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# FROM WRITS TO REMEDIES: A HISTORICAL EXPLANATION FOR MULTIPLE REMEDIES AT COMMON LAW

AARON BELZER<sup>†</sup>

In previous work, “Enforcing Rights,” I examined how courts confine remedies to a single context in constitutional litigation, allowing enforcement of a constitutional right by providing *either* a criminal *or* a civil remedy, but not both.<sup>1</sup> In contrast, outside the constitutional context, courts do not similarly limit remedies to a single context. This Essay builds on “Enforcing Rights” and previews a larger work suggesting a historical explanation for the emergence and persistence of multiple remedies in the non-constitutional context.

## INTRODUCTION

Courts often confine remedies to a single context in constitutional litigation, yet seldom do so in other arenas. Commentators have not yet examined the historical evolution of law that led to the availability of multiple remedies for non-constitutional harms.<sup>2</sup> Yet an examination of that evolution suggests an explanation for the prevalence of multiple remedies in this area: the separate development of private (common) law and American constitutional law. Such an explanation offers a plausible account of the emergence and persistence of multiple remedies for a single common law wrong.

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1. Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306 (2015).

2. Though many have examined the history of writ pleading at English common law, few have examined the evolution of law with a focus on why multiple remedies have persisted. See G. Edward White, *The Intellectual Origin of Torts*, 86 YALE L. J. 671, 672 (1977) [hereinafter White, *Intellectual Origins of Tort*] (discussing the emergence of tort as a distinct branch of law, and the collapse of the writ system, although not addressing the remedial implications of that demise); G. Edward White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212 (1976) [hereinafter White, *Jurisprudence*] (discussing the development of American jurisprudence and the divergence from English common law); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008) (discussing how the law of remedies became a separate subject of study and, in particular, noting the complicated nomenclature that surrounds the field); Note, *Tortious Interference with Contractual Relations In The Nineteenth Century: The Transformation Of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980) (discussing the progression of nineteenth century legal thinking, focusing specifically on the tort of interference with contractual relations and noting the distinct conceptualizations of tort and contract, but only mentioning in passing that “the old forms of action gave way to a new conception of ‘tort’ and ‘contract’ ... ” at 1511);

## HISTORY OF WRITS

Historically, in English law, a writ was a sealed letter from the King, usually written in Latin, and a prerequisite to bringing one's case before the Royal Courts.<sup>3</sup> The writ was literally a command from the King "that the case be brought before the Royal Court."<sup>4</sup> For a party to bring a case, he first had to obtain the appropriate judicial writ—a brief but specific statement of the "form of action" that also prescribed the specific type of judgment that could be awarded thereunder.<sup>5</sup> Because there were "few subjects of private litigation," there were accordingly few different writs "necessary to meet all ordinary cases."<sup>6</sup> For example, personal property law was in an embryonic stage, and real property law was concerned primarily with maintaining feudal tenures.<sup>7</sup> Judges hearing these cases had no discretionary power and were "fixed by iron rules."<sup>8</sup>

Initially, there was a tendency to hold the number of writs low to avoid variety or confusion in the causes of action. Moreover, writs were rigid and narrowly construed; because juries were illiterate, it was necessary to reduce the cases within the writs "to one simple issue of everyday fact."<sup>9</sup> However, as civilization became more complex and new relations arose, issues appeared that were "impossible to compress into the then existing writs."<sup>10</sup> Nevertheless, "common law judges, impelled by the habit of adherence to limitations" resisted increasing the number of writs.<sup>11</sup>

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3. See F.W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 299 (A.H. Chaytor & W.J. Whittaker, eds., 1909). Prior to the King's Courts becoming ubiquitous, until the twelfth century, there was an "intricate network of local courts ... ancient courts of the shires and the hundreds, courts older than feudalism, some of them older than the English Kingdom.... Above all of these rose the king's own court [which was] destined to increase." *Id.* at 306.

4. CONSTITUTION SOCIETY, *Definition of Writ*, [http://www.constitution.org/writ/writ\\_def.htm](http://www.constitution.org/writ/writ_def.htm) (last visited May 5, 2016).

5. MISS. CHANCERY PRACTICE, *The Ancient Judicial Writ* §1:2 (2013). Writs were markedly different from one another and each prescribed a method of procedures, pleading, trial, judgment, and remedy. There were a finite number of writs, and forms of actions, and "the substantive law administered in a given form of action [developed] independently of the law administered in other forms. Each procedural pigeon-hole contain[ed] its own rules of substantive law, and ... each has its own precedents." MAITLAND, *supra* note 3, at 298.

6. MISS. CHANCERY PRACTICE, *The Jury of Inquest* §1:3. See KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 81 (1875).

7. MISS. CHANCERY PRACTICE, *The Jury of Inquest* §1:3.

8. MAITLAND, *supra* note 3, at 298.

9. MISS. CHANCERY PRACTICE, *The Jury of Inquest* §1:3.

10. MISS. CHANCERY PRACTICE, *The Insufficiencies of the Judicial Writs* §1:4. See MAITLAND, *supra* note 3, at 340.

11. MISS. CHANCERY PRACTICE, *The Insufficiencies of the Judicial Writs* §1:4. Even in extraordinary cases, judges maintained "there should rather be a failure of specific justice than a modification of the established laws of the realm." *Id.* See also FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 563 (2d ed., 1898).

By the time of Henry II, the use of writs was becoming relatively commonplace in the English legal system.<sup>12</sup> New writs were drafted to accommodate new situations, with the Chancery often reusing old forms as boilerplate writs.<sup>13</sup> Creating new writs meant creating new forms of action, which defined the rights of the parties.<sup>14</sup> Opposition to creating new writs led to the adoption of the Provisions of Oxford 1258, which forbid the creation of new writs without the King's sanction.<sup>15</sup> Subsequently, new writs were created only with the express sanction of Parliament. Thus, in the thirteenth century, the forms of writ calcified, with each writ defining a specific form of action.

#### WRITS AND REMEDIES IN THE UNITED STATES

At its outset, the United States adopted English law, including the “rigid set of forms of relief.”<sup>16</sup> However, the Federal Rules of Civil Procedure, adopted in 1938, explicitly abolished certain writs, providing one form of action in civil cases.<sup>17</sup> Relief formerly available by a writ was thereafter only available through a civil action.<sup>18</sup> This change spawned the development of the modern understanding of “remedy.”

Detailed legal historical accounts of the evolution of remedies are scarce. But the available literature suggests that the modern conception of remedies—“what a court should do to prevent a threatened violation of law or to correct an actual violation of law”<sup>19</sup>—is much different than the historical concept of remedies.<sup>20</sup> Early American conceptions of remedy focused on the remedies as either a cause of action or as part of procedure, with certain consequences flowing naturally from that, while the modern idea of remedies instead examines more narrowly what a court can do to correct or prevent a violation of the law.<sup>21</sup> The historical devel-

12. MAITLAND, *supra* note 3, at 315; DIGBY, *supra* note 6, at 57.

13. POLLOCK & MAITLAND, *supra* note 11, at 559; MAITLAND, *supra* note 3, at 300, 340, 342.

14. See MAITLAND, *supra* note 3, at 341; See also *Definition of Writ*, *supra* note 4 (“[T]he ability to create new writs was close to the ability to create new rights, a form of legislation.”).

15. Ian Holloway, *Judicial Activism in an Historical Context: of the Necessity for Discretion*, 24 MEM. ST. U. L. REV. 297, 309 n.64 (1994) (noting however, that “[p]ublic pressure, however, caused the proscription to be somewhat modified [twenty-seven] years later,” which allowed Chancery clerks to vary existing writs to cover similar situations).

16. *Definition of Writ*, *supra* note 4. It should be noted here that the evolution of the courts of equity took a slightly different track than the courts of law. The explanation proposed here focuses on the development of the courts of law.

17. Although referred to as a “form of action,” the American system gradually became more focused more on the *cause* of action, rather than the procedural *form* the action took.

18. *Definition of Writ*, *supra* note 4. A few writs did persist however: the writ of habeas corpus, the writ of certiorari, the writs of mandamus and prohibition, writ of error coram nobis. Additionally, some states maintained various writs. *Id.*

19. Laycock, *supra* note 2, at 162.

20. *Id.* at 162; see Robert Palmer, *The Feudal Framework of English Law*, 79 MICH. L. REV. 1130, 1151, 1158, 1163 (1980–1981).

21. Laycock, *supra* note 2, at 162. “[I]n the late nineteenth and early twentieth centuries” the word remedy had multiple meanings. Sometimes “a remedy was a writ or cause of action. Sometimes it was used to refer to civil procedure.... Sometimes it was used in something like the modern sense to describe what a court could do to remedy a violation of law.” *Id.* at 175. See also, Note,

opment of writs and, relatedly, these two conceptions of “remedy,” when “distilled from their tangled separate origins,”<sup>22</sup> helps explain why modern courts permit multiple remedies for common law claims but not constitutional claims.

Under the writ system, the “jurisdiction, cause of action, substantive law, and remedy were all tied together” and specific to each writ, or form of action.<sup>23</sup> The explanation is partly cultural: with the rise of Victorian intellectualism, a trend toward conceptualization emerged, which “sought universal principles in academic fields of study[,] stressed ‘scientific’ methodologies and substituted secular theories for religious dogma.”<sup>24</sup> Along with conceptualism, a “second trend was the collapse of the system of common law writ pleading, [which had become] too random and arbitrary to [achieve] regularity and expediency in legal proceedings.”<sup>25</sup> The collapse of the writ system left a void that enabled the application of the conceptualists’ methodologies, which aimed to achieve a “scientific reorientation of techniques of legal analysis” through which one “derived general [legal] principles that had some operative meaning in practice.”<sup>26</sup>

The demise of the writ system is conventionally explained by dissatisfaction with its pleading system, “which was founded on enforced conformity to arcane technicalities.”<sup>27</sup> By the late nineteenth century, “the writ system became increasingly haphazard ... because of the grow-

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*supra* note 2 (The focus of the article is on third-party tortious interference with contracts, but it helps to explain why multiple remedies exist for some non-constitutional harms. The article isn’t explicit in saying this, but it sheds light on a theory that: because the jurisprudence and doctrine have developed over time, with overlapping and evolving theories about how/what was protected—for example, contract rights thought of as “property” rights, and so on—the *remedies* have possibly persisted while the underlying *causes of action* have been streamlined into “contract,” “tort,” or “property” claims.)

22. Laycock, *supra* note 2, at 162.

23. *Id.* at 170.

24. White, *Intellectual Origins of Tort*, *supra* note 2, at 672. Professor White describes “Victorian” as:

[A]fter 1850 the role of religion as a unifying force among American intellectuals was considerably diminished, and the sense that American civilization offered endless possibilities for individual growth and progress was sharply qualified. With these developments a new phase in the history of ideas in America emerged, best signified by the term “Victorian.” “Victorian” refers to a cultural and intellectual ethos that had originated in England during the middle years of Queen Victoria’s reign.

*Id.* at 675.

Further, White attributes the rise of “conceptualism” to and defines it as:

[P]ost-Civil War intellectuals were interested in restoring the sense of order and unity that had characterized 18th-century thought, but they rejected efforts to derive order and unity from “mythologic” religious principles. A particular interest of intellectuals in the quarter century after the war was conceptualization—the transformation of data into theories of universal applicability. Their source of unity was to be methodological: the “scientific” ordering of knowledge.

*Id.* at 676. White cites such notable legal conceptualists as Oliver Wendell Holmes and Nicholas St. John Green, among other philosophers. *Id.* at 676.

25. *Id.* at 672.

26. *Id.* at 681.

27. *Id.* at 679.

ing diversity of American law and the tendency of courts to create exceptions to the system's rigorous requirements."<sup>28</sup> The analytically unsatisfactory "haphazardness of the writ system was a source of irritation to those working with it."<sup>29</sup> Thus, alternatives influenced by the contemporaneous conceptualists' philosophies came under consideration.<sup>30</sup>

A movement to codify American laws was emerging during this time, with the extreme position being "total replacement of the common law with an American civil code."<sup>31</sup> That movement ultimately led to reform in the states, beginning with New York in 1848 adopting the New York Code of Procedure, abolishing the writ system's forms of action.<sup>32</sup> Twenty-three states had abolished the writ system by the 1870s.<sup>33</sup>

Additionally, diversity in American law and a judicial "preference for substance over form" led to increasing randomness as the technicalities of pleading were inconsistently relaxed, resulting in less certainty and predictability of fundamental legal rules.<sup>34</sup> Thus, because the writ system was "only indifferently adhered to during the early 19th century, its value as a classification device was undermined. [And its] emphasis on arcane particulars ran counter to a growing scholarly interest in deriving universal principles."<sup>35</sup>

Furthermore, "the social and intellectual climate in . . . America was markedly unlike that in England," and attitudes toward law and legal institutions, inspired by the Revolution and natural rights theory, "were unique rather than derivative."<sup>36</sup> This uniquely American ideology affected jurisprudential thinking too, with three features being particularly salient: (1) the idea that common law must always reflect current social attitudes; (2) the view that a written constitution is the ultimate source of legal principles; and (3) the "delegation of lawmaking power to a 'consti-

28. *Id.* at 678–79. White also notes as a factor contributing to the haphazardness, the absence of "conceptual unity in American Jurisprudence." *Id.* at 679.

29. *Id.*

30. *Id.*

31. *Id.* Obviously, that movement was unsuccessful, but it did catalyze the movement for a reform of civil procedure.

32. *Id.*

33. *Id.* Professor White notes that this conventional explanation is potentially overly dramatic: "Unfortunately, not enough scrutiny of the writ system has taken place to justify the conventional explanation." However, "the fact remains that the writ system was widely abolished in the 1850s with remarkably little opposition." *Id.* at 680–81.

34. See William E. Nelson, *The Reform of Common Law Pleading in Massachusetts 1760–1830: Adjudication as a Prelude to Legislation*, 122 PA. L. REV. 97, 120 (1973–1974) (noting a judicial preference for substance over form was explicitly enunciated in *Cole v. Fisher*, where [the Massachusetts Supreme Judicial Court] held 'a contest over the form of action . . . [to] be of little avail to the defendant' and left 'the case to the jury, to settle it as a question of fact, upon the principles . . .') (citation omitted); White, *Intellectual Origins of Tort*, *supra* note 2, at 681.

35. White, *Intellectual Origins of Tort*, *supra* note 2, at 681 (quoting Holmes who wrote that the writs were "in fact so arbitrary in character, and owe their origin to such purely historical causes, that nothing keeps them but our respect for the sources of our jurisprudence").

36. White, *Jurisprudence*, *supra* note 2, at 1212.

tutionalizing' agent of government."<sup>37</sup> The esoteric English pleading practice, which emphasized technical correctness in pleadings at the risk of "the most minor error in a writ" rendering the claim invalid, was counter to American attitudes.<sup>38</sup> Thus, although the colonialists "received the common law of England as the basis of their jurisprudence," they rejected those parts that "were inconsistent with their own views of justice and morality or with their own needs and circumstances."<sup>39</sup> In doing so, "an association of common law with currently dominant social attitudes and values took place throughout the colonies,"<sup>40</sup> which likely contributed to the random nature of the American writ system, and ultimately its demise.

The written Constitution also "imparted a new dimension to law in America"<sup>41</sup> It was a manifestation of universal principles meant to be reflective of social attitudes.<sup>42</sup> The interaction of constitutional and non-constitutional law redefined common law adjudication.<sup>43</sup> Common law became "Americanized" as the "principles of the Constitution were interpreted."<sup>44</sup> This Americanization, or constitutionalization, "among American jurists in creating an indigenous jurisprudence"<sup>45</sup> likely was a significant factor contributing to the consolidation (or elimination of) writs.

Importantly, private law and constitutional law developed along very distinct tracks, although their interaction is ubiquitous throughout the development of American jurisprudence.<sup>46</sup> This separate but interrelated development helps explain why courts afford multiple remedies for non-constitutional harms but not constitutional harms: constitutional law was a start-from-scratch project; private (common) law existed at the

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37. *Id.* at 1212. "[T]he belief that 'common' or 'nonconstitutional' law, however defined, must continually reflect currently held social attitudes; the tradition of a written constitution as the ultimate source of legal principles; and the delegation of lawmaking power to a 'constitutionalizing' agent of government."

38. White, *Jurisprudence*, *supra* note 2, at 1214; *id.* at 1215 ("technicalities would not be tolerated if they offended a communal sense of justice"). See Nelson, *supra* note 34 at 120 (noting the judicial preference for substance over form).

39. White, *Jurisprudence*, *supra* note 2, at 1216.

40. *Id.* at 1217. See Nelson, *supra* note 34 at 120 ("[T]he sole concern of the court had become the existence or nonexistence of a substantive right in the plaintiff.").

41. White, *Jurisprudence*, *supra* note 2, at 1220.

42. *Id.*

43. *Id.* at 1227.

44. *Id.* at 1251.

45. *Id.*

46. *Id.* at 1258. White also points out the critical role of the judiciary in the development of American jurisprudence:

[T]he path of jurisprudence in America reveals a continuous interaction among constitutional law, nonconstitutional law, and "private ordering," based on currently dominant ideas and values and on social and economic relationships. It also reveals an indispensable role for the judiciary as forger of links among those entities. Portraits of "legal history" that ignore the multiple sources of law in America and minimize the role of the judiciary are incomplete.

*Id.*

inception of America and was carried over from England. Private law was established when American law burgeoned; the multiple remedies afforded for the various writs simply persisted into our unique system.

#### AFTER WRITS

In any event, abandonment of the writ system and the adoption of procedural codes effectively eliminated the procedural nature of writs. Thus, it seems likely that the writs' causes of action became consolidated or standardized into homogeneous silos of 'contract,' 'tort,' and 'property' claims.<sup>47</sup> However, it appears as though only the underlying causes of action became standardized and the existing *remedies* (in the contemporary sense—what courts can do to correct a violation of the law) for each underlying cause of action persisted to enforce each of these rights to its full extent.<sup>48</sup>

The suggestion that the existence of multiple remedies can be attributed to the development of our modern legal system from the writ system is further implied in the literature by passages such as: “There is no reason to have a different law of damages, or a different law of injunctions, for each cause of action, as though we had never abandoned the writ system.”<sup>49</sup> Such thinking suggests that perhaps when the writ system transitioned into the contemporary legal system, the multiple ‘remedies’ of the writ system persisted through that evolution.

Once the contemporary legal system abolished the writs, the conception of remedies, and specifically the idea of remedies as separate from the underlying rights (or writs), became blurry at best.<sup>50</sup> As noted,

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47. See Nelson, *supra* note 34, at 132-33 (A statute enacted in 1851 in Massachusetts, established a procedural code, which formally abolished the writ system, and “created generic pleas of contract, tort and replevin for litigating personal actions ...”); *Id.* at 125 (“courts came to analyze sealed contracts under the broader, more general rubric of contract.”); *Id.* at 121-25 (discussing the “generic form[s] of wrong,” such as “tort” or “contract” claims and describing these claims as “emerging substantive concept[s]” that plaintiffs could bring when a variety of forms of action writs would appropriately describe a legal harm).

48. See POLLOCK & MAITLAND, *supra* note 11, at 565 n.1, 565-68 (describing the “species” of each “genus” of different writs, which were used to address very nuanced issues under each broad category of writ).

49. Laycock, *supra* note 2, at 165.

The idea of correcting the violation of a substantive legal right ... is part of the modern idea of remedies. But ... the modern idea of remedy as a distinct phase of the lawsuit focused on how and to what extent to correct the violation of law. That distinction could not easily emerge under the writ system, in which jurisdiction, procedure, cause of action, substantive law, and remedy were all tied together in each writ. Blackstone implicitly equated remedies with writs; choosing what “remedy” to pursue meant choosing the appropriate writ.

*Id.* at 169-70.

50. Some time after 1885 John Austin, “distinguished primary rights” from “secondary rights.” Primary rights are those that do not arise from violations of other rights. Secondary rights, or “sanctioning’ rights ... do arise from the violation of other rights and duties.” In contemporary terms, secondary rights are analogous to remedies; primary rights are analogous to substantive rights from which remedies would follow for violation thereof. Austin’s work is the first we have seen that separates the concepts of rights and remedies. This conception of rights as separate from remedies is



the word “remedies” had many meanings.<sup>51</sup> In one sense, “remedy” meant the cause of action. But characterizations referring to the *procedure* for rectifying particular harms persisted as well.<sup>52</sup>

The writ system itself explains the different characterizations of writs as either “cause-of-action” writs or as what we think of as the contemporary “remedy” type of writs. Historically, there were two kinds of writs,<sup>53</sup> each issued at a different stage of the proceedings. “Writ” was a generic term; its primary function was to “convey the King's commands to his officers and servants.”<sup>54</sup> The contemporarily termed ‘remedy’ writs were issued after “adjudication and granted relief; we see the same usage in a more familiar context in surviving references to a ‘writ of injunction.’”<sup>55</sup> Conversely, the form-of-action writs, known as original writs, were issued to initiate the proceedings. They “were more like a complaint and summons than a grant of relief.”<sup>56</sup> The distinction among the two types of writs was a continuum rather than a bright line: “[s]ome original writs ... were original writs that led to distinctive relief.”<sup>57</sup>

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important because it is both relevant to the broader rights-making literature, and explains why remedies are limited for constitutional harms. Briefly, this “pure rights” concept is potentially enabling the Court to announce constitutional rights but without concomitantly designating a remedy to enforce them when they are violated. See Laycock, *supra* note 2, at 181 n.9 (citing John Austin). See also David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricting Remedies*, 2005 U. ILL. L. REV. 1199, 1212 (2005), suggesting that,

[t]he erosion of remedial measures over the past twenty-five years reflects hostility to substantive constitutional and statutory rights and creates very different worlds of rights in theory and in practice. By the steady adoption of remedial limitations, the Court and Congress have effected a significant cutback in civil rights at the operational level while avoiding the controversy that would be provoked by the direct abrogation of constitutional and statutory rights.

51. Laycock, *supra* note 2, at 175 (noting that “remedy” had many meanings). Those “usages persisted into the second half of the twentieth century, with little in the way of explanation. Occasionally, all three usages appear in the writings of the same person.” *Id.* Furthermore,

[T]he choice of remedy [was implicitly equated] with choice of the proper form of action. To obtain a remedy at law, one first had to obtain a writ. It must have seemed a natural verbal shortcut—probably not even recognized as a shortcut—to say that the remedy for dispossession from land was ejectment and the remedy for breach of contract was assumpsit. Each writ culminated in a remedy if plaintiff succeeded; each writ also entailed many other functions that we would not think of as remedial today

*Id.*

52. See Laycock, *supra* note 2, at 179. The lasting (different) meanings of “remedy” serves to complicate tracking the evolution, as there seems to be no consistent taxonomy to give clarity to what the (particularly older) literature is actually referring to when mentioning “remedies.” “References to the forms of action as ‘remedies’ persisted ... Other survivors of the writ system—most notably mandamus, prohibition, habeas corpus, and quo warranto, collectively described as prerogative writs and more recently as extraordinary legal remedies—are remedies in the modern sense.” *Id.*

53. This is an accurate, but fairly broad generalization. An in depth history of the writ system (which is *fascinating*) is way beyond the scope of this Article. That history is also somewhat muddled; different scholars provide slightly different accounts of medieval English common law.

54. Laycock, *supra* note 2, at 180–81.

55. Laycock, *supra* note 2, at 180–81 (internal citations omitted).

56. *Id.* at 180–81 (internal citations omitted); THEODORE F.T. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 341 (2d Ed. 1936). See also MAITLAND, *supra* note 3, at 299.

57. Laycock, *supra* note 2, at 180–81 (internal citations omitted). See 3 ILL. PRACTICE *Civil Procedure Before Trial, The History of Pleading—The Forms of Action* § 22:1 (2012).

Unfortunately, adopting the procedural codes did little to clarify the blurred terminology distinguishing a cause of action from a remedy. Form-of-action writs were the method for obtaining remedies in the writ system, “and came themselves to be referred to as remedies.” When the “civil action substituted for the forms of action . . . by a sort of transitive law, the one civil action” also became known as a “remedy.”<sup>58</sup> Thus, despite the distinction between the form-of-action writs and the remedy-writs, when writs were abolished for procedural codes, the terminology remained mostly static. Essentially, the causes of action became streamlined and the multiple remedies persisted, but no taxonomy was available to effectively differentiate the two.

With the abolition of the writ system for the contemporary American legal system, it seems that while the underlying *cause-of-action* writs became consolidated into generic silos of “contract,” “tort,” and “property” claims, the *remedial* side of writs persisted as recourse regarding the differing degrees of harm—the nuances that existed with respect to the old writs for each (thence abolished) degree of a particular type of harm. That is, the American legal system’s evolution consolidated the cause-of-action writs, but consolidating the multiplicity of remedies that existed to effectively enforce the nuances of each of these rights was impossible. As a result, those multiple remedies persisted for non-constitutional harms. As for constitutional harms, however, that multiplicity of remedies has never existed. Indeed, this historical account helps explain why courts routinely afford multiple remedies in the non-constitutional context while limiting remedies in the constitutional context. The former realm was born with multiple remedies, whereas the latter realm has no history with multiple remedies and had no reason to adopt them.

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If a case was of sufficient interest to the central government to warrant it being heard in the royal courts, the Chancellor of England would issue a writ that authorized the case to be filed in those courts. This writ, besides authorizing the royal courts to hear the case, specified the substantive and procedural rules that were to govern its resolution. These substantive and procedural rules surrounding each writ later became known as a form of action.

With the passing of the feudal era, the writ system remained to govern access to the royal courts; however, after the feudal courts were no longer in existence, there was no alternative forum. Furthermore, while the issuance of writs had originally been a flexible procedure, as time passed, it became more rigid. . . . If there was no writ, there was no right. The existence of a procedural remedy dictated the recognition of the substantive right.

58. Laycock, *supra* note 2, at 185.