A Student's Guide to the Meanings of "Equity"

Samuel L. Bray*

equity, *n.*
1. The recognition of an exception to a general rule.
2. A moral reading of the law.
3. The doctrines and remedies developed in the English courts of equity, especially the Court of Chancery.

Equity is a slippery word, and hard to grasp. What makes it so slippery is its long history, and the many uses to which the word has been put. In legal usage, there are at least three different meanings for this word.

One is the recognition of an exception to a general rule. This meaning can be traced back to Aristotle. In the *Nicomachean Ethics* he says

> the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the

* Professor of Law, UCLA School of Law. Thanks for comments to Michael McConnell, Seana Shiffrin, and Eugene Volokh.

> equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. *And this is the nature of the equitable, a correction of law where it is defective owing to its universality*.[1]

Aristotle's definition had nothing to do with equitable remedies, and it was not directed to judges. Yet it represents a highly influential idea about what equity means—equity is about the exceptional case, the unforeseen circumstance, the extension of a law to a case that is within its spirit but not quite within its letter.[2] This sense of equity can be seen in William Blackstone's description of "equitable interpretation" of a statute:

> [I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it. . . . But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* [i.e., as to this] disregard it.[3]

---

1 Aristotle, *Nicomachean Ethics*, in 2 *The Complete Works of Aristotle* bk V, ch 10, p 1795-1796 (J. O. Urmson rev., W. D. Ross transl., Jonathan Barnes ed. 1984) (emphasis added). For commentary on this passage, good starting points are W. F. R. Hardie, *Aristotle's Ethical Theory* 209-210 (2d ed. 1980); Allan Beever, *Aristotle on Equity, Law, and Justice*, 10 Leg. Theory 33 (2004).

2 See D. Ibbetson, "A House Built on Sand: Equity in Early Modern English Law" in *Law & Equity: Approaches in Roman Law and Common Law* 55, 57 (E. Koops & W. J. Zwalve eds. 2014) (describing the "equity" of a statute, in late medieval England, as "the principle underlying a statute, its *ratio*, which justified a slight analogical extension outside its express terms").

3 1 William Blackstone, *Commentaries* *91. Blackstone added that "there is no court that has power to defeat the intent of the legislature, when couched in such evidence and express words, as leave no doubt whether it was the intent of the legislature or no." Id.

A second meaning of *equity* is a moral reading of the law. An example is the foundational case for unjust enrichment in the Anglo-American legal tradition, *Moses v. Macferlan*.[4] In that case, even though the defendant had not committed what we would today call a tort or a breach of contract, Lord Mansfield held that the plaintiff could still recover money in an action of assumpsit: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."[5] Thus the court held that the plaintiff could recover on what would now be called a claim for unjust enrichment, not because the case was exceptional but because "equity" required it.[6]

Note that the first two senses of equity overlap. Often what leads a court to find an exception unforseen by the legislator are reasons of natural rights and justice. Consider, for example, *Riggs v. Palmer*,[7] where a grandson poisoned his grandfather and then tried to inherit under the grandfather's will. The court interpreted the inheritance statute not to allow a murderer to inherit the estate of a victim. In reaching this decision, the court invoked the first meaning of equity (citing Aristotle and Blackstone) and the second (quoting maxims such as "No one shall be permitted to profit by his own fraud"). But the second meaning of *equity* does add something to the first one. In Aristotle's definition, an equitable interpretation is neither more nor less than what the legislator would have wanted—it is ordinary interpretation taking into account legislative imperfection.[8]

---

4 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

5 Id., 2 Burr. at 1012, 97 Eng. Rep. at 681.

6 The court deciding *Moses v. Macferlan* was the King's Bench—not a court of "equity" in the third sense described below. Note that as the law of unjust enrichment has developed, it has developed more rules, and so it would be misleading to think that merely appealing to equity in this sense is enough. See Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt b (2011). But it remains true that the second sense of *equity* has shaped this part of the law.

7 115 N.Y. 506 (1889).

8 See Hardie, supra note _, at 210 ("Aristotle does not suggest that . . . judges and juries should 'correct' the law."); see also Ibbetson, supra note 2, at 56-57; E. L. McAdam, Jr., *Dr. Johnson and the English Law* 119-120 (1951).

A third meaning of *equity* is pervasive in law school courses: the doctrines and remedies developed in the English courts of equity, especially the Court of Chancery.

As you think about this definition, start with how it ends: "the Court of Chancery."[9] Here *equity* is not a free-floating term for fairness or justice, but rather a word tied to a specific institution. That institution had a long history in England, but it can be summarized briefly.[10] Sometime before or shortly after the Norman Conquest of England in 1066, there was an English administrative department called the Chancery. It did not decide cases. Instead, it would issue royal grants and it would draw up the procedural forms, or "writs," that plaintiffs needed to be able to sue in the royal courts. The official in charge of the Chancery was the chancellor. But people who could not get justice in the courts started to come to the chancellor asking for relief. Over time, the chancellor's decisions and interventions came to look more judicial. By the end of the fourteenth century it was clear that Chancery was a court, often called a "court of conscience." Over the next two centuries, the procedure in Chancery became more regular. And precedent became more important in the chancellor's decisions. By the seventeenth century it was clear that there were controlling principles in equity just as there were in the courts of law, even though the chancellor had his own special procedures (e.g., depositions) and special remedies (e.g., injunctions). Chancery continued as a separate court until the nineteenth century, when it was dissolved by Parliament.

The history just sketched is about an institution: Chancery. Now if this institutional reference were the whole definition of *equity*, then it would amount to little more than "equity is whatever a court of equity does." In fact, that very definition was adopted by the English legal historian Frederic Maitland.[11] But it is not especially helpful for

---

[9] There were a few other courts of equity in England, such as the Court of Exchequer, but it is Chancery that has left its mark on equity.

[10] Two good introductions to the history of equity are J. H. Baker, *An Introduction to English Legal History* 97-116 (4th ed. 2007) and John H. Langbein, Renée Lettow Lerner, & Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* 267-412 (2009).

[11] Maitland's definition, subject to certain qualifications not relevant here, was as follows: "'Equity is that body of rules which is administered only by those Courts which are known as Courts of Equity." F. W. Maitland, *Equity: A Course*

understanding equity and equitable remedies in contemporary American law. After all, there are very few courts of equity left in the United States. Only three states still have separate courts of equity—Delaware, Mississippi, and Tennessee—though a handful of other states do draw some jurisdictional distinction between law and equity cases.[12] But in all fifty states "equity" remains part of the everyday vocabulary of courts and lawyers. So more is needed than just identifying equity with the Court of Chancery.

Working back from the end of the definition, the next part is that *equity* refers to what "*developed* in the Court of Chancery." Throughout its history, one of the central ideas in equity was that it would aid those who could not receive an adequate remedy at law. As Adam Smith once put it in his lectures on law, "when one wants to have his cause tried by the Court of Chancery, he relates his story to the court, representing at the same time that the courts of common law can grant him no redress."[13] And equity had a distinctive mode of reasoning. Its hallmarks were, and are, case-specificity, discretion, flexibility, moral reasoning, and resistance to fraud, exploitation, and the abuse of legal rights.[14] As one scholar has said:

> the rules developed and applied in equity had more of a moral content than those at law. Thus, the Chancellor spoke of good faith, unconscionable conduct, unjust enrichment. And . . . the rules that were developed were not applied as mechanically as those of the common-law. Relief in equity was not viewed as a matter of right but was deemed as subject to the discretion of

---

of Lectures 1 (A. H. Chaytor & W. J. Whittaker, eds., revised by John Brunyate, delivered in 1906 and published in 1936).

[12] New Jersey and Cook County, Illinois have separate divisions for law and equity within a single court, and Georgia distinguishes equity for trial and appellate jurisdiction. Also, Iowa has unified courts that administer what the state constitution calls "distinct and separate jurisdictions" for law and equity.

[13] Adam Smith, *Lectures on Jurisprudence* 281 (R. L. Meek, D. D. Raphael & P. G. Stein eds. Liberty Fund reprint 1982)

[14] For an introduction to these characteristics of equitable decisionmaking, and especially the way equitable doctrines constrain opportunistic behavior, see Henry E. Smith, *An Economic Analysis of Law versus Equity* (March 2012 draft).

> the court. Not a personal discretion of the individual judge, not caprice, not sympathy, but a judicial discretion—one based upon the principles which had activated the Chancellors of the past—which enabled the court to consider a variety of factors that might be involved in the particular case and evaluate them, weighing one against the other, before coming to its conclusion.[15]

The mode of reasoning associated with the Chancery overlaps to a great degree with the first two meanings of equity mentioned above: a focus on the exceptional case and a moral reading of the law.

Now we arrive at the beginning of the third definition: "*doctrines and remedies* developed in the Court of Chancery." Equity is not just identified with an institution, and not just developed through a certain mode of reasoning. It is also a body of law, in the sense of binding legal rules.

But it is important to think carefully about where law and equity have merged in the United States and where they have not. It used to be true that there were separate courts of law and equity in many U.S. jurisdictions. As in England, the law and equity courts had their own separate rules. These included procedural rules, such as the ones governing what needed to be filed with the court to begin a case, and what evidence was admissible. There were also certain kinds of suits that were typically brought in equity because the chancellor had developed special doctrines for them—especially suits about trusts and mortgages. (This is where the idea of a homeowner's "equity" came from—the chancellor's protections for debtors who had mortgaged their properties.[16]) Other kinds of suits could be brought either at law or in

---

[15] John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 Cath. U. L. Rev. 59, 64 (1961).

[16] The most important of those protections was the "equity of redemption." At common law, a person who had mortgaged his property and was late in making a payment would forfeit all right to the property. But the chancellor allowed a mortgagor to pay off the mortgage and regain the land. The mortgagor's interest protected by Chancery was called the "equity of redemption." "Eventually, this concept evolved from simply a late payment rule to connote, in addition, the mortgagor's ownership interest in the land prior to the satisfaction of the mortgage. The term 'equity' became and is

equity, such as a suit to enforce a contract, but law and equity would apply different rules and give different remedies. Thus law usually enforced a contract with damages, but equity often gave specific performance. Much of this has changed. As noted above, most jurisdictions in the United States have merged their courts of law and equity. Most jurisdictions have merged law and equity's distinctive procedural rules. And in substantive areas where law and equity used to have different rules, there has been some merger of the rules.[17]

One area where merger has not happened, at least not very much is remedies. Courts still routinely classify some remedies as legal and others as equitable. If the remedy a plaintiff seeks is an equitable one, then a host of special doctrines apply. One is that equitable remedies are given only by judges, not by juries. Another is that a claim for an equitable remedy is subject to special equitable defenses, such as laches and unclean hands. Another is that equitable remedies are given only after the plaintiff shows that legal remedies are inadequate. Another is that a decree giving an equitable remedy must be specifically worded. An equitable remedy is always subject to later modification. And an equitable remedy may be enforced with contempt proceedings. These special doctrines usually apply when a plaintiff seeks an equitable remedy, but not when a plaintiff seeks a legal remedy.[18] In short, there was once a much larger body of equitable principles and precedents, but it has been narrowed, and a large part of what remains are equitable remedies and remedy-related doctrines.

Thus the third meaning of equity: "*Equity* refers to the doctrines and remedies developed in the English courts of equity, especially the Court of Chancery." Another way of putting this is that there is a body of law ("doctrines and remedies"), which originated in a particular institution ("the Court of Chancery"), and arose from that institution using a characteristic mode of reasoning (how it "developed").

---

today the pervasively used term to describe this interest." Restatement (Third) of Property (Mortgages) § 3.1 cmt a (1997).

[17] There are still some substantive areas that it can be helpful to think of as equitable. Henry E. Smith, "Why Fiduciary Law Is Equitable," in *Philosophical Foundations of Fiduciary Law* (Andrew S. Gold & Paul B. Miller eds., 2014).

[18] *See, e.g.*, Samuel L. Bray, *The System of Equitable Remedies*, 63 U.C.L.A. L. Rev. 530 (2016).

The third meaning of *equity* is related to the preceding two. It is hard to understand contemporary equity without understanding its history, and it is hard to understand its history without having some grasp of those other meanings. Throughout the long history of Chancery as a judicial institution—roughly from the thirteenth century through the nineteenth century—the actions of the chancellor were repeatedly shaped and justified by appeals to general notions of exceptional cases and the chancellor's conscience.[19]

Consider two examples. The first is from seventeenth-century England. Lord Ellsmere, who was the chancellor, explained why the Court of Chancery existed, and his explanation drew on the first two meanings of equity:

> The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.
>
> The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called *Summum Jus*.[20]

Another example is from twentieth-century America, and it involves the constructive trust. The constructive trust is an equitable remedy that lets a court return property (and any money made from it) to the rightful owner, by declaring that the defendant is a constructive trustee who holds the property and proceeds for the benefit of the plaintiff. Judge Cardozo described the constructive trust in words that sound in the second meaning of equity, equity as a moral reading of the law: "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good

---

[19] On the idea of the chancellor's conscience, in both the past and present, good starting points are Richard Hedlund, *The Theological Foundations of Equity's Conscience*, Oxford J.L. & Religion 1, 21 (2015); Henry E. Smith, "Property, Equity, and the Rule of Law," in *Private Law and the Rule of Law* 234–37, 244–46 (Lisa Austin & Dennis Klimchuck eds., 2015).

[20] The Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (1615).

conscience retain the beneficial interest equity converts him into a trustee."[21]

Nor have these notions died away. State and federal courts still routinely associate equitable remedies with exceptional cases and moral reasoning.[22] Judges still appeal to Aristotle to illuminate what equity means.[23]

Equity, then, is a complex idea. Several distinct but overlapping meanings share this word: an exceptional case, a moral reading of the law, and the doctrines and remedies developed in the Court of Chancery. Only by grasping these different meanings of *equity* can you understand how this term has been used in the past and how it is used today.

---

[21] Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386 (1919).

[22] E.g. Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 829-30 (D.C. Cir. 1984); In re Estate of Reilly, 933 A.2d 830, 837 (D.C. 2007) (describing the purpose of a constructive trust as "preventing humans from being successful in shady bits of behavior" (internal quotation marks omitted)).

[23] Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1979 (2014) (Breyer, J., dissenting).