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## FOREWORD

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Equity, however large its triumphs, has long been trailed by challenges to its legitimacy. Arbitrary and unpredictable outcomes could easily follow from doctrines of substantive law, and remedies, that vest great discretion in a judge and openly invite arguments premised upon moral intuition and conscience. John Selden, long ago, characterized equity as “roguish” for just this reason, as an idiosyncratic exercise in measuring justice by the “Chancellor’s foot.”<sup>1</sup> The merger of law and equity in most jurisdictions does not resolve these challenges; legitimacy remains a question even “[a]s memories of the divided bench, and familiarity with its technical refinements, recede further into the past . . . .”<sup>2</sup> The articles in this symposium explore facets of doctrine and practice that originated with equity, each suggesting an answer to the enduring question of legitimacy.

One form of legitimacy—a practical workaday sort—arises from settled practice that creates transparent criteria for decisionmaking; however broadly stated, if the criteria are explicit, their presence is a constraining force. Additionally, judges make decisions in a context defined by their membership in a profession. In this respect the history of equity jurisprudence is informative. The first influential chancellor in the United States, James Kent in New York, explained in his extrajudicial writing how he succeeded in bringing order to an unsettled system and making English authority (in the immediate aftermath of the War of 1812) palatable to his patriotic colleagues on the bench. Chancellor Kent described his judicial technique as follows:

My practice was, first, to make myself perfectly and accurately (mathematically accurately) master of the facts. It was done by abridging the bill, and then the answers, and then the depositions, and by the time I had done this slow and tedious process, I was master of the cause and ready to decide it. I saw where

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1. See H. Jefferson Powell, “*Cardozo’s Foot*”: *The Chancellor’s Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7 (Summer 1993).

2. See *Mertens v. Hewitt Associates*, 61 U.S.L.W. 4510, 4513 (U.S., Jun. 1, 1993).

justice lay, and the moral sense decided the court half the time; and then I sat down to search the authorities until I had examined my books. I might once in a while be embarrassed by a technical rule, but I most often found principles suited to my views of the case; my object was so to discuss a point as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel.<sup>3</sup>

Chancellor Kent introduced to his court the practice of written opinions—his two predecessors having produced no written authority ever cited to Kent during his nine years as Chancellor—with the objective of gaining acquiescence in his views.<sup>4</sup>

Kent's emphasis on factual mastery was not unique to the early nineteenth century. A leading judicial practitioner of equity, William T. Allen, has written that in his court, the Delaware Court of Chancery, "the particulars of the case, not radiant legal generalities, are of transcending importance . . ."<sup>5</sup> Professor Powell's article in this symposium, likewise, emphasizes the factually dense nature of Judge Benjamin Cardozo's equity opinions.<sup>6</sup> Commentators and later judges may have overlooked this quality, reducing Cardozo's reasoning to mere slogans, but to Cardozo himself equity's central characteristic was "its ability to answer 'the call of the occasion'."<sup>7</sup> To meet that call, discretionary justice is grounded in the decisionmaker's conscientious understanding of the controversy.

To be sure, over time a body of written precedents may jeopardize the court's capacity to respond to each situation alert to its own particularity. Written justifications for decisions, and abstracts from them, may come to have lives of their own that impede subsequent decisionmakers' sensitivity to factual nuance. Chancellor Kent noted that "[a] court of equity becomes, in the lapse of time, by gradual and almost imperceptible degrees, a court of strict technical jurisprudence, like a court of law."<sup>8</sup> Although Kent seems to have overgeneralized on the basis of contemporary English experience,<sup>9</sup> the practical need for

3. See WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, L.L.D. 158-59 (1898) (1828 letter to Thomas Washington).

4. See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 572 (1993).

5. William T. Allen, *Speculations on the Bicentennial: What Is Distinctive About Our Court of Chancery*, in COURT OF CHANCERY OF THE STATE OF DELAWARE 1792-1992, 17 (1992).

6. Powell, *supra* note 1, at 22.

7. *Id.* (quoting *Adams v. Champion*, 294 U.S. 231, 237 (1935)).

8. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 490 (2d ed. Halsted 1832).

9. Kent specifically commended Lord Eldon, chancellor from 1801 to 1827, "for resisting the temptation so often pressed upon him, to make principles and precedents bend to the hardship of a particular case." *Id.* Other commentators assess Eldon less favorably. Professor Stone describes his steadfast opposition to divorce. See LAWRENCE STONE, ROAD TO DIVORCE 156, 172, 334 (1990). Eldon's position was manifest in his invalidation of settlement deeds conditional on future separation, his opposition to paternal agreements to surrender custody and his fierce cross-examination of petitioners for Parliamentary divorces, which frightened off petitioners and caused many to abandon their petitions. Professor Atiyah assigns to Eldon's disposition significant responsibility for the court of chancery's decline; Eldon procrastinated endlessly and was unwilling to reach final decisions. See PETER S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 392-93 (1979). Eldon's intellectual conservatism led him to "make a thorough nuisance of himself on the subject of companies," and initially to treat all companies as illegal monopolies. *Id.* at 366.

stability and predictability is to some degree inescapable. Predictability, though, invites generalizable rules, in turn undermining the narrow and fact-bound nature of equitable judging. If, as Professor Laycock argues in his symposium article, the equitable remedies of injunction and specific performance have become routine in many contexts,<sup>10</sup> Chancellor Kent's prediction has to that degree been vindicated.

Like Kent, Selden has contemporary counterparts. Professor Rowe's article describes the inhospitable reception met by equitable remedies and concepts of jurisdiction before the United States Supreme Court in recent public law cases.<sup>11</sup> Selden's sensibility seems especially to animate Justice Scalia. It is "little if any exaggeration," writes Professor Rowe, to conclude that Justice Scalia "strives to minimize the scope for judicial discretion."<sup>12</sup> The high degree of political sensitivity attending federal public law may explain, but not justify, the recent regression in the Court and its departure from the general developments explored by Professor Laycock. Paradoxically, of course, discretionary judicial decisionmaking becomes more unpredictable when the occasions for it are restricted, while discretion's opponents often stress their concern for lack of predictability and stability.

The comparative perspective afforded by Justice Gummow's article is helpful in understanding both these domestic developments and the Australian framework that Gummow analyzes. In Australia, as in the United States generally, the injunction is rapidly losing its character as an extraordinary remedy.<sup>13</sup> The Australian constitution entrenches federal public law jurisdiction to enjoin officers of the federal government who act or threaten to act illegally; Australia has no statute barring federal injunctions to stay proceedings in state court and no judicial doctrine of federal abstention. But the Australian federal and state constitutions contain no guarantees of a right to jury trial in civil cases or of freedom of speech or due process; the latter point has limited the occasion to develop injunctions to regulate and reform the structure of governmental institutions.<sup>14</sup>

Kent's account is that once immersed in the particulars of the parties' dispute, he "saw where justice lay . . ." Professor Powell, focusing on Judge Cardozo's equity decisions delivered a century after Kent's service, notes that Cardozo "assumed the existence of a moral tradition, within the legal profession and in society generally," that Cardozo did not see his decisions as matters of choice at all, but rather as "attempts truthfully to describe and respond to the situations brought before him."<sup>15</sup> In our very different world, the bases for

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10. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53 (Summer 1993).

11. Thomas D. Rowe, Jr., *No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law*, 56 LAW & CONTEMP. PROBS. 105 (Summer 1993).

12. *Id.* at 118.

13. The Honourable Mr. Justice William Gummow, *The Injunction in Aid of Legal Rights—An Australian Perspective*, 56 LAW & CONTEMP. PROBS. 83 (Summer 1993).

14. *Id.* at 85.

15. Powell, *supra* note 1, at 26-27.

legitimacy are less obvious; many would be skeptical of a judge's ability to envision justice in the immediate and incontestable sense that Kent probably meant.

The experience in Delaware suggests two responses, one highly formal and one more pragmatic. Delaware's second constitution in 1792 established a separate court of equity, today a flourishing and much-celebrated institution. Although the court is best known for its adjudication of disputes involving Delaware corporate law, it has a general equity jurisdiction in which non-corporate cases are numerically significant.<sup>16</sup> Formal bases for equity's legitimacy in Delaware are its constitutional grounding and long history. Professor William T. Quillen's article in this symposium argues that the court's status as a general equity court with constitutionally vested jurisdiction has "emboldened its judges in the exercise of power, supplied a permanence which has enabled its structure to grow, and given a heightened cultural emphasis to equitable maxims and principles."<sup>17</sup> Moreover, argues Professor Quillen, equity works: The Delaware court of chancery resolves complex (as well as simple) disputes expeditiously, having aired the issues in professional and forthright manner, and lets the litigants move on<sup>18</sup>—at least to an appeal to the Delaware Supreme Court, where the odds of reversal seem pretty low.<sup>19</sup>

Another earmark of equity jurisprudence identified by Chancellor Allen is its retrospective not prospective orientation. Having focused on the particulars of a specific controversy, that is, a judge working in this tradition is more concerned with achieving justice among the parties to that action than in building and maintaining a system of general rules justified by its future utility to other persons.<sup>20</sup> Equity's concern with relationships of trust and dependency, and its

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16. The contribution of the court's general equity jurisdiction to its repute in corporate law is a significant unexamined question. Varying somewhat over time, though, noncorporate cases, at least in number, occupy a substantial portion of the docket. See William T. Quillen, *A Short History of the Delaware Court of Chancery*, in *COURT OF CHANCERY OF THE STATE OF DELAWARE 1792-1992*, 45 (1992) (during service of Chancellor Duffy, 1966-1973, 75% of cases on docket involved local Delaware issues respecting land titles, zoning, picketing in labor disputes and property rights under wills and trusts); Stephen J. Massey, *Chancellor Allen's Jurisprudence and the Theory of Corporate Law*, 17 *DEL. J. CORP. L.* 683, 691 n.22 (1992) (between 1985 and 1992, 61% of opinions issued by incumbent chancellor involved corporate law).

As it happens, Delaware chancellors themselves emphasize the professional and personal satisfaction they obtain from deciding noncorporate cases. Chancellor Duffy's own account emphasizes land title cases, a will dispute that led to the redesign of funerary statuary, and a guardianship case involving the ability of a guardian of the person to determine whether to withdraw the life-support system sustaining his unconscious ward. See Quillen, *supra*, at 45-46. The incumbent chancellor singles out a property dispute involving an unconscionable transfer. See Allen, *supra* note 5, at 17. And Chancellor Seitz's decisions desegregating educational institutions in Delaware, prior to *Brown v. Board of Education*, are characterized as "one of the Court's finest hours" by the incumbent chief justice of the Delaware Supreme Court. See E. Norman Veasey, *The Court of Chancery - The Court of Excellence*, in *COURT OF CHANCERY OF THE STATE OF DELAWARE 1792-1992*, 12 (1992).

17. Quillen, *supra* note 16, at 123.

18. *Id.* at 119.

19. See Massey, *supra* note 16, for a discussion of the relationship between these two courts in corporate law disputes.

20. See Allen, *supra* note 5, at 16.

creation and enforcement of fiduciary duties—all settings that require a mechanism to examine the actual use of power or control by one person over property or another person—explain this emphasis.

The colloquy between Professors Lindgren and English illustrates the ongoing significance of these questions. Equity's traditional concern with dependent persons, chiefly exercised through its regulation of guardianships, places in court many disputes about the termination of life-supporting medical technology. Professor Lindgren critically examines the standards courts apply in such cases and advocates as a standard to guide the exercise of judicial discretion, the adoption of a principle of "death by default."<sup>21</sup> Most people, Lindgren argues, would prefer in stated circumstances that their lives not be artificially prolonged, a preference manifest in extensive polling data and living wills; in the absence of evidence that a particular person would have preferred otherwise, courts should permit life-support to be withdrawn.<sup>22</sup> Professor English emphasizes, instead, the ambiguous and conflicting nature of cases on treatment.<sup>23</sup> As to many of the circumstances identified by Lindgren, in which most people would prefer death to life's artificial prolongation, English notes that interpretive questions will inevitably arise and that certainty in adjudication will be elusive; "in this area of the law," concludes Professor English, "there can be no simple solutions."<sup>24</sup>

The colloquy between Professor Scheppele and her commentator, Chancellor Allen, reflects a similar debate. Professor Scheppele criticizes the Supreme Court's recent doctrine defining insider trading, arguing that it is too rigidly focused on locating a fiduciary relationship and should, instead, reflect the broader principles earlier developed in equity to require disclosure of information to which a person has had privileged access.<sup>25</sup> Professor Scheppele justifies her proposal for a broader prohibition on insider trading through an exercise in contractarian ethics, that is, an effort to discern the rule to which all affected persons would consent before circumstances of a specific dispute arise.<sup>26</sup> Chancellor Allen maintains that Scheppele is insufficiently sensitive to the context in which most insider trading occurs. Anonymous transactions through intermediaries on stock exchanges connect buyers and sellers who, otherwise, have no relationship at all to each other.<sup>27</sup> More generally, Allen argues that Scheppele's contractualist technique is an attempt to objectify what are inescapably contestable exercises in moral reasoning in the law.<sup>28</sup> Instead, when

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21. See James Lindgren, *Death By Default*, 56 LAW & CONTEMP. PROBS. 185 (Summer 1993).

22. *Id.* at 185-86.

23. See David M. English, *Comment: Defining the Right to Die*, 56 LAW & CONTEMP. PROBS. 255 (Summer 1993).

24. *Id.*

25. Kim Lane Scheppele, "It's Just Not Right": *The Ethics of Insider Trading*, 56 LAW & CONTEMP. PROBS. 123 (Summer 1993).

26. *Id.* at 125.

27. William T. Allen, *Professor Scheppele's Middle Way: On Minimizing Normativity and Economics in Securities Law*, 56 LAW & CONTEMP. PROBS. 175 (Summer 1993).

28. *Id.* at 182.

confronted with their inevitable responsibility for the interstitial formulation or modification of rules, courts may “legitimately take fairness concerns directly, albeit cautiously, into account.”<sup>29</sup>

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29. *Id.* at 183.