d 161, 163 (5th Cir. 1965) (court refused to reverse judgment on ground that failure to verify answers to admissions under Rule 36 resulted in technical admission of truth of statements, particularly when proof clearly refuted truth of any such admissions; “the spirit of the federal practice [is] to accord substantial justice over mere technical contentions”); *Ford Motor Credit Co. v. Beard*, 45 F.R.D. 523, 525 (D.S.C. 1968) (“spirit of the federal rules” contemplates avoidance of circuitry or multiplicity of litigation); *Gonzales v. Sec. of the Air Force*, 824 F.2d 392, 396 (5th Cir.), cert. denied, 485 U.S. 969 (1987). (Brown, J., dissenting) (stating that it is “contrary to the spirit of Federal Rule 1” to require the plaintiff to file

very rarely will courts avoid the straightforward or even rigid application of a procedural rule, notwithstanding Federal Rule 1 and the proverbial “spirit” of the Federal Rules.⁴²⁷

Unfortunately, the historical understanding of equity is freighted with the baggage of “natural law.”⁴²⁸ In the tradition of separate systems of law and equity, the strict law was subordinate to principles of reason and conscience as determined by the law of God.⁴²⁹ With common philosophical and religious systems of morals, universal standards of justice could be divined in earlier times.⁴³⁰ In contemporary discourse, however, consensus as to the content of those standards is unlikely, and thus any invocation of morality can be highly controversial and analytically suspect.⁴³¹ Implementing the principles of equity need not, however, introduce a system wedded to natural law. Since Blackstone’s scientific explication of their respective roles two centuries ago,

and serve the defendant within the 30 day statutory time limit when the statute makes no mention of service).

427. See *supra* note 383 and accompanying text. See also *In re Simon II Litigation*, 211 F.R.D. 86 (E.D.N.Y. 2002) (Weinstein, J.) (using FRCP 1 in conjunction with equitable maxim that ensures where there is a wrong there is a remedy); *Tyson v. City of Sunnyvale*, 159 F.R.D. 528 (D. Cal. 1995) (just, speedy, and inexpensive determination requires that court exercise its discretion to extend the time period for serving process when process was served one day late); *TPI Corp. v. Merch. Mart of S.C., Inc.*, 61 F.R.D. 684, 692 (D.S.C. 1974) (notwithstanding considerable contrary authority, court permitted permissive intervention because justice required that the party requesting intervention be granted it); *Rollerblade, Inc. v. Rappelfeld*, 165 F.R.D. 92, 95 (D. Minn. 1995) (extending time for service of process under Rule 4(m)).

428. See Walter Wheeler Cook, *Equity*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 582 (1931) (“The most common of the non-technical meanings of equity, one in which lawyers themselves not infrequently use the word, is as a synonym for ‘natural justice.’”); Pound, *Justice*, *supra* note 49, at 702 (characterizing equity as “justice without law”).

429. See Christopher Saint Germain, *Doctor and Student; or, Dialogues Between a Doctor of Divinity and a Student*, in *THE LAWS OF ENGLAND* 37–51, 144–47 (photo. reprint 1988) (1518), cited in Joel Edan Friedlander, *The Rule of Law at Century’s End*, 5 *TEX. REV. L. & POL.* 317, 337 (2001). See also HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 290 (1993) (“The natural-law school treats law essentially as the embodiment in legal rules and concepts of moral principles derived from reason and conscience.”).

430. See Roscoe Pound, *Juristic Science and the Law*, 31 *HARV. L. REV.* 1047, 1060 (1918).

431. See generally Francis J. Mootz, III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*, 11 *YALE J.L. & HUMAN.* 311 (1999); Randy E. Barnett, *A Law Professor’s Guide to Natural Law and Natural Rights*, 20 *HARV. J.L. & PUB. POL’Y* 655 (1997); Stephen Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 *VAND. L. REV.* 1387 (1997); Ronald M. Dworkin, “Natural” Law Revisited, 34 *U. FLA. L. REV.* 165 (1982). For a comprehensive bibliography, see James V. Schall, *The Natural Law Bibliography*, 40 *AM. J. JURIS.* 157 (1995).

procedure has been conceptually divorced from substance.⁴³² Within this time-honored framework, procedure was separated from and subordinated to substance.⁴³³ The procedural infrastructure is but an ancillary set of rules of “etiquette” designed to ensure the application of substantive law.⁴³⁴ The application *vel non* of a set of purely functional procedural rules should not implicate the philosophical and religious values that make natural law and equity problematic. Indeed, if those values were implicated in the decision whether to apply the procedural rule, this would suggest that there is substantive content beyond the scope of procedure and within the scope of substance where, incidentally, the principles of equity enjoy greater influence.⁴³⁵

Equity’s charge to deliver “individualized justice” also incites fears of unabashed and unprincipled judicial activism.⁴³⁶ In this regard, Professor Chafee once remarked of the authority of chancellors: “O, it is excellent [t]o have a giant’s strength; but it is tyrannous [t]o use it like a giant.”⁴³⁷ But equity is no tyrant. Equity was, and remains, a supplementary law; it

432. Toran, *supra* note 195, at 378–79, n.165, n.169 (describing procedure as “an unclogged artery through which substantive rights could flow”).

433. See *supra* notes 183–93 and accompanying text.

434. See Roscoe Pound, *The Etiquette of Justice*, 3 PROC. NEB. ST. B.A. 231 (1908). See also Charles Clark, *Fundamental Changes Effected by the New Federal Rules (Pt. 1)*, 15 TENN. L. REV. 551, 551 (1939) [hereinafter, Clark, *Fundamental Changes*]; see also Clark, *The Challenge*, *supra* note 275.

435. See *supra* notes 291–305 and accompanying text.

436. Charges of judicial activism used to be the province of conservatives. Liberals have joined that chorus as congressional legislation becomes increasingly vulnerable to a more conservative Supreme Court. For scholarship addressing this topic of judges exceeding their proper authority, see generally Stephen F. Smith, *Taking Lessons From the Left?: Judicial Activism on the Right*, 2002 GEO. J.L. & PUB. POL’Y, 57–80 (2002); David P. Bryden, *A Conservative Case for Judicial Activism*, 111 PUB. INTEREST 73 (1993); Gary Minda, *Jurisprudence at Century’s End*, 43 J. LEGAL EDUC. 27, 32–36 (1993); CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY* (1991); Earl Maltz, *The Prospects of a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990); Lino A. Graglia, *Judicial Activism: Even on the Right It’s Wrong*, 95 PUB. INTEREST 57 (1989); STEVEN C. HALPERN & CHARLES M. LAMB, *SUPREME COURT ACTIVISM AND RESTRAINT* (Lexington Books 1982); DAVID FORTE, *THE SUPREME COURT: JUDICIAL ACTIVISM VERSUS JUDICIAL RESTRAINT* 17 (D.C. Heath, 1972); Alpheus T. Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385 (1969); and ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). See also Jack B. Weinstein, *Justice and Mercy—Law and Equity*, 28 N.Y.U. L. REV. 817, 818–19 (1984) (noting that the approach of the nineteenth century French judges “who abandoned rules of law completely and instead engaged in ad hoc decision-making according to the equity of the cases” was “individualism run riot”).

437. CHAFEE, *supra* note 391, at 303.

was designed “not to destroy the law but to fulfill it.”⁴³⁸ If a Federal Rule requires a particular result, it should, in most instances, be applied as written. But procedural rules are “but an aid to an end and not an end in themselves.”⁴³⁹ Accordingly it must be more important that fair and efficient applications of substantive law be facilitated than that predictability and uniformity be assured through rigid adherence to existing procedural rules.⁴⁴⁰

Importantly, the scope of the exercise of equity is limited to the individual case.⁴⁴¹ Faced with procedural insufficiencies, courts will often disclaim responsibility and authority for “amending” the procedural rules.⁴⁴² In *Amchem*, for example, Justice Ginsburg wrote that “The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered.”⁴⁴³ But equity does not require judicial amendment; indeed equity does not accommodate it. The purpose of equity “was to provide a tribunal where the hardship of particular cases might be relieved; the purpose was not to provide general rules of law.”⁴⁴⁴ The introduction of equity into the procedural context thus is not an invitation for judges to effect wholesale revisions to the applicable Rules. For example, judges could not, under

438. See MAITLAND, *supra* note 7, at 17. See also CLARK, *supra* note 191, at 1 (equity “supplements” existing rules of law by reference to current standards of morality); Manuel Rodriguez Ramos, *Equity*, in *THE CIVIL LAW: A COMPARATIVE ESSAY*, 44 TUL. L. REV. 720, 724 (1970) (“Equity . . . is nothing more than reason or natural justice, that is, a supplement to the written law.”).

439. Clark, *Fundamental Changes*, *supra* note 434, at 551.

440. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (1969).

441. This scope thus may be more limiting than the type of “equitable” review suggested by Professor Bauer and by Judge Moore. Their arguments for broadening the interpretation of Federal Rules stem primarily from the Congressional delegation to the courts of the authority to make the Federal Rules in the first instance. See Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720 (1988) (arguing that because the Supreme Court promulgates the Rules, federal courts are “fully justified in taking an expansive view of the Federal Rule under scrutiny, giving it a liberal reading if that is required to fulfill the purposes of the Rule or to do justice between the parties before the court”); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993) (“Given substantial, although largely unexercised, powers of the Court in the promulgation process, a more activist role in the interpretative stage, one that considers purpose and policy, is appropriate.”).

442. See *supra* notes 376–84 and accompanying text.

443. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

444. Campbell, *supra* note 4, at 111. See Smith, *supra* note 20, at 310 (“Law, like surgery, loses a certain number of patients. It has been the function of equity to cut down this loss, not by an entire abrogation of the general rule . . . but by a modification of the rule in the particular case.”).

the authority of equity and in contravention of Federal Rule 8(a), impose heightened pleading standards in all civil rights cases simply because to do so would further the efficient administration of justice.⁴⁴⁵ Nor could the Federal Rule 23 prerequisites to certification of a class action be summarily ignored.⁴⁴⁶ Rather, equity could offer relief from hardship or mischief created by a particular application of a procedural rule.⁴⁴⁷

The historical continuity of equity should be channeled through moderate and restrained interpretations of the Federal Rules of Civil Procedure. No principle dictates that a court enforce to the outermost limit the mandate of a particular Federal Rule. An unforgiving interpretation of a Federal Rule is inconsistent with the broad judicial discretion that is the principal reported accomplishment of the Federal Rules.⁴⁴⁸ Such an interpretation is also inconsistent with Federal Rule 1.⁴⁴⁹ Procedural insufficiencies typically will present a conflict between the principles of equity, on one hand, and a particular Federal Rule on the other.⁴⁵⁰ As with any conflict analysis, these interests should be balanced.⁴⁵¹ Thus, when the application of a Federal Rule is unfair,

445. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992), *reversed*, 507 U.S.163 (1992). See generally William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7 (1994).

446. See FED. R. CIV. P. 23(a) (identifying prerequisites of numerosity, commonality, typicality and adequacy).

447. See *supra* notes 75–78, 86–90, 146–48 and accompanying text.

448. See *Bone*, *supra* note 161, at 98–100; *Subrin*, *supra* note 23, at 946–48. See also Charles Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448–49 (1936) (describing the new rules as “modern, elastic and sleek”). See also *supra* note 323.

449. See *supra* notes 422–27 and accompanying text.

450. See, e.g., *Tyson v. City of Sunnyvale*, 159 F.R.D. 528, 530 (D. Cal. 1995) (just, speedy, and inexpensive determination requires that court exercise its discretion to extend the time period for serving process when process was served one day late); *TPI Corp. v. Merch. Mart of S.C., Inc.*, 61 F.R.D. 684, 692 (D.S.C. 1974) (notwithstanding considerable contrary authority, court permitted permissive intervention because justice required that the party requesting intervention be granted it); *Rollerblade, Inc. v. Rappelfeld*, 165 F.R.D. 92, 95 (D. Minn. 1995) (extending time for service of process under Rule 4(m)); *Rashidi v. Albright*, 818 F. Supp. 1354, 1357 (D. Nev. 1993) (postponing responsive pleadings until motion for summary judgment was considered in order to ensure a just, speedy, and inexpensive determination of action); *Lawhorn v. Atlan. Ref. Co.*, 299 F.2d 353, 357 (5th Cir. 1962) (“If one hauled into court as a defendant has a claim but the adversary plaintiff has not, the nominal defendant ought to be allowed to name the time and place to assert it The Rules should be construed in such a manner as to do substantial justice. Under the pain of foregoing permanently a ‘valid counterclaim’ by such a putative defendant, the rules ought not to be construed in any such barratrous fashion.”).

451. See generally DAVID P. CURRIE ET AL., *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 179–80 (6th ed. 2001); Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

inefficient, too complicated, or otherwise deficient, the applicability of that rule should be re-examined with a view to a more moderate and restrained interpretation.⁴⁵² Within this framework, correction is a product of either the policy and purpose of the traditional principles of equity, or their proxy, Federal Rule 1.⁴⁵³ The ability of equity to correct problems stemming from application of strict law modernizes and reforms the legal doctrine while also boosting its societal legitimacy. Equity is a fundamental method by which the law has sought to meet changing conditions.⁴⁵⁴ Legislative amendment cannot, of course, correct the mischief created by changed conditions; at best, amendment avoids the hardship in subsequent cases, and only then if the mischief were to repeat.⁴⁵⁵ Moreover, the legislative amendment may itself create problems upon changed circumstances.⁴⁵⁶ Equity thus plays an important role in the growth of the law, and without that engine, “our law will be moribund, or worse.”⁴⁵⁷

Equity was a court of vast jurisdiction, and occasionally throughout history was eminently progressive in increasing its authority.⁴⁵⁸ Hardship and mischief created by the procedural infrastructure need not be tolerated. On behalf of the state, equity has stood in this breach since time far beyond memory. Why not now? Our courts are not inferior to those of our ancestors. The jurisprudence of the twenty-first century is not beneath that of the 14th century.⁴⁵⁹ The administration of equity

452. See, e.g., *Smith v. Morrison-Knudsen Co.*, 22 F.R.D. 108, 113 (D.N.Y. 1958) (“Rules of procedure, like principles of substantive law, should be interpreted to meet the challenge of changing conditions of life and litigation . . . Problems created by [the mobility of Americans to travel abroad] can be solved by our law’s inherent flexibility.”); *United States v. U.S. Cartridge Co.*, 6 F.R.D. 352, 354 (D. Mo. 1946) (court was “loathe” to give strict construction to Rule 33 “absent the showing that such is necessary to promote the ends of justice”).

453. The traditional principles of equity may be more limited after *Grupo Mexicano*, but that case should usually be distinguishable since the relief sought there was not the type of relief “traditionally accorded by courts of equity” and because it had been “specifically disclaimed by longstanding judicial precedent.” 527 U.S. at 322.

454. See SMITH, *supra* note 53, at 209 (crediting Sir Henry Sumner Maine for the famous dictum that there are three methods by which the law has sought to meet changing conditions: (i) fictions; (ii) legislative amendment; and (iii) equity). See also JOHNSON, *supra* note 19, at 352–53.

455. See generally MANNING, *supra* note 308, at 767.

456. See COOPER, *supra* note 42, at 1944 (“[I]t may be better to leave judges free to adapt to the challenges without interference from statutes and rules framed for the last war by Congress and the rulemaking committees.”). See also *supra* note 312.

457. BORDWELL, *supra* note 279, at 749.

458. See *supra* notes 99–104 and accompanying text. See also SIMKINS, *supra* note 177, at 6.

459. See CAMPBELL, *supra* note 4, at 112.

requires skill, nerve, good judgment, detachment, compassion, ingenuity, and the capacity to sustain confidence.⁴⁶⁰ But such is the task of judging.⁴⁶¹ Judges routinely administer the substantive principles of equity in the application of substantive law.⁴⁶² Procedure, too, outside the context of the Federal Rules has been dramatically influenced by the substantive principles of equity.⁴⁶³ Formalistic interpretations of Federal Rules of Civil Procedure are inconsistent with and unnecessary within a unified system of law and equity.

B. Accommodating Equity in the Construction of Procedural Rules

Application of the substantive principles of equity is best accommodated by succinct and generalized procedural rules that accord judges broad discretion. A proposal that our unified system of law and equity be administered by modern, elastic and sleek procedural rules should be relatively uncontroversial. Of the various fronts where the rules-standards war have been fought,⁴⁶⁴ the rhetoric of discretionary standards has clearly prevailed on the civil procedure battlefield.⁴⁶⁵ Indeed, the complication, trivialization and ossification of the Federal Rules seems to have commenced in spite of our allegiance to a set of rules that despises formality.⁴⁶⁶ My effort here is to urge a commitment and return to more flexible and discretionary rules of procedure that reflect the rhetoric and the common perception that the Federal Rules are “all equity.”⁴⁶⁷

460. See GEOFFREY HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 65 (1978).

461. See David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2090 (1997) (broad discretion in the hands of judges may be “a risky and uncomfortable state of affairs—but it is always risky and uncomfortable when our well-being lies in the hands of heroes”).

462. See *supra* notes 291–305 and accompanying text.

463. See generally Weinstein & Hershenov, *supra* note 12; Subrin, *supra* note 23, at 970–82; Marcus, *supra* note 177, at 725; Resnik, *supra* note 262, at 376; Waters, *supra* note 262, at 542–51; Laycock, *supra* note 12, at 53–54. See also Chayes, *supra* note 262, at 1292–96 (discerning in public law litigation the “triumph of equity”). See also *supra* note 323.

464. See generally Pierre J. Schlag, *Rules and Standards*, 33 U.C.L.A. L. REV. 379 (1985); see, e.g., Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 749 (1982); Erwin Griswold, *The Judicial Process*, 31 F. B. J. 309, 314 (1972); Joseph Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 12–13 (1984).

465. See Clark, *supra* note 448, at 448–49; Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937). See also *supra* note 323.

466. See *supra* notes 307–48 and accompanying text.

467. See *supra* notes 307–48 and accompanying text.

To be sure, strict definite rules have their virtues.⁴⁶⁸ Some interests may require the protection of more comprehensive, predictable and uniform mandates.⁴⁶⁹ In criminal or commercial law contexts, for example, one can argue that it is better to have a bad rule that everyone knows than a new and better rule of which no one is certain.⁴⁷⁰ Similarly, a formalist procedure may advance certain values.⁴⁷¹ Indeed, some argue that judicial discretion threatens the internal morality and general legitimacy of law by undermining the notice and publicity requirement of rules, which are fundamental elements of a legal system in the formalist tradition.⁴⁷² Moreover, even in the context of procedural rules, strictness and definiteness have an illustrious pedigree. The common law courts embraced certainty, predictability and uniformity as primary norms and celebrated the technicality that engineered that system.⁴⁷³

But the merger of law and equity changed our ability to (micro)manage procedure. An autonomous system of equity enjoyed the

468. See *supra* notes 91–98 and accompanying text. See generally Schlag, *supra* note 464, at 400–01 (cataloging the superficial virtues and vices of rules and standards).

469. See Johnson, *supra* note 19, at 355. Cf. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“in most matters it is more important that the applicable rule of law be settled than that it be settled right”).

470. See *Sony Corp. v. Bank One*, 85 F.3d 131, 145 (4th Cir. 1996) (Widener, J., dissenting) (crediting certainty as the cardinal principle for more than 200 years of commercial law); Bradley M. Elbein, *The Hole in the Code: Good Faith and Morality in Chapter 13*, 34 SAN DIEGO L. REV. 439, 485–87 (1997); Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 355–56 (1988) (articulating the need for uniformity in criminal law); Stephen G. Bene, Note, *Why Not Fine Attorneys? An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 921–22 (1991) (discussing role of predictability in calculation of benefits and costs of criminal activities under general theory of deterrence); Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2036 (1992) (stating that predictability in sentencing scheme fosters deterrence).

471. See generally Robert G. Bone, *Rethinking the “Day in Court” Idea and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights (Part I)*, 1973 DUKE L.J. 1153 (1973); John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657 (1994); Jerry Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Value*, 44 U. CHI. L. REV. 28 (1976); Robert A. Bush, *Dispute Resolution Alternatives and Achieving the goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893 (1984); JOHN RAWLS, *A THEORY OF JUSTICE* 235–39 (1971).

472. See LON L. FULLER, *THE MORALITY OF LAW* 35 (2d ed. 1969) (stating that it is “very unpleasant to have one’s case decided by rules when there was no way of knowing what those rules were”).

473. See *supra* notes 156–72 and accompanying text.

flexibility and discretion to prevent hardship caused by procedural insufficiency and to fulfill the curative purpose of equity.⁴⁷⁴ A unified system of law and equity seems less capable of accommodating individualized justice.⁴⁷⁵ And more and longer procedural rules will never anticipate all of the eccentricities that fate or human ingenuity are “virile enough to devise.”⁴⁷⁶ Roscoe Pound recognized this and favored a flexible procedural system that granted judges liberal discretion “despite his emphasis on certainty.”⁴⁷⁷ Similarly, Charles Clark insisted on flexibility and discretion “even when pragmatism dictated the need for more detail and complexity.”⁴⁷⁸

The potent legacy of equity in various non-procedural contexts demonstrates that judges can be more than umpires.⁴⁷⁹ Procedural rules could likewise be drafted with more discretion to allow and encourage judges to apply their judicial skill.⁴⁸⁰ The solution, then, is to avoid elaborate amendments tailored specifically to address particular procedural insufficiencies.⁴⁸¹ Such amendments perpetuate a cycle that leads to the creation of further procedural insufficiencies that, in turn, require still more elaboration.⁴⁸² That cycle could be broken with broader and more discretionary forward-looking rules that facilitate vigor and common sense and efficiency and fairness in their application.

One need not be especially creative to develop talking points for equity-based reforms to the Federal Rules. Prior to the merger of law and equity in 1938, the federal courts operated courts of equity for more than a century under the Federal Equity Rules. A comparison of the current procedural rules to their professed source, would be an obvious

474. See *supra* notes 86–90 and accompanying text.

475. See *supra* notes 307–84 and accompanying text.

476. See Campbell, *supra* note 4, at 113.

477. Toran, *supra* note 195, at 374 (citing Bone, *supra* note 161, at 98–100 and Subrin, *supra* note 23, at 946–48).

478. Toran, *supra* note 195, at 376 (citing Subrin, *supra* note 23, at 956–66, 977, 995–96; Resnik, *supra* note 43; Charles E. Clark, *The Federal Rules of Civil Procedure: 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 448 (1958); AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART II, CIVIL CASES (1934)).

479. For a discussion of the potent, if unappreciated legacy of equity in contemporary jurisprudence, see *supra* notes 291–305 and accompanying text.

480. See Frierson, *supra* note 32, at 404.

481. For a discussion of the increasing number and length of amendments to the Federal Rules, see *supra* notes 307–84 and accompanying text.

482. See *supra* notes 307–10 and accompanying text.

baseline.⁴⁸³ In the context of class actions, for example, consider the old Federal Equity Rule which provided in its entirety that:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.⁴⁸⁴

Would we not trust the reasoned, intelligent discretion of judges trained for their task to apply this rule and to satisfy as many competing demands as that particular application of the rule presents?⁴⁸⁵ The certification of class actions can, of course, destroy individual rights, and I do not intend to devalue the many difficulties presented by mass solutions.⁴⁸⁶ However, in situations like *Amchem* or *Ortiz*, for example, a district judge applying this broad discretionary rule would be permitted to balance all of the difficult issues and competing interests of the various parties to determine whether litigation as a settlement class would be appropriate and fair and efficient. Indeed, the Supreme Court suggested in both of these cases that the proposed settlement was both substantively and procedurally fair and that the settlement proposed an efficient resolution of a phenomenon that defied customary judicial administration.⁴⁸⁷ Yet the classes in those cases could not be certified, the

483. For a discussion of the relationship between the Federal Equity Rules and the Federal Rules of Civil Procedure, see *supra* notes 240–77 and accompanying text.

484. Federal Equity Rule 38 (1912).

485. See generally Johnson, *supra* note 19, at 354.

486. For critiques of aggregation, see, e.g., Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1056 (1995) (the district court approved a “tainted settlement . . . [t]o help rid the court system of the terrible burden imposed by . . . asbestos litigation”); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 847 (1987) (“the move toward collective [as opposed to individual] responsibility in tort law is not, on the whole, a sensible development”); Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J. L. & COM. 1 (1990); and Trangsrud, *supra* note 354. For a defense of aggregation, see, e.g., Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990); Bone, *supra* note 471; Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479 (1997); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff’s Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); and Rosenberg, *supra* note 347; and David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996). See generally Shapiro, *supra* note 347; Tidmarsh, *supra* note 352.

487. See *supra* notes 368–75 and accompanying text.

Court explained, because the elaborate Federal Rule 23 imposed substantive, err “structural” protections of its own.⁴⁸⁸

The ultimate result in *Amchem* or *Ortiz* might have been the same even under a broad discretionary rule. Even so, it should not have been a procedural rule that dictated the result.⁴⁸⁹ A broad and discretionary rule would not impose structural requirements and would instead bring into relief the competing interests at stake. Procedural rules should not, indeed cannot, enlarge, abridge or modify substantive rights.⁴⁹⁰ The primary and ultimate issue in those cases was protection of the due process and other substantive rights implicated by the settlement class.⁴⁹¹ Interpretation and application of strict definite procedural rules instead dominated the Court’s attention.⁴⁹²

In light of the increasing strictness of the procedural infrastructure, it is perhaps not surprising that many proposed reforms for the resolution of mass tort claims are looking to bankruptcy courts as a forum and model.⁴⁹³ Bankruptcy courts, of course, are courts of equity,⁴⁹⁴ but there,

488. See *supra* notes 368–75 and accompanying text.

489. See generally Koniak, *supra* note 486, at 1056 (describing a “tainted settlement . . . [t]o help rid the court system of the terrible burden imposed by . . . asbestos litigation.”).

490. See 28 U.S.C. § 2072 (2000).

491. See generally Berry, *supra* note 45.

492. See *supra* notes 368–75 and accompanying text.

493. See generally Cooper, *supra* note 42; Hazard, *supra* note 362; Weinstein & Hershenov, *supra* note 12, at 303, 320; Thomas E. Willging, *Appendix C: Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, in REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, 187 F.R.D. 328, 387–404 (1999); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise—Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045 (2000); Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Actions to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405 (1999); Sheldon S. Toll, *Bankruptcy and Mass Torts: The Commission's Proposals*, 5 AM. BANKR. INST. L. REV. 363 (1997); Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 855 (1984); Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 383 (1994); Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43 (2000); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1457 (1995) (finding bankruptcy reorganization superior to class action for resolving mass torts while protecting interests of future claimants); Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 488 (1995) (asserting that bankruptcy court is the “best forum” for mass tort future claims cases). See also AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* 12 (1994) (“Serious questions . . . can be raised as to whether bankruptcy courts can cope with the massive litigation ancillary to a complex reorganization proceeding, as well as whether they can achieve equity between early- and late-filing claimants.”); Edith H. Jones, *Rough Justice in*

too, the traditional flexibility and discretion of equity seem to be mired within a very detailed code⁴⁹⁵ and an extensive set of procedural rules.⁴⁹⁶ Indeed, bankruptcy courts seem to be equity courts largely in name only.⁴⁹⁷ But the successful—and equitable—resolution of mass tort claims should not require escape to an alternative system, as the substantive principles of equity should inhere in the unified system of law and equity administered pursuant to the Federal Rules of Civil Procedure.

Procedural rulemakers can have their cake and eat (at least some of) it too. Future amendments to the Federal Rules should feature flexibility and discretion. Elaborate legislative drafting to contemplate all conceivable applications can create hardship and mischief. Thus we should be skeptical of strictness, and tolerate rigidity only in circumstances where the norms of certainty, predictability and uniformity are particularly compelling. In circumstances where those norms are present, but are not particularly compelling, suggested limitations or applications could be included in the rule but relegated to a secondary, illustrative or non-binding status.

Specifically, I recommend three techniques that procedural rulemakers could use to suggest, without imposing constraints on the discretion and flexibility of judges. First, rulemakers can signal suggested applications of procedural rules through more elaborate promulgation of Committee Notes. The Rules Enabling Act requires that amendments include “an explanatory note . . . and a written report explaining the body’s

Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?, 76 TEX. L. REV. 1695, 1702 (1998) (criticizing National Bankruptcy Review Commission proposal, and bankruptcy approach generally, questioning whether bankruptcy approach is truly improvement over class action approach).

494. See Hon. Marcia S. Krieger, “*The Bankruptcy Court is a Court of Equity*”: *What Does that Mean?*, 50 S.C. L. REV. 275 (1999). See also *infra* note 493 and *supra* note 497.

495. See 11 U.S.C. §§ 1–1330.

496. See F. R. BANKR. P. 1–9032.

497. See Krieger, *supra* note 494, at 310 (“From historical, procedural, jurisprudential and practical perspectives the bankruptcy court is not a court of equity. It is, instead, a specialized court of limited jurisdiction applying statutory law that embodies a particular, often changing, social objective.”); Steve H. Nickles, *Another Way of Thinking About Section 105(A) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7, 16 (2000) (“Equitable principles and rules, however, are not a source of general authority to act beyond or different from the Bankruptcy Code. So, even if there is a real and lawful basis for bankruptcy judges to assume the role of equity chancellors, this role gives them little reason or room to add substantive, supplemental law to the Bankruptcy Code.”); Jason A. Rosenthal, *Courts of Inequity: The Bankruptcy Laws’ Failure to Adequately Protect the Dalkon Shield Victims*, 45 FLA. L. REV. 223, 226–32 (1993).

action.”⁴⁹⁸ The Advisory Committee frequently articulates the purpose of a rule or an amendment in these Committee Notes, and offers guidance on future interpretations.⁴⁹⁹ “Over the years, the Notes have increased in significance, and they now play an integral role in the rulemaking process.”⁵⁰⁰ Thus in many circumstances the procedural norms of predictability, certainty and uniformity might be satisfied by articulating the desired applications in Committee Notes. This technique would allow rulemakers to signal particular desired outcome, but would not rigidly constrain district judges.

Second, procedural rulemakers could recognize a hierarchy of rules within the Federal Rules of Civil Procedure, subordinating procedural rules of particular application to primary meta-rules containing broad discretionary mandates.⁵⁰¹ For example, a broad discretionary class action rule (perhaps similar to the old Federal Equity Rule or to the current Federal Rule 23(a)) could be adopted as a primary and dominant rule. Suggested applications of or limitations upon the general

498. 28 U.S.C. § 2073 (1988).

499. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1112 (2002) (citing FED. R. CIV. P. 4, Advisory Committee Note (1993) (“The general purpose of this revision is to facilitate the service of the summons and complaint.”); FED. R. CIV. P. 26 Advisory Committee Note (1993) (“[a] major purpose of the revision [to Rule 26(a)] is to accelerate the exchange of basic information about the case”); *id.* Advisory Committee Note (2000) (stating that the amendments “restore national uniformity to disclosure practice [and] to other aspects of discovery”); FED. R. CIV. P. 30 Advisory Committee Note (1993) (explaining that the aims of new Rule 30(a)(2)(A) are to assure judicial review before any side takes more than ten depositions without consent of other parties and “to emphasize that counsel have a professional obligation to develop a Mut. cost-effective plan for discovery”); FED. R. CIV. P. 33 Advisory Committee Note (1993) (“The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice.”); FED. R. CIV. P. 45 Advisory Committee Note (1991) (listing five purposes for the amendment); FED. R. CIV. P. 53 Advisory Committee Note (1991) (“The purpose of the revision is to expedite proceedings before a master.”); FED. R. CIV. P. 77 advisory committee's note (1991) (“The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment.”); FED. R. CIV. P. 50 Advisory Committee Note (1991) (“Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard.”); FED. R. CIV. P. 50 Advisory Committee Note (1993) (reaffirming that “the 1991 revision . . . was not intended to change the existing standards under which ‘directed verdicts’ could be granted”)).

500. Struve, *supra* note 499, at 1112. Indeed, the article suggests that, because of the uniqueness of the Congressional delegation to the Supreme Court of the rulemaking authority, the Courts should accord the Notes “authoritative effect.” *Id.* at 1103. If Professor Struve’s proposal proves to be as persuasive as it is fascinating, my recommendation that the Notes be used as secondary, illustrative and non-binding signaling would obviously be ineffectual.

501. Of course, I suggest in Part V.A., *supra*, that Federal Rule 1 outlines such a dominant purpose.

principle(s) could be expressed separately.⁵⁰² Such a framework would avoid the hardship created by strict applications, either because the particularized rule could be narrowly construed in light of the broader mandate or because the particularization could be expressly subordinate to the primary mandate. Although none of the current Federal Rules of Civil Procedure reflect this organization, one might consider the Federal Rules of Evidence as a possible model.⁵⁰³ Federal Rule of Evidence 403, for example, provides broad discretionary prerogative for a judge to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice”⁵⁰⁴ Rules 404 through 415 then target specific circumstances that may curb that discretion in particular circumstances.⁵⁰⁵ A similar structure of meta- and subordinate procedural rules could allow procedural rulemakers to limit discretion while allowing the principles of hierarchy to avoid hardship and mischief that could be created by strict and technical applications of subordinate rules.

Finally, procedural rules could simply be drafted with more hortatory and less mandatory language. A renewed commitment to discretionary and flexible rules could provide a durable corpus of procedural rules that would not require constant tinkering by amendment. Although a new structural framework for procedure may be unnecessary, rulemakers might consider something entirely new. The *Restatements of Laws*, for example, tend to follow a model where the governing rules are stated broadly with certain finer points relegated to a secondary and often non-

502. Suggested applications could refer to the current typology of actions contained in Federal Rule 23(b); suggested limitations could be those currently detailed in Federal Rule 23(c).

503. I thank and credit Professor Peter Nicolas for suggesting this interesting analogue.

504. FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

505. See FED. R. EVID. 404 (“Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes”); *id.* 405 (“Methods of Proving Character”); *id.* 406 (“Habit; Routine Practice”); *id.* 407 (“Subsequent Remedial Measures”); *id.* 408 (“Compromise and Offers to Compromise”); *id.* 409 (“Payment of Medical and Similar Expenses”); *id.* 410 (“Inadmissibility of Pleas, Plea Discussions; and Related Statements”); *id.* 411 (“Liability Insurance”); *id.* 412 (“Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition”); *id.* 413 (“Evidence of Similar Crimes in Sexual Assault Cases”); *id.* 414 (“Evidence of Similar Crimes in Child Molestation Cases”); *id.* 415 (“Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation”). See *Frank v. County of Hudson*, 924 F. Supp. 620, 624 (D.N.J. 1996) (“FRE 413–415 ‘are permissive rules of admissibility, not mandatory rules of admission’”) (quoting Memorandum from Department of Justice to United States Attorneys 3 (July 12, 1995)).

binding status as “comments” or “illustrations”.⁵⁰⁶ Similarly, the *Model Code of Professional Responsibility* provides layers of Canons, Ethical Considerations and specific Disciplinary Rules.⁵⁰⁷ In both of these examples, the multiple layers of authority accommodate the overactive lawmaking gland⁵⁰⁸ with minimal interference to the controlling fundamental principles. These models could provide a way for procedural rulemakers to signal certain outcomes, without risk of creating procedural hardship and mischief.

All three proposals for modifying the construction of procedural rules underscore the significance of discretion and flexibility. In a unified system of law and equity, the procedural infrastructure must allow the substance of equity to flourish. Until judges are inclined to invoke equity as a justification for avoiding the application of a procedural rule that would create hardship,⁵⁰⁹ it is especially important that the moderating force of equity be incorporated into the procedural infrastructure through discretion and flexible rules.

VI. CONCLUSION

The wisdom of dual systems of law and equity was the ability of the latter to correct the substantive and procedural deficiencies of the former. The genius of a unified system of law and equity was the notion that the substance of law and equity could be merged *procedurally* without affecting the substance of either law or equity. But a problem is presented when the procedural infrastructure of the unified system begins to interfere with the traditional jurisdiction of equity. This phenomenon is underway. And unless the principles of equity are allowed to trump the rules of the procedural infrastructure charged with the administration of its substantive principles, traditional equity is impaired.

506. See, e.g., RESTATEMENT (SECOND) OF PROPERTY § 4.1 (1981) (including restatement of Validity of Disabling Restraint, with comments and illustrations); RESTATEMENT (SECOND) OF JUDGMENTS § 73 (including restatement of Changed Conditions supporting relief from judgment, with comments and illustrations).

507. See generally Nancy B. Rapoport, *Turning & Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913, 941 (1994) (explaining that Canons define what conduct is expected of attorneys; Ethical Considerations are guidelines for attorneys to act ethically; and Disciplinary Rules are minimum standards required of attorneys).

508. See *supra* note 455 and accompanying text.

509. See *supra* Part V.A.