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# JUDICIAL DISCRETION AND THE “SUNK COSTS” STRATEGY OF GOVERNMENT AGENCIES

DAVID E. COLE\*

**Abstract:** When a government agency, during the construction of a public works project, has violated a statute, a court may be hesitant to issue an injunction because of the potential “waste” of public funds that have already been spent. Knowing this, agencies may engage in a “sunk costs” strategy while a decision on enjoining the project is looming—continuing to invest money in the project, often at an increased rate, in order to gain advantage in the equitable balancing used to evaluate the necessity for an injunction. An increase in the amount of irrecoverable public funds invested in furtherance of a statutory violation may tilt the judge’s balancing in the agency’s favor. This Note addresses this sunk costs strategy and concludes that, in light of traditional equitable jurisprudence, the money spent by an agency to take advantage of this balancing cannot be included in the balancing process.

*Thus, in the midst of the mud and at the heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.<sup>1</sup>*

## INTRODUCTION

In 1933, Congress created the Tennessee Valley Authority (TVA) to further national defense and agricultural and industrial development by “improv[ing] navigation in the Tennessee River” and “control[ing] the destructive floodwaters in the Tennessee River and Mississippi River Basins.”<sup>2</sup> To fulfill its mission, the TVA started building a network of dams throughout the Tennessee Valley river system.<sup>3</sup> One of the last of these dams, a small non-power project, which the TVA

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<sup>1</sup> CHARLES DICKENS, BLEAK HOUSE 21 (Penguin Books 1980) (1853).

<sup>2</sup> Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831 (2000).

<sup>3</sup> Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REFORM 805, 807–08 (1986).

proposed for regional development,<sup>4</sup> came to national attention in 1978 in the case of *TVA v. Hill*,<sup>5</sup> as the agency was fighting its way through one of a series of lawsuits aimed at blocking the completion of the project.<sup>6</sup>

As proposed, the Tellico Dam project would have far reaching social, economic, and ecological effects: the dam was to be built on the Cherokees' most sacred religious site, the city of Chota; furthermore, the TVA would need to condemn hundreds of families' generational farmland.<sup>7</sup> Local opposition soon arose consisting of: the family farmers; the Eastern Band of Cherokees; biologists, who regarded the region as an important natural habitat for species; archeologists and historians, who wanted to protect the area's cultural and historical significance; and sportsmen, who were concerned about the effects of the dam on fishing and hunting.<sup>8</sup>

As a successful suit under the National Environmental Policy Act (NEPA) halted work on the dam, forcing the TVA to prepare an environmental impact statement for the Tellico Dam project,<sup>9</sup> the

<sup>4</sup> The project required the acquisition of the generational property of hundreds of families. *Id.* TVA agents reminded those who refused to sell their land of TVA's statutorily granted eminent domain power. One agent threatened, "We've got our own court and our own judge." WILLIAM U. CHANDLER, *THE MYTH OF TVA: CONSERVATION AND DEVELOPMENT IN THE TENNESSEE VALLEY, 1933-1983*, at 162 (1984); see 16 U.S.C. § 831q. This condemned acreage included land that would remain unsubmerged, which would be given to the Boeing Corporation to build a modern industrial city, named Timberlake, requiring additional federal funding. See STEPHEN J. RECHICHAR & MICHAEL R. FITZGERALD, *THE CONSEQUENCES OF ADMINISTRATIVE DECISION: TVA'S ECONOMIC DEVELOPMENT MISSION AND INTRAGOVERNMENTAL REGULATION* 42-43 (1983). In early 1975, Boeing withdrew from the Tellico Dam project partly because of the increasingly grim prospects of obtaining this additional federal funding. See *id.*

<sup>5</sup> 437 U.S. 153 (1978) [*Hill III*].

<sup>6</sup> There were three major lawsuits and various appeals. *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980); *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976) [*Hill I*], *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978); *Env'tl. Def. Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

<sup>7</sup> See CHANDLER, *supra* note 4, at 164; Zygmunt J.B. Plater, *Reflected in a River: Agency Accountability and the TVA Tellico Dam Case*, 49 TENN. L. REV. 747, 756 (1982). The Cherokee had inhabited Georgia until 1838 when soldiers, under the command of General Winfred Scott, concentrated them into prison camps, and then started them on a winter march westward to Indian Territory, or what is now the State of Oklahoma. DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* 7 (1970). This march, known as the "Trail of Tears," claimed a quarter of the Cherokee's lives by cold, starvation, or disease. *Id.* A few hundred had escaped the march and sought refuge in the Smoky Mountains. *Id.*

<sup>8</sup> See Plater, *supra* note 7, at 756 & n.27.

<sup>9</sup> *Env'tl. Def. Fund*, 339 F. Supp. at 812.

conflicting values of the local community and the agency became evident.<sup>10</sup> On August 12, 1973, Dr. David Etnier, an ichthyologist from the University of Tennessee, discovered the snail darter, a small, threatened fish near the project site.<sup>11</sup> Knowing that strong legislation was about to be passed by Congress regarding the protection of endangered species, Etnier commented, "[T]his is the fish that will stop Tellico Dam."<sup>12</sup>

In December of 1973, the Endangered Species Act (ESA) was enacted, mandating that

[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.<sup>13</sup>

The passage of the ESA breathed new life into the dam's local opposition, who found that the newly discovered, endangered, three-inch fish now had the potential to block the Tellico Dam project.<sup>14</sup> In 1974, a citizens group requested that the TVA comply with the new federal law.<sup>15</sup> The TVA insisted that the ESA did not apply to the Tellico Dam project, and stated that "no court had ordered the agency to halt construction" yet.<sup>16</sup>

The citizens group petitioned the Department of the Interior to list the snail darter as endangered and designate its critical habitat as the waters near the Tellico Dam project.<sup>17</sup> The TVA actively resisted both of these efforts; these two procedural requirements would allow

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<sup>10</sup> See RECHICHAR & FITZGERALD, *supra* note 4, at 39.

<sup>11</sup> *Id.* Ironically, Dr. Etnier was working under contract with the TVA at the time to study the environmental impacts that the Tellico Dam would have on the river in accordance with TVA's NEPA obligations. CHANDLER, *supra* note 4, at 163.

<sup>12</sup> See RECHICHAR & FITZGERALD, *supra* note 4, at 39.

<sup>13</sup> Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000).

<sup>14</sup> See *id.*; *Endangered Species Oversight: Hearing Before the S. Comm. on the Env't & Public Works*, 95th Cong. 877 (1977) (written statement of Hiram G. Hill, Jr., Member, Tenn. Endangered Species Comm.) [hereinafter *Oversight Hearings*].

<sup>15</sup> See *Oversight Hearings*, *supra* note 14, at 877 (written statement of Hiram G. Hill, Jr., Member, Tenn. Endangered Species Comm.).

<sup>16</sup> See *id.*

<sup>17</sup> *Hill I*, 419 F. Supp. 753, 756 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

the citizens group to invoke the ESA's protection for the fish.<sup>18</sup> The most obvious objectives of the TVA's efforts failed: the snail darter was eventually listed as endangered,<sup>19</sup> its critical habitat was designated near the Tellico Dam project,<sup>20</sup> and plaintiffs were able to file suit seeking an injunction to halt the completion of the dam.<sup>21</sup> With all of its efforts, the TVA achieved a less obvious objective—delay.<sup>22</sup> As one of the plaintiffs in the *Hill* litigation observed:

The effect of TVA's voluminous submissions, complaints, and objections, often filed at the end of the official comment periods . . . was to prolong the administrative process until November 1975 for the species listing and the [critical] habitat listing until April 1976. Even then the agency argued that the [Department of the] Interior actions were not effective until 30 days after publication.<sup>23</sup>

The importance of this delay to the TVA manifested itself in a dramatic change in atmosphere and a new sense of urgency at the Tellico Dam construction site as this drama of the snail darter unfolded.<sup>24</sup> The TVA continued dam construction, despite the opinion of the Director of the Fish and Wildlife Service that "[t]he proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat,"<sup>25</sup> and despite the citizen group's subsequent notification to the TVA that further work on the Tellico Dam project would violate the ESA.<sup>26</sup> Also, the pace of the dam's construction dramatically increased.<sup>27</sup> In the seven years

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<sup>18</sup> See 16 U.S.C. §§ 1533, 1536(a)(1); *Hill I*, 419 F. Supp. at 756; *Oversight Hearings*, *supra* note 14, at 877 (written statement of Hiram G. Hill, Jr., Member, Tenn. Endangered Species Comm.).

<sup>19</sup> See *Hill I*, 419 F. Supp. at 756. This listing occurred on November 10, 1975, ten months after the citizens group first urged the Department of the Interior to do so. *Id.*

<sup>20</sup> *Id.* This designation occurred in April of 1976 to become effective on May 3, 1976. *Id.*

<sup>21</sup> A citizens group, along with Zygmunt Plater, a professor of law at the University of Tennessee, and Hiram Hill, a law student at the University of Tennessee, filed the lawsuit in February of 1976. See *id.* at 756. Hill had written a term paper on the Endangered Species Act for Plater that "was the genesis of the Tellico Dam snail darter lawsuit." Plater, *supra* note 7, at 756 n.28.

<sup>22</sup> See Plater, *supra* note 7, at 768 n.72.

<sup>23</sup> See *Oversight Hearings*, *supra* note 14, at 877 (written statement of Hiram G. Hill, Jr., Member, Tenn. Endangered Species Comm.).

<sup>24</sup> See Plater, *supra* note 7, at 768.

<sup>25</sup> See *Hill I*, 419 F. Supp. at 756 (quoting 40 Fed. Reg. 47,506 (Nov. 10, 1975)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 760; Plater, *supra* note 7, at 768.

preceding Dr. Etnier's discovery, the TVA had expended \$35 million on the project.<sup>28</sup> During the four years following this discovery, the TVA increased the rate of its investment in the project, spending an additional \$67 million in that period.<sup>29</sup>

After a suit was brought to enjoin construction of the dam and its related earthworks, the district court refused to issue an injunction, despite finding that it was "highly probable" that the completion of the dam would "jeopardize the continued existence of the snail darter."<sup>30</sup> When the plaintiffs appealed to the Sixth Circuit, the TVA adopted a three-shift-a-day, six-day-a-week construction schedule, with crews working under floodlights through the night for several months.<sup>31</sup> A statement overheard in a TVA meeting perfectly summarized the strategy that the TVA was employing, while the plaintiffs awaited review of the district court's decision: "By the time Plater [the plaintiffs' attorney] stands up to argue . . . there won't be a tree standing in the reservoir area."<sup>32</sup>

TVA's strategy can be considered a "sunk costs" strategy, a breed of a *fait accompli* tactic.<sup>33</sup> A *fait accompli* strategy involves mooting an issue so that the merits of an action are never addressed.<sup>34</sup> Had the TVA rushed the Tellico Dam to completion before the snail darter could be officially listed as endangered and its critical habitat could be designated—or before an injunction to halt construction could be issued—a court would likely determine the issue to be moot.<sup>35</sup>

Seeking a similar result, those using a sunk costs strategy seek to taint a court's views toward its remedial powers. In the case of Tellico Dam, partial completion of the dam did this quite effectively, even as the courts were addressing a statutory violation. Such a strategy places

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<sup>28</sup> *Hill I*, 419 F. Supp. at 760; Plater, *supra* note 7, at 768.

<sup>29</sup> See Plater, *supra* note 7, at 768.

<sup>30</sup> *Hill I*, 419 F. Supp. at 757.

<sup>31</sup> See *Oversight Hearings*, *supra* note 14, at 875 (written statement of Hiram G. Hill, Jr., Member, Tenn. Endangered Species Comm.); Plater, *supra* note 7, at 768.

<sup>32</sup> See Plater, *supra* note 7, at 768 n.72.

<sup>33</sup> See Jeffrey S. Kopf, Comment, *Steamrolling Section 7(d) of the Endangered Species Act: How Sunk Costs Undermine Environmental Regulation*, 23 B.C. ENVTL. AFF. L. REV. 393, 393 (1996); see also JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 102 (1971).

<sup>34</sup> See SAX, *supra* note 33, at 102.

<sup>35</sup> See *Oversight Hearings*, *supra* note 14, at 877 (written statement of Hiram G. Hill, Jr., Member, Tenn. Endangered Species Comm.); SAX, *supra* note 33, at 102. *But see* TVA v. Hill, 549 F.2d 1064, 1071 (6th Cir. 1977) [*Hill II*] (stating that "[c]onscientious enforcement of the Act requires that it be taken to its logical extreme"—halting the impoundment of water behind a completed dam), *aff'd*, 437 U.S. 153 (1978).

the court in the precarious position of issuing an injunction to stop a costly, nearly completed, federal works project.<sup>36</sup> Defendants using a sunk costs strategy depend on the money spent in violation of a statute or the common law to skew the court's equitable calculus, called the "balancing of the utilities," in the defendant's favor as the court determines the appropriateness of an injunction.<sup>37</sup>

This sunk costs strategy was not new at the time of *Hill*, and it can be a particularly destructive strategy, undermining environmental statutes and regulations.<sup>38</sup> Public agencies find value in this strategy where "much time, effort, and money h[ave] already been invested in a proposal. . . . [P]ublic agencies . . . argue—when challenged—that huge sums of money have already been invested and that public opposition . . . comes too late."<sup>39</sup> By the time a judge can decide whether

<sup>36</sup> See *SAX*, *supra* note 33, at 102–04; *infra* Part IV. The district court grappled with this problem, stating, "In excess of \$78 million in public funds have been invested in the project, and if it were permanently enjoined, TVA estimates that some \$53 million would be lost in nonrecoverable obligations." *Hill I*, 419 F. Supp. 753, 759 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). The Sixth Circuit, on the appeal of this denial and uncomfortable with the position in which it found itself, wrote: "We are . . . asked to balance the survival of a living species against the completion of a public works project which is more than 80% completed and represents a federal investment of almost ninety million dollars." *Hill II*, 549 F.2d at 1067. Later, in the same opinion, the circuit court again stressed the awkwardness of its position: "[T]his legal controversy may well enjoy a modicum of notoriety because it appears to pit the survival of an obscure fish against completion of a \$100 million reservoir . . ." *Id.* at 1069.

<sup>37</sup> See *SAX*, *supra* note 33, at 102.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at 102–03. A related tactic was used in *Citizens to Preserve Overton Park v. Volpe*. That case concerned the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, which prohibited any program or project that required the use of publicly owned land from a public park. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 405 (1971). It provided an exception where there was no feasible or prudent alternative, which required the Secretary of Transportation's approval. *Id.* The Bureau of Public Roads and the Federal Highway Administrator approved of a plan to have Interstate I-40 go through the center of a park in Memphis, Tennessee. *Id.* at 406–07. The Act prohibited this, but instead of using a statute as a general guideline for its actions, the agency tailored its policies and actions towards obtaining an exception to a statute. *Id.* at 407–08. The government agency condemned land and built a highway up to the north and south edges of a public park. *Id.* This made the other alternatives (those which did not require going through the park) allegedly unfeasible and imprudent due to financial constraints that were created by the agency. *Id.* at 408–09. This *fait accompli* tactic was not briefed, but during oral argument the plaintiffs' counsel noted:

[I]f the Secretary is to be allowed to thwart any review of his decisions by this piecemeal acquisition of right of way right up to the park, then the administration, the effectiveness of this statute is whittled away . . . Because, every time he has a controversial project it would be possible to box himself in, and to box the Court in and to present you with a *fait accompli* . . .

an injunction should be issued, she or he must grapple with the difficult issue of the potential "waste" of public funds, and, as a result, the traditional equitable balancing tests tend to be tilted in favor of the project's completion. In such cases, judges are mindful of the public nature of their roles, knowing that "[t]heir peers on the bench, their clerks, counsel, law professors, and politicians in the other branches of government all scrutinize" their decrees.<sup>40</sup>

In the Tellico Dam litigation, the Sixth Circuit eventually ordered an injunction preventing the immediate completion of the Tellico Dam.<sup>41</sup> On appeal to the United States Supreme Court, the injunction was upheld,<sup>42</sup> but not without the caricature of little-fish-versus-big-dam pervading the American consciousness and raising judicial concerns about the air of the ridiculous.<sup>43</sup>

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Transcript of Oral Argument at 13, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (No. 1066). Although the case was reversed and remanded on other grounds, members of the Court were obviously wise to and repulsed by this conscious manufacturing of a statutory exception. During oral arguments, the Court grilled the attorney from the Solicitor General's Office, inquiring:

And by the time the land was cleared, the only feasible route was through the park? . . . And so that's the end. . . . So then, in that case, the moving party here has no possibility of redress. . . . When were the contracts, or have the contracts been let? . . . The contract has been let, hasn't it? . . . This last month. You went ahead very, very rapidly . . . . Is that it? . . . Rather precipitously, if I may use the word. . . . So all we can do now is unring the bell.

*Id.* at 32–34.

<sup>40</sup> PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 20 (1990).

<sup>41</sup> *Hill II*, 549 F.2d at 1074.

<sup>42</sup> *Hill III*, 437 U.S. 153, 195 (1978). The dam was eventually completed after being exempted from all federal laws by way of a rider on the Energy and Appropriations Act of 1980. CHANDLER, *supra* note 4, at 165. A large portion of the land surrounding what is now Tellico Reservoir was acquired by Cooper Land Development, Inc. and in 1986 became Tellico Village, a private recreational-retirement community consisting of village housing, two championship golf courses, a yacht club, a country club, and a community center. COOPER LAND DEV., INC., *FACT BOOK: TELLICO VILLAGE 1–3* (n.d.). Cooper Land Development's base of operations in Tellico Village is located in Chota Center. *See id.* at 7. This appears to be a misplaced homage to Chota—"the sacred capital of the Cherokee [I]ndians, their Jerusalem or Mecca"—which is now under the waters of the Tellico Reservoir. *Compare id.*, with CHANDLER, *supra* note 4, at 164, and Plater, *supra* note 3, at 807.

<sup>43</sup> In conference, Justice Blackmun noted that in "[t]his . . . fable of the snail darter and the Tellico Dam, common sense would mandate the completion of Tellico Dam." Justice William Brennan, *Conference Notes on TVA v. Hill*, 437 U.S. 153 (1978), in *THE SUPREME COURT IN CONFERENCE* (1940–1985), at 151 (Del Dickson ed., 2001). Justice Marshall, observing that the statute could only be interpreted as requiring the halting of the dam's construction, bluntly added, "Congress has the right to be a jackass." *Id.*



After the Tellico Dam controversy, Congress attempted to rectify this sunk costs phenomenon by amending the ESA to prohibit federal agencies from making "any irreversible or irretrievable commitment of any resources" to agency actions or projects that have "the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives" before interagency consultation.<sup>44</sup> This provision may effectively remove the amount of money spent in violation of the ESA, or sunk costs, from factoring into the equitable balance.<sup>45</sup>

This Note will examine the traditional concerns of a court sitting in equity, and how courts have addressed this sunk costs strategy when contemplating the issuance of a permanent injunction<sup>46</sup> in the face of a statutory violation. The Note will not address situations where the equitable discretion of the courts has been explicitly altered by statute,<sup>47</sup> but rather, it will examine what role, if any, sunk costs should play in the granting of an injunction when a government agency has violated the law. Part I discusses the historical development of the injunction and courts of equity. Part II concerns the origin of the balancing of the utilities doctrine. The application of this doctrine to situations involving private defendants and violations of private or public law is explored in Part III. The special circumstance involving a defendant-agency and the balancing of the utilities doctrine is discussed in Part IV.

## I. A SHORT HISTORY OF EQUITY JURISPRUDENCE

An injunction is an equitable remedy employed for the protection of the integrity of established rights from prospective harm.<sup>48</sup> In the courts of the United States, equitable remedies do not necessarily derive from a statutory grant of power to the courts, but rather "[t]he essence of a court's equity power lies in its *inherent* capacity to adjust remedies in a feasible and practical way to eliminate the conditions or

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<sup>44</sup> Endangered Species Act of 1973, 16 U.S.C. § 1536(d) (2000).

<sup>45</sup> However, the actual results of the implementation of this amendment have been questioned. See generally Kopf, *supra* note 33 (arguing that despite this "sunk costs" amendment to the ESA, the sunk costs strategy remains a powerful tool).

<sup>46</sup> A permanent injunction is distinct from a temporary injunction. The former is the court's final grant of complete relief after a trial on the merits, while the latter is used to maintain the *status quo* while the court is in the process of determining the plaintiff's right to a permanent injunction. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987).

<sup>47</sup> A court's equitable jurisdiction can be restricted by a clear and valid legislative command. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

<sup>48</sup> *Id.* at 311; 1 THOMAS CARL SPELLING, *A TREATISE ON INJUNCTION AND OTHER EXTRAORDINARY REMEDIES* 12-14 (2d ed. 1901).

redress the injuries caused by unlawful action."<sup>49</sup> As a general principle, the scope of the courts' equitable powers cannot be denied or limited without a clear and valid legislative directive.<sup>50</sup> Outside such legislative shackling, the courts look to the traditional principles of equity jurisprudence.<sup>51</sup>

An American judge sitting in equity has strong ties to the early political philosophy of the Greeks, the procedures of the Roman Empire's legal system, and the traditions of the English courts of chancery.<sup>52</sup> Therefore, a brief examination of the development of equity jurisdiction and the use of injunctions is helpful to create a basis for the discussion of current doctrines and concerns of the courts of equity in the United States.

### A. *The Greek Concept of Epieikeia*

Although there were ancient cultures that had addressed the problems of law and governance well before the Greeks, the Greek philosophers were among the first to record a true analysis of the associations between law, justice, and the individual.<sup>53</sup> The surviving philosophical writings from the period between 420 and 320 B.C. have had an impact on the legal systems of both the Roman and English empires, and they form the basis of a European classical education.<sup>54</sup> It is therefore appropriate to use the ancient Greeks as a starting point.

A concern for relieving the individual from the rigors of the law—the Greek concept of *epieikeia*, or equity—can be clearly discerned from the works of Plato and Aristotle. In Plato's last work, *The Laws*, he identifies the dilemma that results from a government's

<sup>49</sup> *Freeman v. Pitts*, 503 U.S. 467, 487 (1992); see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (emphasis added). For a further example, note that the Constitution grants "[t]he judicial Power of the United States" to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority," but does not afford an equitable remedy power to federal courts. See U.S. CONST. art. III, §§ 1, 2.

<sup>50</sup> *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.")

<sup>51</sup> Weinberger, 456 U.S. at 313–14.

<sup>52</sup> See 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 64 (Arnold Press Inc., reprint ed. 1972) (1836); J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 1, 39 (1992).

<sup>53</sup> KELLY, *supra* note 52, at 1.

<sup>54</sup> See *id.* at 1–2, 39; T.A. Sinclair, *Translator's Introduction to ARISTOTLE, THE POLITICS* 13, 15–17 (T.A. Sinclair trans., Penguin Books 1992).

need to pass general legislation and a court's need to apply these laws to individual cases.<sup>55</sup> Through a dialogue between Cleinias and an Athenian, Plato notes that when a law is violated, the circumstances surrounding each individual case may "differ in a thousand and one different ways."<sup>56</sup> Observing the impossibility of legislating to address all variations of transgression, he concludes that "some details ought to be left to the courts," so that the court may assign fines or punishments according to its "discretion."<sup>57</sup>

Later, in *Nicomachean Ethics*, Aristotle, once a member of Plato's famous Academy, elaborates on this notion of judicial discretion and further develops the idea of equity:

Hence whenever the law makes a universal rule, but in this particular case what happens violates the . . . universal rule, here the legislator falls short, and has made an error by making an unconditional rule. Then it is correct to rectify the deficiency; this is what the legislator would have said himself if he had been present there, and what he would have prescribed, had he known, in his legislation.

. . . And this is the nature of what is decent—rectification of law in so far as the universality of law makes it deficient.<sup>58</sup>

In *The Politics*, Aristotle clarifies the concept of equity and qualifies it as being subordinate to the law.<sup>59</sup> He argues that where the law is clearly applicable to the given circumstances of a case, "it is the law's rule and decisions that will be best"—superior to the decisions of any citizen.<sup>60</sup> Reliance on the decision of a human being is appropriate only in cases where the law is inadequate.<sup>61</sup> Equity, although permeating Greek political philosophy, was not recognized by the Athenian legal system, which was bound by the strict letter of the law.<sup>62</sup>

<sup>55</sup> PLATO, *THE LAWS* 396 (Trevor J. Saunders trans., Penguin Books 1975).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> ARISTOTLE, *NICOMACHEAN ETHICS* 144–45 (Terence Irwin trans., Hackett Pub. Co. 1985).

<sup>59</sup> See ARISTOTLE, *THE POLITICS* 226–28 (T.A. Sinclair trans., Penguin Books 1992).

<sup>60</sup> *Id.* at 227–28.

<sup>61</sup> See *id.*

<sup>62</sup> KELLY, *supra* note 52, at 29.

## B. *The Roman Concept of Aequitas and the Early Budding of the Injunction*

In the Roman Empire, the Greek concept of equity was slowly incorporated into the Roman legal system.<sup>63</sup> The roots of the modern day injunction—the *praetorian* interdict—can be traced to this period as well.<sup>64</sup>

### 1. *The Jus Praetor*

Although Greek, specifically Aristotelian, philosophies had a strong influence on many aspects of Roman law, the Greek concept of equity and what the Romans called *aequitas* were tied together in the person of the *praetor* in the Roman civil law system.<sup>65</sup> The *praetor* was an elected official who controlled access to the Roman legal system.<sup>66</sup> Parties would initiate litigation by contacting the *praetor*, who would define the basic issues in a case, write them down in a simple formula, and then demand answers to the questions from the judge whom the parties had chosen.<sup>67</sup>

The *praetors*, by framing the issues submitted to the judges, had enormous power over the legal process, and began to use this power to inject concepts of *aequitas* into the Roman civil law system.<sup>68</sup> The resulting *Jus Praetorium*, or *praetorian* law, was comprised of amorphous equitable concepts. It was concerned with the overall fairness of the result and was based on laws common to humankind, which originate from a preexisting state of nature.<sup>69</sup>

This idea of *aequitas* had been phrased in several ways: good faith, fairness, and “honest dealing as between honest people.”<sup>70</sup> Assessing the practical application of *aequitas* by the *praetors*, Papinian explained, “[P]raetorian law is that which in the public interest the *praetors* have

<sup>63</sup> Thomas Edward Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 208, 216 (1907) [hereinafter SELECT ESSAYS]; see J. INST. 1.2.1, 1.2.2.

<sup>64</sup> See J. INST. 4.15.1; 2 STORY, *supra* note 52, at 158.

<sup>65</sup> See KELLY, *supra* note 52, at 52.

<sup>66</sup> DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 6 (1999).

<sup>67</sup> See *id.*; KELLY, *supra* note 52, at 55.

<sup>68</sup> See KELLY, *supra* note 52, at 54–57; Scrutton, *supra* note 63, at 217; see also CICERO, ON DUTIES bk. III, ch. 4, § 7, reprinted in CICERO: SELECTED WORKS (Michael Grant trans., Penguin Books 1971).

<sup>69</sup> Scrutton, *supra* note 63, at 216; see J. INST. 1.2.1, 1.2.2. In the preface to the *Institutes*, a law textbook that Emperor Justinian ordered to accompany the production of his great *Digest*, the hope is expressed that the emperor will “repel the inequities of men who abuse the laws” by every legal means. J. INST. 1.1.pr.

<sup>70</sup> CICERO, *supra* note 68, bk. III, ch. 4, § 7.

introduced in aid or supplementation or correction of the [civil law].<sup>71</sup> Indeed, *praetorian* law was considered the “living voice of the [civil law].”<sup>72</sup> Roman *aequitas*, by allowing the *praetor* to frame the issues of a dispute with the aim of correcting the perceived harshness of the civil law, dramatically expanded the powers of the *praetor*.<sup>73</sup> Notice, however, that these concerns of the *praetor* were injected into the liability stage of litigation. As will be discussed *infra*, once liability or rights were established by the Roman judge, the *praetor*'s next function was simply that of enforcement.

## 2. The Interdict

In addition to his increased discretion, the *praetor* could issue interdicts, if they were required, as a remedial or enforcement tool.<sup>74</sup> Similar to the modern use of injunctions by English and American courts, “[i]nterdicts were . . . forms and formulations of words whereby the *praetor* directed or forbade that something be done.”<sup>75</sup> Interdicts were of three forms: exhibitory, restoratory, and prohibitory.<sup>76</sup> By the exhibitory interdict, the *praetor* compelled the production of some thing or person.<sup>77</sup> In issuing a restoratory interdict, the

<sup>71</sup> See DIG. 1.1.7.1 (Papinian, Definitions 2) (emphasis added); Scrutton, *supra* note 63, at 216.

<sup>72</sup> DIG. 1.1.8 (Marcian, Institutes 1); see DIG. 1.1.7.1 (Papinian, Definitions 2). Evidence of this *praetorian* law can be found in the pages of two of the three final authoritative Roman civil law texts, known as the *Corpus Juris*. Emperor Justinian commissioned the two texts, the *Institutes* and the *Digest*, before the fall of the Roman Empire. See J. INST. 1.1.pr., 1.2.1, 1.2.2; DIG. 1.1.7.1 (Papinian); COUILLETTE, *supra* note 66, at 4–5; Peter Stein, *The Glossators of the Civil Law*, in FRANCIS DE ZULUETA & PETER STEIN, *THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200*, at xiii, xiv (1990). There were three main texts that were the basis of Roman law: the *Institutes*, the *Digest*, and the *Codex*. COUILLETTE, *supra* note 66, at 4–5. The *Digest* was a collection of all of the most authoritative sections of the previous Roman legal texts. *Id.* After the *Digest* was complete, all other Roman legal texts were ordered destroyed to avoid conflicting statements of the law; fragments of one text, the *Institutes of Gaius*, did escape this fate. *Id.* at 5. The *Institutes* was a text for students of the law based on the *Digest*. *Id.* The *Codex* was a compilation of all of the imperial statutes. *Id.* These three works form the body of Roman law, or the *Corpus Juris*, and were completed in 533 A.D. *Id.* at 4–5. Some commentators would include the compilation of Emperor Justinian's later legislation, the *Novels*, as part of the *Corpus Juris* as well. See Stein, *supra*, at xiii.

<sup>73</sup> See KELLY, *supra* note 52, at 52.

<sup>74</sup> See J. INST. 4.15.pr., 4.15.1; HENRY SUMNER MAINE, *ANCIENT LAW* 44 (Univ. of Ariz. Press 1986) (1864).

<sup>75</sup> J. INST. 4.15.pr.; see 2 STORY, *supra* note 52, at 158. As with the injunction, the interdicts applied *in personam*. See DIG. 43.1.1.3 (Ulpian, Edict 67).

<sup>76</sup> J. INST. 4.15.1; 2 STORY, *supra* note 52, at 159–60.

<sup>77</sup> J. INST. 4.15.1; 2 STORY, *supra* note 52, at 160.

*praetor* commanded that a person's possession of an object be restored.<sup>78</sup> By way of a prohibitory interdict, certain actions were forbidden.<sup>79</sup> The prohibitory interdicts were the most common of the three, and they are closely related to injunctions issued by modern English and American courts.<sup>80</sup>

Here, at the remedy stage of the litigation, after the judges had determined the rights of the parties following the *praetor's* formula, the Roman *praetor* was required to issue some form of remedy when necessary to ensure that established rights would be protected.<sup>81</sup>

### C. English Courts of Chancery and Equity

Traces of the Roman legal system were, for the most part, wiped clean from the memories of the English when the Roman occupation of England ended in 410 A.D. After the Norman Conquest of England in 1066, as the English common law system was taking shape, there was a dramatic resurgence in Roman civil law and Emperor Justinian's *Corpus Juris*.<sup>82</sup> Roman manuscripts had made their way over to England in the twelfth century, and Englishmen started going to continental Europe for their education, mainly to Bologna, where there was an intense study of the discovered Roman legal texts.<sup>83</sup> By the latter half of the twelfth century, civil law was being taught at Oxford.<sup>84</sup> Also, Vacarius had begun his teaching of the civil law in England, and published his *Liber Pauperum*, a legal text consisting of excerpts from the *Digest* and the *Institutes* for those who could not afford the full texts.<sup>85</sup> Roman Law so permeated English legal thinking that the two early English treatises in English common law, *Glanville* and *Bracton*,

<sup>78</sup> J. INST. 4.15.1; 2 STORY, *supra* note 52, at 159–60.

<sup>79</sup> J. INST. 4.15.1; 2 STORY, *supra* note 52, at 159.

<sup>80</sup> 1 SPELLING, *supra* note 48, at 2–3.

<sup>81</sup> 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 937 (1941); see GEO. TUCKER BISPHAM, THE PRINCIPLES OF EQUITY 24–28 (5th ed. 1893).

<sup>82</sup> COQUILLETTE, *supra* note 66, at 37; Peter Stein, *Vacarius and the Civil Law in England*, in ZULUETA & STEIN, *supra* note 72, at xxii.

<sup>83</sup> Stein, *supra* note 82, at xxii.

<sup>84</sup> Roman civil law would continue to be the only law taught at Oxford for centuries, until Sir William Blackstone made the common law system part of the curriculum in 1758 when he was appointed as the first Vinerian Chair. Frederick William Maitland, *English Law and the Renaissance*, in 1 SELECT ESSAYS, *supra* note 63, at 168, 198–99; *id.* at 193 (“The voice . . . pleading that English law was the law that should be taught in English universities was a voice that for centuries cried in the wilderness.”); see 1 WILLIAM BLACKSTONE, COMMENTARIES \*4–\*5, \*16.

<sup>85</sup> Stein, *supra* note 82, at xxii–xxv.

both pay homage to or incorporate the Roman texts.<sup>86</sup> In a vain effort to put an end to the invasion of Roman civil law into the English common law system, King Stephen expelled Vacarius from England, and, in a letter to the Mayor of London, ordered the prohibition of the teaching of the civil law in London.<sup>87</sup>

These desperate actions by King Stephen may have slowed Roman influence on the common law courts, but it did not stop the ecclesiastics from teaching civil law and canon law, which is intimately tied to the civil law, in their schools and monasteries.<sup>88</sup>

Drawing heavily from the Roman *Corpus Juris* and from Scripture, Gratian, a possible teacher and monk in Bologna, completed his *Decretum*, a codification and harmonization of the canon laws.<sup>89</sup> Published in 1140, the *Decretum* became the standard text used by the Roman Catholic Church for teaching canon law.<sup>90</sup> This influence of Roman law would be most prominent in the English chancery courts.

### 1. Roman Influence on the Court of Chancery's Determination of Liability

The development of the English chancellors and English equity jurisprudence parallels that of the Roman *praetor* and *praetorian* law. Similar to the Roman *praetor*, the position of the Lord Chancellor of the High Court of Chancery originated as a ministerial position under

<sup>86</sup> See Scrutton, *supra* note 63, at 209–12; William Stubbs, *The History of the Canon Law in England*, in 1 SELECT ESSAYS, *supra* note 63, at 248, 260. *Glanville*, the great treatise on common law procedure, cites Justinian's *Institutes* in the preface to the manual. Scrutton, *supra* note 63, at 209–12. *Bracton*, the first great treatise dealing with the substantive side of the English common law system, incorporates significant portions of the *Corpus Juris*. Stubbs, *supra*, at 260.

<sup>87</sup> See 1 BLACKSTONE, *supra* note 84, at \*18–\*19; Stubbs, *supra* note 86, at 258, 262.

<sup>88</sup> See 1 BLACKSTONE, *supra* note 84, at \*19–\*20.

<sup>89</sup> Katherine Gordley, *Introduction to GRATIAN, THE TREATISE ON LAWS WITH THE ORDINARY GLOSS*, at iv, x, xviii (Augustine Thompson & James Gordley trans., Catholic Univ. of Am. Press 1993) (1140).

<sup>90</sup> *Id.* at xviii. Echoing the Roman concept of *aequitas*, Gratian observes that “there are many [enactments] that should be tempered, either for the necessity of the times, or in consideration of age.” GRATIAN, *supra* note 89, at 53. The *Decretum* was the first written work of what came to be known to canonists as the *Corpus Juris Canonici*. COQUILLETTE, *supra* note 66, at 184; Gordley, *supra* note 89, at xvi. Catholic philosophers were also strongly influenced by the *Summa Theologica* written by Aristotle-influenced St. Thomas Aquinas. COQUILLETTE, *supra* note 66, at 185. Aquinas, citing canon law sources, Scripture, and Roman texts, observed the need to look to the intent of the legislature when looking at any particular case, in order to avoid a harsh application of a statute. See ST. THOMAS AQUINAS, *THE SUMMA THEOLOGICA* pt. II, pt. 2, question 96, art. 6, reprinted in *THE POLITICAL IDEAS OF ST. THOMAS AQUINAS* 75–77 (Dino Bigongiari ed., 1953).

the king, which only later became vested with true judicial duties.<sup>91</sup> In the beginning of English equity jurisprudence, the chancellor acted, essentially, as the "secretary" of the king, issuing writs that allowed a petitioner to bring suit before the king's courts: the courts of the King's Bench, the Common Pleas, and the Exchequer.<sup>92</sup> The chancellor would send the petitioner to one of the three courts where the petitioner's claim could be properly addressed.<sup>93</sup> In some cases, where the suit did not properly fall under the jurisdiction of the other courts, the chancellor himself would have jurisdiction to grant relief to the petitioner.<sup>94</sup> In addition, petitions to the king or the King's Council for royal grace or favor were soon delegated to the chancellor first for administration, and then for final decision.<sup>95</sup>

In the beginning, the chancellor was always an ecclesiastic because not many other people were capable of administering a position that demanded such a high level of literacy.<sup>96</sup> As a result, the ecclesiastic chancellor was almost always well versed in Roman civil law as well as the Roman-influenced canon law, but he often had only the most superficial knowledge of English common law.<sup>97</sup> Consequently, principles of the Roman civil law and canon law would often be used to resolve cases that were brought before the chancellor.<sup>98</sup>

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<sup>91</sup> 3 BLACKSTONE, *supra* note 84, at \*46; 3 EDWARD COKE, INSTITUTES \*328 n.D; THEODORE F.T. PLUNCKNETT, A CONCISE HISTORY OF THE COMMON LAW 695 (Little, Brown & Co., 5th ed. 1956).

<sup>92</sup> BISPHAM, *supra* note 81, at 1, 5-6 (5th ed. 1893).

<sup>93</sup> *Id.* at 6.

<sup>94</sup> *Id.*

<sup>95</sup> See SCRUTTON, *supra* note 63, at 214.

<sup>96</sup> 3 BLACKSTONE, *supra* note 84, at \*47. Until 1530, only a few non-ecclesiastics had held the position of Lord Chancellor. SCRUTTON, *supra* note 63, at 214-15.

<sup>97</sup> See CHRISTOPHER ST. GERMAN, THE REPLICATION OF A SERJEANT AT THE LAWS OF ENGLAND, reprinted in J.A. GUY, CHRISTOPHER ST. GERMAN ON CHANCERY AND STATUTE 101 (J.A. Guy ed., Selden Soc'y 1985) (1787); MAINE, *supra* note 74, at 42-43; SCRUTTON, *supra* note 63, at 214-15. In the biting criticism of the Sergeant of Law, St. German writes:

SERJAUNTE. . . . For moste commonly the Chauncellors of England have bene spirituall men, that hath had but superficial knowledge of the lawes of the realme . . . I may lykyn my lorde Chauncellor, that is not lernyde yn the lawes of the Realme, to hyme that standith yn the vale of White Horse, fer from the horse, and beholdithe the horse; and the horse semythe and apperith to hym a goodly horse, and well proporcionede yn every poynte. And then, if he cumme nere to the place where the horse is, he can perceiue no horse, not nor proporcion of any horse.

ST. GERMAN, *supra*, at 101-02.

<sup>98</sup> SCRUTTON, *supra* note 63, at 215.



Further extension of the chancellor's jurisdiction resulted from the fact that the ecclesiastic chancellor was regarded as the "keeper of the king's conscience"—the king being the "fountain of justice."<sup>99</sup> As such, the chancellor's jurisdiction, in addition to jurisdiction over those tasks delegated to him, was extraordinary, eventually extending to all matters of conscience.<sup>100</sup> Borrowing from civil and canon law, the chancellor, concerned about the overall fairness of a result, would assert jurisdiction over a case and rectified the failures of the common law courts to recognize a right, to enforce a right, or to grant relief where a "petitioner was unable to obtain redress owing to the position or powerful connections of his adversary."<sup>101</sup>

The chancellor exercising his equitable jurisdiction, not bound by precedent or formal rules, looked to the particulars of a case; as the *praetor* did with the civil law, the chancellor relieved the rigors of the otherwise inflexible common law.<sup>102</sup> Seeing that the chancery's power emanated from the "king's conscience" and that conscience was what should guide decisions, Lord Bacon commented:

A judge ought to prepare his way to a just sentence, as God useth to prepare his way, by *raising valleys* and *taking down hills*: so when there appeareth on either side an high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen, to make inequality equal, that he may plant his judgment as upon an even ground.<sup>103</sup>

The chancellor's jurisdiction expanded over time, and by the fourteenth century the High Court of Chancery came into being, owing its existence, at least in part, to the inflexibility and restricted jurisdiction of the common law courts, and the deficiencies inherent in the strict application of the common law.<sup>104</sup> Additionally, the common law courts refused to embrace the concept of equity.<sup>105</sup>

The chancellor's discretionary power to assert jurisdiction over cases previously decided by common law courts and grant relief in the

<sup>99</sup> See 3 BLACKSTONE, *supra* note 84, at \*46; 3 COKE, *supra* note 91, at \*328 n.D; Scrutton, *supra* note 63, at 214.

<sup>100</sup> BISPHAM, *supra* note 81, at 11 (5th ed. 1893).

<sup>101</sup> *Id.* (emphasis removed); see MAINE, *supra* note 74, at 42–43.

<sup>102</sup> See MAINE, *supra* note 74, at 42–43; Scrutton, *supra* note 63, at 216.

<sup>103</sup> Francis Bacon, *Of Judicature* (quoting, in italics, *Isaiah* 40:4), reprinted in FRANCIS BACON: A COLLECTION OF HIS WORKS 185 (Sidney Warhaft ed., 1965) (1625).

<sup>104</sup> See *id.* at 6–7; 2 STORY, *supra* note 52, at 54–55.

<sup>105</sup> BISPHAM, *supra* note 81, at 7 (11th ed. 1931).

name of equity was viewed by some critics as eviscerating English statutory and common law.<sup>106</sup> In response, Christopher St. German offered a much-needed justification in the form of a dialogue between a doctor of divinity and a student of the common law—the influential *Doctor and Student*.<sup>107</sup> His theory was based on canon law and the familiar Roman concept of *aequitas*.<sup>108</sup> St. German's doctor of divinity argued, with respect to equity's treatment of statutes, that equity

considers all of the particular circumstances of the deed and is tempered with the sweetness of mercy. And equity must always be observed in every rule of man and in every general rule thereof, and knew he well that said thus. Laws covet to be ruled by equity . . . . It is not possible to make any general rule of law but that it should fail in some case. And therefore makers of law take heed to such things as may often come, and not to every particular case, for they could not though they would, and therefore to follow the words of the law is in some cases both against justice and the common wealth: wherefore in some cases it is *good and even* necessary to leave the words of the law, and to follow that which reason and justice require, and to that equity is ordained, that is to say temper and mitigate the rigor of the law.<sup>109</sup>

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<sup>106</sup> See e.g., JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Sir Frederick Pollock ed., Selden Soc'y 1927) (1689).

<sup>107</sup> See PLUNCKNETT, *supra* note 91, at 279.

<sup>108</sup> See *id.*

<sup>109</sup> CHRISTOPHER ST. GERMAN, ST. GERMAN'S DOCTOR AND STUDENT 95, 97 (T.F.T. Pluncknett & J.L. Barton eds., Selden Soc'y 1974) (1530) (Note author's translation from old English). The full original passage reads:

Equytye is a ryghtwysenes that consideryth all the pertyculer cyrcumstaunces of the dede / the whiche also is temperyd with the swetes of mercye. And suche an equytye must alway be obseruyd in euery lawe of man / and in euery generall rewle therof / & that knewe he wel that sayd thus. Lawes couet to be rewl'd by equytye . . . . It is not possyble to make any generall rewle of the lawe / but that it shall fayle in some case. And therfore makers of lawes take hede to suche thynges as may often come and not to euery particuler case / for they coulde not though they wolde And therfore to folowe the wordes of the lawe / were in some case both against Iustyce & the common welth: wherefore in some cases it is *good and even* necessary to leue the wordis of the lawe / & to folowe that reason and Justyce requyreth / & to that intent equytie is ordeyned / that is to say to tempre and myttygate the rygoure of the lawe.

Equity, St. German asserted, did not *abrogate* statutory law; rather it merely voiced *implied exceptions* to the law for particular circumstances, supplied by the law of God and by reason, the background against which legislators enact general laws.<sup>110</sup>

Although the chancellors would insist that they were not undermining the common law courts, the fact that the laws of England were ultimately subject to the discretion and “conscience” of the chancellor continued to be criticized.<sup>111</sup> John Selden argued by analogy that if the conscience of the chancellor is the measure of equity, then it would be too unpredictable a measure to be a basis for any law, for as the length of the chancellor’s foot differs from chancellor to chancellor, so does a chancellor’s conscience.<sup>112</sup> With the English chancellor, as with the Roman *praetor*, the only restrictions on the exercise of the court’s discretion were found in the chancellor’s early training in civil law and in the restraints of professional opinion.<sup>113</sup> The fact that precedent did not bind future decisions of the chancellor exacerbated concerns about the discretionary nature of the chancellor’s powers.<sup>114</sup>

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<sup>110</sup> See *id.* (“[E]xception is secretly vnderstande in euery generall rewle of euery polityue lawe . . . . [Y]f any lawe were made by man without any suche excepcon expressyd or implied it were manifestly vnreasonable / & were not to be sufferyd . . . .”).

<sup>111</sup> See ST. GERMAN, *supra* note 97, at 10; SELDEN, *supra* note 106, at 43. St. German’s Sergeant of Law observed:

[Y]n what uncertayntie shall the kinges subgiettes stande when they shalbe put from the lawe of the Realme, and be compellede to be ordered by the discrecion and conscience of oon man? And namely, for asmooche as conscience is a thinge of gret uncerteyntie . . . . And so diuers men, diuers conscience.

*Id.* at 101. Blackstone would later note that chancellors had bestowed upon themselves unlimited discretion “partly from their ignorance of the law . . . partly from their ambition or lust for power . . . but principally from the narrow and unjust decisions of the courts of law.” 3 BLACKSTONE, *supra* note 84, at \*433.

<sup>112</sup> SELDEN, *supra* note 106, at 43. The often quoted language of John Selden reads:

Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to y<sup>e</sup> conscience of him y<sup>t</sup> is Chancell<sup>o</sup>, and as y<sup>t</sup> is larger or narrower soe is equity Tis all one as if they should make y<sup>e</sup> Standard for y<sup>e</sup> measure wee call A foot, to be y<sup>e</sup> Chancellors foot; what an uncertain measure would this be; One Chancello<sup>t</sup> ha’s a long foot another A short foot a third an indifferent foot; tis y<sup>e</sup> same thing in ye Chancello’s Conscience.

*Id.*

<sup>113</sup> MAINE, *supra* note 74, at 62–63. It may be noted that the Roman *praetor* was also expressly guided by the overarching concern for the safety of the state. *Id.* at 63.

<sup>114</sup> See HOFFER, *supra* note 40, at 10–12.

The English chancellors made an attempt to alleviate these concerns in the 1600s by establishing rules of the chancery courts.<sup>115</sup> Richard Francis furthered this effort by summarizing the absolute rules of equity in 1726.<sup>116</sup> He performed a survey of the cases in the High Court of Chancery and published his *Maxims of Equity*, outlining the fourteen important tenets of equity jurisprudence—the canons of equity jurisprudence.<sup>117</sup> As equity jurisprudence developed, the reasoning behind cases slowly became uniform, and chancellors started to be guided by precedent, forming specific equitable doctrines and defenses.<sup>118</sup> This movement towards regularity and predictability came to fruition in the 1700s, as the English chancellors consistently used precedent and doctrinal rules, including Francis's "maxims," in place of the former ad hoc approach.<sup>119</sup>

The uniformity of equity jurisprudence led to the publication of a case reporter and treatises. A collection of equity case law was made available in 1732 as *Equity Cases Abridged*; and in 1737 Henry Ballow offered the first comprehensive equity treatise, *A Treatise of Equity*, and noted the desire for stability in equity jurisprudence, stating, "[I]t is dangerous to extend the authority of this court further than the practice of former times."<sup>120</sup> In 1741, Viner, after whom the Vinerian Chair

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<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Id.* at 10–11.

<sup>117</sup> *Id.* These doctrines consisted of:

- (1) He that will have equity done to him, must do it to the same person;
- (2) he that hath committed inequity, shall not have equity;
- (3) equality is equity;
- (4) it is equity that should make satisfaction, he who receives the benefit;
- (5) it is equity that should have satisfaction, he who sustained the loss;
- (6) equity suffers not a right without a remedy;
- (7) equity relieves against accidents;
- (8) equity prevents mischief;
- (9) equity prevents multiplicity of suits;
- (10) equity regards length of time;
- (11) equity will not suffer a double satisfaction to be taken;
- (12) equity suffers not advantage to be taken of a penalty or forfeiture, where compensations can be made;
- (13) equity regards not the circumstance, but the substance of the act; and
- (14) where the equity is equal, the law must prevail.

*Id.* at 10–11 (altered for legibility and internal brackets removed) (quoting RICHARD FRANCIS, *MAXIMS OF EQUITY*, at iii–iv (1726)).

<sup>118</sup> See PLUNCKNETT, *supra* note 91, at 692–94.

<sup>119</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 22 (1973); HOFFER, *supra* note 40, at 11; MAINE, *supra* note 74, at 63.

<sup>120</sup> I HENRY BALLOW, *A TREATISE OF EQUITY* 21–23 (John Fonblanque ed., Luke Hansard & Sons 5th ed. 1820) (1737); see PLUNCKNETT, *supra* note 91, at 694. Recalling the original need for equity jurisdiction, Ballow writes:

Equity . . . as it stands for the whole of natural justice, is more excellent than any human institution; neither are positive laws . . . any further binding than

at Oxford University is named, began publishing his collection of reports, the *General Abridgment of Law and Equity*.<sup>121</sup>

This rush toward uniformity and predictability in equity jurisprudence had the effect of severely binding the chancellor's previously limitless discretion.<sup>122</sup> In the beginning of the nineteenth century, Lord Eldon sought to further limit the chancellor's discretion, commenting in *Gee v. Pritchard*:

The doctrines of [the courts of chancery] . . . ought to be as well settled and made uniform almost as those of common law, laying down fixed principles, but taking care that they are applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict or give me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot.<sup>123</sup>

This was a dramatic change in equity jurisprudence, transitioning from an ever-changing practice based in the almost absolute discretion of the chancellor and the loose guidance of the civil and canon law, to what became a "controlled, constrained science of equity, ancillary to common-law."<sup>124</sup>

The chancellor's discretion was so tempered by formalizing the equitable doctrines that in 1758 Blackstone observed that an equity court and a common law court both interpreted statutes according to the same principles of reason and justice, and that the unlimited discretion that had previously been characteristic of courts of equity "hath totally been disclaimed by their successors."<sup>125</sup> Some well-settled

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they are agreeable to the law of God and nature . . . . [A]s the rules of the municipal law are finite, and the subject of it infinite, there will often fall out cases which cannot be determined by them . . . .

1 BALLOW, *supra*, at 8.

<sup>121</sup> PLUNCKNETT, *supra* note 91, at 694.

<sup>122</sup> See VEEDER, *A Century of English Judicature, 1800–1900*, in 1 SELECT ESSAYS, *supra* note 63, at 730, 735–36.

<sup>123</sup> *Id.* at 736 (quoting *Gee v. Pritchard*, 36 Eng. Rep. 670, 674 (Ch. 1818)).

<sup>124</sup> HOFFER, *supra* note 40, at 12.

<sup>125</sup> 3 BLACKSTONE, *supra* note 84, at \*430–33; see BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 132–37 (1924); 1 COKE, *supra* note 91, at \*29 n.D. Referring to the role of a judge, Justice Cardozo writes:

Unique situations can never have their answers ready made as in the complete letter-writing guides or the manuals of the art of conversation. Justice is

doctrines of equity were incorporated into the English common law and were used in common law courts.<sup>126</sup> Blackstone observed that the courts of equity had become "governed by established rules, and bound by precedents, from which they do not depart . . . [A]ll these . . . are plainly rules of positive law."<sup>127</sup>

By 1788, Alexander Hamilton, justifying the grant of equity jurisdiction to the federal courts in the United States Constitution, noted: "It is true that [in courts of equity] the principles by which that relief is governed are now reduced to a regular system."<sup>128</sup> He also espoused a concept of equity similar to St. German's philosophy: the equity court must not operate outside of the law, but must uphold the spirit of the law while applying the legislature's implied exceptions.<sup>129</sup>

Joseph Story concurred, in his 1836 equity treatise, with the idea that equity must follow the law and cannot take a contrary position where the law has clearly spoken.<sup>130</sup> He further noted that it is the role of equity "to defend the law from crafty evasions, delusions, and mere subtleties, invented and contrived to evade and elude the Common Law, whereby such as have undoubted right are made remediless . . . . Equity does not destroy the law, not create it, but assists it."<sup>131</sup>

not to be taken by storm. She is to be wooed by slow advances. Substitute statute for decision, and you shift the center of authority, but add no quota of inspired wisdom.

CARDOZO, *supra*, at 134.

<sup>126</sup> See 3 BLACKSTONE, *supra* note 84, at \*430-32.

<sup>127</sup> *Id.* at \*432. These settled doctrines of equity are set forth in Ballow's treatise as well as the better known *Commentaries on Equity Jurisprudence* by Joseph Story. See generally 1 BALLOW, *supra* note 120; 2 BALLOW, *supra* note 120; 1 STORY, *supra* note 52; 2 STORY, *supra* note 52.

<sup>128</sup> THE FEDERALIST NO. 83, at 540 n.\* (Alexander Hamilton) (Robert Scigliano ed., Mod. Libr. 2000).

<sup>129</sup> Compare THE FEDERALIST NO. 78, *supra* note 128, at 500 (Alexander Hamilton), with ST. GERMAN, *supra* note 97, at 95, 97. Hamilton notes:

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature . . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

THE FEDERALIST NO. 83, *supra* note 128, at 540 n.\* (Alexander Hamilton).

<sup>130</sup> 1 STORY, *supra* note 52, at 72.

<sup>131</sup> *Id.* at 18-19 (quoting *Dudley v. Dudley*, 24 Eng. Rep. 118, 119 (Ch. 1705)).

## 2. Roman Influence on the Court of Chancery's Remedies

Once the chancellor, following the settled equitable doctrines and the canons of equity, decided the case, and the liabilities and rights of the parties were settled, he would construct a remedy.<sup>132</sup> If a plaintiff established a cognizable right, then the chancellor ensured it was protected, and he was bound, "to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature."<sup>133</sup> Due to the early influence of the ecclesiastic chancellors, the remedial power of the chancellor was largely derived from the powers of the Roman *praetor*.<sup>134</sup> If equity's most extreme remedy—the injunction—was required, then the chancellor would issue the injunction, just as the Roman *praetor* would have issued a prohibitive interdict if needed to protect established rights of the parties.<sup>135</sup>

Note, however, that an equitable remedy, such as an injunction, would be issued as a matter of course in order to protect established rights; there was no further determination of the need to withhold an equitable remedy, as chancellors were bound to protect the rights that were established in the liability stage, in the ensuing remedy stage of the litigation.<sup>136</sup> Equitable doctrines and the canons were applied in the liability stage of litigation, which determined the rights of the party to seek relief from the chancery court; equitable doctrines were also applied with respect to the other party in the resolution of the dispute.

### D. American Courts of Chancery and Equity

In the American judicial system, equity jurisprudence took the form of that formulated and practiced by the High Court of Chancery in England.<sup>137</sup> American courts, when addressing questions of equitable relief, look to equity's historical development in the English courts

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<sup>132</sup> 4 POMEROY, *supra* note 81, at 937; *see* BISPHAM, *supra* note 81, at 24–28 (5th ed. 1893).

<sup>133</sup> 4 POMEROY, *supra* note 81, at 937; *see* BISPHAM, *supra* note 81, at 24–28 (5th ed. 1893).

<sup>134</sup> SCRUTTON, *supra* note 63, at 224.

<sup>135</sup> 4 POMEROY, *supra* note 81, at 937; *see* BISPHAM, *supra* note 81, at 24–28 (5th ed. 1893); 1 SPELLING, *supra* note 48, at 2–3.

<sup>136</sup> 4 POMEROY, *supra* note 81, at 937; *see* BISPHAM, *supra* note 81, at 24–28 (5th ed. 1893). *See generally* 1 BALLOW, *supra* note 120; 2 BALLOW, *supra* note 120; 1 STORY, *supra* note 52; 2 STORY, *supra* note 52.

<sup>137</sup> *See* BISPHAM, *supra* note 81, at 1 (11th ed. 1931).

for guidance.<sup>138</sup> The United States inherited this jurisprudence, and these prudential concerns and equitable doctrines guide courts in their exercise of equitable jurisdiction today.<sup>139</sup>

### 1. Equity in the Colonies and the Early States

In the eighteenth century, the organization of the courts of equity was rather uneven across the several American Colonies.<sup>140</sup> Some Colonies had separate courts of equity; some simply removed the distinction between common law and equity courts; and in some Colonies the governor and the governor's council acted as the court of chancery.<sup>141</sup> In those Colonies that had separate courts of equity, the administration of these courts was dictated by the English, creating a close association between equity jurisdiction and the executive power of the King of England, and English colonial policy.<sup>142</sup>

After the Colonies secured their independence from England, the principles of the English chancery courts continued to form the basis of equity jurisprudence in the courts of the several States, and these principles eventually became fairly uniform across the country.<sup>143</sup> As it stands, equity jurisprudence in America is much closer to that of England than the common-law approaches of the two nations.<sup>144</sup> As Justice Joseph Story noted, "Equity Jurisprudence, in its main streams, flows from the same sources [in America], that it does in England, and admits of an almost universal application in its principles."<sup>145</sup>

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<sup>138</sup> *Id.* at 2.

<sup>139</sup> *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Greenpeace Found. v. Mineta*, 122 F. Supp. 2d 1123, 1136 (D. Haw. 2000).

<sup>140</sup> FRIEDMAN, *supra* note 119, at 47.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 47-48. The use of the chancery court in New York as more of an English court of exchequer possibly fueled the existing hostility towards the chancery courts and may explain why Alexander Hamilton spent considerable ink in the *Federalist* papers defending the grant of equitable jurisdiction to the federal courts in the Constitution. *See id.*; THE FEDERALIST No. 78, *supra* note 128, at 500 (Alexander Hamilton); THE FEDERALIST No. 80, *supra* note 128, at 512-13 (Alexander Hamilton); THE FEDERALIST No. 83, *supra* note 128, at 540 & n.\* (Alexander Hamilton); *see also* U.S. CONST. art. III, § 2. The *Federalist* papers were part of a propaganda campaign used to sway New York public opinion towards ratification of the Constitution. Robert Scigliano, *Introduction to THE FEDERALIST*, *supra* note 128, at viii-ix.

<sup>143</sup> BISPHAM, *supra* note 81, at 18-19 (11th ed. 1931).

<sup>144</sup> *See* I STORY, *supra* note 52, at 64.

<sup>145</sup> *Id.*



## 2. Equity in the Federal Courts

The United States federal courts' inheritance of English equitable doctrines is apparent by their affirmative recognition of these doctrines.<sup>146</sup> The Constitution extends to the federal judiciary jurisdiction over "all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties . . ."<sup>147</sup> The Framers understood this grant to include the settled equity doctrines as developed by the English chancery courts, to be applied in cases where the common law produced an unsatisfactory result.<sup>148</sup> Equity was viewed as the defender or protector of the general law from cunning parties who might defeat the spirit of the law by taking advantage of its technicalities.<sup>149</sup>

Reinforcing the source and binding power of traditional equitable principles, the Supreme Court has recognized that the federal courts were given "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English chancery court at the time of the separation of the two countries."<sup>150</sup> For this reason, district courts do not have any authority in granting remedies that were historically unavailable to a court of equity,<sup>151</sup> and even after the fusion of law and equity by the Federal Rules of Civil Procedure in 1938, "the substantive principles of Courts of Chancery remain[ed] unaffected."<sup>152</sup>

It appears that federal courts exercising their equitable jurisdiction would use the same equitable doctrines as the English chancery courts to determine liability or the rights of the parties in a dispute,

<sup>146</sup> See *Atlas Life Ins. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

<sup>147</sup> U.S. CONST. art. III, § 2.

<sup>148</sup> THE FEDERALIST No. 78, *supra* note 128, at 500 (Alexander Hamilton); THE FEDERALIST No. 80, *supra* note 128, at 512–13 (Alexander Hamilton); THE FEDERALIST No. 83, *supra* note 128, at 540 (Alexander Hamilton) ("The great and primary use of a court of equity is to give relief in *extraordinary cases*, which are *exceptions* to general rules . . ."); *Id.* at 540 n.\* ("[Equitable principles] are in the main applicable to SPECIAL circumstances, which form exceptions to the general rules.")

<sup>149</sup> See THE FEDERALIST No. 80, *supra* note 128, at 512–13 (Alexander Hamilton); see also 1 STORY, *supra* note 52, 18–19 (quoting *Dudley v. Dudley*, 24 Eng. Rep. 118, 119 (Ch. 1705)).

<sup>150</sup> *Atlas Life Ins.*, 306 U.S. at 568; *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). It is beyond the scope of this Note to address any possible constitutional constraints that may prevent the federal courts from adopting the balancing of the utilities doctrine, which is discussed in Part II *infra*.

<sup>151</sup> See *Grupo Mexicano de Desarrollo*, 527 U.S. at 318–19.

<sup>152</sup> *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 n.26 (1949); see FED. R. CIV. P. 1, 2; HOFFER, *supra* note 40, at 19.

the area where the judge's discretion had been tempered.<sup>153</sup> As the English chancellors and the Roman *praetors* before them, the American judge sitting in equity was bound to protect the parties' rights, using existing equitable remedies, as determined in the liability stage of the litigation.<sup>154</sup> As with the English chancery courts, in the remedies stage of the litigation there was no further determination of the need for withholding an equitable remedy.<sup>155</sup>

## II. INJUNCTIONS AND THE BALANCING OF THE UTILITIES

Before issuing an injunction, the most oppressive of equitable remedies, the American courts required that a plaintiff overcome several doctrinal hurdles that have English roots.<sup>156</sup> Although courts were bound to protect a party's determined rights, in order to obtain the protection of an injunction, a party had to demonstrate that such a remedy was necessary to protect her or his rights by showing: (1) that the party would suffer irreparable harm if an injunction was not granted,<sup>157</sup> and (2) legal remedies were inadequate.<sup>158</sup> If these requirements were satisfied, then the courts tailored a remedy to protect the determined rights of the parties.<sup>159</sup> Apparently, it was not until the beginning of the Industrial Revolution, however, that further judicial discretion was injected into the remedy stage of litigation—allowing a court to leave a determined right to go unprotected by a court of equity.<sup>160</sup> This new discretion took the form of the equitable doctrine referred to as the “balancing of the utilities.”

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<sup>153</sup> See *supra* Part I.B–.D.

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See 1 SPELLING, *supra* note 48, at 4 & n.4. This Note assumes the satisfaction of the two requirements.

<sup>157</sup> *Id.* at 4. In the realm of environmental law, the United States Supreme Court has noted that “[e]nvironmental injury, by its nature, . . . is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Although an irreparable environmental harm may be presumed when an environmental statute is violated, courts do use caution so as not to “exercise equitable powers loosely or casually whenever a claim of ‘environmental damage’ is asserted.” *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 409 U.S. 1207, 1217 (Burger, Circuit Justice 1972); see *Amoco Prod. Co.*, 480 U.S. at 545.

<sup>158</sup> *Amoco Prod. Co.*, 480 U.S. at 531.

<sup>159</sup> See *supra* Part I.C.

<sup>160</sup> See Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 782–91 (1979).

A. *Revival of Discretion, the Industrial Revolution,  
and a Critical Extension of Dicta*

In modern American courts, once a plaintiff has succeeded on the merits of the case, and has proved irreparable injury and the inadequacy of legal remedies, the judge performs a modified pro forma cost-benefit analysis of the rights of the parties, called the "balancing of the utilities," before issuing an injunction.<sup>161</sup> "[T]he court 'balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.'"<sup>162</sup> This doctrine allows the court to take into account the totality of the circumstances so that the burden of the injunction on the defendant is not disproportionate compared with the benefits to the plaintiff of granting the injunction, or the burden on the plaintiff if an injunction is not granted.<sup>163</sup> The balancing of the utilities doctrine also weighs the public interest concerns in the issuance or denial of the injunction.<sup>164</sup> The doctrine appears to have first taken root in the English case of *St. Helen's Smelting Co. v. Tipping*.<sup>165</sup>

1. *St. Helen's Smelting Co.*

The 1865 English case of *St. Helen's Smelting Co. v. Tipping* concerned a common law nuisance, and is considered the point at which the balancing of the utilities doctrine first appeared.<sup>166</sup> The important stage of the *St. Helen's Smelting* litigation was the appeal to the House

<sup>161</sup> See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

<sup>162</sup> See *id.* (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)); *Hill III*, 437 U.S. 153, 193 (1978); *Hecht Co. v. Bowles*, 321 U.S. 321, 321 (1944). To be sure, in doing this delicate balancing where there is a statutory violation on the part of a government agency, no deference is given to an agency's decision or expertise. See *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 590-91 (9th Cir. 1988); *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1087 (D. Wash. 1991).

<sup>163</sup> See *Morgan v. Veach*, 139 P.2d 976, 980 (Cal. Dist. Ct. App. 1943); *Kratze v. Indep. Order of Oddfellows, Garden City Lodge #11*, 500 N.W.2d 115, 120 (Mich. 1993); *Miller v. City of West Carrollton*, 632 N.E.2d 582, 587 (Ohio Ct. App. 1993); *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1259 (Utah 1975).

<sup>164</sup> HOFFER, *supra* note 40, at 147.

<sup>165</sup> 11 Eng. Rep. 1483 (H.L. 1865).

<sup>166</sup> See *Coquillet*, *supra* note 160, at 783; see also *St. Helen's Smelting Co. v. Tipping*, 11 Eng. Rep. 1483, 1486-87 (H.L. 1865). The balancing of the utilities doctrine cannot be found in the leading equity treatises up until this time. See generally 1 *BALLOW*, *supra* note 120; 2 *BALLOW*, *supra* note 120; 1 *STORY*, *supra* note 52; 2 *STORY*, *supra* note 52. One could argue that the true origin lies in the maxim: "[W]here there is equal Equity, the law must prevail." See 1 *STORY*, *supra* note 52, at 75.

of Lords.<sup>167</sup> The case was a common law nuisance action brought by the proprietor of an estate whose "hedges, trees, shrubs, fruit, and herbage," as well as cattle, were damaged by the noxious fumes emitted by a new copper smelting plant.<sup>168</sup> The question in the case was not whether an injunction should issue, but whether the trial judge gave the jury proper instructions for common law nuisance—instructions that resulted in the defendant being held liable for monetary damages.<sup>169</sup>

The holding of the House of Lords seems to support the previous rule of nuisance—one must use his or her property so as not to injure the property of his neighbor.<sup>170</sup> The House of Lords found that the trial judge had given a proper jury instruction and refused to grant a new trial.<sup>171</sup> The cryptic dicta of two of the appellate judges' opinions, however, established the balancing of the utilities doctrine.<sup>172</sup>

Lord Westbury noted that there is a "difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of *sensible* personal discomfort."<sup>173</sup> Lord Cranworth added:

"You must look at it not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person in the town" . . . [B]ecause, if it only added in an infinitesimal degree to the quality of smoke, . . . the state of the [already polluted] town rendered it altogether impossible to call that an actionable nuisance.<sup>174</sup>

Out of these dicta, in the United States and in England, *St. Helen's Smelting* has come to stand for the proposition that the common law nuisance doctrine was subject to a balancing of the utilities.<sup>175</sup> Soon after the House of Lords affirmed the *St. Helen's Smelting*

<sup>167</sup> See Coquillette, *supra* note 160, at 788.

<sup>168</sup> *St. Helen's Smelting*, 11 Eng. Rep. at 1483.

<sup>169</sup> *Id.* at 1484.

<sup>170</sup> See Coquillette, *supra* note 160, at 788–89.

<sup>171</sup> *St. Helen's Smelting*, 11 Eng. Rep. at 1486.

<sup>172</sup> See Coquillette, *supra* note 160, at 789–91.

<sup>173</sup> *St. Helen's Smelting*, 11 Eng. Rep. at 1486 (emphasis added).

<sup>174</sup> *Id.* at 1487.

<sup>175</sup> See Coquillette, *supra* note 160, at 788. The idea that a balancing of the utilities could be performed at the liability stage of litigation was far from a new concept in Eng-

judgment for monetary damages, the proprietor of the estate learned that the copper smelter had plans on expanding its operations.<sup>176</sup> He sought relief in equity, and he was found to be "entitled . . . to an injunction to protect his rights which had been thus ascertained at law."<sup>177</sup> This result indicates that the balancing of the utilities doctrine was first seen by the English courts as a new equitable doctrine used for the determination of the liability or the rights of the parties, *not* for the determination of the need for a remedy to protect those rights.<sup>178</sup> The amount of discretion that such a utilitarian doctrine could offer, however, may have made it attractive to a judge sitting as chancellor searching for a fair resolution to a dispute.

Eventually the balancing of the utilities doctrine found its way into the remedy stage of litigation in cases where a common law nuisance was actually found to exist.<sup>179</sup> In 1868, the Pennsylvania Supreme Court, in the *Appeal of Richards*, was the first American court to uphold the denial of an injunction in the face of a proven nuisance.<sup>180</sup> The case involved an owner of a cotton factory who wanted to enjoin an owner of an ironworks from burning coal because of the damage from the emitted noxious fumes.<sup>181</sup> The lower court, reasoning along the lines of the actual holding of *St. Helen's Smelting*, did not find a nuisance to exist due to the questionable and de minimus nature of the plaintiff's damages.<sup>182</sup> On appeal the plaintiff cited *St. Helen's Smelting* for the proposition that the defendant had no right to pollute

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land. As early as 1606, in the *Ranketts Case*, the Court of the King's Bench noted that it would not find a nuisance where society's need for an alleged nuisance excused it. *Ranketts Case* (K.B. 1606), reported in 2 H. ROLLE, ROLLE'S ABRIDGMENT 139 (1668) ("Si home fait Candells deins un Vill, per que il cause un noysom Sent al Inhabitants, uncore ceo nest ascun Nusans, car le needfulness de eux dispensera ove le noisomness del smell.").

<sup>176</sup> BISPHAM, *supra* note 81, at 555 (5th ed. 1893).

<sup>177</sup> *Id.* at 555-56.

<sup>178</sup> See *id.*; Coquillette, *supra* note 160, at 782-91.

<sup>179</sup> HOFFER, *supra* note 40, at 153. In regard to public nuisances, the historical development of equitable principles goes back at least to the reign of Queen Elizabeth. 1 STORY, *supra* note 52, at 201.

<sup>180</sup> See 57 Pa. 105, 105 (1868); HOFFER, *supra* note 40, at 152. Although courts asserted that discretion was the hallmark of equity, up until the 1860s an injunction regularly issued upon the finding of a nuisance. 1 STORY, *supra* note 52, at 152. Some concerns included the concept that "the crown cannot sanction a nuisance" and that to do so on the behalf of private parties would effectuate a right of private eminent domain. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 876 (N.Y. 1970) (Jasen, J., dissenting); 1 STORY, *supra* note 52, at 202.

<sup>181</sup> See *Appeal of Richards*, 57 Pa. at 105.

<sup>182</sup> *Id.*

so as to have a detrimental effect on neighboring property.<sup>183</sup> The Pennsylvania Supreme Court, however, agreed that there was a nuisance, but denied an injunction after balancing the utilities in the remedy stage of the litigation, stating: “[C]oal, we think . . . is necessary in the manufacture of iron, such as the business of the defendants require, and whose fabrics the public require.”<sup>184</sup>

## 2. Reaction to Equity's Formalism

Modern courts have accepted the balancing of the utilities doctrine and have extended it beyond common law nuisance actions to cases involving violations of statutes and regulations.<sup>185</sup> This doctrine allows for greater judicial discretion in the remedy stage of litigation, as opposed to the liability stage that is guided by well-settled equitable doctrines. It appears to be a reaction to the reduced discretion in the liability stage found in equity jurisprudence.<sup>186</sup>

The infusion of discretion into the remedy stage of litigation by the balancing of the utilities doctrine would appear to have injected the concept of the court's conscience into the remedy stage, a problem of possible unbounded discretion akin to that experienced and criticized when equity was in its youth.<sup>187</sup> As equity originally sought to alleviate the rigors of the common law, this balancing approach acts as a check to prevent abuse of the rigors of the settled equitable doctrines by plaintiffs.<sup>188</sup> One state intermediate appellate court acknowledged the prophylactic nature of this doctrine stating:

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* Possibly the most famous American nuisance case, decided on similar lines, is *Boomer v. Atlantic Cement Co.*, where the air pollution associated with a cement factory was determined to be a nuisance but was allowed to continue provided that the cement company pay existing and estimated permanent damages to neighboring property owners. 257 N.E.2d at 874–75. Here the court balanced the amount of harm to the cement factory owner and the public interest if the injunction issued, to the harm to the plaintiffs if the injunction did not issue—Oscar Boomer, the named plaintiff, was complaining of cement dust damage to his junkyard. Telephone Interview with Oscar Boomer (Sept. 2001). Mr. Boomer stated that the cement factory is still polluting to this day; he believes that the trial court judge did not care for junkyards that much. *Id.*

<sup>185</sup> See *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358–59 (5th Cir. 1996); *United States v. Pozsgai*, 999 F.2d 719, 736 (3d Cir. 1993); *United States Envtl. Prot. Agency v. Envtl. Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990); *Guam Scottish Rite Bodies v. Flores*, 486 F.2d 748, 749 (9th Cir. 1990); *Gilbert v. Repertory, Inc.*, 18 N.E.2d 437, 439 (Mass. 1939); *Stewart v. Finkelstone*, 92 N.E. 37, 38 (Mass. 1910).

<sup>186</sup> See *Miller v. City of West Carrollton*, 632 N.E.2d 582, 587 (Ohio Ct. App. 1993); *supra* Part I.C.

<sup>187</sup> See *supra* notes 102–114 and accompanying text.

<sup>188</sup> *Miller*, 632 N.E.2d at 587.

This [balancing of the utilities] is . . . the judicial recognition of a circumstance in which one party uses a legal right to gain purchase of an equitable club to be used as a weapon of oppression rather than in defense of a right. It is a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than through reason.<sup>189</sup>

If this is true, is it also true that this newfound discretion in the remedy stage can reject the underlying goals of equity jurisprudence or the long established equitable canons and doctrines? Further study into the nature of the balancing of the utilities should remember the admonition of then-Chief Justice Cardozo of the New York Court of Appeals: "In the award of equitable remedies there is often an element of discretion, but never a discretion that is absolute or arbitrary. In equity, as at law, there are signposts for the traveler. 'Discretion . . . must be regulated upon grounds that will make it judicial.'"<sup>190</sup>

### III. BALANCING OF THE UTILITIES AND SUNK COSTS

Since the introduction of the balancing of the utilities doctrine, what does a court of equity do when it has been determined that a defendant has violated a statute? What is balanced? What of sunk costs? What "signposts" are there to help guide the judge through her or his decisionmaking?

It appears that the contours of the balancing of the utilities doctrine result from the nurturing of a historic equitable canon, "where the equity is equal, the law must prevail" (the Canon), which was applied in the remedy stage of litigation. The Canon is concerned with the "innocence" of a party's action and the diligence of the parties.<sup>191</sup> It seems that it would embrace the balancing of the utilities doctrine, whereas it notes that the equities, and the utilities, of the parties are *capable* of being unequal.<sup>192</sup> This proposition, however, ignores the fact that the Canon is concerned with the *innocence* of the parties' ac-

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<sup>189</sup> *Id.*

<sup>190</sup> *Evangelical Lutheran Church of the Ascension v. Sahlem*, 172 N.E. 455, 457 (N.Y. 1930) (quoting *Haberman v. Baker*, 28 N.E. 370, 370 (N.Y. 1891) (quoting Lord Chancellor Eldon)).

<sup>191</sup> *See* HOFFER, *supra* note 40, at 10-11 (quoting RICHARD FRANCIS, *MAXIMS OF EQUITY* iii-iv (1726)).

<sup>192</sup> *Id.*

tions and the *diligence* in prosecution of the parties.<sup>193</sup> Describing the policies underlying this canon, Joseph Story writes, "Equity is equal between persons, who have been equally innocent, and equally diligent."<sup>194</sup>

It may be helpful to look at the application of the Canon to disputes concerning private actors. As will be shown, by using the balancing of the utilities doctrine, a private defendant may not seek shelter from the court's power of injunctive relief if the defendant has willfully and knowingly proceeded in violation of private law.<sup>195</sup> Courts, implicitly incorporating the Canon into the remedy stage of litigation, have also accepted this reasoning where it comes to willful and knowing violations of public law by private parties.<sup>196</sup> This reasoning should sound the death knell for any advantage in the balancing of the utilities that a private defendant may seek from an aggressive sunk costs strategy, provided that the plaintiff has not run afoul of any of the other settled canons or maxims of equity.<sup>197</sup>

#### A. *Willful and Knowing Violations in Suits Involving Private Parties and Private Law*

Once a violation of a law is found in litigation between private parties, then a court will proceed to fashion a remedy. The balancing of the equities is not performed where a private defendant willfully and knowingly violates private law—for example, easements and covenants.<sup>198</sup> "The benefit of the doctrine of balancing the equities . . . is reserved for the *innocent* defendant."<sup>199</sup> When the defendant's

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<sup>193</sup> See JOHN ADAMS, DOCTRINE OF EQUITY \*148, \*159; F.W. MAITLAND, EQUITY 327–28 (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1936) (1909); 1 STORY, *supra* note 52, at 75.

<sup>194</sup> 1 STORY, *supra* note 52, at 75; see also MAITLAND, *supra* note 193, at 326.

<sup>195</sup> See *United States v. Marine Shale Processors*, 81 F.3d 1329, 1358–59 (5th Cir. 1996); *United States v. Pozsgai*, 999 F.2d 719, 736 (3d Cir. 1993); *United States Env'tl. Prot. Agency v. Env'tl. Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990); *Guam Scottish Rite Bodies v. Flores*, 486 F.2d 748, 749 (9th Cir. 1990).

<sup>196</sup> See *infra* Part III.

<sup>197</sup> See *id.* In a powerful statement of the limited powers of equity when facing a violation of a statute, John Selden observes that if it is determined that a defendant has violated a statute, then the judge sitting in equity is robbed of a large degree of discretion and "must doe by him as they have publickly agreed" because both the judge and the defendant have consented to the law. SELDEN, *supra* note 106, at 43–44. Selden is actually referring to a criminal statute with a violation resulting in the death penalty. *Id.*

<sup>198</sup> See *Marine Shale Processors*, 81 F.3d at 1358–59; *Pozsgai*, 999 F.2d at 736; *Env'tl. Waste Control*, 917 F.2d at 332; *Guam Scottish Rite Bodies*, 486 F.2d at 749.

<sup>199</sup> *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1259 (Utah 1975) (emphasis added).



violation is deliberate, and is a willful and intentional act, equity may require that an injunction issue. In such a circumstance, no attention is paid to the "relative inconveniences or hardships that may result" from the granting of an injunction, because a willful and knowing violation of a law can hardly be termed "innocent."<sup>200</sup> Without allowing the counterbalance of the defendant's sunk costs, the plaintiff prevails and an injunction will issue.<sup>201</sup> The public interest concerns in this category of cases are usually not raised, because violations of private law usually do not impact the public interest.<sup>202</sup>

Without the advantage of the sunk costs in the balancing of the utilities, judicial results have been unapologetically harsh to the defendant, often requiring complete removal of structures or the restoration of property.<sup>203</sup> The Canon circumscribing the inherent discretion of the balancing of the utilities doctrine has taken form in a series of cases where a defendant willfully and knowingly built structures that encroached onto a neighboring property,<sup>204</sup> frustrated an easement,<sup>205</sup> or violated a covenant on a deed.<sup>206</sup>

In a case often cited to illustrate the application of the Canon, *Stewart v. Finkelstone*, the Massachusetts Supreme Judicial Court upheld an injunction requiring the removal of a completed building constructed by the defendant in willful and knowing violation of a deed restriction addressing the character and extent of structures on the property.<sup>207</sup> The court admonished the defendant's action, stating that it was a deliberate attempt to override the restriction.<sup>208</sup> In upholding the injunction, the court acknowledged that its result was drastic, but that "it ought not be withheld merely for the reason that it will cause pecuniary loss."<sup>209</sup> The defendant "took his chances with

<sup>200</sup> See *id.*; M.T. Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521, 524 (1954).

<sup>201</sup> See *Marine Shale Processors*, 81 F.3d at 1359; 5 POMEROY, *supra* note 81, at 4362-64.

<sup>202</sup> See *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 550-52 (1937).

<sup>203</sup> *Papanikolas Bros. Enters.*, 535 P.2d at 1259; see *Gilbert v. Repertory, Inc.*, 18 N.E.2d 437, 439 (Mass. 1939); *Stewart v. Finkelstone*, 92 N.E. 37, 38 (Mass. 1910).

<sup>204</sup> See, e.g., *Curtis Mfg. Co. v. Spencer Wire Co.*, 89 N.E. 534, 535 (Mass. 1909); *Kratz v. Indep. Order of Oddfellows, Garden City Lodge No. 11*, 500 N.W.2d 115, 120-21 (Mich. 1993).

<sup>205</sup> See, e.g., *Gilbert*, 18 N.E.2d at 439.

<sup>206</sup> See, e.g., *N.H. Donuts, Inc. v. Skipitaris*, 533 A.2d 351, 357 (N.H. 1987); *Papanikolas Bros. Enters.*, 535 P.2d at 1259.

<sup>207</sup> 92 N.E. at 34-35.

<sup>208</sup> See *id.*

<sup>209</sup> *Id.* at 38.

eyes open to the results that might ensue."<sup>210</sup> The court went on to state, in one of the most cited comments in this area of law, "Entrenchment behind considerable expenditures of money cannot shield premeditated efforts to evade or circumscribe legal obligations from the salutary remedies of equity."<sup>211</sup>

The plaintiff's rights will be enforced irrespective of the degree of actual property or monetary damage that the plaintiff would suffer if the private law creating the right were not enforced.<sup>212</sup> Relief is not withheld because the damage to the plaintiff is unsubstantial or even nonexistent.<sup>213</sup> "[I]t is not a question of damage, but the mere circumstance of the breach of [a private law right] affords sufficient ground for the Court to interfere by injunction."<sup>214</sup>

In Professor Van Hecke's survey of injunctions that were issued or denied concerning the removal or remodeling of structures erected in violation of the law, he noted that the courts "unanimously refused to put relative hardship into the reckoning in cases where the defendant had acted willfully . . . and the hardship likely to result to the defendant if [an] injunction were granted was of his own making."<sup>215</sup> As between two private parties in a dispute concerning private law, the defendant is not allowed to offer a counterweight in this equitable balance.<sup>216</sup>

### B. *Willful and Knowing Violations in Suits Involving Private Parties and Public Law*

As equity jurisprudence evolved, the Canon was applied to facts involving the grant of an injunction where a private party defendant willfully and knowingly violated a public law.<sup>217</sup> This is true for violations involving public law such as federal statutes<sup>218</sup> or local zoning

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *See* *Evangelical Lutheran Church of the Ascension v. Sahlem*, 172 N.E. 455, 457 (N.Y. 1930).

<sup>213</sup> *See id.*; *Trs. of Columbia Coll. v. Thacher*, 87 N.Y. 311, 316 (1881); *Manners v. Johnson*, [1875-76] 1 Ch. D. 673, 680 (1875) (quoting *Tipping v. Eckersley*, 69 Eng. Rep. 779, 782 (Ch. 1855)).

<sup>214</sup> *Trs. of Columbia Coll.*, 87 N.Y. at 316 (quoting *Tipping*, 69 Eng. Rep. at 782).

<sup>215</sup> Van Hecke, *supra* note 200, at 530.

<sup>216</sup> *See id.*

<sup>217</sup> *See* *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996).

<sup>218</sup> *See id.* (suggesting the application of the innocence of action factor, absent a clear restriction on the court's jurisdiction from Congress, to violations of the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act); *Hill II*, 549 F.2d 1064, 1071 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978) (implicitly applying the exception to

ordinances.<sup>219</sup> These cases hardly mention the public interest for it is presumed that the legislative mandate indicates where the public interest lies.

In the case of *McCavic v. DeLuca*, a court was forced to grapple with a willful and intentional violation of a city zoning ordinance that dictated the existence of a fifteen-foot setback line on a lot.<sup>220</sup> The court, citing the *private law* case of *Stewart v. Finkelstone*,<sup>221</sup> applied the Canon to a public law and private actor context. It denied the possible protection of balancing, where the sunk costs surely would have tilted in the defendant's favor, because the offending structure was, in fact, completed.<sup>222</sup> The court upheld an injunction ordering the removal of the portion of the building—a considerable portion that was seven feet over the setback line.<sup>223</sup> In doing so the court noted: "If there is any hardship caused by the enforcement of the ordinance, it has been brought about entirely by defendant's stubborn insistence upon proceeding, in violation of the ordinance . . . ." <sup>224</sup>

In *United States v. Marine Shale Processors*,<sup>225</sup> the Fifth Circuit, considering the Canon as an *exception* to the balancing of the utilities doctrine, affirmed the issuance of an injunction. This was due to the district court's finding that the defendant willfully and voluntarily violated the Clean Air Act; this effectively foreclosed the use of equitable balancing to the defendant.<sup>226</sup>

#### IV. EXTENDING THE EQUITABLE CANON OF INNOCENCE AND DILIGENCE TO AGENCIES AND THE PUBLIC LAW: A GUIDE FOR JUDGES AND ENVIRONMENTAL LITIGANTS

Although this Canon appears readily applicable to most scenarios involving willful and voluntary violations of some form of public or private law, courts appear to be hesitant to ignore the amount of public money that has already been spent when the willful and voluntary

the Endangered Species Act). This exception has also been applied to intellectual property cases. *Marine Shale Processors*, 81 F.3d at 1359 n.16.

<sup>219</sup> See generally *Morgan v. Veach*, 139 P.2d 976 (Cal. Dist. Ct. App. 1943); *Cooke v. Taube*, 125 N.W.2d 278 (Mich. 1963); *McCavic v. DeLuca*, 46 N.W.2d 873 (Minn. 1951).

<sup>220</sup> *McCavic*, 46 N.W.2d at 875.

<sup>221</sup> *Id.* at 878.

<sup>222</sup> See *id.* at 874.

<sup>223</sup> See *id.* at 874, 878.

<sup>224</sup> *Id.* at 877.

<sup>225</sup> 81 F.3d 1329 (5th Cir. 1996).

<sup>226</sup> *Id.* at 1358-60.

violator is a government actor.<sup>227</sup> In this scenario, the balancing of the utilities between the parties appears to be nonsensical and is not performed.<sup>228</sup> Thus, the judicial determination is reduced to a balancing of public interests<sup>229</sup>: the public interest in the government agency spending public money in violation of the law, and the public interest in having the government act according to the law.<sup>230</sup>

#### A. Extension to an Agency's Willful and Knowing Violation of a Public Law

In the *TVA v. Hill* litigation, the Sixth Circuit Court of Appeals insisted that economic expenditures and realities of the TVA's Tellico Dam project<sup>231</sup> did not grant it a license to rewrite a statute and allow a government agency to operate counter to a statute, no matter how desirable the agency's project may have appeared.<sup>232</sup> The Sixth Circuit decided that it was an abuse of discretion on the part of the district court not to issue an injunction, and that the court could not allow a clear violation of federal law to continue.<sup>233</sup> The court refused the in-

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<sup>227</sup> See generally *Hill III*, 437 U.S. 153 (1978); *Hill II*, 549 F.2d 1064, 1074 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978); *Hill I*, 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

<sup>228</sup> See *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (D. Wash. 1991).

<sup>229</sup> See *id.*

<sup>230</sup> See *id.* Although beyond the immediate scope of this Note, one could argue that the public interest in having the government obey the law would outweigh any counterbalance. It has been suggested that in cases involving public health and environmental legislation, there is a strong presumption that the public health emphasis creates a countervailing public interest that must be taken into account in the equitable calculus. See *Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (quoting MASS. CONST. pmbi., pt. 1, art. 30) ("a government of laws and not of men"); *Hells Canyon Pres. Council v. Jacoby*, 9 F. Supp. 2d 1216, 1245 (D. Or. 1998); 2 HENRY DE BRACON, BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 33 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (1220) ("The king must not be under man but under God and under the law, because law makes the king."); GRATIAN, *supra* note 89, at 29 ("It is just that the prince be restrained by his own ordinances. . . . That princes are bound by their own enactments in itself prohibits them from infringing the ordinances they have imposed on their own subjects."); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 199–201, 202 ("Where-ever law ends, tyranny begins . . ."), 203–209, reprinted in TWO TREATISES OF GOVERNMENT (1690); JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY pt. I, at 118 (1755) ("[T]he first rule of the public economy is that the administration should be in conformity with the laws."), reprinted in JEAN-JACQUES ROUSSEAU: THE BASIC POLITICAL WRITINGS (Donald A. Cress trans. & ed., 1987); JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT bk. III, ch. X, at 193 (1762), reprinted in JEAN-JACQUES ROUSSEAU: THE BASIC POLITICAL WRITINGS (Donald A. Cress trans. & ed., 1987).

<sup>231</sup> See the account of these expenditures in the Introduction.

<sup>232</sup> *Hill II*, 549 F.2d at 1074 (citing W. Va. Div. of Izaak Walton League v. Butz, 522 F.2d 945, 955 (4th Cir. 1975)).

<sup>233</sup> See *id.* at 1074–75; SAX, *supra* note 33, at 175–92.

vation to “legislate” an exemption to the ESA for the Tellico Dam, and it directed the district court to issue a permanent injunction arresting all activities incident to the Tellico Dam project.<sup>234</sup> The court additionally stated: “This injunction shall remain in effect until Congress, by appropriate legislation, exempts Tellico from compliance with the Act or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined.”<sup>235</sup>

The Sixth Circuit, believing that it could not engage in a balancing of the utilities after finding a statutory violation, may have assumed that if it were allowed naked discretion under the balancing of the utilities doctrine, the analysis of the utilities concerning the Tellico Dam project may favor the denial of injunctive relief.<sup>236</sup> In recognition of the Canon, the court added that the *character* of the defendant’s action could have been considered.<sup>237</sup>

When the United States Supreme Court affirmed the Sixth Circuit’s decision, it did so on different grounds.<sup>238</sup> The Court clung to the explicit language of the ESA, holding that it stripped the court of its traditional discretion, which it otherwise would exercise when deciding to grant an injunction.<sup>239</sup> The Court also insisted that where a court’s equity jurisdiction is *not* circumscribed by the legislature, equitable remedies, including injunctions, are discretionary<sup>240</sup>—reasoning contrary to the implication of the Sixth Circuit’s ruling that there is no discretion when a court faces a clear statutory violation.<sup>241</sup> In so doing, the Supreme Court implied that the decision to issue an injunction would otherwise be subject to traditional equitable concerns and judicial discretion, but the Court did *not* imply that this discretion was completely unbridled.<sup>242</sup>

Taken together, the opinions of the Sixth Circuit and the Supreme Court outline the analysis required where a government agency has willfully and knowingly violated a statute, and is attempting to use a sunk costs strategy to influence any balancing that a court may undertake.<sup>243</sup> After deciding that a statute has been violated, a

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<sup>234</sup> See *SAX*, *supra* note 33, at 175–92.

<sup>235</sup> *Hill II*, 549 F.2d at 1075.

<sup>236</sup> *Id.* at 1074.

<sup>237</sup> See *id.* But see INTRODUCTION for a discussion on TVA’s actions and expenditures.

<sup>238</sup> See *Hill III*, 437 U.S. 153, 193–95 (1978).

<sup>239</sup> *Id.*

<sup>240</sup> See *id.*; *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

<sup>241</sup> See *Hill II*, 549 F.2d at 1074–75.

<sup>242</sup> See *Hill III*, 437 U.S. at 193–95; *SELDEN*, *supra* note 106, at 43.

<sup>243</sup> See *Hill III*, 437 U.S. at 193–95; *Hill II*, 549 F.2d at 1074–75.

court must determine whether the statute leaves the court with any discretion in fashioning a remedy, or whether the statute requires or precludes an injunctive remedy.<sup>244</sup> Next, the balancing of the utilities is performed subject to the Canon—a court's consideration of the character of the defendant's action.<sup>245</sup>

Thus, where a government agency has acted willfully and knowingly, expending funds in furtherance of a statutory violation, those funds are subject to the same treatment as situations involving private party defendants; a court will exclude such funds from its calculus.<sup>246</sup> If the court is to adopt the Greek, Roman, and High Court of Chancery vision of equity as a measure of fairness to be used "to defend the law from crafty evasions, delusions, and mere subtleties, invented and contrived to evade and elude the Common Law, whereby such as have undoubted right are made remediless,"<sup>247</sup> then it is reasonable that the Canon be explicitly extended to govern the balancing of the utilities doctrine, in the form of an exception or otherwise. But, how does a judge decide when an agency's violation is willful and knowing?

### B. *The Trigger: When Is an Agency Violation of the Public Law Willful and Knowing?*

To decide at what point a government agency's actions become a willful and knowing violation of a statute, it is helpful to discern the rationale behind the triggering mechanisms used for this determination in the parent body of law—litigation involving only private parties. In private party litigation, the finding of a defendant's willful and knowing violation of a private or public law turns on the existence of the defendant's actual or constructive knowledge of the violation.<sup>248</sup> The most common examples include the defendant's actual or constructive knowledge of restrictions on his or her deed,<sup>249</sup> protests by private persons who had standing to enforce such restrictions,<sup>250</sup> pro-

<sup>244</sup> See *Hill III*, 437 U.S. at 193–95; see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

<sup>245</sup> *Hill II*, 549 F.2d at 1074.

<sup>246</sup> See *id.*; see also *supra* Part I.D.2–3.

<sup>247</sup> See 1 STORV, *supra* note 52, at 18–19 (quoting *Dudley v. Dudley*, 24 Eng. Rep. 118, 119 (Ch. 1705)).

<sup>248</sup> See *Van Hecke*, *supra* note 200, at 530.

<sup>249</sup> See, e.g., *Stewart v. Finkelstone*, 92 N.E. 37 (Mass. 1910); *Van Hecke*, *supra* note 200, at 530 n.96.

<sup>250</sup> See, e.g., *Curtis Mfg. Co. v. Spencer Wire Co.*, 89 N.E. 534 (Mass. 1909); *Van Hecke*, *supra* note 200, at 530 n.97.

tests by government officials,<sup>251</sup> threats of lawsuits,<sup>252</sup> or the actual bringing of a suit.<sup>253</sup>

Once the willful and knowing nature of the defendant's action is found, none of these cases draws a bright line between the legitimate sunk costs expended by accident or innocent mistake, and the costs that were incurred in furtherance of a possible violation.<sup>254</sup> Such a distinction is unnecessary because landowners are unlikely to be caught in mid-construction by a *new* private law covenant without at least constructive knowledge of its existence. It is also unlikely that a landowner would face the consequences of a sudden downzoning of her or his property if the construction had already been issued a building permit.<sup>255</sup> This is true for the permitting of other private party activities as well.<sup>256</sup>

The application of the Canon, which some courts label the willful and knowing exception, to the balancing of the equities doctrine did not need to accommodate scenarios in which a defendant actively, willfully, and knowingly violated a private or public law enacted mid-construction.<sup>257</sup> This is especially true where legislation is passed at some point in time after the defendant government agency begins a

<sup>251</sup> See, e.g., *McCavic v. DeLuca*, 46 N.W.2d 873 (Minn. 1951); Van Hecke, *supra* note 200, at 530 n.97.

<sup>252</sup> See, e.g., *Gilbert v. Repertory, Inc.*, 18 N.E.2d 437 (Mass. 1939); Van Hecke, *supra* note 200, at 530 n.97.

<sup>253</sup> See, e.g., *Morgan v. Veach*, 139 P.2d 976 (Cal. Dist. Ct. App. 1943); Van Hecke, *supra* note 200, at 530 n.98.

<sup>254</sup> See notes 200–216 and accompanying text.

<sup>255</sup> Procedural due process concerns would require more of a municipality or town—at least notice of the proposed regulation—before it could be applied to its inhabitants by holding them responsible for compliance. See U.S. CONST. amends. V, XIV, § 1. As a side note, the issue of a building permit is raised so that the difference between states where development rights become vested late (after the issuance of a building permit), early (after the submission of a preliminary plan), or somewhere in between, does not have to be further clarified and its implications dealt with in this Note. See generally *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 553 P.2d 546 (Cal. 1976) (the leading case on late vesting development rights); *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980) (providing a general discussion on early vesting, late vesting, and intermediate “balancing test” vesting development rights); Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719 (2001) (offering a discussion on the principles of vested rights and the need for development agreements in some states).

<sup>256</sup> See note 185 and accompanying text.

<sup>257</sup> See *supra* Part I.D.2–3.

project.<sup>258</sup> A sorting out and a separate accounting of such pre- and post-notification expenses are necessary.<sup>259</sup>

In such cases, a judge could apply the indicators that courts use when evaluating whether private conduct is willful and knowing.<sup>260</sup> But, in the special case of an agency-defendant, it is established that such a defendant must comply with both the most current state of statutory law, including the Administrative Procedure Act (APA),<sup>261</sup> with an eye to the demands of traditional equity jurisprudence. One of the tenets of equity jurisprudence holds: "There is an equity to keep [government agencies] within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority."<sup>262</sup> As traditional equity jurisprudence pertains to the specific case of TVA's Tellico Dam, it has been observed that government agencies that "have the power to take land and construct public works are not amenable to the jurisdiction of a court of equity if they keep within the line of their powers . . . [but] if they exceed their authority . . . the courts will interfere."<sup>263</sup> Because government agencies have a duty to comply with the current state of applicable laws—unless otherwise granted a statutory exemption—the court must hold such agencies to a high standard when discerning their willful and knowing actions.<sup>264</sup>

The duty to comply with a statute may be said to begin when the agency gains actual knowledge of its violative conduct, or with some other form of notification, either from another governmental entity, or from a private party. However, the duty to comply apparently begins with the enactment of the statute that the agency is actively violating.<sup>265</sup> As in cases involving private parties, a court must find a willful and knowing violation of a statute and ignore the money expended in an agency's sunk costs strategy.<sup>266</sup> Non-recoverable expenditures that were incurred before the enactment of the statute may surely enter

<sup>258</sup> *See Hill III*, 437 U.S. 153, 193 (1978).

<sup>259</sup> *See id.*

<sup>260</sup> *See* notes 248–253 and accompanying text.

<sup>261</sup> *See* Administrative Procedure Act of 1946, 5 U.S.C. § 706(A) (1996).

<sup>262</sup> *BISPHAM*, *supra* note 81, at 355 (11th ed. 1931).

<sup>263</sup> *Id.* at 361–62.

<sup>264</sup> *Id.*

<sup>265</sup> *See* Administrative Procedure Act of 1946, 5 U.S.C. § 706(A) (1996); *BISPHAM*, *supra* note 81, at 361–62, 376–77 (11th ed. 1931).

<sup>266</sup> *See* *BISPHAM*, *supra* note 81, at 376–77 (11th ed. 1931).



into the balance of the utilities.<sup>267</sup> If this is true, then a court may also look to the other deceptive behavior surrounding an agency project—sudden increases in expenditures as a lawsuit is looming—and use these actions, according to the Canon, to discount such expenditures and remove the sunk costs weapon from an agency's arsenal.

### CONCLUSION

The sunk costs strategy of government agencies has the potential to cripple the enforcement of environmental statutes and regulations. If agencies are allowed to spend money in furtherance of their statutory violations, and count those expenditures in the balancing of the utilities doctrine, then they are rewarded for their illegal efforts, and government may be able to avoid accountability, and worse, avoid its own laws.

From its beginning, equity has been concerned about the fairness of a dispute's resolution, by taking into account the particular circumstances of the dispute. Equity has also addressed the protection of rights as determined by the court; however, this basic principle of equity has been tempered by the injection of seemingly wild discretion into the remedy stage of litigation through the adoption of the balancing of the utilities. Although it is a fairly new doctrine, judges sitting in equity have, either implicitly or explicitly, carried over other principles of equity, namely the canon stating that, "where the equity is equal, the law must prevail." This canon, dealing with the innocence of the parties' actions, guides judges and prevents what an otherwise naked pro forma, cost-benefit analysis may yield alone. In private litigation, courts look to the innocence of the parties' actions; determine that a willful and knowing violation of the law is not innocent; and have refused to allow the defendant's money spent in furtherance of the violation to be weighed in any equitable balance.

This logic should be extended to the actions of government agencies as well, whether termed as an exception to the balancing of the utilities doctrine, or stated as the canon itself. Then, when confronted with the uncomfortable position of deciding whether to issue an injunction to stop construction on a multi-million dollar public works project a court can simply state, "In balancing the utilities, we refuse to assign any weight to the money that the Executive Branch has spent in furtherance of its willful statutory violation."

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<sup>267</sup> See 5 U.S.C. § 706(A); *Hill II*, 549 F.2d 1064, 1074 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978); *BISPHAM*, *supra* note 81, at 361-62, 376-77 (11th ed. 1931).