On Being Mostly Right

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Samuel Bray, *The Supreme Court and the New Equity*, 68 **Vand. L. Rev.** 997 (2015).

Close only counts in horseshoes, hand-grenades, and the Supreme Court's recent treatment of equitable remedies. So says Samuel Bray in *The Supreme Court and the New Equity*, where he defends fourteen Supreme Court decisions decided from 1999 to 2014 that are fraught with errors and frequently criticized, which Bray labels "the new equity cases." The equity in these cases is "new" in two ways. First, it maintains a clear distinction between equitable and legal remedies by entrenching the "irreparable injury rule," or the requirement that there be no adequate remedy at a law before a judge consider equitable relief. Second, it seeks to control judicial discretion by adhering strictly to the history of equitable practice, and drawing from that history rules and multi-part tests to guide the application of equitable relief.

"It is not easy to imagine," Bray writes, "anything further from the conventional scholarly wisdom than" the doctrinal developments of the new equity cases. (P. 1008.) For one, experts had long celebrated both the death of the irreparable injury rule and the unity, for all practical purposes, of equitable and legal remedies. Bray points to Douglas Laycock's 1991 book "The Death of the Irreparable Injury Rule" as the *aristeia* of a movement to tear down the barrier between equitable and legal remedies that began over a century ago. Laycock "meticulously" illustrated that the requirement to show no adequate remedy at law has no discernable impact on a judge's decision whether or not to grant equitable relief; as Bray puts it, "[w]hen judges want to give a permanent injunction, they never find legal remedies adequate." (P. 1006.) Even the American Law Institute criticized the irreparable injury showing as "antiquated" and "spurious" in its *Restatement (Third) of Restitution and Unjust Enrichment*.

For two, the Court's history of equitable practice is marred by misunderstandings and clear errors. Throughout the new equity cases, the Court has said things that are objectively and discernably incorrect about equitable practice—for example, despite the Court's insistence on the distinction, mislabeling certain legal remedies as equitable remedies and *vice versa*—and has "restated" tests that, though made up of familiar elements, had never been stated before.

That much has already been said by others; Bray's contribution is his defense of these new equity cases. As Bray puts it, the Court has intentionally or unintentionally fabricated an idealized history of equity that, while not accurate, is useful for adjudicating cases. It is not a historian's history, but a judge's history that smooths out many centuries of equity practice to make it easier to digest. Bray likens it to a tailor who has repaired a tattered cloth with patches and seams, so that it may be cut to use; the resulting "new old" coat may not be handsome, but it is better suited to its purpose.

Bray drives this point home by highlighting the growing consensus among members of the Court across the new equity cases, a point not yet covered by the literature. The Court began bitterly divided in the 1999 case Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc., where the question was whether a federal court was authorized to issue an injunction freezing assets unrelated to the litigation but potentially needed to satisfy a money judgment. Such injunctions, called *Mareva* injunctions, had only become accepted in the courts of the United Kingdom during the last several decades. Justice Scalia wrote for a 5-4 majority, holding that the federal courts were not authorized to issue such

injunctions because they were not an accepted part of equity practice when Congress passed the Judiciary Act of 1789. Resisting Scalia's push to freeze equity at 1789, Justice Ginsburg's dissent argued that equity must be eminently flexible "to protect all rights and do justice to all concerned."

Bray argues that neither approach is workable; the scope of equitable remedies must be more flexible than Scalia's approach and less amorphous than Ginsburg's approach to provide guidance to lower courts. Over time the Court has coalesced around a middle path that protects the discretion inherent in equity while cabining its use to exceptional circumstances. For example, the Court was unanimous in eBay v. MercExchange (2006), which established a four-part test for permanent injunctions and which Bray identifies as the "most important decision in decades" on the issue. And the next time Justice Ginsburg dissented in favor of equity's flexibility, in Winters v. Natural Resources Defense Council (2008), only one other justice joined. Under the new equity cases, the guiding rule is that equitable remedies are "exceptional." Bray explains that the "norm is legal remedies" and "[a]ny departure demands justification; even if it is easily made, it still must be made." (P. 1038.) The Court has provided the tools for making that justification in "new old" multipart tests and a repaired history, thereby giving lower courts better guidance than actual equitable practice could offer.

Bray concludes that this approach is broadly consistent with equity's broad tradition, even if inconsistent with its specific practice over the centuries (which often were inconsistent or conflicting). For example, at one time equity "would never enjoin a trespass," whereas now an injunction is the definitive remedy for trespass. (P. 1016.) That broad perspective offers the best approach. Plus, an artificial history is also easier to update, providing flexibility to better seek the aspirational principles that are "not just the words but the music" of equity. (P. 1012.) Thus, Bray defends the new equity cases as mostly right and good enough.

I do wish that Bray touched on the relationship between the type and content of an equitable remedy, an issue that is not obvious to those of us who are not remedies experts. For example, Justice Ginsburg's approach in *Grupo Mexicano de Desarrollo* extolling equity's flexibility is not, as Bray argues, a useful guiding principle when distinguishing between types of remedies—like when deciding whether the phrase "equitable remedies" in a particular statute includes injunctions but not writs of mandamus. But it offers useful guidance to a judge's ability to control the content of, for example, a preliminary injunction—having no restrictions is not the same has having no guidance. The rub is that the type of injunction seems tied by its content—what is a *Mareva* injunction if not the familiar preliminary injunction tailored to do a specific thing? If so, Ginsburg's broad approach may be a workable answer to the practical question of whether the judge can do what she did. Whatever the correct answer, explaining both sides of this coin would better communicate Bray's argument to a general readership.

On the whole, Bray's article is a wonderfully written reminder of how instrumental legal reasoning is. Though we labor under various euphemisms, precedent is only as right as it is useful. We forgive advocates of this weakness in recognition of the institutional role that they play in an adversarial system, but we forget that judges also play an institutional role—that of making a decision, and not always the right decision. In the new equity cases, Bray argues that the Court succeeded in performing its institutional function of providing guidance to lower courts, and not untangle the Gordian history of equitable remedies. Ours is a system designed to settle expectations, not exceed them. Consider then-Associate Justice Rehnquist's frustration that that legal academy "holds [the Court] up to a far higher standard than any group of nine mortals can expect to attain":

> If our opinions seem on occasion to be internally inconsistent, to contain a logical fallacy, or to insufficiently distinguish a prior case, I commend you to the view attributed to Chief Justice Hughes upon his retirement from our Court in 1941. He said that he always tried to write his opinions logically and clearly, but if a Justice whose vote was necessary to make a majority

> insisted that particular language be put in, in it went, and let the law reviews figure out what it meant.

Tip of the hat then, to Bray for figuring out what it means.

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