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Foreword

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Strange might it seem that concepts and precepts originating in Equity play major roles in the complex regulatory schemes created by many contemporary statutes. Indeed, some of the most controversial aspects of these schemes stem from their equity-based components. The articles in this symposium illustrate both the practical significance and the pervasive nature of Equity's controversial contributions to contemporary regulatory structures.

Equity's constructs have qualities that explain their long-enduring appeal as well as their inducement to controversy. Equity doctrines are visibly malleable. Doctrines like unconscionability and undue influence, for example, lack sharp edges that define with clarity and precision the conduct that will make a transaction vulnerable to successful challenge. Moreover, Equity's approach to remedies, likewise flexible, created possibilities beyond the winner-take-all prospect of the common law. Justice Joseph Story, writing initially in 1836 to expound Equity's basic features, explained that

> one of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law . . . are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant.[1]

However admirably sensitive to context and particulars, equity doctrines and remedies may also be applied unpredictably and arbitrarily.[2]

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1. Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America § 28 at 28 (1st ed. Boston, Hilliard, Gray & Co. 1836). Justice Story's footnote states that "[m]uch of this paragraph has been abstracted from Dr. Lieber's Encyclopedia Americana, article 'Equity.'" *Id.* at 28 n.1. Justice Story, in turn, contributed 120 double-columned pages to his friend Lieber's Encyclopedia. *See* Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. Legal Educ. 339, 361 (1992).

2. Justice Story noted that prior to the appointment of Chancellor Kent in New York in 1814, "'the [equity] doctrines of the Courts depended much less upon the settled analogies of the system, than upon the character of the particular judge. If he possessed a large and liberal mind, he stretched them to a most unwarrantable extent; if a cautious and cold one, the system fainted and expired under his curatorship.'" 1 William W. Story, Life and Letters of Joseph Story 233 (1851). Justice Story credited

Justice Story noted as well Equity's sensitivity and responsiveness to the human phenomenon of trust and Equity's ingenuity in remedying abuses of trust that "Courts of Common Law do not recognize at all, or, if they do recognize them, they leave them wholly to the conscience and good will of the parties."[3] To Equity is credited authorship of the trust as an enforceable legal construct and the creation of remedies, available in a variety of settings for "many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will interfere and grant redress, but which the common law takes no notice of, or silently disregards."[4] Equity's progeny thus includes fiduciary duties, duties whose content is somewhat variable.

Several articles in this symposium remark upon the protean quality of equity doctrines. Professor Baxter's article[5] evaluates the claim that directors of federally insured banking institutions and their professional advisers owe a direct fiduciary duty to act in and with regard to the interests of their federal regulators. Within the "labyrinth of federal banking legislation,"[6] the addition of such a fiduciary duty would add nothing of substance to statutorily specified requirements that directors operate the institution to maintain its safety and soundness.[7] To the regulators, however, the lure of imposing a direct fiduciary duty is that it would have enabled them "to determine the content of the duty owed to them without regard to potentially applicable state law standards of fiduciary duty," on a case-by-case basis incident to enforcement actions.[8] In short, the duty's lack of initial definition helps explain its appeal. Mr. Fisher's article emphasizes the value regulators likely ascribe to novel and protean theories of liability as bases to expand counsel's liability for advice given to federally insured depository institutions.[9] My own article examines another equity concept, oppression, in the context of Canadian corporations legislation, contrasting its operation with counterpart regulation in the United States. Oppression is a protean, amoeba-like concept that resists initial definition and indeed operates, at least in the Canadian context, to discourage and even defeat ex ante specifications of entitlements.[10]

Chancellor Kent with Equity's assumption in New York of a "'steady and well defined shape.'" *Id.* Story's son (and biographer) credited both with disentangling Equity in the United States from "many of the useless forms and complicate processes in which the English system is entangled, and gave to it that certainty and despatch, which is in England its greatest want." *Id.* at 234.

3. STORY, *supra* note 1, § 29 at 28.

4. *Id.*

5. Lawrence G. Baxter, *Fiduciary Issues in Federal Banking Regulation*, 56 LAW & CONTEMP. PROBS. 7 (Winter 1993).

6. *See id.* at 23.

7. *Id.* at 23-24.

8. *Id.* at 30.

9. *See* Keith R. Fisher, *Nibbling on the Chancellor's Toesies: A "Roguish" Concurrence with Professor Baxter*, 56 LAW & CONTEMP. PROBS. 45, 50 (Winter 1993).

10. *See* Deborah A. DeMott, *Oppressed But Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and other Corporate Constituents*, 56 LAW & CONTEMP. PROBS. 183, 221-23 (Winter 1993).

Separately, symposium articles analyze the strengths and limits of fiduciary duty in complex regulatory settings. Professor Stein assesses the efficacy of Equity's contributions to the federal regulation of employee benefit plans created by Congress in ERISA. That ERISA imposes fiduciary duties on persons in control of such plans and otherwise borrows from Equity does not, he argues, adequately resolve a number of fundamental and recurring questions.[11] In particular, the plan's sponsor determines, free of fiduciary constraints, whether to provide a plan as well as the plan's design,[12] while regulation (including regulation through the imposition of fiduciary duty) does not conduce toward plan formation.[13] Professor Alexander, more generally, argues that the trust-based structure for ownership of pension plan assets, dictated by ERISA, results in passive ownership of plan assets by plan participants that is politically and morally problematic.[14] Fiduciary duty itself presupposes that "the appropriate role of pension owners is that of passive investors, rather than self-governing and responsible owners."[15] Paradoxically, though, greater control by plan participants likely undercuts the ultimate security of their pensions.

In various ways, several articles recognize that the interest of the United States as an insurer or other stakeholder of last resort contributes both analytic and normative complications. Dean Wolk, justifying the passive ownership role into which fiduciary norms cast participants in a pension plan, notes that the federal Pension Benefit Guaranty Corporation ("PBGC") insures benefit payouts in defined benefit plans.[16] As a result, the PBGC is "vitally interested in proper trust investment;"[17] from its standpoint, propriety virtually defines itself as that investment or management strategy which minimizes the likelihood of claims on the PBGC. The regulatory strategy criticized by Professor Baxter and Mr. Fisher, likewise, entailed regulators' assertion of fiduciary duty to reduce prospectively the risk of claims on federal deposit insurers or, retrospectively, regulators' assertion of past breaches of such a duty as a basis upon which to impose penalties which would in monetary effect reduce the drain on the federal insurance funds. Mr. O'Hara's article explores the propriety of equitable defenses, such as caveat emptor, in actions brought to recover the cost of cleaning up contaminated property under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). In the post-CERCLA world, the federal government acting through the Environmental

11. *See* Norman Stein, *ERISA and the Limits of Equity*, 56 LAW & CONTEMP. PROBS. 71, 82 (Winter 1993).
12. *Id.* at 88.
13. *Id.* at 110.
14. *See* Gregory S. Alexander, *Pensions and Passivity*, 56 LAW & CONTEMP. PROBS. 113 (Winter 1993).
15. *Id.* at 126.
16. *See* Bruce A. Wolk, *Comment: Pensions and Passivity*, 56 LAW & CONTEMP. PROBS. 143, 146 (Winter 1993).
17. *See id.*

Protection Agency, spending monies in the Superfund,[18] is the environmental stakeholder of last (and often of first) resort. CERCLA disallows the caveat emptor defense in actions brought by the United States against potentially responsible parties to reimburse Superfund for cleanup costs because it places greater priority on the rapid replenishment of Superfund;[19] in private litigation—such as actions for contribution subsequent to recoveries by the United States—Mr. O'Hara argues such a defense should be available.

Symposium participants also acknowledge that legal doctrines, including those derived from Equity, do not operate in a vacuum; indeed the practical efficacy of doctrine in a complex regulatory scheme often turns on its extra-legal impact on behavior. Will the doctrine, all things considered, encourage socially favored behavior while discouraging socially disfavored behavior? Mr. O'Hara argues that by legitimating the use of caveat emptor in private litigation under CERCLA, courts would create incentives for the prompt revelation of information about contamination from sellers to buyers of property by encouraging the buyer to assess known environmental costs accurately in determining the price to pay for the property. The seller's incentive, otherwise, may be to conceal rather than reveal full information about the contamination.[20] Professor Stein, likewise concerned with ERISA's efficacy in discouraging socially disfavored conduct, observes that however stringently they are cast, fiduciary standards are not self-enforcing.[21] Fiduciaries who are not adequately monitored are likely, sometimes accurately but sometimes erroneously, to resolve uncertain questions so as to further their own benefit.[22]

To be sure, these insights are not newly revealed in late twentieth-century regulatory contexts. Describing the import of doctrines of constructive fraud,[23] Justice Story wrote

> they will be found to be founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetuate a wrong, rather than to rely on mere remedial justice, after a wrong has been committed. By disarming the parties of all legal sanction and protection, they suppress the temptations and encouragements, which might otherwise be found too strong for their virtue.[24]

18. *See* Michael O'Hara, *Increasing Fairness and Market Efficiency in Real Property Transactions: The Utilization of Caveat Emptor in CERCLA Private Party Cleanups*, 56 LAW & CONTEMP. PROBS. 151, 157-58 (Winter 1993).

19. *See id.* at 158.

20. *Id.* at 165.

21. Stein, *supra* note 11, at 108.

22. *Id.* at 105.

23. That is,

> such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore, are prohibited by law, as within the same reason and mischief, as contracts and acts done *malo animo*.

STORY, *supra* note 1, § 258 at 261.

24. *Id.*

The point remains true, although the focus of its application has shifted from private transactions typically involving interests in real property to statutorily defined regulatory structures. Through such statutes, Equity gains contexts to apply and refine its doctrines, ones identified by acronyms, but the underlying choices and dilemmas are not *so* different from Justice Story's perception of them.