Notre Dame Law Review

Volume 97 | Issue 5 Article 1

6-2022

Getting into Equity

Samuel L. Bray
Professor of Law, Notre Dame Law School

Paul B. Miller
Professor of Law, Associate Dean for International and Graduate Programs, and Director of the Notre Dame Program on Private Law, Notre Dame Law School

GETTING INTO EQUITY

Samuel L. Bray & Paul B. Miller***

For two centuries, common lawyers have talked about a "cause of action." But "cause of action" is not an organizing principle for equity. This Article shows how a plaintiff gets into equity, and it explains that equity is shaped by the interplay of its remedial, procedural, and substantive law. Equity is adjectival, that is, it modifies law rather than the other way around. Its power comes from remedies, not rights. And for getting into equity, what is central is a grievance. To insist on an equitable cause of action is to work a fundamental change in how a plaintiff gets into equity.

* Professor of Law, Notre Dame Law School.

** Professor of Law, Associate Dean for International and Graduate Programs, and Director of the Notre Dame Program on Private Law, Notre Dame Law School. The authors are grateful for comments from A.J. Bellia, Barry Cushman, Kellen Funk, Andrew Kull, John Langbein, Richard Re, and Henry Smith.

INTRODUCTION

One of the puzzles in the contemporary law of the federal courts is where an equitable cause of action comes from. Surely it has to come from somewhere, for everyone recognizes the legitimacy of injunctions like that in *Ex parte Young*.[1] But where?

That question is not easily answered. Having a cause of action was how a plaintiff would get into a court of law, but to get into equity, a plaintiff needed something quite different. A suitor in equity needed a grievance, a good story that would motivate the court. The story needed to connect up with some recurring pattern of equitable intervention, and these patterns were called "heads of equitable jurisdiction."[2] A plaintiff who didn't fit within one of the heads of equitable jurisdiction would be denied relief "for want of [e]quity"—not for failure to state a cause of action.[3]

At law, the cause of action determined everything about the case, and there was a 1:1 relationship between the cause of action and the plaintiff's claim. But the equitable patterns were looser. If the legal cause of action was like a computer file organization that uses folders, the equitable patterns worked more like tags. There might be one tag for a suit in equity, or there might be several. What equity was offering was not a kind of stand-alone justice, but something adjectival. It was correcting or supplementing the justice offered by law—patching holes, as it were. And a critical part of equity's attraction was the potency of its remedies.

These differences about the basis for litigation at law and in equity have been obscured for courts and scholars today. One consequence is that the Supreme Court has sometimes preferred to treat the availability of equitable relief as largely a matter of statutory interpretation, as in *Armstrong v. Exceptional Child Center, Inc.*[4] Yet that approach is not possible in cases involving non-statutory claims. Cases

---

1 *See* 209 U.S. 123 (1908). For debate about what exactly *Ex parte Young* stands for, see John Harrison, Ex Parte *Young*, 60 STAN. L. REV. 989 (2008); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269 (2020); David L. Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011).

2 *See, e.g.*, EUGENE A. JONES, MANUAL OF EQUITY PLEADING AND PRACTICE 31 (1916) ("[T]he plaintiff's narrative of his grievance . . . must state a case remediable under some head of equity jurisdiction . . . .").

3 *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA § 472, at 372 (2d ed., Boston, Charles C. Little & James Brown 1840) (1836) ("[W]henever there is no sufficient ground shown in the Bill for the interference of a Court of Equity, the defendant may demur to the Bill for want of Equity to sustain the jurisdiction.").

4 575 U.S. 320 (2015).

like *United States v. Texas*[5] force the courts to consider anew what it takes for a plaintiff to get into equity.

The ambition of this Article is to recover the traditional understanding of how plaintiffs got into equity, and to show how this understanding can help federal courts understand and inhabit equity today. We look primarily at the concurrent jurisdiction of equity.[6] In other words, our concern is primarily with those cases in which equity offers an alternative to what a plaintiff could get at law—especially an alternative remedy. This concurrent jurisdiction of equity is in contrast to the exclusive jurisdiction, i.e., the swathes of substantive law that are entirely the creation of equity (e.g., trust law).

The federal courts have equity jurisdiction, and the Supreme Court has decided many cases about its contours over the last quarter-century.[7] In this burgeoning set of new equity cases, the Court has looked to the traditional practices of equity to determine whether a particular equitable claim or remedy should be available. These are good developments.[8] By recovering the traditional understanding of the bases for equitable intervention, this Article provides a foundation for many of these cases and for new ones in the future.

The remainder of this Article is as follows. Part I diagnoses two reasons for the confusion about how to get into equity: one is a misunderstanding of procedural fusion, and the other is an attempt to read equity in terms of rights and correlative duties, much as

---

5 *See* United States v. Texas, No. 21-CV-796, 2021 WL 4593319, at *16–18 (W.D. Tex. Oct. 6, 2021), *cert. granted before judgment*, 142 S. Ct. 14 (2021) (mem.), *cert. dismissed as improvidently granted*, 142 S. Ct. 522 (2021) (mem.); *see also* Aditya Bamzai & Samuel L. Bray, Debs *and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. (forthcoming 2022).

6 The canonical formulation of the distinction between equity's three jurisdictions is in Justice Story's *Commentaries*: "The jurisdiction of a Court of Equity is sometimes concurrent with the jurisdiction of a Court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it." *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 33, at 32–33 (Boston, Hilliard, Gray & Co. 1836); *see also* 1 HENRY BALLOW, A TREATISE OF EQUITY 10–11 n.f (John Fonblanque ed., Dublin, Byrne, J. Moore, W. Jones, E. Lynch & H. Watts 1793). On the development of the concept, see David Yale, *A Trichotomy of Equity*, 6 J. LEGAL. HIST. 194 (1985). For a summary (as well as critique), see Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 665 (2007).

7 *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); Liu v. SEC, 140 S. Ct. 1936 (2020); Taggart v. Lorenzen, 139 S. Ct. 1795 (2019); SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954 (2017); Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663 (2014); CIGNA Corp. v. Amara, 563 U.S. 421 (2011); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006); eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999).

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

Blackstone did with the common law. Part II considers whether equity has "causes of action," and concludes that it does not. Part III offers an affirmative account of how to get into equity. It emphasizes the centrality of the grievance, as well as equity's loose organizing structure, its adjectival quality, and the priority of remedies. Part IV addresses contemporary implications.

I. CLEARING AWAY THE COBWEBS

This Part clears away two misunderstandings that can obscure how a plaintiff gets into equity. One is overreading the merger of legal and equitable procedure, for which the decisive moment in the federal courts is the adoption of the Federal Rules of Civil Procedure in 1938. The other is trying to think about equity in terms of correlative rights and duties, the deontic logic that Blackstone brought to the common law from Roman law.

A. Procedural Fusion

How does one get into equity? The very question might strike some as odd. Why single out equity? Why not instead simply ask how one brings a civil action? And framed in such a quotidian way, the question loses interest. That question is answered in elementary law school courses on civil procedure.

Even a reader alive to the fact that procedure once differed in law and equity might think the question a strictly historical one. Procedural fusion was a dream shared by many early American lawyers, and it was realized long ago in New York with the enactment of the Field Code and in most other states since. In the federal courts, it was systematically achieved nearly a century ago with the adoption of the Federal Rules of Civil Procedure.[9]

To see that the question of how to get into equity is a live one, we must start with clearing away a misunderstanding about the effect of procedural fusion. In the long-running debates about procedural fusion, the critics warned that it would lead to wider conflation and confusion of law and equity, while the fusionists insisted that only the procedures of law and equity were being merged.[10]

---

9 *See* Kellen Funk, *The Union of Law and Equity: The United States, 1800–1938*, *in* EQUITY AND LAW: FUSION AND FISSION 46, 46–69 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019).

10 *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 466 (2003) ("Code reformers took great pains to emphasize that the new codes reorganized only the procedure of law and equity. Accepting Blackstone's view that substance and procedure were conceptually distinct, the Field Code took the additional

As a matter of legal effect, the fusionists were right. Merging the procedures of law and equity did not affect substantive rights. Indeed, it could not have, because the Rules Enabling Act explicitly says that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right."[11] This understanding has been explicitly endorsed by the Supreme Court in just the last decade. The Court held that because laches was "a defense developed by courts of equity[,] its principal application was, *and remains*, to claims of an equitable cast."[12] And the Court expressly rejected the argument that the adoption of the Federal Rules of Civil Procedure merged legal and equitable defenses. "True," wrote Justice Ginsburg for the Court, "there has been, since 1938, only 'one form of action—the civil action.' But 'the substantive and remedial principles [applicable] prior to the advent of the federal rules [have] not changed.'"[13]

And yet in another sense the critics of fusion were right. Equity continues to make important contributions to our legal system, but these have become invisible to many American lawyers, scholars, and law students.[14] There is fresh academic interest in equity and its distinctive contributions, both actual and potential.[15] But there is plenty of inertia and unknowing indifference, and many substantive and remedial doctrines of equity have been dislocated from equity proper (i.e., equity as a subsidiary system of law) and have been fragmented or dispersed throughout the common law. This is how equity is experienced by a contemporary law student. Even when

---

step of recognizing the divisibility in fact of substance and procedure . . . ." (footnotes omitted)).

11 28 U.S.C. § 2072(b) (2018).

12 Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 678 (2014) (emphasis added). The quoted sentence continues: "for which the Legislature has provided no fixed time limitation." *Id.*

13 *Id.* at 679 (citation and alterations omitted) (quoting 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1043, 177 (3d ed. 2002)); *see also* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.").

14 *See* Samuel L. Bray, *Equity: Notes on the American Reception*, *in* EQUITY AND LAW, *supra* note 9, at 31, 31–45.

15 *See, e.g.*, the contributions to this Symposium issue, as well as PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020); Funk, *supra* note 9; Paul B. Miller, *Equity as Supplemental Law*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra*, at 92; Jennifer Nadler, *What Is Distinctive About the Law of Equity?*, 41 OXFORD J. LEGAL STUD. 854 (2021); James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723 (2020); Irit Samet, *Equity*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 373, 373–89 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

doctrines are identified as equitable, they are encountered as strewn about courses on contract, tort, property, civil procedure, agency, trusts, corporations, intellectual property, and constitutional law.[16]

Equity may have "conquered" law through procedural fusion if we measure success by tallying the origins of elements of a now-fused single system of civil procedure.[17] Fused procedure *is* predominantly equitable. But if one looks beyond procedure, equity's triumph is less clear. Few remember now precisely what equity contributed to fused procedure and, more importantly, why equity's procedures, pre-fusion, took the shape they did in contradistinction to those prevailing at law.

More troubling, fusion has spilled the embankments that were supposed to contain it. Procedural fusion has obscured distinctions between law and equity in substantive and remedial doctrine. In other work, one of us has examined the impact of collective amnesia about equity on remedies while arguing that recent Supreme Court jurisprudence might stimulate renewed appreciation of the distinctive functions performed by equitable remedies.[18] In this Article, we turn our attention to the interplay between what would now be called substantive equity, remedial equity, and procedural equity.

B. Blackstone and Roman Law

One way in which fusion has obscured distinctions between law and equity lies in the tendency to assimilate equitable bases for equitable relief with legal bases for legal relief. Over the last two centuries, especially due to the influence of Blackstone, Roman law thinking about the structure of civil liability has shaped the common law.[19] That idea of a deontic structure has also come increasingly to grip our thinking about equity.

The formulary writs of the old common law made the availability of legal remedies the prisoner of procedural formality. Indeed, the procedural formality of the writ system was so formidable that it occluded attention to, and practical deliberation on, substantive law. That is why historians have attributed the flowering of substantive

16 *Cf.* ZECHARIAH CHAFEE, JR., CASES ON EQUITABLE REMEDIES v (1938): "Equity in American law schools seems to be suffering the fate of the Austrian Empire. One part after another has been split off to take on an independent existence."

17 *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987); *see also* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1398 (2015).

18 *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530 (2016).

19 *See* Michael Lobban, *Blackstone and the Science of Law*, 30 HIST. J. 311, 312 (1987).

doctrine at common law—in torts, contracts, and beyond—to the abolition of the writ system.

But before the writ system was abolished, Blackstone and other synthesizers wanted to bring some order to the burgeoning common law. It was not surprising that they would turn to Roman law, and especially to Justinian's Digests, to do so. Inspired by Roman law, Blackstone argued that the common law consistently manifests a deontic logic whereby the wrongful violation of duties correlative to primary rights (as a matter of substantive doctrine) generates secondary rights or claims to remedies (via remedial doctrine).

Blackstone was, tellingly, not interested in equity. He was a famous equity skeptic, considering it an aberration generated by the writ system—perhaps practically necessary, but unfortunate and historically contingent.[20] But Blackstone's scheme has taken hold of jurisprudential thought on equity nearly as much it has shaped common-law theory. Many working within common-law traditions have insisted on fitting all of common law that can be considered private law—procedural, substantive, and remedial—into deontic categories of correlative right and duty, wrong and remedy. Wesley Hohfeld, an object of resurgent fascination, influentially rendered the normative grammar of the common law in terms of "Fundamental Jural Relations," building on Blackstone's scheme.[21]

Lawyers with fading fluency in equity have come to think about, to analyze, and to represent or reformulate it in Blackstonian and Hohfeldian terms. Witness references—now standard in professional usage—to "equitable rights," "equitable obligations," "equitable wrongs," "equitable ownership," "equitable title," and the like. In each case, legal concepts are invoked in the representation and development of equitable concepts. In each case, the new equitable concepts are drawn into a normative vocabulary and set of associated practices appropriate to law and its relative formality (rendered, usually, in deontic terms).

The bases of civil suits lie at the interstices of substance and procedure. These bases of civil suits also inform claims for remedies and guide judicial discretion in crafting remedial orders. Thus, some

---

20 *See* John H. Langbein, Introduction to 3 WILLIAM BLACKSTONE, COMMENTARIES viii (Univ. of Chi. Press 1979) (1768) ("[Blackstone] insisted that there were no material differences between the substantive law of the courts of law and equity, and he concealed or downplayed the facts that made this contention untenable."); *see also* Main, *supra* note 10, at 453 ("Blackstone largely ignored equity, finding the law/equity distinction to be superficial" (footnotes omitted) (citing Robert L. Munger, *A Glance at Equity*, 25 YALE L.J. 42, 49 (1915))).

21 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917).

of our most consequential linguistic practices as lawyers involve the choice of words in stating—and then arguing about, and reasoning in relation to—the bases of suits. What should we call recognized bases of civil suits? At law, it seems natural and has long been customary to call them causes of action. But is "cause of action" an apt term in equity?

II. ARE THERE EQUITABLE CAUSES OF ACTION?

This Part considers two closely related meanings of "cause of action," namely, the form of action indicated in the plaintiff's pleading and the plaintiff's legal entitlement to sue. It shows that equity, strictly speaking, does not have a cause of action in either sense.

A. Two Senses of a Cause of Action

The phrase "cause of action" means a number of different things.[22] Two meanings need to be pulled apart before we can decide whether it is intelligible to speak of an "equitable cause of action."

The first sense of "cause of action" is derived from the old common-law writs. The writs were the structuring devices for the common-law system of adjudication. Plaintiffs would sue under various writs, and each one was a different "form of action."[23] The forms varied. Each had different requirements. But those requirements were absolutely central: meeting them was necessary and sufficient for a plaintiff to succeed.

In time, especially with nineteenth-century pleading reforms in the United States and the demise of some of the older forms, the phrase "form of action" passed out of use and was replaced by "cause of action." But the salient features were the same. The causes of action were the legal categories into which suits fell. If you were a plaintiff, it was critical to know which category you were in, because that would determine what the elements of your claim were.[24]

This first sense of "cause of action" is focused on pleading. To have a cause of action means to be able to plead (or successfully plead) the various elements required. In the twentieth century, "cause of

22 For a leading analysis of "cause of action," see Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004), though note that Professor Bellia uses "cause of action" for both law and equity.

23 *See, e.g.*, SIR JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 60–76 (5th ed. 2019); F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES (A.H. Chaytor & W.J. Whittaker eds., 1909).

24 *Cf.* Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 837 (1924) ("The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons.").

action" fell out of favor and the Federal Rules of Civil Procedure used "claim" instead. This term was broader—multiple rights could be subsumed within a single claim. The terminological shift also suggested a shift away from legal theories (elements of a cause of action) and toward facts, or toward a transaction, as the basic principle for organizing what a plaintiff says to justify her being in court. So the pleading sense of "cause of action" is now obsolete, at least outside of code-pleading states. But it has nevertheless been generative.

A second sense of "cause of action" is a legal entitlement to sue. This is distinct from the first sense, because here attention is trained not on what the plaintiff says to the court (the pleading sense) but on whether there is some legal authority (e.g., a statute or constitutional provision) that allows the plaintiff to come into court in the first place.

This second sense is about authorization. It is related to and probably developed out of the first sense. At common law, there was no prior set of legal rights for which you might be able to pursue legal redress: the forms of action were the means of legal redress, and from the operation of these forms of action it could then be deduced that there was an underlying right. That is why the substantive law was created in the interstices of procedure.[25]

Once these two senses of "cause of action" are distinguished, it is also important to see how they changed over time. In the nineteenth century, for legal claims, the dominant sense of "cause of action" was the first sense, about pleading. In the world still shaped by the forms of action, the requirement of a cause of action in the first sense did much of the work we now attribute to standing doctrine.[26] A federal court would not need to inquire whether there was a concrete injury, traceable to the defendant, that would be redressable by a favorable ruling. The form of action, the cause of action, would determine what counted as an injury, and who could be sued, and what the favorable ruling would be.

Not only was standing doctrine underdeveloped (by our standards) during the time of the "cause of action" in the first sense, but there was also little anxiety over whether there was a "cause of action" in the second sense, about a legal entitlement to sue. If the plaintiff had a form of action, a cause of action, then that was the legal entitlement—there was no need for a legislature to authorize the suit.

---

25 HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883); *see also* Bellia, *supra* note 22, at 631–632.

26 *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992) (including the plaintiff's cause of action among the "important antecedents" of modern standing doctrine); *see also* Bellia, *supra* note 22, at 826.

It was "good at common law." Once statutes became more common, they would add or create causes of action.

But then two things changed. One can be located in a specific year: in 1938, the Federal Rules of Civil Procedure put the federal courts on a trajectory away from using "cause of action" in the first sense. Out with cause of action, for pleading purposes, and in with the claim.[27]

The other is a more diffuse development throughout the late-nineteenth and twentieth centuries, and that is the rising tide of positivism.[28] Once there was widespread distrust for the common law as a source of claims in federal court, once there was a need to trace each claim to some authorizing positive enactment, then a "cause of action" in the second sense became salient and critical.

These twin developments mean that "cause of action" in the first, pleading sense was fading away; while "cause of action" in the second, legal entitlement sense was on the rise. To sum up: "cause of action" can be used in two senses (pleading, legal entitlement to sue), and by the late twentieth century the dominant sense was the second. Today that remains the case.

B. Is There a Cause of Action in Equity?

Now can we speak of an "equitable cause of action" in either of these senses? In the first, pleading sense, there never was such a thing as an equitable cause of action. There were no forms of action in equity. There were no elements that, if proved, were necessary and sufficient to secure relief. As discussed below, equity has a different structure, one that emphasizes grievances (rather than wrongs) and narratives (rather than elements). There is an emphasis on the chancellor's discretion, and the need for the plaintiff to motivate the chancellor to act.

---

27 *See* 1 JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE (1938) 145 ("Nowhere in the Rules is the term 'cause of action' used. This can only mean that the draftsmen, by the use of the phrases 'claim' or 'claim for relief,' hoped that such different expressions in lieu of 'cause of action' would give the courts freedom to escape from the morass of decisions concerning a cause of action; and would adopt a pragmatic treatment of what we may for convenience still refer to as a cause of action." (footnote omitted)); *see also* Subrin, *supra* note 17, at 976 (describing Charles Clark's efforts to avoid requiring either facts or causes of action).

28 *Erie* is often taken as emblematic, though this association has been criticized. *See* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

It is true that equity would delineate the requirements for a suit with more specificity in the areas in its exclusive jurisdiction.[29] For example, a breach of trust claim, or a breach of confidence claim, have long had definite requirements, and these might look very much like elements. There might be relatively little judicial discretion once the claim was made out. Even so, the hallmarks of how one gets into equity—including the emphasis on grievances and narratives—are also found in the exclusive jurisdiction. And recall that the concern of this Article is with the concurrent jurisdiction, the cases where equity intervenes to alter the legal outcome or provide remedial reinforcements. In the concurrent jurisdiction, equity manifestly never had anything like a cause of action in the pleading sense.

In the second, legal entitlement sense, was there a cause of action in equity? Yes, if a legal entitlement to sue is being contrasted with lawless vigilantism or officious intermeddling. Suing in equity was *licit*, permitted by the legal system as a whole. But if we are asking whether there was an enactment that authorized this plaintiff to bring this suit, the answer is not necessarily. Equity is not a creature of statute, and the different kinds of claims it would hear were not and are not sharply distinguished from each other (as the forms of action were). And these claims are usually not traceable to other authority. They developed out of the decisions of the chancellors, especially in the seventeenth and eighteenth centuries as equity developed a stronger sense of precedent.[30]

Three refinements should be noted. First, in the United States, equity was included in the federal judicial power under Article III of the U.S. Constitution and was authorized by the Judiciary Act of 1789.[31] Even so, these authorities cross-reference the concept of equity developed in England.[32] They refer to the whole system of "equity jurisprudence." They do not identify and provide a basis in positive law for specific equitable causes of action.[33]

---

29 On the jurisdictions of equity, see *supra* note 6.

30 *See* BAKER, *supra* note 23, at 118–119; *see also* sources cited in Bray, *supra* note 8, at 1012 n.72.

31 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; *see* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

32 *See* Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) ("The suits in equity of which the federal courts have had 'cognizance' ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery.").

33 *Cf.* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949 (2011) ("After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action,

Second, in the Process Act of 1792,[34] Congress prescribed the use by the federal courts of "the principles, rules and usages which belong to courts of equity . . . , as contradistinguished from courts of common law."[35] Moreover, the same statute authorized the Supreme Court to make procedural rules for federal cases in equity.[36] Yet neither provision generated any identifiable equitable causes of action. Like the Judiciary Act of 1789, the Process Act of 1792 cross-referenced the English practice.[37] And the Federal Rules of Equity promulgated in 1822 would incorporate the "bill" from traditional equity[38] but say nothing about causes of action, which meant that the practice of the English Chancery Court remained authoritative in federal courts.[39]

Third, over time, there were federal statutes that authorized plaintiffs to obtain various kinds of equitable relief, especially injunctions, in certain circumstances. Some of those statutes might have been merely codifying the decisions of equity, but where they added to equity's armory or scope of operation, they could be thought of as giving a "cause of action" in the second, legal entitlement sense. Even so, it was unnecessary for equity to have a "cause of action" in the sense of a legal entitlement to sue. A plaintiff might have a statutorily specified right to sue in equity, but no one would ever have thought that she had to have a statutorily specified right. Equity was in the background, and it was always there.[40]

Although equity lacked a "cause of action" in either sense, courts of equity still had reasons to act. It is only in a loose, non-technical sense that we could speak of a court of equity having a cause of action—something more like "a cause for acting."[41] Indeed, much of

---

in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action.").

34 Act of May 8, 1792, ch. 36, 1 Stat. 275 (repealed 1872).

35 *Id.* § 2, at 276.

36 *Id.* On the Process Act of 1792 and federal equity, see 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 580–586 (1971); *see also* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 653 (2015).

37 *See* Vattier v. Hinde, 32 U.S. (5 Pet.) 252, 274 (1833)

38 20 (7 Wheat.) U.S. vi (1822) (Rules 4–5).

39 *See id.* at xiii (Rule 33).

40 *Cf.* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1829–31 (2012).

41 *See, e.g.*, JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 180–81 (Byron F. Babbitt ed., 8th rev. ed. 1933) (1912) (using the phrase "stating the cause of action" in connection with a plaintiff's bill of complaint under Rule 25 of the Federal Equity Rules of 1912); Clark, *supra* note 24, at 825 (distinguishing common-law pleading from equity, because in the latter "different rules prevailed," for "the plaintiff's bill was in the form of one continuous narrative, and 'the bundle of diverse rights which equity permitted a

the law of equity was a loose description of situations in which equity would act. This traveled under the name of "equitable jurisdiction." That term is misleading to many readers now because it did not refer to the power of a court of equity to pronounce a judgment. Rather, it was a shorthand for the whole "body of equitable precedents, practices, and attitudes."[42] In other words, equitable jurisdiction can be understood as the sum total of the things that equity was "in the habit of undertaking."[43]

And so, to get into the equitable jurisdiction, you needed to have a good story, a real grievance, and a persuasive account of how you wanted equity to do something that was the sort of thing that equity does. This grievance, not a cause of action in either of the two senses described above, was what would motivate the chancellor in the concurrent jurisdiction of equity.[44]

But many courts and scholars have given up on being careful to avoid speaking of a "cause of action" in equity, and the new but widespread use of "cause of action" in equity is misleading. It imports

---

plaintiff to enforce in one suit might be regarded as one equitable cause of action'"); *cf.* 6 SIR JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, 174 (2003) ("Since the theoretical basis of its jurisdiction was that a party sometimes required a remedy in conscience where none was available at common law, it was requisite that a plaintiff show not only *a cause of action in conscience* but also the absence of a remedy at law." (emphasis added)). An example of this loose usage is Justice Douglas's insistence in *American Federation of Labor v. Watson* that a district court "should not invoke its powers unless those who seek its aid have a cause of action in equity," which he seemingly equated with the requirement that a court of equity should not act except "to prevent irreparable injury which is clear and imminent." 327 U.S. 582, 593 (1946) (first citing Douglas v. City of Jeannette, 319 U.S. 157, 162–63 (1943); and then quoting *id.* at 163).

42 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 180 (2d ed. 1993).

43 Jones v. Parker, 163 Mass. 564, 566 (1895) (Holmes, J.). For transitional cases, see Mass. State Grange v. Benton, 272 U.S. 525, 528 (1926) (Holmes, J.) ("Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked."); Smith v. Apple, 264 U.S. 274, 278–80 (1924). By 1939, the Supreme Court could say of the Judiciary Act of 1789's reference to suits in equity that "[t]his clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity." Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939); *see also* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 381–82 (1949) ("As the District Court found irreparable injury to all respondents in the jurisdictional amount, we assume there is both federal and equitable jurisdiction.").

44 Note that what we describe as a "grievance" is similar to what Henry Smith describes as a "trigger." *See* Smith, *supra* note 15, at 1059, 1081, 1084–1089, 1112. *Grievance* emphasizes the position of the suitor in equity, and it has a moral and affective quality. *Trigger* emphasizes law and equity as structures. But both words are descriptions of the movement from outside of equity to being inside equity.

a definiteness and decisiveness. It conveys a sense of regularity and formality that comes from the formal juridical definition of the bases of civil suits, along with a sense that these bases are recognized as such at law. That is, "causes of action" are recognized as independently actionable grounds for litigation, a hearing and, if the grounds are deemed well established (factually) and proven (legally) through impartial adjudication, for relief. "Cause of action" works well as a synonym for bases of civil suits that sound in the common law precisely because the language echoes the conceptual definiteness and peremptory normative status of legal rules establishing primary rights; rights violations (civil wrongs) are generic causes of action.

Just as the deontic language and logic characteristic of substantive doctrine at common law have come to dominate analysis of substantive doctrine in equity, so too has reference to equitable "causes of action" come to overtake language native to equity—that is, as discussed more fully below, the language of "petition," "complaint," and "suits in equity."

Were that the choice of language was innocent. Among lawyers, it rarely is. It is a mistake, or at least conducive of a mistake, to refer to "causes of action" in equity. To do so is to assimilate complaints brought in equity—which require petitioners to show that an equity has arisen in their favor, relative to and notwithstanding the law—with actions brought at law, which require plaintiffs to allege a civil wrong or other actual or threatened violation of norms or enabling doctrines of general application.

In the following Part we lay out an alternative: an affirmative account of how one gets into equity. In doing so, we reveal the mischief, both conceptual and normative, that is produced by imposing the legal concept of "cause of action" in equity (especially in the second sense of a legal entitlement to sue). We also uncover key differences between suits in equity and actions at law. These differences are now largely obscured because of fusion. Even though fusion is notionally just procedural, here, at the interstices of procedure and substance, it has caused great confusion.

III. HOW TO GET INTO EQUITY

This Part gives an affirmative account of how a plaintiff gets into equity. It begins by carefully distinguishing a plaintiff's grievance from the violation of a fixed duty correlative to a plaintiff's right, and it shows that the grievance is central in equity. The equitable structure is looser, and it is always stated in relation to law, rather than the other

way around. In other words, equity is adjectival law or meta-law.[45] And in equity it is remedies that are the focus of complexity and the object of judicial attention.

A. The Centrality of Grievances

At the heart of the common law is the concept of the civil wrong. This concept is traceable to the formulary writs, and to the Roman-law influenced reconstruction of the common law by Blackstone. But the substantive basis of a typical suit in equity was, and is, something more amorphous. It is a grievance.

A grievance, in the sense used in this Article, is a complaint rooted in interpersonal interactions that are governed by law, and it is a challenge to the law's routine administration or enforcement. Over time, with doctrinal development, some of these grievances have become standardized so as to be roughly equivalent to civil wrongs. For example, equity did recognize certain wrongs in relation to the exercise of legal rights and powers, such as a breach of fiduciary duty. Here, as is characteristic of doctrine in the exclusive jurisdiction, equity supplemented surrounding law with new law; the product of this function can be described as "supplemental equity." But most of the grievances that equity would hear have not been formalized as civil wrongs. Here, exercising its older function, equity channels discretionary corrective intervention in the enforcement of law. A suit in "corrective equity" is paradigmatically about a grievance, not about a liability for a wrong.

Consistent with corrective equity's exceptional nature and the underlying frailties of law that equity seeks to ameliorate, it is not surprising that the substantive bases of suits in corrective equity are less defined than those at common law.[46] Grievances recognized in corrective equity implicate hardships that are difficult to foresee or define, or that may be foreseeable but nevertheless do not have a set of common factual elements. They can involve a wide range of inequities and injustices—in contrast to the sharply defined and independently actionable causes of action at common law. Indeed, it was precisely because these hardships, inequities, and injustices were *not* actionable that the grievances that lie in corrective equity had to be brought in equity. And, as we will explain below,[47] these grievances were not actionable "independently" because they were held *in relation to* law (e.g., in relation to its abuse or its gaps).

45 *See generally* Smith, *supra* note 15.

46 *See id.*

47 *See infra* Section III.C.

Maitland rightly said that we can have law without equity, but that the converse is not true; equity without law is but a "castle in the air."[48] The same is true by implication of equitable grievances. They are grievances not merely in relation to the conduct of a person under law; they are grievances in relation to law as such, implicating as they do assertions that a law, though just as a general matter, generates or permits injustice in the circumstances that are the basis for the grievance. The petitioner asks that his or her grievance be heard as a matter of natural justice and equity *notwithstanding* the law and its general justice (i.e., the law's practical reasonableness or moral soundness as applied in typical circumstances). As Adam Smith put it, in his lectures on jurisprudence, "when one wants to have his cause tried by the Court of Chancery, he relates his story to the court, representing at the same time that the courts of common law can grant him no redress."[49]

The inherently irregular nature of the grievances that ground corrective equitable intervention is evident from a brief survey of substantive doctrine. Consider, for example, grievances alleging undue influence in contracting, oppression in corporate decision-making, or estoppel in the assertion of property rights. In each case, the grievance, while amenable of broad description and illustration, is not amenable of exhaustive definition. When petitioners articulate their grievances, they are not simply aiming to show satisfaction of conditions requisite to liability. Instead, they aim to show that the subject matter of a complaint (a) falls within the wide parameters of a kind of grievance that equity has recognized or has jurisdiction to recognize and (b) is sufficiently compelling in its particulars as to justify intervention that is exceptional and hence inherently discretionary.

So, for example, in petitioning for relief from a forced sale of shares on the basis of oppression, an aggrieved minority shareholder does not plead facts suggestive of satisfaction of individuated elements of "liability" for a "wrong" of oppression. Rather, the grievance recites facts showing, particularly and with sensitivity to context, the unfairly disappointed expectations of the minority shareholder at the behest of a majority shareholder who, in coercing a sale, acted lawfully but sharply or opportunistically.

As this example illustrates, equity's recognized grievances can be denominated. They are not free-form adventures in remedial flexibility. Yet they have a loose structure because the grievances recognized

48 F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 19 (A.H. Chaytor & W.J. Whittaker eds., 2d rev. ed. 1936).

49 ADAM SMITH, LECTURES ON JURISPRUDENCE 281 (R.L. Meek, D.D. Raphael & P.G. Stein eds., Oxford 1978) (1763).

by equity are so many glosses on potentially inequitable behavior. They are wide, open-textured recharacterizations of the kinds of circumstance in which equity *might* alter—because it *has* altered—the operation of law (e.g., by reversing corporate decisions reached in conformity with proper procedure, invalidating a technically valid contract, or refusing to permit disclaiming of representations that are, as a matter of law, non-binding).

There are some exceptions. These tend to appear in equity's exclusive jurisdiction, when equity is operating in a supplemental mode.[50] In areas such as the law of trusts, partnerships, corporations, and mortgages, equitable intervention was once exceptional. But over time it was made first-order law, with courts of equity devising generalized norms that have the imperative quality of correlative rights and duties, and that imply liability that is functionally equivalent to wrong-based liability at common law (being premised on violation of equitable obligations).[51] As noted earlier, in these areas, a petition in equity does look more like the itemized statement of a cause of action at law: there are generalized norms that include duties, violation of those duties will result in liability, and such violation is independently actionable. Equity will impose liability for a violation of one of those duties.

And yet even these exceptions prove the rule, and they show how equity resists full assimilation to Romanistic reconstruction of the common law. Even where equity supplements law, and it does so by elaborating precisified standards of conduct and denoting them "duties," it does not go all the way in mimicking the deontic structure of liability native to civil law. It is, for instance, common to refer to "fiduciary duties," "duties of confidence," "duties of good faith," and the like, but it is much less common—indeed, rare—to refer to corresponding underlying primary rights.[52] Equitable duties mark (now) fixed constraints on independently grounded, properly *legal*, rights and powers.

In other words, these equitable duties condition the exercise of legal, not equitable, rights and powers, and though the existence of a

50 *See* Miller, *supra* note 15.

51 Marcia Neave & Mark Weinberg, *The Nature and Function of Equities (Part I)*, 6 U. TAS. L. REV. 24, 26 (1978) (noting that in respect to these doctrines, "there is no doubt about the plaintiff's entitlement to a remedy . . . . It can [for example] be dogmatically stated that where B fraudulently induces A to convey land to B, A is entitled to have the conveyance set aside against B.").

52 *Cf.* Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, *in* PROCEEDINGS OF THE EIGHTEENTH ANNUAL SESSION OF THE BAR ASSOCIATION OF ARKANSAS HELD AT FORT SMITH, ARKANSAS, JUNE 1 AND 2, 1915 130, 135 (Bar Ass'n of Ark. 1915) ("[M]ark you, the king was never appealed to merely for the establishment of a right; but only for the redress of some wrong or injury.").

duty implies a corresponding entitlement, equity has tended to ignore that element precisely because the entitlement is legal and so primarily the business of law. Corrective equity, by contrast, is concerned with remedying inequity in the exercise of legal rights or powers. Equity's grievances stand apart from the deontic structure of liability at law precisely because they are triggers for modifications or departures from the outcomes otherwise dictated by that structure.

And the primary and primordial function of equity—reflected in a surfeit of substantive equitable doctrine—is, again, corrective rather than supplemental in nature. Equity corrects for exceptional injustice or inequity, the risk of which inheres in law in virtue of its generality.[53] As Henry Smith has explained, through substantive doctrines that engage and channel its corrective function, equity ameliorates the damaging effects of opportunism on the integrity of first-order law, responding to exceptional instances of abuse or misuse of legal rights and powers.[54] Additionally, corrective equity adjusts the operation of law in response to polycentric problems and other circumstances of unusual complexity in the reconciliation of different legal norms and enabling doctrines—circumstances that are, by their nature, difficult to foresee and address through further development of law.[55]

Thus, when equity acts in a supplemental mode it goes furthest toward establishing equitable duties, violation of which may be pleaded in a manner similar to the pleading of a cause of action. Yet this is not the paradigmatic mode in which equity operates.

B. Tags, Not Hierarchies

The central "trigger" for equitable intervention is a grievance, as described in the preceding Section. But equity does not, before every suit, drink from the River Lethe and forget all its past work. How have the individual grievances to which equity responds become organized? In other words, how have the grievances clustered, forming patterns of equitable intervention that have some predictability?

Here an analogy is useful. In computer file systems, the typical organization is hierarchical. A folder contains other folders, which in turn contain other folders, which contain documents and still more folders. And so on. Each file or folder is located within one folder, no more, no less. That hierarchical organization resembles a Linnaean

53 *See* ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 1137b (c. 4th century B.C.E.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE at 1795–96 (J.O. Urmson rev., Jonathan Barnes ed., W.D. Ross transl., 1984); *see also* Dennis Klimchuk, *Aristotle at the Foundations of the Law of Equity*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 32, *supra* note 15.

54 *See* Smith, *supra* note 15, at 1054–56.

55 *See id.*

classification, with each species within one genus, and each genus within one family.

An alternative organization uses tags. All the files may be in a single bucket, but they are marked with various tags. For example, a photo app might allow users to tag their photos "Home," "Kids," "Puppy," "Vacation," etc. Multiple tags can be applied to the same photo. One photo could be marked "Home," another "Home" and "Kids," another "Kids" and "Puppy" and "Vacation." In a tag system, the hierarchy is flat and the tags are multiple.

The common-law system of causes of action resembles a hierarchical file organization. Each cause of action is different from another. The same event might give rise to several possible causes of action—say, both a tort of defamation and a breach of contract. But the tort of defamation is separate and distinct from the breach of contract; each has separate elements, and each is in a separate "folder" (tort or contract).

The grievances that give rise to equitable intervention are also organized, but their organization is based on tags. For example, one of the chief bases of equitable intervention is "no adequate remedy at law." Another is "multiplicity of suits." A court might give an equitable remedy because there is no adequate remedy at law, or because doing so will avoid a multiplicity of suits, or for *both* reasons.[56]

Contrast a suit bringing two tort claims against a defendant, such as the torts of assault and intentional infliction of emotional distress. The court will analyze the elements of one, and then analyze the elements of the other. If the plaintiff is successful at proving both torts, there will be a quantum of damages for assault, and a separate quantum of damages for the emotional infliction of intentional distress.

Corrective equity does not work this way. A court might decide that the lack of an adequate remedy at law is a good basis for granting an injunction, and that an injunction is needed to avoid multiplicity of suits. But the court will not then proceed to analyze a "no adequate

56 There is no canonical list of these tags or their relationship. For example, the more general entries in John Freeman-Mitford's late-eighteenth-century list were summarized in Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the* Zenith *Case*, 81 MICH. L. REV. 1571, 1586–93 (1983): "Equity intervenes in the first place where the common law gives a right but fails to afford a complete remedy; in the second place, 'where the courts of ordinary jurisdiction,' *i.e.*, the courts of common law, 'are made instruments of injustice'; and in the third place, where the common law gives no right, but where upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong." *Id.* at 1586 (quoting JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, BY ENGLISH BILL 103 (2d ed. Dublin, Elizabeth Lynch 1789) (1780)); *cf.* STORY, *supra* note 3, § 32, at 30–31 (endorsing Mitford's list as a summary of the "general account" of equitable jurisdiction).

remedy at law" claim as distinct from a "multiplicity of suits" claim. There won't be one injunction meant to remedy the lack of an adequate remedy at law, while another injunction is meant to remedy the multiplicity-of-suits problem. In other words, these two bases for equitable intervention are means of establishing that a plaintiff can get into equity, but that is all. They are not separable claims that retain a distinct identity throughout the litigation process.

C. The Adjectival Nature of Equity

Another concern with the assimilation of equitable and legal bases of civil actions under the legal nomenclature of "cause of action" is that it conceals the fundamentally adjectival nature of all forms of equitable intervention, and thus all substantive bases of suits in equity.

Equity is adjectival in relation to law in that its interventions modify the law (e.g., by supplementing it) or its enforcement (e.g., by correcting it). Thus, equitable suits are suits brought in relation to law and, where the basis of a suit is a grievance in corrective equity, it must meet the burden of displacing the default presupposition that relief must be sought in law. That is, in order to successfully petition for correctively equitable intervention, a petitioner must show that there is no adequate remedy at law.

This adjectival quality is missed by those who treat "cause of action" or "right of action" as a good description of how one gets into equity. That approach assumes a procedural equivalence in the substantive bases of civil litigation in law and in equity. Accepting that equivalence would confuse the relationship between law and equity, or, more accurately, equity's bearing toward law. That is a problem because equity's distinctively adjectival orientation toward law suffuses it, marking the procedural, substantive, and remedial doctrines that are arrayed across its different "jurisdictions."[57] The legal nomenclature suggests that all claimants assert well-defined private rights (or claim similarly well-defined powers or permissions, or invoke a legal form of relationship or association). And it suggests that when those claimants initiate a civil action, and state their case, the question is just whether they reach into a bag of recognized "causes of action" supplied by law or a similar bag supplied by equity.

In other work, one of us has explained that common-law private law (including property, torts, and contracts) articulates *primary rights*; that is, norms that guide the actions of members of political communities as to the ways in which they may or must interact in recognition of their moral interests in their person, property, agree-

57 On the different jurisdictions of equity, see *supra* note 6.

ments, and other undertakings.[58] Understood in this sense (i.e., in a way amenable to Romanistic/Blackstonian analysis), common-law private law is meant to supply a comprehensive compendium of rules that lend order to civil society.[59]

If the guidance supplied by way of primary rights is to be effective, it will be practically reasonable.[60] It must also be general (i.e., applicable to all members of a community, or those similarly situated in ways relevant to the law's legitimate aims). That is why scholars so often place emphasis in private law on formality (i.e., relative invariance to context).[61]

Most of the history of equity can be summarized as an entire subsidiary system of justice developing—and increasing in consistency and systematicity—out of what were initially informal and inscrutable practices of entertaining petitions, put in simple and piteous terms, by those seeking justice unavailable at law.[62] Equity emerged and developed as a system as the Chancery's institutional apparatus expanded,

---

58 *See* Paul B. Miller, *Juridical Justification of Private Rights*, *in* JUSTIFYING PRIVATE RIGHTS 105, 109 (Simone Degeling, Michael Crawford & Nicholas Tiverios eds., 2020).

59 *See* Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175 (2021).

60 *See id.* at 199–200. The practical reasonableness of a law is a function of the moral quality of the guidance it applies, understood relative to its content and actual (vs. intended) impact on the practical deliberation and conduct of its addressees. *Id.* In turn, the justice of a person's actions by light of practically reasonable laws is a matter of the person's willing conformity to the law's requirements, while the justice of official enforcement action (including court judgments) is a matter of its vindication of the law and the guidance it provides. When a claimant at law seeks official vindication of a primary right originating in *law*—whether by way of declaratory, injunctive, or remedial orders—they are seeking justice according to law and, given that the relief sought is grounded in enjoyment of a right, they are properly understood to be exercising a power to seek recourse in asserting a "cause of action." Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003). The law establishes causes of action (e.g., by specifying requisites of wrongful violation of a given right), and the justice of the claimant's cause limits the court's legitimate assertion of authority in determining whether and how to hear and to dispose of the action brought. Understood functionally, a claimant who asserts a cause of action is calling into operation the first-order system of action-guiding norms supplied by law in response to a defendant's alleged failure to conform with it. *See* Smith, *supra* note 15, at 1079–80. Or, put another way, the claimant seeks recourse for the defendant's failure to abide by peremptory general guidance supplied by law (i.e., guidance the defendant was unconditionally obligated to abide by).

61 *See, e.g.*, Henry E. Smith, *Systems Theory: Emergent Private Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 143 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020); Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055 (2015); Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16 (2000).

62 *See* George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 91 (1916) ("[T]he essential characteristic of Equity procedure . . . is that it begins with a petition asking the king to interfere to secure justice where it would not be secured by the ordinary and existing processes of law."); *see generally* BAKER, *supra* note 23, at 106–24.

its procedures regularized, and its substantive and remedial doctrines were developed. This development happened through ordinary analogical reasoning. As they decided whether or not to give relief, the chancellors reached for definition of equity's adjectival jurisdiction (notably, via formulation of maxims), and they identified patterns of a sort essential to the development of recognizably legal constructs (e.g., equitable principles and standards that specify not rights but rather the manner of their exercise).

But, as noted earlier, in order to preserve its functionality, corrective equity was never fully formalized; i.e., it was never reduced to norms and enabling doctrines meant to provide *ex ante* guidance to all members of a given political community. Rather, as Henry Smith has explained, corrective equity operates primarily *ex post*.[63] It operates relative to the immediate past or potential invocation of law in a particular case. Its doctrines direct judges toward the kinds of particular injustice or inequity that *might*, depending on facts pled, warrant relief in equity from the routine administration of law.

Corrective equity consists in *interventions* made against, and so adjectivally in relation to, law. Where granted, equitable relief suspends or otherwise varies the enforcement of legal rights, conditions the exercise of legal powers, requires the specific performance of legal obligations, or otherwise modifies the usual effect of law. The fact that intervention, premised on the successful presentation of a grievance, is exceptional and focused on the achievement of particular justice is reflected in the maxim that equity acts in personam and not in rem.[64] The maxim is something of a misfit for supplemental equity, insofar as its doctrines operate generally and prospectively. But it continues to resonate in corrective equity, for here equity aims not to make or to change law but rather to allow for adjustment of its administration in a manner that is intelligible as a matter of moral principle, even as its work is neither the product of, nor productive of, a legal rule.

One might think that where equity supplements rather than corrects law, it loses its adjectival orientation. And, as noted earlier, if we think of the adjectival bearing of equity simply in terms of discretionary adjustment of law in its administration, it is true to say that supplemental equity *becomes law* in achieving full integration with surrounding law. But all supplemental equity originated in corrective equity. As a result, even supplemental equity bears residual markings of equity's adjectival orientation toward law.

Supplemental equity consists in adjectival modifications made durable when time and experience generated awareness in Chancery

63 *See* Smith, *supra* note 15, at 1076–81.

64 *See id.* at 1116–18.

of patterns of opportunism or other sources of mischief that—being patterned—invited supplemental lawmaking. As trusts scholars have said of the beneficial interest of the *cestui que trust*, equity came to recognize in personam equitable claims in the *cestui* held *against* (by way of duties recognized in equity) the in rem legal rights of the trustee over the trust corpus. The *cestui*'s beneficial interest became cognizable as such—i.e., as a generic equitable interest—but only gradually, emerging out of a mass of cases in which grievances were asserted by *cestuis que use* and, before that, by persons betrayed through informal trusts, grievances resolved case by case as a matter of conscience rather than fixed equitable interest.[65]

The observation that equitable property implicates the assertion of (equitable) claims against (legal) rights can be generalized, for most of supplemental equity consists in obligations or entitlements that condition the enforcement or exercise of legal rights, powers, and permissions.[66] In each case, the adjectival orientation of supplemental equity is encased in a structural relationship of asymmetric reference, with equity having permanently altered law in pivoting from correction to supplementation. Hence, even in respect of supplemental equity, to view law and equity as a "fused" whole consisting of so many "causes of action" is to ignore equity's basic structure and functional orientation toward law. It is also to ignore the normative lessons taught by equity's impulse to correct law, whether ad hoc or permanently.

D. Distinctive Characteristics of Equity Pleading

One hundred and fifty years of procedural fusion has been presented as a legacy that tells of equity's triumph over law.[67] One consequence is a blurring of lines between substance and procedure that were intended (however implausibly) to be maintained. Another consequence is a loss of awareness of the symbiosis between the distinctive characteristics of equity pleading and the distinctive characteristics of the substantive bases of suits in equity. The casualness with which we invoke "cause of action" as a generic descriptor of how one gets into law *or* equity suggests as much.

As noted earlier, whereas one generally gets into law by asserting the actual or imminent interference with a primary right—that is, a completed or threatened civil wrong—one generally gets into

65 Smith, *supra* note 15, at 1099 & nn.189–90 (citing several scholars).

66 *See* Ben McFarlane & Robert Stevens, *What's Special about Equity? Rights about Rights*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 191 (Dennis Klimchuk, Irit Samet, & Henry E. Smith eds., 2020); Henry T. Terry, *Legal Duties and Rights*, 12 YALE L.J. 185, 208 (1903).

67 *See, e.g.*, Subrin, *supra* note 17.

corrective equity by stating a grievance that equity recognizes or might recognize as within its jurisdiction. Equity pleading is historically distinguished above all else by two things: its relative informality as to the elements of pleadings and their juridical specificity,[68] and the priority placed on comprehensive presentation of factual evidence (including, but not limited to, oral or written depositions) that are germane to the petitioner's grievance.[69] One cannot understand contemporary equity and its distinctive characteristics without understanding equity's history and, in particular, the ways in which equity was understood by its practitioners to be situated adjectivally relative to law.

Equity began as an emanation of the prerogative power and responsibility claimed by the English monarch to render justice to his

68 *See* BAKER, *supra* note 23, at 112 ("Pleading was in English and, although common-law phraseology was adopted where convenient, it was free from undue technicality. There was no need for a single issue."); JONES, *supra* note 2, at 16 ("The character of the bill is determined by the nature of the grievance stated and the relief prayed, and not by the choice of words employed in its statement."); JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING 20–21 (1969) ("In framing his statement of a cause of action in what was called a 'Bill in Equity' as opposed to a 'Declaration at Law', the plaintiff followed no set Form of Action, as at Common Law, but proceeded upon the [broad] equities involved in the controversy, and stated the Facts *at large*, mingling both Questions of Fact and of Law, there being no need to separate them on the Record as at Law, since they were both to be decided by the Chancellor . . . ."); Main, *supra* note 10, at 457 ("Whereas the common law over-emphasized form, chancery historically had eschewed it. There were no forms of action nor emphasis upon the formation of a single issue . . . ." (footnotes omitted)).

69 United States v. Wonson, 28 F. Cas. 745, 746 (C.C.D. Mass. 1812) (No. 16,750) (Story, Circuit J.) ("In equity causes, the decree was necessarily shaped in many instances by a minute inquiry into facts, and the result of the evidence, as well as the propriety of relief, were questions almost inseparably connected."); BAKER, *supra* note 23, at 111 ("In exercising his informal jurisdiction the chancellor was free from the rigid procedures under which inconveniences and injustices sheltered, because he was free to delve into the facts at large."); W.S. Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 7 (1916) ("In modern law a salient difference between the procedure in an action at law and the procedure in a suit in equity consisted in the fact that, in an action at law, the proceedings were . . . based upon a legal right which the plaintiff asserted had been infringed; while, in a suit in equity, the proceedings . . . were based upon facts which made it just and equitable that the plaintiff should get the remedy or relief which he sought."); Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1989 (2004) ("[T]he broad substantive mandate of Equity focused the court on an integrated story of law and fact in a manner that demonstrated that the story was not remediable by the law courts." (footnote omitted)). On the inquisitorial posture of judges within equity, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183 (2005) ("As late as the nineteenth century, Anglo-American courts of equity . . . employed a mode of procedure, which like that used in the courts of continental Europe, derived from the Roman-canon tradition and thus was significantly inquisitorial.").

subjects.[70] Ordinarily, the responsibility of the Crown to render justice was met through provision of laws and through their administration by the royal courts, and hence through the exercise of devolved judicial power. However, where laws or their administration proved inadequate—that is, inequitable or unjust—in a particular case, the Crown retained residual prerogative power and even responsibility to hear subjects' grievances, and, where warranted, to dispense to complainants a more perfect justice.[71] This dispensation could enable a more perfect justice inasmuch as it supplied a morally sound resolution of whatever particular injustice or inequity was caused or left unaddressed by law. The King could hear grievances and dispense equity personally, but it became customary to refer these subjects to the Lord Chancellor—an important senior advisor to the Crown and officer of the state who, in medieval England, was ordinarily a bishop responsible for spiritual advisement of the Crown and thus referred to as Keeper of the King's Conscience.[72]

Regardless of how and by whom they were heard, it was universally understood from equity's inception that grievances were entertained in equity entirely outside of the ambit of law and its institutional apparatus, and that any relief that might be awarded would be extra-legal, even though it might have clear implications for law (e.g., by suspending its usual effect in a given case).[73] The specialized language

---

70 BAKER, *supra* note 23, at 106 ("By the end of the thirteenth century numerous petitions (or 'bills') were being presented to the king, asking for his grace to be shown in respect of some complaint. . . . [I]n the exceptional cases where the king or the Council took some direct action, we can see the beginning of the newer jurisdictions in which suits were not only commenced by bill but did not follow the due process of the common law."); HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 3 (2d ed. 1948) (1936).

71 Frierson, *supra* note 52, 135–36.

72 See the description of the office in MEAGHER, GUMMOW AND LEHANE'S EQUITY DOCTRINES & REMEDIES 5 (J.D. Heydon, M.J. Leeming & P.G. Turner eds., 5th ed. 2015):

> In the first period of equity, the mediaeval period . . . . [equity] centred around the person of the Lord Chancellor . . . . His position was unique. He was the head of the King's Council; 'the King's natural prime minister'; the source of enormous ecclesiastical patronage; the head of the Chancery, which by 1300 had become a great department of state; the keeper of the Great Seal, 'a transcendent, multifarious and indefinable office'; and the possessor of a multitude of other heads of power.

Id. (footnotes omitted) (first quoting with alteration T.F. TOUT, THE PLACE OF THE REIGN OF EDWARD II IN ENGLISH HISTORY 58 (1914); and then quoting with alteration Jeremy Bentham, Draft of Plan for Judicial Establishment in France (1789), *as reprinted in* JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY 436, 437 (London, Longman, Rees, Orme, Brown & Green 1828)).

73 MCCLINTOCK, *supra* note 70, at 10 ("During the period of the ecclesiastical chancellors, equity was regarded more as an administrative function of the executive than as a judicial system administered by a different court."); *see also* BAKER, *supra* note 23, at 107 ("In origin [the Chancery] was not a court of law but a department of state . . . .").

employed in early equity reflects the distinctiveness both of substantive bases of equitable intervention and of equitable procedure. Complainants were *not* understood to bring an action at law precisely because they had no recourse or inadequate recourse at law. Instead, and consistent with equity's origins in exercise of prerogative powers of the Crown, statements of grievances were referred to as *petitions*, persons bringing them as *petitioners*, and person(s) impugned and compelled to answer to them as *respondents*. Unlike *actions* brought in law through the royal courts, *petitions* presented to the Crown sought some exceptional relief from the King , directly or via the monarch's appointed representative (i.e., the Lord Chancellor).

Early in equity's history, there were two kinds of petition that might be presented, namely petitions of right and petitions of grace.[74] Only one of them is relevant here, but their pairing as species of a genera is instructive of their relationship to law—that is, both can be thought of as avenues for relief where an adequate remedy could not be found at law.

Petitions of right prayed that the Crown permit action on legal claims against it that would lie as a matter of course against an ordinary subject but which could not be brought in the royal courts without permission (because of sovereign immunity and the structural inferiority of jurisdiction vested in the courts). Put simply, petitioners of right *asked*—not demanded, the latter being an impossibility—that the Crown answer to law by signaling its *willingness to accept* liability on terms established by general law.[75]

By contrast, petitions of grace were made not *against* but *of* the Crown; they were requests of a personal nature, for grace and favor to be shown by the Crown in direct resolution of a conflict or concern, or for provision of a benefit. As Professor J.K. Johnson has shown, the English Crown heard all manner of petitions of grace—including requests for jobs, money, and land—but prominent among them were petitions for the resolution of grievances in equity.[76]

Note the meaning and connotations of the language used to describe grievances brought in equity. The language of *petition* is important, and contrasts sharply with later language of *claim* and *cause*.

---

74 For analysis, see Ludwik Ehrlich, *Petitions of Right*, 45 L.Q. REV. 60, 69–75 (1929). On the differences between the Latin and English sides of Chancery, with the petitions of right being in the former, see BAKER, *supra* note 23, at 108–110.

75 *See* W.S. Holdsworth, *The History of Remedies Against the Crown, Pt I*, 38 L.Q. REV. 141, 149 (1922) ("[I]f a petitioner asks simply for his 'droit' or legal right, he must establish that legal right in a manner similar to that in which it must be established in an ordinary action. . . . To a petition of right there must always be a reply: 'Let right be done.'"); *see also* W.S. Holdsworth, *The History of Remedies Against the Crown, Pt II*, 38 L.Q. REV. 280 (1922).

76 *See* J.K. Johnson, *"Claims of Equity and Justice": Petitions and Petitioners in Upper Canada 1815–1840*, 28 SOC. HIST. 219, 220 (1995); *see also* MCCLINTOCK, *supra* note 70, at 47.

The latter may be asserted but the former is merely brought.[77] Notice, too, associated language evocative of the piteous (rather than righteous) posture of the petitioner in equity and the magnanimity or charity asked of the Crown. The petitioner seeks the *grace and favor* of the Crown or its delegate in the resolution of a grievance, and does so by *praying* for relief from or in spite of the law because the latter affords him no adequate remedy.[78] (To be sure, this posture of supplication was not, in the late medieval period, unique to equity, yet equity retained this strong petitionary quality in its pleadings long after it ceased to exert influence on the law.)

A petitioner pleading in equity thus recognized the exceptional nature of equitable intervention and the robust discretion that would be exercised in determining whether a grievance was heard, not to mention in relation to any subsequent investigation, hearing, and dispensation. The petitioner in early equity sought the indulgence—again, by way of grace and favor[79]—of a hearing and asked for a fair or just resolution of the grievance pled. Written petitions replete with references to natural law and precepts of Christian morality were meant to summon the conscience of the Crown to the petitioner's aid, while also implicating the conscience of the petitioner and respondent.[80] Grace, if it was deemed warranted, was supplied through some exceptional relief responsive to the circumstances of the petitioner's grievance, subsequent to investigation of those circumstances and examination of the conscience of the parties.

As one would expect of petitions before the Crown but beyond law and its baroque institutional apparatus, written submissions stating a grievance in equity originally defied convention as to content and format.[81] They were sometimes prepared by subjects without the assistance or advice of lawyers. They were written in plain terms with

77 *See* Holdsworth, *The History of Remedies Against the Crown, Pt I*, *supra* note 75, at 142 (commenting on "that large genus 'petition,' by which remedies could be sought . . . which were wholly outside anything that could be given by the existing forms of action").

78 MCCLINTOCK, *supra* note 70, at 50 ("The early bills were in the form of humble petitions for a favor, not for relief to which the law entitled them.").

79 Holdsworth, *The History of Remedies Against the Crown, Pt I*, *supra* note 75, at 149 ("[T]o a petition of grace there is merely an assent or a refusal and no judgement, 'because the ordinary course of the common law is not pursued.'") (citation omitted).

80 For discussion, see Margaret Center Klingelsmith, *Early Bills in Equity*, 71 U. PA. L. REV. 115, 119 (1923) (noting the following invocations in bills of eyre, close antecedents of bills in equity: "'For God's sake,' 'For the love of Jesus Christ,' 'For God's sake and the soul of the queen,' are common").

81 MCCLINTOCK, *supra* note 70, at 27 ("In the early years, pleading and practice in the court of chancery were very informal; the bill was evidently drawn by the complainant himself and conformed to no technical rules of pleading.").

minimal or no use of legal terms of art.[82] Because these grievances took no general form, they were merely described factually. Furthermore, written submissions usually made a general request for relief in the name of charity, justice, and mercy, without specifying a particular remedy. And, finally, they often appealed explicitly to the conscience of the Crown, recognizing and invoking the monarch's power to see to the realization of God's will that natural justice be served where it was wanting at law.[83]

Here is an example of a short bill in eyre (the latter being regarded as an antecedent of early bills in equity[84]):

> Alice, the daughter of Piers Knotte of Shrewsbury, maketh complaint to the Justices of our lord the King of Mabel that was wife of Richard of Berwick for that the same Mabel wrongfully withholdeth from her the rent of a messuage in Shrewsbury, being one penny and a halfpenny for each year, and hath withheld this rent for these twelve years past. Of this she prayeth remedy for God's sake, an it please you, and for the Queen's soul's sake. For God's sake, Sir Justice, think of me, for I have none to help me save God and you.[85]

---

82 *Cf.* Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 773 (1945) ("The plaintiffs wrote in the vernacular, be it remembered, for they presented petitions, not pleadings as in the common law . . . .").

83 What Bolland says of bills of eyre holds true of early bills in equity:

> These bills were an appeal over the head of the law to the paternal powers, so to, speak, of the King as father of his people, put where he was, to quote Bracton again, to serve as God's vicar on earth, to judge between right and wrong, to see that all his subjects bore themselves uprightly and honestly, that none harmeth another, that every man kept unimpaired that which was rightly his.

WILLIAM CRADDOCK BOLLAND, THE GENERAL EYRE 75–77 (1922).

84 William Craddock Bolland, *Introduction to* 7 SELDEN SOCIETY YEAR BOOKS OF EDWARD II: THE EYRE OF KENT, 6 & 7 EDWARD II, A.D. 1313–1314, at xxviii–xxix (William Craddock Bolland, Frederic William Maitland & Leveson William Vernon Harcourt eds., 1912) ("I think that there can be no doubt that these bills are the very beginning of the equitable jurisdiction."). For discussion, see George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 88 (1916) ("The bills in Eyre are in form and purport so nearly like the later Chancery bills that both Sir Frederick Pollock and Dr. Hazeltine are inclined to regard the Chancery bills as descended from them.").

85 SELDEN SOCIETY, SELECT BILLS IN EYRE, A.D. 1292–1333, at 2 (William Craddock Bolland ed., 1914). Here is an illustrative example of a fifteenth-century bill in equity:

> To the most reverend and worshipful Father in God, my Lord Cardinal Archbishop of Canterbury and Chancellor of England:
>
> Meekly beseecheth your orator, John Brown, cousin and heir of Walter Sherington, clerk, that whereas the said Walter and others were seized of manors, lands, tenements, rents, and possessions in the shire of Kent, to the use and behoof of the said Walter and his heirs; and being so seized, (said Walter) died without any will thereof (*viz.*, of said real estate) declared; after whose decease James Fenys, (who was) then the Lord Say, by great cunning and malice aforethought, set about to buy the said manors, lands and tenements, rents and

Of course, equity pleading changed substantially over centuries. It left behind such informal pleading by unrepresented petitioners, who employed colloquial language to invoke biblical morality with the aim of awakening the conscience of a sovereign viewed as the fount of earthly justice. Gradually, in tandem with the development of equity's institutional framework and doctrines, informal and eventually formal principles of equity pleading developed as well.

Thus, with time, short petitions lacking fixed structure came to be replaced by bills of complaint with a consistent structure, such that by the eighteenth century an original bill of complaint in equity had several subparts, might be supplemented by a secondary bill, and would usually result in prolix cross-submissions between the petitioner and respondent (chiefly, demurrer, answer, demurrer to answer, reply, and demurrer to the reply). In turn, heightened complexity and experience led to the proliferation of templates for original bills and other submissions. Specialization in pleadings meant that what was once an almost impossibly simple process of stating a grievance became cumbersome, intricate, and costly.

Notwithstanding the drafting complexity associated with later equity pleading, some of its distinctive characteristics have enduring significance.[86] Its features dovetail with and reflect the distinctive characteristics of substantive bases of equity suits. More specifically, a complaint seeking relief in equity—we can now dispense with the language of a "bill of complaint"—continues to be focused on presentation of grievances and specifying requests for relief. It is not focused on the delineation of wrongs and demands for remedies as of

---

> possessions from the co[-]feoffees of the said Walter; and after he had got that far, then he, against all right and conscience, caused your said beseecher to be imprisoned until the time when your said beseecher, by (force of) great duress and against his will (executed a re-lease of his interest in said property). And afterwards the said Lord Say, knowing that he was about to be put to death by that horrible and cruel traitor Jack Cade, openly acknowledged among other extortions this matter, requiring and charging a chaplain called Thomas Oldhall, then acting as his confessor, that he should urgently press the matter upon (do his faithful labour to) the wife of the said Lord Say (so) that your said beseecher speedily might have restitution and reformation of the said wrongs and oppressions in this matter to him done. May it please, therefore, your gracious lordship to grant a writ of subpoena directed to the said N to appear before your good lordship, and there to be examined in aid of your beseecher toward the righting of his said wrongs, for the love of God and in the way of charity.

Glenn & Redden, *supra* note 82, at 765–66 (translating into modern English from *John Broun v. The Widow of James Lord Say*, in 1 CALENDARS OF THE PROCEEDINGS IN CHANCERY, IN THE REIGN OF QUEEN ELIZABETH xlvii, xlvii (London, House of Commons 1827)).

86 *Cf.* MCCLINTOCK, *supra* note 70, at 21 (noting that Chancery's "system of procedure, . . . in time, became very complex and dilatory, but" it still "differed fundamentally from the common law system").

right, at least in corrective equity. While a legal cause of action has elements that are necessary and sufficient to plead a claim, equity's reasons for intervention are such that there is no necessary and sufficient list of elements.

E. The Centrality of Remedies

It has frequently been observed that remedies have had a central role in the development of equity jurisdiction,[87] and for good reason. At equity's inception, the injustice of being denied an adequate remedy at law led subjects to bring their petitions to the Crown or the Lord Chancellor. The petitioners of early equity were not merely seeking to be heard, much less were they seeking a public airing of disputes; hearings were often informal and in camera, initiated simply in hope of a just resolution. Petitioners sought to awaken the conscience of the Crown or the Crown's delegate, marshalling the monarch's prerogative power to compel respondents to pay, perform, stand by, or otherwise accept a limitation on their rights or powers on pain of imprisonment for contempt.

The priority of remedies in early equity is evident from the content of petitions placed before the Chancery. Petitioners' pleas were utterly lacking formality as to the substantive bases of intervention and prayers for relief, since their grievances were not defined by law and were not yet categorizable by description or characterization in equity. Recognizing that any relief to be afforded was discretionary and exceptional, requests for relief were put piteously and left open-ended. Petitioners prayed for a just, fair, or equitable remedial resolution of a specific problem, again invoking the Crown's power and responsibility for dispensing justice that cannot be realized through law.

As noted earlier, equity pleadings eventually increased in formality and drafting practices accordingly came to require lawyerly specialization. These developments reflected, in part, the expansion and development of equitable substantive and remedial doctrine. Thus, with time, it became possible and important to specify particular grievances recognizable in equity and to request particular forms of available equitable relief, even as pleadings continued to emphasize

87 *See, e.g.*, Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) (noting that the "system of equity 'derived its doctrines, as well as its powers, from its mode of giving relief'" (quoting C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING xxvii (1877))); D.E.C. Yale, *Introduction* to LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 16 (D.E.C. Yale ed., 1965) (c. 1674) (citing C.C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55 (1887), *reprinted in* C.C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 1, 1 (2d ed. 1908) (1904)) ("Equity is essentially a system of remedies.").

detailed narration and so, in this sense, prioritized substance over form. However, it is telling that here, too, it was judicial practice and doctrinal development in relation to remedies that often fed downstream development of substantive doctrine. As the chancellors gained experience in crafting and ordering discretionary remedies, they came to recognize patterns and to elicit principles, standards, and other ways in which to loosely formalize grievances short of stipulation of a conduct rule (e.g., a right, duty, power, or liability). And where corrective equity gave way to supplemental equity, the Chancery began to displace loosely characterized grievances with the formulation of equitable obligations, powers, and liabilities.

Although the priority of remedies to substantive doctrine seems backward from the vantage point of civil lawyers and the Romanistic reconstruction of the common law, it is sensible when situated in light of equity's history as a system of adjectival law. It is only in agreeing to hear and intervene in the face of inarticulate or colloquially articulated grievances, and in coming to hear them in bulk, that the Chancery could develop doctrine through processes of analogical reasoning that typify all judge-made law.

Given that equitable intervention was, and is, remedies-focused, it should be unsurprising that remedies are (with limited exceptions[88]) the locus of complexity in equity pleadings and doctrine. Equitable remedies, unlike legal remedies, tend to be specific rather than substitutional, consistent with equity's practice of acting on the person via compulsion.[89] They are notoriously adaptable, amenable of being tailored to meet the circumstances giving rise to the equity in the petitioner.[90] For that reason, they can be more time and resource-intensive to administer.[91] And given that specific relief is generally not available at law, litigants' appetite for equitable relief motivates suits and has necessitated limiting doctrines, including the modestly limiting effect of a requirement to stipulate in pleadings the grievances that provide a substantive basis for access to equitable remedies.[92] Given the reasons for equity's grievances remaining open-textured, and the demand for equitable remedies, courts with equitable powers have for centuries sought to limit equitable jurisdiction in the name of

88 An example is the byzantine mass of substantive doctrine found in trust law, which enabled its remarkable adaptability and integration with surrounding law (especially property, contract, family, inheritance, charities, tax and bankruptcy law).

89 Ralph E. Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE. L. REV. 186, 188 (1949).

90 *See* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) (citing Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)); Woodruff v. N. Bloomfield Gravel Mining Co. (The Debris Case), 16 F. 25, 29–30 (D. Cal. 1883).

91 *See* MCCLINTOCK, *supra* note 70, at 47–48; Bray, *supra* note 18, at 572–77.

92 For discussion of other limiting principles, see Bray, *supra* note 18, at 572–86.

protecting the integrity and stability of first-order law (common law and legislation). If equity is ever at risk of overstepping, it is because it offers comparatively attractive remedies on the basis of triggers (grievances) that are supple and so (ironically) inviting of misuse by the cunning.[93]

Equity has multiple mechanisms for regulating access. These mechanisms can be used to make it more difficult for opportunistic, remedies-driven petitioners to get into equity. As noted above, its development of substantive doctrine presents soft constraints. More importantly, many of equity's maxims have a direct or indirect cabining effect, serving as reminders of practices that limit equity jurisdiction.[94] But perhaps the most powerful mechanism is the judge fluent in equity, one who is mindful that intervention sounding in corrective equity is meant to be exceptional, and aware that the cautious exercise of ample discretion is the most important factor in determining whether equity will be served where it ought to be and restrained where petitioners ought to be turned back to law.

That is why one of the widely known characteristics of equitable remedies is so important: namely, that they are robustly discretionary.[95] Judges in equity have discretion in determining whether, as a matter of substantive doctrine, petitioners have "an equity" that warrants intervention (i.e., that establishes prima facie eligibility for an equitable remedy) as well as in selecting and tailoring remedies and providing for compliance with remedial orders.[96]

Viewed now from the perspective of remedies, one can further appreciate the muddle generated by the post-fusion assimilation of equitable with legal "causes of action." As a matter of law, the enjoyment of a primary right generates a secondary entitlement to a remedy upon proof that the right was, in fact, actionably violated (i.e., that the right-holder was wronged). Reference to a "cause of action" is natural and innocent in this context because the plaintiff's fixed legal entitlement grounds a settled expectation of a remedy.

But things are different as a matter of corrective equity. Here, ordinarily, the petitioner has *no (reasonable or recognized) settled expectation* of any equitable remedy, much less a particular one, even if

93 On the vulnerability of equitable remedies to opportunistic abuse, see Bray, *supra* note 18, at 534, 572–78.

94 *See* Bray, *supra* note 18, at 582–86.

95 *See* Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 551 (1937) ("[T]he extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court.").

96 MCCLINTOCK, *supra* note 70, at 2 ("[I]t is still true that most of the rules of equity are characterized by a greater flexibility than those of the common law, and that courts possess greater discretion in administering equitable remedies than even the same courts have in administering common-law remedies.").

the suit is well founded in that the grievance and record reveal an equity warranting relief.[97] Again, judges in equity have inherent discretion whether and how to remedy well-founded grievances. In exercising that discretion soundly, they must look to a range of considerations that are generally not pertinent to the award of legal remedies (e.g., the relative equities of the petitioner and respondent and potentially destabilizing effects on surrounding law). Finally, even if a petitioner succeeds in securing an equitable remedy, its extent is subject to discretionary adjustment and tailoring, as well as modification and dissolution as circumstances change.[98] All of this is lost in the linear thinking about the relationship between "wrongs" and "remedies" encouraged by talk of "causes of action" in equity.

IV. CONTEMPORARY IMPLICATIONS

Some of the implications of the analysis here are straightforward.

First, and easiest of all, this analysis should encourage courts not to ask whether there is an "equitable cause of action." At best, the expression is subject to misunderstanding, if a court means only that there is sufficient ground for equitable intervention. More likely, the expression leads the courts to assimilate the bases for equitable relief to those of law. The phrase should be retired, and courts should instead ask whether there is a basis for equitable intervention, or whether there is equitable jurisdiction, or whether the suit is cognizable in equity, or whether there are grounds for equitable relief, and so on. The preceding formulations are effectively identical.

Second, this analysis emphasizes that equity cannot be static. *Grupo Mexicano*[99] itself recognizes that some development in equity is necessary,[100] and this has long been the position of the Court. For example, the Court has said: "From the beginning, the phrase 'suits in equity' has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery

97 MCCLINTOCK, *supra* note 70, at 49 (1948) ("Equitable relief cannot be demanded as a matter of right whenever specified facts are shown; but is granted in the discretion of the court, by which is meant a 'judicial discretion' to be exercised by applying established principles of equity to the situation presented by all of the facts in the case, and adapting the remedy to accomplish the most equitable result possible."). For an explanation of substantive doctrine situated in corrective equity, see Neave & Weinberg, *supra* note 51, at 27 ("The plaintiff in such a case cannot point to a category and assert his right to a remedy on the basis of such a category. Rather, he must persuade the court to provide a remedy on the basis of the facts of his particular case.").

98 *See* Bray, *supra* note 18, at 547 n.81, 583.

99 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999).

100 *See* Bray, *supra* note 8, at 1010 n.61.

before 1789, as they have been developed in the federal courts."[101] The account given in this Article, especially the argument that equity is adjectival, supports the argument by James Pfander and Jacob Wentzel that relief in equity has to change and adjust as the relief in law does.[102] If law is not static, the equity that corrects and supplements it cannot be static either.

Third, the development of equity needs to happen through the application of traditional equitable principles. These include principles of potency, as well as principles of limitation. These principles about when equity will and will not act are still there, and they need no specific authorization in order to continue shaping the equitable claims, defenses, and remedies of the federal courts. This is perhaps the lesson of the reference to "equity" in Article III of the Constitution,[103] and certainly of the reference to "equity" in the Judiciary Act of 1789.[104] Hence the availability of an equitable remedy does not need to be tied to a provision of the Bill of Rights or to the Supremacy Clause.

Fourth, this analysis shows that the texture of equitable principles and doctrines is different. Law is more likely to have elements in a cause of action. Equity is more likely to have triggers to permit the exercise of judicial power,[105] along with focal considerations to guide the exercise of that power.[106] And yet even if the trigger is activated, there is still a residual discretion for equity not to act.[107]

One application of this point about equity's texture is that we should avoid the mistake of thinking that any list of elements or any multi-factor test will encompass all the considerations for the grant of an equitable remedy. In other words, there is more to the decision about a permanent injunction in federal court than simply applying

---

101 Gordon v. Washington, 295 U.S. 30, 36 (1935).

102 *See* Pfander & Wentzel, *supra* note 1. This works in both directions, both with equity confronting new challenges and with equity no longer needing to act. On the latter, see, e.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 n.19 (1962) ("It was settled in *Beacon Theatres* that procedural changes which remove the inadequacy of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases."); N. Pac. R.R. Co. v. Amacker, 46 F. 233, 236 (C.C.D. Mont. 1891) ("The perfecting of legal proceedings has often done away with the necessity of a resort to equitable remedies.").

103 U.S. CONST. art. 3, § 2.

104 Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

105 *See* Smith, *supra* note 15, at 1084–89. For further discussion of the relationship of "triggers" and "grievances," see *supra* note 44.

106 *See* Bray, *supra* note 18, at 584–86.

107 *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 778 n.116 (1982) (noting a trial court's "discretion . . . to withhold a permanent injunction as unnecessary even when the plaintiff has made out all the other elements of his case").

eBay v. MercExchange,[108] and there is more to a preliminary injunction than just applying *Winter v. Natural Resources Defense Council*.[109] Another application is that the distinctive texture of equitable claims further strengthens the arguments by John Goldberg and Henry Smith that equitable grievances, even ones that are routinized, should not be treated as torts.[110]

Fifth, this analysis helps illuminate why the Supreme Court's equity cases so often tend to merge together considerations of justiciability, merits, and remedy. Other scholars have skillfully analyzed the interplay of these considerations,[111] but in this less equity-conscious age some may miss that this interplay is different in law and in equity.[112] For legal claims, justiciability is a threshold, and once through the door the plaintiff is able to obtain remedies without much consideration of whether the plaintiff just barely made it over the threshold. But in equity it all connects—the broader and deeper the remedy the plaintiff wants, the stronger the plaintiff's story needs to be.[113] This interplay is the result of equity's not having causes of action: the cause of action delimits the scope and relief in a legal suit, but without that limiting principle in equity, others are needed. Put differently, this is an instance of the "paradox at the heart of equitable remedies": these remedies give courts the greatest capacity for managing the parties, and yet courts often decline to issue these remedies precisely "on the ground that they would require too much management of the

108 547 U.S. 388 (2006). In other words, Mark Gergen, John Golden, and Henry Smith were right. *See* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 219–30 (2012).

109 555 U.S. 7 (2008).

110 John C.P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Tort*, *in* EQUITY AND LAW, *supra* note 9, at 309, 310.

111 *E.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

112 For an exception, see Ernest Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885 (2022).

113 *See, e.g.*, Paine v. Upton, 87 N.Y. 327, 337 (1882) (Andrews, C.J.) ("The granting or refusing of equitable relief on the ground of mistake may depend, to some extent, on the fact whether the contract is executory or executed. The court might very well refuse the specific performance of a contract for the sale of land, in respect to which a mistake is alleged, and leave the party to his remedy at law, when it would not interfere, if the contract had been executed."). It is no accident that most of the abstention doctrines originate in equity; these doctrines show how concerns about the merits and the remedies feed back into abstention ab initio. For discussion and critique, see Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057 (2022); Fred O. Smith, Jr., *Abstaining Equally*, 97 NOTRE DAME L. REV. 2095 (2022); Lael Weinberger, *Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures*, 87 U. CHI. L. REV. 1737 (2020).

parties."[114] The fact that equity lacks the rigid boundaries and limits of law, especially the cause of action, makes this paradox more intelligible.

Sixth, this analysis is a reminder of why a statute-focused legal culture makes it harder for lawyers, judges, and scholars to have an intuitive feel for equity. Equity is the general law *par excellence*, the law least likely to be jurisdiction-specific and most likely to have contact with more general principles of litigation morality and fair play.[115] It is also the law that is most difficult to codify. Yet in the legal culture of the late-twentieth and early-twenty-first centuries, there is a strong appetite for demanding a specific legal authorization for every claim, and so the tendency is to speak of a case like *In re Debs* as being a *nonstatutory claim*.[116] That label assumes a statutory claim as the default. In a legal world with these premises—law is local, law is codified, and the default is a claim with specific statutory authorization—equity has to scramble to keep its footing.[117]

These implications follow rather straightforwardly from the preceding analysis. But they are also easy because they are unapplied. To say that traditional equitable principles should govern does not say what the result should be in cases that are hard or novel.

But even in those cases, the courts should not require a "cause of action" in equity, but they should consider the scope and intensity of the remedy in deciding whether there is equitable jurisdiction. One of the problems with asking whether there is a cause of action in equity is that it encourages a bifurcation between the "cause of action," which can be assessed and adjudicated first, and the "remedy," which can then be taken up. But equity does not know that bifurcation. There is a constant interplay between the question of whether the plaintiff *should be in equity* and the question of what the plaintiff *wants from equity*.[118]

CONCLUSION

For two centuries, common lawyers have talked about a "cause of action." But what they mean by that has not been constant. One sense of a cause of action is a legal entitlement to sue, and this is a familiar and fundamental concept in the common law. But "cause of action"

114 Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71, 83 (2018).

115 On general law, see Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

116 Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 YALE L.J. 118 (1979).

117 *See, e.g.*, Andrew Kull, *Equity's Atrophy*, 97 NOTRE DAME L. REV. 1799 (2022).

118 *See, e.g.*, City of L.A. v. Lyons, 461 U.S. 95, 111–13 (1983); Massachusetts v. Mellon, 262 U.S. 447 (1923) (consolidated with *Frothingham v. Mellon*).

is not an organizing principle for equity, and to insist on an equitable cause of action is to work a fundamental change in how a plaintiff gets into equity. Equity is adjectival, modifying law rather than the other way around. Remedies, not rights, are what give equity its power. And for getting into equity, it is the grievance that is central.