THE OUTER LIMITS OF EQUITY: A PROPOSAL FOR CAUTIOUS EXPANSION

Equity had long been established when the Constitution and the Judiciary Act of 1789 incorporated it into the new American legal system. In concept, it dates back to Aristotle; in implementation, at least back to the English Chancery courts.[1] These developed as "court[s] of conscience," free to provide individualized justice that could not come from the general rules of common law.[2] But despite equity's long pedigree, the scope of equitable power remains difficult to define.[3] The Supreme Court's declaration that American equity jurisdiction follows the principles of judicial remedies that developed in the Chancery courts provides a good starting point.[4] But that said, at the time the Founders imported equity from the Chancery courts, there was no consensus among their contemporaries in England as to what exactly equity was.[5] Some argued that equity judges had the power to render a just judgment any time natural law compelled a result different from the dictates of common law precedent (the "expansive view").[6] Others saw equity merely as a parallel system that did not in essence differ from the common law: governed by precedent and bound by rules (the "restrictive" view).[7] That debate came to the United States along with equity, and it has continued to the present day.[8] The Supreme Court has always been at the center of this debate. During the first half-century of the nation's existence, the Court fluctuated from an expansive view of equity to a restrictive one and back again.[9] Recent Supreme Court opinions have given voice to both views of equity.[10]

This Note will propose a synthesis between the restrictive and the expansive views. Part I will examine a 1999 case to elu-

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1. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 103–06 (4th ed. 2007).

2. *Id.*

3. *See* Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 610 (1997).

4. *See* Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939).

5. *See* John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1431–33 (1998).

6. *Id.* at 1437.

7. *See id.* at 1438.

8. *See id.* at 1431; Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 642 (2007).

9. Kroger, *supra* note 5, at 1431.

10. *See* Maloy, *supra* note 8, at 642–43.

cidate the principles underlying each view. Part II will review in depth a 2015 case that may indicate a shift in the Court's equity jurisprudence. Part III will use the principles from Part I and the facts from Part II to outline an effective synthesis of the two views, ensuring that courts retain the flexibility afforded by equity while seeing that flexibility cabined to particularly exigent circumstances.

I. *GRUPO MEXICANO* AND THE COMPETING VIEWS OF EQUITY

In *Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund*,[11] a bare majority of the Court took the restrictive view over a spirited dissent arguing for the expansive view. The facts of that case, briefly, are as follows: In anticipation of a company's impending insolvency, creditors had sought and received a temporary restraining order (TRO) preventing the company from transferring certain assets lest those assets disappear before debts could be satisfied.[12] Justice Scalia, writing for the Court, held that the district court lacked equitable power to grant the TRO.[13] According to Justice Scalia, the only equitable remedies available to federal courts are those "traditionally accorded by courts of equity"—traditionally, that is, as of 1789, when the Constitution and the Judiciary Act of 1789 adopted what then existed in equity.[14] And at that time, equity courts did not issue anything analogous to TROs for creditor protection.[15] Justice Ginsburg dissented in relevant part. Writing for herself and three other Justices, she argued that the Founders had adopted equitable *principles* rather than equitable *practices*, leaving room for evolution and expansion of equitable remedies.[16]

In following a narrow view of equity jurisdiction, Justice Scalia focused on the dangers of unbounded equity. He wrote that, "[t]o accord a type of relief that has never been available before" would mean that courts were not simply flexible, but

11. 527 U.S. 308 (1999).

12. *Id.* at 312.

13. *Id.* at 333.

14. *Id.* at 318–19.

15. *Id.* at 319–22. The United States, as amicus curiae, argued that an equitable remedy known as a creditor's bill, which existed in 1789, was similar to the TRO, but Justice Scalia distinguished the creditor's bill from the TRO at issue. *Id.* at 319–21.

16. *Id.* at 336 (Ginsburg, J., concurring in part and dissenting in part).

effectively omnipotent.[17] He also noted that, to the extent that changed circumstances in business practices necessitated new remedies, Congress was in a much better position to make that assessment than the Court.[18] Justice Scalia then undertook a lengthy examination of the development of debtor-creditor law, noting that a balance had developed over time, which courts should be loath to unsettle.[19] Given these factors, expansive equity would be an unbridled power to upset a careful balance on an issue about which the Court lacks expertise—a potentially destructive capability that Justice Scalia likened to a "nuclear weapon."[20] Justice Ginsburg, on the other hand, argued for an expansive view of equity to ensure that justice be done in any given dispute between actual parties.[21] Without the power to issue a TRO, the district court would have been unable to protect the interests of the creditors—a distasteful outcome especially given the possibility that the debtor was gaming the system to buy time to dispose of its assets.[22]

Three years later, by the same 5–4 majority, the Court once again took the narrower view of equitable remedies in *Great-West Life & Annuity Insurance Co. v. Knudson*.[23] This case involved a provision of the Employee Retirement Income Security Act (ERISA) authorizing certain persons to initiate civil actions to obtain "appropriate equitable relief."[24] The question was whether this language precluded a claim for money due under a contractual obligation—a form of relief sounding in law, not equity.[25] Writing for the Court, Justice Scalia noted that equitable relief "must mean *something* less than *all* relief"[26] and was, in fact, limited to those remedies "typically available in equity."[27] Dissents by Justice Stevens and Justice Ginsburg called this an "ancient classification"[28] and an "obsolete distinction[]"[29] that

17. *Id.* at 322 (majority opinion).
18. *Id.*
19. *Id.* at 327–32.
20. *Id.* at 332 (internal quotation marks omitted).
21. *Id.* at 336 (Ginsburg, J., concurring in part and dissenting in part).
22. *Id.* at 341–42.
23. 534 U.S. 204 (2002).
24. *Id.* at 209 (quoting 29 U.S.C. § 1132(a)(3) (1994)).
25. *Id.* at 210.
26. *Id.* at 209 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 258 n.8 (1993)).
27. *Id.* at 210.
28. *Id.* at 224 (Ginsburg, J., dissenting).

had no place in a modern regulatory scheme enacted by a Congress likely unconcerned with such finer points of history.[30]

Note, however, that the battlefield had shifted. *Grupo Mexicano* was about whether to expand the universe of remedies to include those not available in law or equity in 1789; *Great-West* was about drawing the law-equity boundary line within that (unexpanded) universe. Then followed a smattering of decisions on equitable remedies which, though in some respects highly significant, did not really change the *scope* of equity. Three subsequent ERISA cases applied the *Great-West* framework.[31] Cases on injunctions and equitable defenses dealt with the availability of well-established equitable remedies in certain contexts.[32] Nothing suggested that the Court was on the verge of backing away from the restrictive view reflected in *Grupo Mexicano*.

II. THE MOOD CHANGES: *KANSAS V. NEBRASKA*

Kansas v. Nebraska,[33] decided in January 2015, involved a dispute between the named states, along with Colorado, over rights to water from the Republican River. While the case raised issues regarding the Court's original jurisdiction and natural resources law, it also represented a significant shift in the Court's equity jurisprudence. The Court in *Kansas v. Nebraska* did not explicitly overrule *Grupo Mexicano*; in fact, neither the majority opinion nor the three opinions concurring in part and dissenting in part so much as mentioned the case. Perhaps, given the relatively rare and unique invocation of original jurisdiction, none of the Justices thought *Grupo Mexicano* applied.[34] But if *Kansas v. Nebraska* did not overrule *Grupo Mexicano*, it at least represents a change in the Court's equitable

29. *Id.* at 222 (Stevens, J., dissenting).

30. *Id.* at 225 (Ginsburg, J., dissenting).

31. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1014–16 (2015).

32. *See id.* at 1023–36.

33. 135 S. Ct. 1042 (2015).

34. There is also the difficulty of looking to pre-1789 English Chancery practice to determine equity's role in an interstate water dispute in a federal system. But the Supreme Court has looked to analogues in equity practice before. *See* Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565–66 (1990) (noting that because the particular action at question did not exist in 18th-century England, the court "must therefore look for an analogous cause of action that existed in the 18th century").

mood. While the Court in *Grupo Mexicano* refrained from approving extraordinary equitable remedies, the Court in *Kansas v. Nebraska* showed no such compunction, and indeed ordered remedies perhaps beyond what was essential.

The facts of *Kansas v. Nebraska*, though somewhat complicated, are essential to this analysis. The waters at issue were those of the Republican River, which, along with its tributaries, irrigates farmland in both Nebraska and Kansas.[35] The river begins in Colorado, and the three states formed an interstate compact ("Compact") in 1943 to allocate a share of river water to each state: 11% to Colorado, 49% to Nebraska, and 40% to Kansas.[36] The Compact charged officials from the three states with computing the river's "Virgin Water Supply" (that is, the volume of water originating within the Republican River Basin) and ensuring that each state stayed within its allocation, but prescribed few details for how to do either task.[37] In 1997, a dispute arose over whether Nebraska's pumping of water from underground aquifers within the basin should count against its allocation.[38] Kansas argued that this activity was subject to the Compact, while Nebraska argued that it was not.[39] The Supreme Court agreed with Kansas, and the states negotiated a settlement ("Settlement") to address groundwater pumping and other Compact issues.[40] The Settlement adopted a set of "Accounting Procedures" which in turn adopted a formula called the "Groundwater Model."[41] This was not a modification of the Compact's terms, but rather a way of better calculating both the Virgin Water Supply and the volume of water used.[42] As requested by Kansas, the Groundwater Model estimated the impact of groundwater pumping on usage.[43] It also estimated

35. *Kansas*, 135 S. Ct. at 1049.

36. *Id.*

37. Report of the Special Master at 4, *Kansas*, 135 S. Ct. 1042 (No. 126, Orig.).

38. *Kansas*, 135 S. Ct. at 1049–50. This mattered because aquifers may be hydraulically connected to the river and thus deplete the water supply in a way that is difficult to measure using stream flow. *Id.* at 1050. To make things more complicated, such depletion may not occur at a one-to-one ratio with the amount pumped. *Id.* at 1050 n.1.

39. *Id.* at 1050.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

the amount of "imported" water—that is, water that originated elsewhere but ended up in the Republican River Basin, and excluded that water from Settlement accounting.[44]

After this came a straightforward dispute. In 2007, Kansas alleged that during the previous two years, Nebraska had taken more than its share of water.[45] After failing to resolve the dispute through arbitration, Kansas filed suit at the Supreme Court, requesting damages, an injunction, and disgorgement.[46] The Court appointed a Special Master to manage the proceedings.[47] Nebraska responded to Kansas's allegations by saying that it had tried in good faith to comply with the Compact but had been thwarted by unforeseeably dry weather.[48] Nebraska also maintained that the Groundwater Model failed to accurately calculate imported water in dry conditions, and it asked the Master to order reformation of the Settlement to put a better formula in place.[49] The Master found, in relevant part, that Nebraska had "knowingly failed" to comply with the Compact by exceeding its allocation, and that the Groundwater Model was indeed inaccurate.[50] He proposed awarding damages and partial disgorgement to Kansas, denying the injunction, and granting Nebraska's request for reformation.[51]

The Supreme Court adopted the Master's recommendations in full.[52] Writing for the Court, Justice Kagan[53] first noted that proceedings pursuant to the Court's original jurisdiction over disputes between states are "'basically equitable in nature.'"[54] Justice Kagan then pointed to two aspects of this particular interstate dispute that called for especially broad equitable relief.

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44. *Id.*

45. *Id.*

46. *Id.* at 1051. Disgorgement entered the picture because of an interesting wrinkle in the facts: Water is more valuable to Nebraska than to Kansas (at least in the context of irrigation in the area at issue). *Id.* at 1056. Therefore, in monetary terms, Nebraska's gain was greater than Kansas's loss—substantially greater, in fact. *Id.*

47. *Id.* at 1051.

48. *Id.* at 1054.

49. *Id.* at 1050–51.

50. *Id.* at 1050.

51. *Id.*

52. *Id.*

53. Justice Kagan's opinion was joined in full by Justices Kennedy, Ginsburg, Breyer, and Sotomayor, and in part by Chief Justice Roberts.

54. *Id.* (quoting Ohio v. Kentucky, 410 U.S. 641, 648 (1973)).

First, in any interstate water dispute, the upstream state (here, Nebraska) could in theory take all of a river's water before the downstream state got so much as a drop.[55] This consequence of geography had led the Court for over a century to assert an "inherent authority . . . to equitably apportion interstate streams between states."[56] Here, even with an interstate compact in place, that authority must remain as a protection against an unfair or otherwise deficient compact.[57] Second, an interstate compact, once ratified by Congress, becomes federal law and must be enforced accordingly.[58]

Moving on to remedies, Justice Kagan first addressed Nebraska's overconsumption. Calling Nebraska's efforts to comply with the Compact "not only inadequate, but also 'reluctant,'" Justice Kagan adopted the Master's finding that Nebraska had knowingly failed to comply.[59] She found that this warranted a remedy of disgorgement, in addition to damages, despite Nebraska's protests that disgorgement is only appropriate in cases of deliberate breach.[60] Stating that Nebraska had "recklessly gambled" with Kansas's rights, Justice Kagan noted that "[i]n some areas of the law . . . the distinction between purposefully invading and recklessly disregarding another's rights makes no difference."[61] Disgorgement, she wrote, would "remind[] Nebraska of its legal obligations, deter[] future violations, and promot[e] the Compact's successful administration."[62] In light of the Court's broad equitable powers and these objectives, it was appropriate to order disgorgement for Nebraska's knowing breach. Justice Kagan acknowledged in a footnote that specific performance could possibly accomplish similar objectives, but that logistical problems rendered that remedy suboptimal.[63]

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55. *Id.* at 1052.

56. *Id.*

57. *Id.*

58. *Id.* at 1053.

59. *Id.* at 1055–56.

60. *Id.* at 1056–57. Nebraska based this contention on the relatively recent *Restatement (Third) of Restitution and Unjust Enrichment*, which, as will be discussed later, is itself somewhat controversial.

61. *Id.*

62. *Id.* at 1057.

63. *Id.* at 1057 n.8.

Justice Kagan then addressed Nebraska's counterclaim and its request for reformation. While acknowledging that "courts should hesitate, and then hesitate some more, before modifying a contract," Justice Kagan explained that reformation was nonetheless appropriate based on two consequences of the Groundwater Model's inaccuracy.[64] First, the inaccurate apportionment was thwarting the intentions of the parties.[65] Second, by improperly factoring in some imported water, the Groundwater Model was reaching outside the scope of the Compact (and therefore breaching federal law).[66] Reformation was especially necessary given the admission of both states that they were unlikely to successfully renegotiate the Settlement on their own.[67]

Justice Thomas dissented in relevant part.[68] He began by characterizing the case as "in essence, a contract dispute" in which "ordinary principles of contract law" should apply, and accused the Court of "[i]nvoking equitable powers, without equitable principles."[69] He argued that the dual status of an interstate compact as contract and federal law actually called for judicial restraint so as to protect state sovereignty against federal imposition.[70] Justice Thomas then noted that, both in water disputes and in contract law, disgorgement was an "extraordinary reme-

64. *Id.* at 1061.

65. *Id.* Justice Kagan characterized the intent of the states in the Settlement as implementing the Compact's "strict demarcation between virgin and imported water . . . ." *Id.* Thus, if the formula were incorrect, it would thwart this intent. The dissent, on the other hand, characterized the Settlement as implementing an intent simply to be bound by the Groundwater Model's calculations. *Id.* at 1073–74 (Thomas, J., concurring in part and dissenting in part).

66. *Id.* at 1062–63 (majority opinion).

67. *Id.* at 1063.

68. Justice Thomas was joined in full by Justices Scalia and Alito and in part by Chief Justice Roberts. Chief Justice Roberts and Justice Scalia each wrote brief opinions concurring in part and dissenting in part. Chief Justice Roberts joined the majority on the disgorgement issue but joined Justice Thomas in dissent on the reformation issue. *Id.* at 1064 (Roberts, C.J., concurring in part and dissenting in part). Justice Scalia wrote separately to caution against overreliance on the *Restatement (Third) of Restitution and Unjust Enrichment*, stating that "the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." *Id.* (Scalia, J., concurring in part and dissenting in part).

69. *Id.* at 1064–65 (Thomas, J., concurring in part and dissenting in part).

70. *Id.* at 1066–67.

dy" for three reasons.[71] First, the traditional remedy for breach of a water contract is specific performance, with only one previous Supreme Court case awarding damages and none awarding disgorgement.[72] Second, contract law principles indicate that disgorgement is rarely available for breach of contract.[73] Third, even accepting that disgorgement for breach is available under the *Restatement (Third) of Restitution and Unjust Enrichment*—a dubious authority in Justice Thomas's view—it is only available for deliberate breach.[74] Neither the Master's extension of disgorgement to "knowingly expos[ing] Kansas to a substantial risk" nor the Court's assimilation of "deliberate" and "reckless" conduct were appropriate justifications for disgorgement.[75] Justice Thomas similarly found that the precondition for the equitable remedy of reformation—that is, mutual mistake in transcribing contractual intent into contractual terms—did not exist.[76] With respect to reformation, Justice Thomas wrote what could serve as the fundamental thesis of his whole opinion: "That a court is exercising equitable power means only that it must look to established principles of equity. . . . If a court fails to apply the proper standard . . . it is no answer to recite the obvious fact that the court acted in equity."[77]

III. JOURNEY TO THE EQUITABLE PERIPHERY

Justice Thomas's words highlight the central issue in *Kansas v. Nebraska*: the scope of equitable remedies in federal courts. Is equity a magic word by which a court may create *new* standards (or even simply ignore old ones in fashioning a unique remedy)? Or is it just a different set of standards—more forgiving and flexible, perhaps, but a set of standards nonetheless? While not totally soluble, this problem does at least lend itself to a better judicial compromise than the ping-pong of positions seen between *Grupo Mexicano* and *Kansas v. Nebraska*. In fact,

71. *Id.* at 1068.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1068–69 (internal quotation marks omitted).
76. *Id.* at 1071.
77. *Id.* at 1072–73.

Kansas v. Nebraska was an excellent opportunity—and a missed opportunity—for the Court to create such a compromise.

Consider how to classify judicial remedies. One could separate remedies into two categories: one legal, one equitable.[78] On this conceptualization, the question in *Grupo Mexicano* was on *how big* the set of equitable remedies is: whether it is bounded by the practices of the pre-1789 Chancery or whether it includes more. But under the *Grupo Mexicano* framework, it also makes sense to classify remedies in three distinct categories:

1. Legal remedies.
2. Equitable remedies in existence at the time of the Founding. Under *Grupo Mexicano*, these are available to federal courts. I will term these "core" equitable remedies.
3. Equitable remedies not in existence at the time of the Founding. These are unavailable under the *Grupo Mexicano* test, but would be available under Justice Ginsburg's view of flexible, expansive equity. I will term these "peripheral" equitable remedies.

Kansas v. Nebraska involved all three types of remedies—legal, core equity, and peripheral equity. Consider the issue of Nebraska's breach.[79] The typical remedy at law for breach of contract is damages.[80] The equitable remedy of specific performance developed in the English Chancery courts for situations where damages were unavailable or inadequate,[81] and therefore it is a traditional equitable remedy under *Grupo Mexicano*. Indeed, in interstate water disputes, it was not simply a traditional remedy but also the *only* remedy prior to 1987.[82] We can therefore safely call specific performance a core equitable remedy, whether in contracts generally or interstate water disputes

78. *Cf.* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 25 (6th ed. 1853).

79. The issue of the inaccurate formula would follow a similar analysis, which for brevity's sake will be omitted.

80. *See, e.g.*, Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

81. *See, e.g.*, John T. Cross, *The* Erie *Doctrine in Equity*, 60 LA. L. REV. 173, 209 (1999).

82. Report of the Special Master at 128, Kansas v. Nebraska, 135 S. Ct. 1042 (2015) (No. 126, Orig.) (citing Kansas v. Colorado, 533 U.S. 1, 23 (2001) (O'Connor, J., concurring in part and dissenting in part)).

specifically.[83] In contrast, disgorgement for breach of contract is a peripheral equitable remedy.[84] Even its proponents acknowledge that it "will alter the doctrinal landscape of contract law" as it "conflict[s] with traditional contract law principles."[85] In the context of interstate water disputes before *Kansas v. Nebraska*, it was quite literally unprecedented.[86]

Among the available remedies, then, each category is represented: a legal remedy, a core equitable remedy, and a peripheral equitable remedy. But the Court's decision elides any conceptual difference between the latter two. It is true that the Court first notes that its original jurisdiction over suits between states is "basically equitable in nature" and then finds additional reasons why that equitable power is broad.[87] This could imply that the Court's basic equitable power in original jurisdiction suits, absent additional compelling reasons, only supports core equitable remedies. But the additional reasons—the subject matter of interstate waterways, and the interest in enforcing federal law—are essentially duplicative. Disputes over interstate waterways involve sovereign actors, and the enforcement of federal law implicates public rights—but both of these conditions are generally present for any dispute between states. By this reasoning, it

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83. For this reason, the dispute between Justice Kagan and Justice Thomas over whether to characterize the case as a matter of enforcing federal law in a natural resources case or merely a contract case is a bit of a red herring. Specific performance is a core equitable remedy, and disgorgement a peripheral equitable remedy, in both bodies of law.

84. *See, e.g.*, John D. McCamus, *Disgorgement for Breach of Contract: A Comparative Perspective*, 36 LOY. L.A. L. REV. 943, 943 (2003) (noting that "disgorgement for breach of contract does not yet appear to be a well-established feature of American private law"); Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131, 141 (2008) ("Although not unprecedented . . . this remedy will be essentially new to the American scene."). *But see* S.E.C. v. Cavanagh, 445 F.3d 105, 119 (2d Cir. 2006) (arguing that Story's discussion of the remedy of "account" in his Commentary "recognized the Chancellor's power to compel disgorgement of wrongly gained assets"). Story, however, characterized account as being "confined" to "narrow boundaries." STORY, *supra* note 78, at § 444.

85. Roberts, *supra* note 84, at 134.

86. *Kansas*, 135 S. Ct. at 1068 (Thomas, J., concurring in part and dissenting in part).

87. *Id.* at 1051–52 (majority opinion) (quoting Ohio v. Kentucky, 410 U.S. 641, 648 (1973)) (internal quotation marks omitted).

would seem that in the Court's original jurisdiction, any and all remedies are in play, whether core or peripheral.[88]

The traditional trigger for a court to invoke equitable powers is the inadequacy of a remedy at law.[89] This has sometimes been termed the "irreparable injury rule."[90] But while the Supreme Court has recently reaffirmed the requirement of irreparable injury in one equitable context,[91] the irreparable injury rule as a gatekeeper to equity may be a thing of the past. So argues Professor Douglas Laycock, a prominent remedies scholar.[92] Courts, Professor Laycock contends, decide whether a legal remedy is adequate based on whether they want to grant an equitable remedy.[93] And indeed, some of the original justifications for the irreparable injury rule may be irrelevant now. The merger of law and equity means there is no need to protect law courts from jurisdictional encroachment by equity courts.[94] Moreover, equity is now an accepted part of our legal system. After hundreds of years of judicial evolution, equitable remedies are hardly experimental or dangerous such that they should be tools of last resort.

This latter point, however, is not true for peripheral equity. By definition, peripheral equity lacks the traditional and precedential foundations of core equity. Even in a post-merger

88. Going forward, the holding in *Kansas v. Nebraska* may be limited to original jurisdiction cases; certainly, treating original equity cases as unique would explain why the Court did not even mention *Grupo Mexicano*. But there is no reason why the rule in *Kansas v. Nebraska* could not be applied outside of the original jurisdiction context. *See, e.g.*, Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2637–38 (2013) (Ginsburg, J., dissenting) (noting that *South Carolina v. Katzenbach*, an original jurisdiction case, had long "supplie[d] the standard of review" in voting rights cases).

89. *See* Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29, 32.

90. *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990). Most scholars agree that the requirement of irreparable injury and the requirement of inadequate remedy at law are two ways of saying the same thing. *See id.* at 694; Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 209 (2012). *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548 (1985) (calling adequacy a question of jurisdiction and irreparable injury a question of the need for a court to act).

91. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (requiring a showing of irreparable injury before issuing a permanent injunction in patent infringement action).

92. Laycock, *supra* note 90, at 692.

93. *Id.*

94. *See* Kennedy, *supra* note 3, at 648.

world, there should be a clear preference for established legal and equitable remedies over new and extraordinary ones. The "dead" irreparable injury rule should therefore be revived, not as a barrier between law and equity, but as a gatekeeper to peripheral equity. A court should be limited to legal remedies and core equitable remedies unless a plaintiff can show that those remedies are inadequate and that only a peripheral equitable remedy will vindicate his rights.

Let us call this revived irreparable injury rule the "peripheral equity rule," and apply it to *Kansas v. Nebraska*. The Court would presumptively be able to order either damages or specific performance. To order disgorgement, the Court would have to find both of these remedies inadequate. This would not be a difficult finding to make as to damages, even using the Court's existing analysis: Limiting damages to Kansas's actual loss would still allow Nebraska to profit by breaching by essentially creating a "recipe for breach."[95] Specific performance, dismissed by the Court in a footnote,[96] would be tougher to dispatch on inadequacy grounds. The Special Master did note several difficulties with specific performance: timing of delivery, location of delivery, and the fact that no party had asked for it.[97] But on the other hand, whatever its difficulties, specific performance would probably accomplish the Court's stated remedial goals of deterring future breach and vindicating federal law. What greater deterrent could there be, to a water-strapped state, to know that whatever water it took would have to be paid back out of future years' water allocations? Further, just as it is sometimes said that primary purpose of a contract is performance and not nonperformance,[98] surely the best way to vindicate federal law is to see it complied with, not to punish noncompliance. Then there is the somewhat odd matter of the Court quoting the Solicitor General as saying "[i]t is important that water flows down the river, not just money" to justify a remedy in money, rather than water.[99] The Solicitor General's observation may support the idea that deterrence is

95. Kansas v. Nebraska, 135 S. Ct. 1042, 1057 (2015).

96. *Id.* at 1057 n.8.

97. Report of the Special Master at 129, *Kansas*, 135 S. Ct. 1042 (No. 126, Orig.).

98. *See, e.g.*, Rubinstein v. Rubinstein, 244 N.E.2d 49, 52–53 (N.Y. 1968).

99. *Kansas*, 135 S. Ct. at 1057 (alteration in original) (internal quotation marks omitted).

important, but it also supports the idea that specific performance is at least adequate—and possibly ideal.

Assuming that these considerations did show specific performance to be adequate, the peripheral equity rule would foreclose an order of disgorgement. The advantages of this rule become clear when disgorgement is examined with the skeptical eye of the restrictive view of equity. First, as proposed by the Special Master (and adopted by the Court), the amount of the disgorgement award was completely untethered to any objective measure.[100] The Court ordered disgorgement of $1.8 million; Kansas proposed three different awards, ranging from $3.7 million to "roughly $25 million."[101] When a court has the power to issue a disgorgement award somewhere between 49% and 676% of the actual loss,[102] that starts to look like the "omnipotence" against which *Grupo Mexicano* warned. Outside of the disgorgement context, other peripheral remedies will (again, by definition) have fewer established precedential contours, giving judges a similarly unpredictable and unacceptable level of flexibility.

Second, as in *Grupo Mexicano*, the peripheral remedy runs the risk of upsetting a long-developed balance. Here, that balance is the federal-state balance. One scholar writes:

> In American equity jurisprudence, one of the most important principles had been the federal balance created by the Constitution of 1787. From the first Judiciary and Process Acts there was an understanding—a clearly expressed understanding—that the principle of federalism was a source of restraint on the equity powers of the federal courts.[103]

Much of the recent scholarly angst over broad federal equitable powers has been related to federalism concerns and the fear of intrusions on state sovereignty (most prominently related to

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100. *Id.* at 1059 ("Truth be told, we cannot be sure why the Master selected the exact number he did . . . .").

101. *Id.* at 1058 (quoting Sur-Reply of Plaintiff State of Kansas at 5, *Kansas*, 135 S. Ct. 1042 (No. 126, Orig.)) (internal quotation marks omitted).

102. Kansas's actual loss (and the amount that Nebraska had to pay in damages exclusive of disgorgement) was calculated at $3.7 million. *Id.* at 1056.

103. Gary L. McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 HARV. J.L. & PUB. POL'Y 507, 509 (1984).

structural injunctions).[104] As Justice Thomas noted in *Kansas v. Nebraska*, the Court had held less than two years before that the ability to regulate the use of water "is an essential attribute of [state] sovereignty."[105] In interstate water disputes, that sovereign power must yield at some point, but given the delicate nature of the federal-state balance it is best to resolve disputes touching on that power in accordance with settled principles of federal-state equitable interaction, wherever possible.

Finally, the Court's seemingly pragmatic decision to allow a novel remedy in a specific case may have unintended consequences. The remedy of disgorgement, for one, is deeply intertwined with questions of contract theory. If Nebraska were morally obligated to keep its side of the Compact (under a "contract as promise" view[106]), then it committed a wrong by breaching. On the principle that a wrongdoer should not profit by his wrongdoing,[107] disgorgement would be proper. But from an efficient breach perspective, actions that create a net societal benefit should not be deterred[108]—and it is hard to ignore that Kansas lost $3.7 million while Nebraska gained possibly upwards of $61.9 million.[109] The choice of whether or not to award disgorgement therefore serves at least as an implicit endorsement of a certain view of contract theory. Indeed, a supporter of the *Restatement* provision cited in *Kansas v. Nebraska* has written that disgorgement for deliberate breach represents a "breathtaking . . . potential transformation of the traditional contractual landscape from a choice model of contract law to a perspective that values keeping promises and condemns certain breaches."[110] Such a revolution in contract law is not something the Court should enable in passing. Whatever its scope,

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104. *See, e.g.*, *id.*; Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 706–23 (1978); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1123–24 (1996).

105. *Kansas*, 135 S. Ct. at 1066–67 (Thomas, J., concurring in part and dissenting in part) (alteration in original) (quoting Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2132 (2013)).

106. *See generally* CHARLES FRIED, CONTRACT AS PROMISE (1981).

107. *See, e.g.*, Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).

108. *See, e.g.*, Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988).

109. *See* Report of the Special Master at 170–72, *Kansas*, 135 S. Ct. 1042 (No. 126, Orig.).

110. Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991, 993 (2009).

equity's purpose is to provide individualized justice, not to enact legal theories of broad applicability. The peripheral equity rule would thus function as an avoidance canon, ensuring that whenever possible, courts acting in equity decide individual cases without making unnecessary doctrinal pronouncements.

So far, all these reasons could simply point to the affirmation of the *Grupo Mexicano* test, rather than the creation of the peripheral equity rule. But the possibility that specific performance would fail as an effective remedy (perhaps due to logistical difficulties that enable Nebraska to manipulate its compliance such that deterrence is ineffective[111]) demands the option of extraordinary equitable remedies. It is axiomatic that "equity will not suffer a wrong to be without a remedy."[112] If the only effective remedy is foreclosed because it was developed after 1789 then, as critics of *Grupo Mexicano* noted, a court may indeed have to suffer a wrong to be without remedy. But the peripheral equity rule proposed here ensures that will not happen. If specific performance was truly inadequate at vindicating Kansas's rights, the Court could order disgorgement.[113]

Of course, a rule that attempts to satisfy everyone may well satisfy no one. The peripheral equity rule would not categorically prevent the destabilizing use of peripheral equitable remedies, nor would it allow judges full freedom to choose the most effective remedy in any case. But it would ensure that whenever a dispute could fairly be solved by following equitable precedent, that is what would happen. Even plaintiffs seeking vindication would benefit. The Court in *Kansas v. Nebraska* noted that parties bargain in the shadow of the Court's equitable power, and therefore that equitable power must rescue parties who rely on it for vindication.[114] But while it may be important for parties to know that the Court will save them, it is also important for them to know *how* it will go about doing so. The peripheral equity rule

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111. *Cf.* Report of the Special Master at 129, *Kansas*, 135 S. Ct. 1042 (No. 126, Orig.).

112. Brill, *supra* note 89, at 29.

113. Had the peripheral equity rule been applied in *Grupo Mexicano*, that case would have in all likelihood come out the other way. But the peripheral equity rule should not be seen as an outright rejection of *Grupo Mexicano*. It acknowledges the valid concerns underlying that decision and preserves the distinction between core equity and peripheral equity. What it does, however, is change that distinction from an insurmountable barrier to a strong preference.

114. *Kansas*, 135 S. Ct. at 1052.

would give parties, both before and during litigation, a clearer sense of what remedies a court might order.

CONCLUSION

The peripheral equity rule has the potential to provide a compromise position that brings doctrinal clarity to the long running debate between the restrictive and expansive views of equity, while preserving equity's important role in our judicial system. If equity were confined to its precedents as of 1789, it would soon become indistinguishable from the rest of common law. If equity were allowed unfettered discretion, the justice system would soon take on a new, frighteningly arbitrary character. The peripheral equity rule keeps equity in its traditional position of safety valve, providing individualized justice without overstepping its bounds. It maintains the general scheme of the *Grupo Mexicano* rule while acknowledging the occasional necessity of going beyond a too-static conception of equity. *Kansas v. Nebraska* would have been an ideal case in which to announce this rule because of the range of available remedies and the strong competing values of respect for sovereign states and allocation of vital water resources. But there will doubtlessly be more cases in the future. When the opportunity arises again, the Court should create a new synthesis in the debate over equity by implementing the peripheral equity rule.

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