

EQUITY IN THE AMERICAN COURTS AND IN THE WORLD COURT: DOES THE END JUSTIFY THE MEANS?

I. INTRODUCTION

Equity, as a legal concept, has enjoyed sustained acceptance by lawyers throughout history. It has been present in the law of ancient civilizations¹ and continues to exist in modern legal systems.² But equity is no longer a concept confined exclusively to local or national adjudication. Today, equity shows itself to be a vital part of international law.³ The International Court of Justice—"the most visible, and perhaps hegemonic, tribunal in the sphere of public international law"⁴—has made a significant contribution to the development of equity. Particularly in cases involving maritime delimitation,⁵ equity has frequently been applied by the Court to adjudicate disputes.⁶

Equity is prominent in national legal systems and has become increasingly important in international law. It is useful, perhaps essential, for the international lawyer to have a proper understanding of it. Yet the meaning of equity remains elusive. "A lawyer asked to define 'equity' will not have an easy time of it; the definition of equity, let alone the term's application in the field of international law, is notoriously uncertain, though its use is rife."⁷

Through a comparative analysis, this note seeks to provide a more precise understanding of the legal concept of equity as it relates to two distinct systems of law: the American and the international. To compare the equity administered by the American courts with that administered by the World Court, this note

1. See sources cited *infra* notes 10, 22.

2. See sources cited *infra* notes 54, 68.

3. Stephen W. DeVine, *Polyconnotational Equity and the Role of Epieikeia in International Law*, 24 TEX. INT'L L. J. 149, 155 (1989). "One who has studied [international] judicial and arbitral proceedings relating to the allocation of maritime rights and resources, in particular those concerning the delimitation of the continental shelf, cannot help but remark the apparently central role of 'equity' and 'equitable principles' in the decisions rendered to date." *Id.*

4. *Id.* at 199.

5. "Maritime delimitation" refers to the adjudication of ocean boundary disputes between nation-states.

6. CHRISTOPHER R. ROSSI, EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING 173, 251 (1993).

7. DeVine, *supra* note 3, at 150. "That intellectual quicksilver of justice called equity has taken on many different guises in many different contexts throughout the history of law." Sharon K. Dobbins, *Equity: The Court of Conscience or the King's Command, the Dialogues of St. German and Hobbes Compared*, 9 J.L. & RELIGION 113 (1991). "An impressive literature on the concept of equity or justice can be found in any law library. A superficial look at it confirms the incredible variety of signification coming out of the same significant (*i.e.*, the word 'equity'). Despite this, lawyers have been working with the idea of *aequitas* [*i.e.*, equity] since their profession began, and they have built up a number of legal traditions around this ambiguous term." Ugo Mattei, *Efficiency as Equity: Insights from Comparative Law and Economics*, 18 HASTINGS INT'L & COMP. L. REV. 168 (1994) (footnote omitted).

briefly traces the history of equity from its earliest beginnings to its subsequent establishment in the American and the international legal traditions. The similarities between the two traditions of equity are then examined. An analysis of the differences between the two traditions follows, in which it is argued that in the American tradition, equity is a means-based system, while in the international tradition, equity is an ends-based system. This note concludes by offering objections to the World Court's use of ends-based equity.

II. THE PATHS TO MODERN EQUITY

Both the American⁸ and international⁹ systems of equity spring from the Western legal tradition. This tradition has its origin in antiquity. "While it is said that all roads of the Western experience lead to Rome, equity's road begins in ancient Greece with the legal theory of Aristotle."¹⁰

The teaching of Aristotle is most closely identified with the Greek conception of equity. Among the Greeks, Aristotle was the first to put forth equity as a legal concept.¹¹ The earlier understanding of equity,¹² in which the Greeks perceived "the law" and "equity" to be set in opposition to one another,¹³ was challenged by Aristotle's novel explanation of equity:

When the law states a universal proposition, and the facts in a given case do not square with the proposition, the right course to pursue is therefore the following. The legislator having left a gap, and committed an error, by making an unqualified proposition, we must correct his omission; we must say for him what he would have said himself if he had been present, and what he would have put into his law if only he had known. So considered, the corrective action of equity is just, and an improvement upon one sort of justice; but the justice upon which it is an improvement is not absolute justice—it is [legal justice—or rather] the error that arises from the absolute statements of law. The nature of the equitable may accordingly be defined as "a correction of law where law is defective owing to its universality."¹⁴

8. HENRY L. MCCLINTOCK, *HANDBOOK OF EQUITY* 6 (1936). "When the English colonists came to this country [i.e., the United States], they brought with them the laws of England, including the system of equity which had been developed in England by the chancellors." *Id.*

9. ROSSI, *supra* note 6, at 22.

10. *Id.* at 22-23.

11. GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION* 15 (1982).

12. In Greek, "equity" is *epieikeia*. *Id.*

13. *Id.*

14. ARISTOTLE, *THE POLITICS OF ARISTOTLE* 368 app. (translation of the NICOMACHEAN

Two distinct ways of thinking about equity have emerged from Aristotle's explanation. It is possible to think of equity as "only the corrective function of the law and not something different from the law."¹⁵ Equity may also be thought of as "an extension of natural justice."¹⁶

In Aristotle's conception of equity, discretion played an important role. "The discretion of the adjudicator conditioned the resort to and application of equity."¹⁷ But the prominent role of discretion in Aristotle's theory of equity should not be overstated. Aristotle recognized that the use of discretion was inherently dangerous. For him, "equity was something far less than a license for unfettered discretion."¹⁸

Aristotle's formulation of equity as a legal concept had an enormous impact on the subsequent development of legal theory in the West.¹⁹ Not only did Aristotle articulate the doctrine of equity so as to assimilate it into orthodox jurisprudence,²⁰ but he also, "by distinguishing equity from law and by implicitly sanctioning a procedure for its application, . . . laid the basis for a doctrinal fissure that was to erupt eventually in the complete separation of law from equity."²¹

Although Rome embraced Aristotle's formulation of equity, the Roman understanding of equity experienced further development.²² The compartmentalization of Roman law into separate areas would shape the way Romans thought about equity.²³ Prominent in Roman law was the separation of "the law common to all nations" (*ius gentium*) from "the law promulgated for Roman citizens" (*ius civile*).²⁴ As Roman law developed, "equity . . . came to be associated with the tradition of natural law" (*ius naturale*).²⁵ A connection was subsequently established between the concept of *ius gentium* and *ius naturale*²⁶ on the supposition that the latter was "law that reflects the common

ETHICS) (Ernest Barker trans., 1958) (section numbers omitted).

15. MAX HAMBURGER, *MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY* 96 (1965), *quoted in* MCDOWELL, *supra* note 11, at 15. Equity has been perceived to be, in its "corrective" capacity, "a means to justice" and "a procedure whereby equity follow[s] the law." ROSSI, *supra* note 6, at 23-24.

16. ROSSI, *supra* note 6, at 23. As an extension of natural justice, equity is "an all-inclusive, rationally discernible legal order." *Id.*

17. *Id.* at 24.

18. MCDOWELL, *supra* note 11, at 18.

19. ROSSI, *supra* note 6, at 23.

20. *Id.*

21. *Id.* at 24.

22. MCDOWELL, *supra* note 11, at 19.

23. In Latin, "equity" is *aequitas*. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* *But see* ROSSI, *supra* note 6, at 29. "This identification of the law of nations with natural law (*ius naturale*) was close and confusing. Indeed, it has been suggested that the

nature of mankind."²⁷ *Ius civile* having been set apart from *ius gentium* and *ius naturale*,²⁸ "[i]t came to be seen as part of the duty of the [Roman magistrate] to supersede [with *ius naturale*] the *ius civile* where necessary in order to restore the natural standard of justice in the Roman law."²⁹

The Romans and the Greeks perceived a duality in the nature of equity. Equity was thought of not only as a way of meliorating the law's rigidity,³⁰ but also as a catalyst for the application of natural law.³¹ Although various paths to modern equity were to emerge—one path leading to the American tradition, another leading to the international tradition—the legacy of ancient Greece and Rome would continue to influence equity's development.

Notwithstanding the fact that no juridical concept of equity existed in the England of the Anglo-Saxons, Rome had a tremendous impact on the development of the English tradition of equity³² from which the American tradition springs.³³ Also significant in the shaping of English equity was the thinking of Aristotle.³⁴ These ancient sources of equity influenced, and were reformulated by, the English legal scholars Glanville, Bracton, and St. Germain.³⁵ Yet while the English tradition of equity traces its theoretical basis back to antiquity, its experimental basis begins in the era of the Norman conquest.³⁶

Although a bifurcated system of common law courts and equity courts would eventually arise in England, for almost two centuries after the Norman conquest the "common law and equity existed as one undifferentiated system administered by the prerogative power of the king."³⁷ Before the fourteenth century, English equity courts were unknown since "the common law was equitable."³⁸ But by the mid-fourteenth century, it was apparent that the

two were not distinct enough to have the character of separate bodies of law." *Id.* (footnotes omitted).

27. MCDOWELL, *supra* note 11, at 19. "The point of contact between *ius gentium* and *ius naturale* was the notion of [equity] or, more precisely, . . . natural equity." *Id.*

28. ROSSI, *supra* note 6, at 29.

29. MCDOWELL, *supra* note 11, at 19.

30. *Id.*

31. ROSSI, *supra* note 6, at 23; MCDOWELL, *supra* note 11, at 19.

32. MCDOWELL, *supra* note 11, at 21.

33. *See supra* text accompanying note 8.

34. MCDOWELL, *supra* note 11, at 24.

35. *Id.* at 21-25. Equity in England was also influenced by Christianity. *See* Timothy A.O. Endicott, *The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity*, 47 U. TORONTO FAC. L. REV. 549-70 (1989) (discussing the way in which Christian doctrine influenced the development of the English tradition of equity).

36. ROSSI, *supra* note 6, at 32.

37. *Id.*; MCDOWELL, *supra* note 11, at 24.

38. ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 188 (Liberty Fund 1985) (1966).

common law had lost the flexibility necessary to satisfactorily adjudicate all legal controversies.³⁹ Due in part to the influence of *stare decisis*, the common law had become "hardened";⁴⁰ it was now "limited . . . to a set of restricted forms of action covering fairly well defined types of cases."⁴¹ "The separate administration of courts of equity arose around the middle of the 14th century because common law courts were either unwilling or unable to give relief to every claim."⁴²

The courts of equity⁴³ were established to allow those without an adequate remedy at common law to benefit from the extraordinary relief of equity.⁴⁴ Equity served as a corrective of the law,⁴⁵ and the chancellor "applied a rational form of discretionary justice often based on nothing more than unarticulated conceptions of right and wrong."⁴⁶ Adjudications of cases in equity were made on the basis of "natural justice" because guiding precedent for such cases had not yet been established.⁴⁷ But as more cases were decided, equity courts began to adhere to precedent rather than only "natural justice."

39. MCDOWELL, *supra* note 11, at 24.

40. *Id.*

41. 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 582-86 (1931), reprinted in WALTER WHEELER COOK, *CASES AND MATERIALS ON EQUITY* 2 (4th ed. 1948).

42. ROSSI, *supra* note 6, at 33 (footnotes omitted).

So long as those who administered the common law were prepared to create and apply competent remedies, the common-law courts required no supplemental jurisdiction such as Chancery later supplied. The mysterious hardening of common-law procedures at the close of the thirteenth century, perhaps due to the lack of confident invention and initiative, forced the development of other means of rendering justice in new and difficult cases and ultimately created the division between common-law and Equity courts

HOGUE, *supra* note 38, at 188.

43. At their inception, the courts of equity, via the king, received petitions from those seeking a remedy in equity. "The monarch seems always to have referred these special petitions to his chancellor (usually an ecclesiastic), the Keeper of the Great Seal, for resolution. By the fifteenth century this practice had solidified into a Court of Chancery" MCDOWELL, *supra* note 11, at 24-25.

44. Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 22 (1989); ROSSI, *supra* note 6, at 34; MCDOWELL, *supra* note 11, at 24.

45. ROSSI, *supra* note 6, at 35.

The English legal system has always shown a concern for what *ought* to be the results of a legal principle as well as a concern for the strict application of that principle. This distinction between *what is* and *what ought to be* may serve as a rough guide to the difference between common law and equity in the centuries after the fourteenth. Equity supplements the common law; its rules do not contradict the common law; rather, they aim at securing substantial justice when the strict rule of common law might work hardship.

HOGUE, *supra* note 38, at 175.

46. ROSSI, *supra* note 6, at 35.

47. 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 41, at 4.

As in the common law, the principle of *stare decisis* had a hardening effect on equity and turned it into a thoroughgoing system of law.⁴⁸

Despite adherence to precedent, the courts of equity continued to utilize natural law as a basis of decisionmaking. "Through the common law doctrine of *stare decisis*, equity became a system of positive jurisprudence without ever shedding its association with natural law."⁴⁹ Although there had been fear that the decisions of the equity courts either would be subject solely to the conscience of the chancellor,⁵⁰ or would become an instrument of political despotism,⁵¹ the fact that equity had become a fixed body of law precluded these dangers.⁵²

The English tradition of equity was transported to the United States.⁵³

48. *Id.*

[A]s the petitions became more and more numerous, the chancellor began to follow more or less the precedents established by himself in prior cases which seemed to him similar and then later to examine into and follow the decisions of the chancellors who had preceded him. This [was the] development of equity from a system of natural justice into a system of law

Id.

49. ROSSI, *supra* note 6, at 36 (footnote omitted).

50. H. Jefferson Powell, "*Cardozo's Foot*": *The Chancellor's Conscience and Constructive Trusts*, 56 LAW AND CONTEMP. PROBS. 7 (Summer 1993). This article refers to the legal philosophy of John Selden. "The displacement of the known rules of the (common) law by the chancellor's exercise of conscience, in Selden's view, rendered legal rights and liabilities uncertain . . . and dependent on the moral character and wisdom (and the politics) of the individual who happens at any given moment to be chancellor." *Id.* at 8 (footnote omitted).

51. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 250 (Liberty Fund 1982) (8th ed. 1915).

52. *Id.*

The law administered by the Lord Chancellor, or, in other words, Equity, had in it originally an arbitrary or discretionary element, but it in fact conferred real benefits upon the nation and was felt to be in many respects superior to the common law administered by the common-law judges. Even before 1660 acute observers might note that Equity was growing into a system of fixed law. Equity, which originally meant the discretionary, not to say arbitrary interference of the Chancellor, for the avowed and often real purpose of securing substantial justice between the parties in a given case, might, no doubt, have been so developed as to shelter and extend the despotic prerogative of the Crown. But this was not the course of development which Equity actually followed; at any rate from the time of Lord Nottingham (1673) it was obvious that Equity was developing into a judicial system for the application of principles which, though different from those of the common law, were not less fixed. The danger of Equity turning into the servant of despotism had passed away, and English statesmen, many of them lawyers, were little likely to destroy a body of law which, if in one sense an anomaly, was productive of beneficial reforms.

Id.

53. See *supra* text accompanying note 8. "The equity known by the framers [of the Constitution] was that of Blackstone: tame, precedent-bound, and not at all extraordinary."

But although in the United States the substance of English equity doctrine remained intact,⁵⁴ the administration of equity experienced procedural modification. Although a uniform separation between the courts of law and courts of equity existed in England at the time of the American Revolution, the governments of the United States used various methods to administer equity.⁵⁵ In most states, remedies both at common law and at equity were administered by a single court.⁵⁶ In the federal realm, the courts had equity jurisdiction equivalent to that of the English chancery court.⁵⁷ Today, a distinction between actions at law and actions at equity no longer exists in the majority of states,⁵⁸ such actions having been replaced by a "civil action" in which all legal remedies are received.⁵⁹ The federal courts also feature a single "civil action" for the administration of remedies at law and at equity.⁶⁰ The civil action procedurally eliminates the distinction between law and equity, but the substantive distinction still remains: in both the state⁶¹ and federal⁶² courts, remedies at law and remedies at equity are recognized as separate.

The influence of Aristotle and of ancient Rome extends to the interna-

Honorable H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 943 (1994).

54. MCCLINTOCK, *supra* note 8, at 1. "In Anglo-American law, equity means the system of legal materials developed and applied by the court of chancery in England and the courts succeeding to its powers in the British Empire and the United States." *Id.*

55. 27 AM. JUR. 2D *Equity* § 4 (1966). "In some states, separate courts of chancery were constituted. In other states, the courts of common law were empowered to exercise equity jurisdiction. In still other states, the rules and principles of equity were administered by existing courts without any express constitutional or statutory authorization." *Id.* (footnotes omitted).

56. Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L. J. 215, 234-35 (1995).

In the early republic years and beyond, states and territories did not generally create separate chancery courts. States primarily followed the federal model and gave chancery powers to the circuit courts (or their equivalents), leaving it to the legislature to create chancery courts if and when those courts were considered necessary.

Id.

57. *Matthews v. Rogers*, 284 U.S. 521, 529 (1932). "The equity jurisdiction conferred on inferior courts of the United States by section 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by section 24 of the Judicial Code (28 USCA s 41), is that of the English court of chancery at the time of the separation of the two countries." *Id.*

58. 30A C.J.S. *Equity* § 4 (1992). "Only four states, Arkansas, Delaware, Mississippi, and Tennessee, still have separate courts of equity." Gitelman, *supra* note 56, at 244.

59. 30A C.J.S. *Equity* § 4 (1992).

60. FED. R. CIV. P. 2.

61. 27 AM. JUR. 2D *Equity* § 4 (1966).

62. 30A C.J.S. *Equity* § 4 (1992).

tional tradition of equity,⁶³ as well as to the American tradition. But unlike the courts of the United States, which inherited⁶⁴ from England a comprehensive and largely fixed set of equity principles which developed systematically and over time,⁶⁵ the International Court of Justice⁶⁶ has succeeded to a different system of equity. In the international realm, "[n]o wellspring of equity jurisprudence exists; there is no hardened international law of equity on which the international judge . . . can rely. Equity jurisprudence developed in piecemeal fashion."⁶⁷

The modern tradition of international equity has been derived from two main sources: international claims conventions and international arbitration agreements,⁶⁸ the history of which begins with the Jay Treaty (1794), and the *Alabama Claims Arbitration* case (1871-1872).⁶⁹ In the late nineteenth century, these two arbitrations, coupled with a "burgeoning climate of internationalism," paved the way for many more arbitrations between nation-states.⁷⁰ Great confidence in international law existed in the late nineteenth and early twentieth centuries, during which time rules to regulate war between nation-states were established by various conferences, forums for dispute settlement were created, and numerous international treaties were signed.⁷¹ International law was characterized by positivism.⁷² The incorporation of naturalism into international law soon followed.

In the early twentieth century, international arbitral decisions often utilized principles of natural law to meliorate "the rigidities of the positivist international legal framework."⁷³ Woodrow Wilson is credited with reviving the ideas of natural law which international arbiters were then applying.⁷⁴ The League of Nations he envisioned, which had its basis in natural law,⁷⁵ aided "[t]he rise of naturalism in the first three decades of the 20th century."⁷⁶

63. ROSSI, *supra* note 6, at 39.

64. *See supra* text accompanying note 8.

65. *See* sources cited *supra* notes 40, 41.

66. The International Court of Justice is the successor to the Permanent Court of International Justice (1922-1946), which was established by the League of Nations. When the League ceased to exist in 1946, so did the Permanent Court. Under the authority of the United Nations, the International Court of Justice was established in 1946. The International Court of Justice is the "principal judicial organ of the United Nations." SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 14-15, 21, 24-25 (1995).

67. ROSSI, *supra* note 6, at 41.

68. *Id.* at 42, 59.

69. *Id.* at 42.

70. *Id.* at 43.

71. *Id.* at 43-45.

72. *Id.* at 45.

73. *Id.* at 46.

74. *Id.*

75. *Id.* at 46-47, 50.

76. *Id.* at 51.

In earlier arbitration decisions, equity was "an end in itself, . . . the standard of review on which the correctness of a decision was based."⁷⁷ In later decisions, a transformation occurred in which equity "also became a means by which the end result was achieved."⁷⁸ An important consequence of this transformation⁷⁹ was the application of positive doctrines of equity by arbitral tribunals.⁸⁰ No longer separate from the law, equity was now an essential part of the law. "[A]s a natural law concept, [equity] became an integral component in the administrative aspect of international decision making."⁸¹ Numerous decisions of the Permanent Court of International Justice,⁸² which utilized international rules of equity,⁸³ attest to the strong role equity played in substantive international law.

On the basis of its implied judicial powers, the International Court of Justice incorporated the principles of international equity for use in decision-making.⁸⁴ Although the Statute of the International Court of Justice does not authorize the Court to utilize the principles of equity in deciding cases,⁸⁵ "the very nature of the judicial function"⁸⁶ provides justification for the Court's use

77. *Id.* at 76.

78. *Id.*

79. *Id.* at 76, 81. The transformation "incorporated two aspects of equity For conceptual purposes, they may be referred to as 'administrative postulates or principles of equity', which are found in both common and civil law systems, and 'rules of equity', which stem primarily from the Anglo-Saxon common law tradition." *Id.* at 80.

80. *Id.* at 76.

81. *Id.*

82. See *supra* text accompanying note 66.

83. ROSSI, *supra* note 6, at 127.

84. *Id.* at 129.

85. *Id.* As stated in Article 38 of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

ROSENNE, *supra* note 66, at 288-89 (quoting STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1-2).

86. ROSSI, *supra* note 6, at 129.

of equity.⁸⁷ “[W]hen rules fail to provide a standard for the resolution of disputes, [international] judges rely on inherent interpretive powers to apply principles they deem essential to the proper performance of their duties. This . . . explains the judicial recourse to equitable principles.”⁸⁸

International arbitration agreements and claims conventions—the parties to which have largely been Western nation-states—“were the avenues through which equity initially was received into international law.”⁸⁹ It is therefore no surprise that, “[a]lthough rooted in the world’s major legal systems and religious traditions, equity as it is known in international law developed from and is associated most closely with the Western tradition.”⁹⁰ Yet the meaning of equity in the international tradition is also infused with ideas other than those of Western jurisprudence; notions of equity in the legal systems of many other civilizations have penetrated international law.⁹¹ Traditions of equity

87. *Id.* at 142.

[T]he law as applied by the International Court represents the highest grade of international law, matching in jural quality the law of any municipal legal system. It is a grade of law qualitatively superior to auto-interpretative and arbitrable grades. Given this classification, there is a heavy presumption in support of the proposition that the Court knows best how to do what it does. This presumption spawns a great deal of deference over the means chosen by the Court to effectuate its end. It is this deference to the judicial process that enables the Court to craft its own set of implied powers and construct its own *lex judicicia*.

Id. (footnote omitted).

88. *Id.* at 143.

89. *Id.* at 59.

90. *Id.* at 22.

The rise of international law in Europe in the 16th and 17th centuries, facilitated by the development of the modern European state system and the alacrity with which Jean Bodin’s doctrine of sovereignty was accepted by statesmen and scholars alike, brought with it the incorporation of many of the teachings and practices of the Western experience. Equity was one among them and for this reason the classical understanding of equity in international law bears the imprimatur of the Western legal tradition.

Id. (footnotes omitted).

91. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 139-40 (Feb. 20) (separate opinion of Judge Ammoun).

Incorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court, the principle of equity manifests itself in the law of Western Europe and of Latin America, the direct heirs of the Romano-Mediterranean *jus gentium*; in the common law, tempered and supplemented by equity described as accessory; in Muslim law which is placed on the basis of equity (and more particularly on its equivalent, equality) by the Koran and the teaching of the four great jurisconsults of Islam condensed in the Shari’a, which comprises, among the sources of law, the *istihsan*, which authorizes equity-judgments; Chinese law, with its primacy for the moral law and the common sense of equity, in harmony with the Marxist-Leninist philosophy; Soviet law, which quite clearly provides a place for considerations

from around the world provide the International Court of Justice with "a vast resource from which to quarry the elements of the universal sense of justice and fairness that underlies the meaning of equity."⁹²

III. SIMILARITIES BETWEEN THE TWO TRADITIONS OF EQUITY

In the American courts and the World Court, equity has five prominent characteristics: (1) it is an often utilized source of law; (2) it involves the application of rules; (3) it is characterized by flexibility; (4) it allows the judge to use discretion; and (5) it promotes decisionmaking which achieves justice.

Equity is a source of law which is often used by the American courts. "Equitable doctrine is part of the warp and woof of our substantive law."⁹³ Equitable remedies are not extraordinary in American jurisprudence.⁹⁴ The

of equity; Hindu law, which recommends 'the individual to act, and the judge to decide, according to his conscience, according to justice, according to equity, if no other rule of law binds them'; finally the law of the other Asian countries, and of the African countries, the customs of which particularly urge the judge not to diverge from equity and of which 'the conciliating role and the equitable nature' have often been undervalued by Europeans; customs from which sprang a *jus gentium* constituted jointly with the rules of the common law in the former British possessions, the lacunae being filled in 'according to justice, equity and good conscience'; and in the former French possessions, jointly with the law of Western Europe, steeped in Roman law. A general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice.

Id. (footnotes omitted).

Some other important sources should also be mentioned—the fine analyses of justice in Greek and Judaic philosophy; the equity-impregnated concept of "dharma" in Hindu jurisprudence; the elaborately researched concept of fairness and justice in Buddhism; the Christian tradition of justice and conscience as "weightier matters of the law" as opposed to mere legalism; and the Qur'anic injunction: "If thou judge judge in equity between them for God loveth those who judge in equity" which has been the subject of extensive commentary over the centuries by the jurists of Islam. The sophisticated notions of reasonable and fair conduct currently being unveiled by modern researches in African, Pacific and Amerindian customary law, and the principle of deep harmony with the environment which underlies Australian Aboriginal customary law add to the reservoir of sources available.

Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 275-76 (June 14) (separate opinion of Judge Weeramantry) (footnotes omitted).

92. 1993 I.C.J. at 275 (separate opinion of Judge Weeramantry).

93. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71 (Summer 1993).

94. *Id.* at 61.

“irreparable injury rule”—sometimes invoked by the courts—suggests that “equitable remedies are unavailable if legal remedies will adequately repair the harm.”⁹⁵ But a predisposition in favor of legal as opposed to equitable remedies does not exist.⁹⁶ If a litigant desires a remedy at equity, he usually receives it.⁹⁷ Although the distinction between law and equity still exists in the American courts,⁹⁸ the rules of equity are frequently employed by judges,⁹⁹ even in circumstances in which a particular rule’s origin in equity might not be recognized.¹⁰⁰

The International Court of Justice also uses equity as a source of law. It was noted in the *North Sea Continental Shelf* cases—in which equity had been applied in the Court’s decision—that “[a] general principle of law has . . . become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice.”¹⁰¹ But equity is not simply a general principle of law:

In the course of the history of legal systems the term ‘equity’ has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.¹⁰²

95. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990).

96. *Id.* at 692.

97. *Id.* at 768.

98. See sources cited *supra* notes 61, 62. Laycock, however, would rather see an end to this distinction.

My instincts are much more integrationist. The distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won. We should stop thinking of equity as separate and marginal, as consisting of extraordinary remedies, supplemental doctrines, and occasional exceptions, as special doctrines reserved for special occasions. Except where references to equity have been codified, as in the constitutional guarantees of jury trial, we should consider it wholly irrelevant whether a remedy, procedure, or doctrine originated at law or in equity. We should invoke equity just as we invoke law, without explanation or apology and without a preliminary showing that this is a case for equity.

Laycock, *supra* note 93, at 53-54.

99. Laycock, *supra* note 93, at 68-71.

100. *Id.*

101. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 140 (Feb. 20) (separate opinion of Judge Ammoun).

102. *Concerning the Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 60 (Feb. 24).

The Court has reaffirmed this notion.¹⁰³ At the bar of the World Court, "law" and "equity" are not entirely separable concepts. Litigants are assured that the Court may apply principles of equity in decisionmaking just as it applies rules of international law.

The application of rules is characteristic of equity in the American courts. "Equity may be described as 'a system of positive jurisprudence founded upon established principles.'"¹⁰⁴ It seems that "equity and law no longer appear to involve different methodologies of decisionmaking. Modern equity jurisprudence has itself become a great body of equitable law, as complex, doctrinal, and rule-haunted as the common law ever was."¹⁰⁵ In a case in which equitable relief is involved, the judge is presented with a large body of equitable doctrine from which the applicable rules may be drawn.¹⁰⁶

The International Court of Justice also applies rules when resorting to equity. Because justice is a primary concern of the Court when it applies equity, the Court often refers to justice when analyzing equity's relationship to legal rules. The *North Sea Continental Shelf* cases set forth what continues to be the Court's position with respect to the relationship between equity and the rule of law:

103. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 224 (June 14) (separate opinion of Judge Weeramantry). "[T]he term equity, as used in the Court's Judgment or in the context of international law, is quite distinct from its use to designate separate systems of judicial administration such as existed in some legal systems for the purpose of correcting insufficiencies and rigidities of the law." *Id.*

104. Associated Investment Company Limited Partnership v. Williams Associates IV, 645 A.2d 505, 511 (Conn. 1994) (quoting Harper v. Adamez, 113 A.2d 136 (Conn. 1955)).

105. Powell, *supra* note 50, at 8. "If bankruptcy is regarded as being within the traditional equitable jurisdiction, it undoubtedly has become the most regimented and codified part of equity" Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 594 n.3 (1982).

106. The role of the judge in applying the principles of equity has been compared to that of a priest.

The judge as priest engages in a thought process that uses the tool of reason to divine sources or to apply doctrines based on orthodox principle. Judicial divination looks first to existing principles and rules for guidance in resolving problems. Such a thought process does not challenge the controlling orthodoxy of which the judge feels a part. Judicial divination accepts the principles of the orthodoxy, including its doctrinal structure, and seeks to apply those orthodox principles to the specific factual situations that come before the judges.

David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 140 (1988).

[W]hen mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field [i.e., maritime delimitation] it is precisely a rule of law that calls for the application of equitable principles.¹⁰⁷

The Court has clarified its stance on equity's relationship to rules by noting that "the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law"¹⁰⁸ and that "the fact that [the Court] dispenses justice does not entitle it to ignore the rules of law."¹⁰⁹ Further suggesting that well-defined rules allow for the successful application of equity, the Court has observed that, "[w]hile every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained."¹¹⁰

Although rules of equity are applied by the American courts and the World Court, in the former, there is a wealth of equitable rules which has emerged through *stare decisis*, while in the latter, there are relatively fewer rules. Owing to the small number of maritime delimitation cases decided by the Court to date, a significant body of equitable rules has yet to develop. It is thought that as more decisions are made in which the rules of equity are applied, an increasingly hardened, coherent body of doctrine will emerge.¹¹¹

107. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 48 (Feb. 20).

108. *Concerning the Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 39 (June 3).

The message of the Court is clear. It does not hold out the possibility that a clearly determinative black-letter rule of law will be established. Nor should the maritime boundary law devolve to the point where it is so indeterminate that each delimitation is decided on an ad hoc basis comparable to a decision *ex aequo et bono*. Rather, in the common-law tradition as understood by the realists, the continuing series of judgments and awards should progressively refine the legal rules and their objectives.

Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227, 233 (1994).

109. *Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 I.C.J. 38, 240 (June 14) (separate opinion of Judge Weeramantry).

110. 1985 I.C.J. at 55. "Judge Jennings has noted that a 'structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate.'" L. D. M. Nelson, *The Roles of Equity in the Delimitation of Maritime Boundaries*, 84 AM. J. INT'L L. 837, 852 (1990) (quoting Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27, 38 (1986)).

111. Louis B. Sohn & Russell Gabriel, *Equity in International Law*, 82 AM. SOC'Y INT'L L. PROC. 277, 288 (1988). "As judicial recourse to equitable principles increases, the outlines of the rules of equity become clearer, as is appropriate in any source of law applied by

But even if precedent does have the effect of creating a more thoroughgoing aggregation of equitable rules, the impact of such rules on the Court will not necessarily parallel that of equitable rules on the American courts. Though earlier decisions in equity bind the courts of the United States, *stare decisis* does not bind the World Court.¹¹² "The Court does not have to follow its precedents even though it often chooses to do so."¹¹³

The American courts, although bound by precedent when applying equity, have maintained flexibility when applying equitable rules.¹¹⁴ "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."¹¹⁵ "A hallmark of equity is its 'capacity of expansion [beyond the common law], so as to keep abreast of each succeeding generation and age."¹¹⁶

Equity in the World Court is also characterized by flexibility. The rules of equity flex to accommodate various circumstances. "In the context of maritime delimitation, each case presents upon the facts a different shape from every other, and equity adjusts itself around that shape . . . because it is flexible, where a rigid rule would scarcely do it justice."¹¹⁷ The Court avoids inelastic applications of equity because "[i]t would be a negation of [the] flexibility which is a characteristic of equity if we were at this early stage in the development of maritime demarcation to introduce into it the very element of rigidity which equitable doctrine was developed to prevent."¹¹⁸

The exercise of discretion is a vital part of equity in the American courts.¹¹⁹ The grant of equitable relief is thought to entail a certain amount of discretion.¹²⁰ Benjamin Cardozo believed that the discretion applied by the

judges." Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-as-Fairness*, 81 GEO. L. J. 563, 595 (1993). "[O]ne should recall that a little more than 20 years has elapsed since the judicial articulation of equitable criteria in the *North Sea Continental Shelf* cases. It took equity more than 400 years to harden into a system of common law." ROSSI, *supra* note 6, at 246.

112. Charney, *supra* note 108, at 228.

113. Barbara Kelly, Note, *The International Court of Justice: Its Role in a New World Legal Order*, 3 TOURO J. TRANSNAT'L L. 223, 226 (1992).

114. See Plater, *supra* note 105, at 525.

115. *Hays v. Regents of University of Michigan*, 220 N.W.2d 91, 96 n.8 (Mich. Ct. App. 1974) (quoting *Brown v. Board of Education of Topeka*, 349 U.S. 294, 300 (1955)).

116. *Associated Investment Company Limited Partnership v. Williams Associates IV*, 645 A.2d 505, 511 (Conn. 1993) (quoting 1 J. POMEROY, EQUITY JURISPRUDENCE § 67, at 89 (5th ed. 1941)).

117. *Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38, 250 (June 14) (separate opinion of Judge Weeramantry).

118. *Id.* at 263 (separate opinion of Judge Weeramantry).

119. Laycock, *supra* note 93, at 73.

120. See Powell, *supra* note 50, at 22; *Guignard v. Atkins*, 317 S.E.2d 137, 140 (S.C. Ct. App. 1984).

judge was equivalent to "the shared morality of the community."¹²¹ He "assumed the existence of a moral tradition, within the legal profession and in society generally."¹²² "In his world, the informed conscience of the chancellor was free to exercise discretion in judgment because his decisions were embedded in a tradition that made discretion . . . an act of solidarity . . ."¹²³ This view of discretion still prevails. One modern court states that "[e]quity speaks of conscience. . . . It is a judicial conscience—'a metaphorical term, designating the common standard of civil right and expediency combined . . .'"¹²⁴ Further elaborating, this court has noted that "[e]quity also speaks of morality. The morality involved is that of society—the standards evolve through social advancement in a stabilized community life."¹²⁵

The International Court of Justice, which is required to apply international law in the settlement of disputes,¹²⁶ probably cannot claim to exercise a form of discretion which gives effect to the values of one particular community or nation. The Court, nevertheless, exercises discretion in applying equity. Discretion is perceived to be an essential element of decisionmaking. "[T]he use of judicial discretion within the prescribed parameters [of the law] is . . . a necessary and intrinsic part of the judicial process . . ."¹²⁷ The Court exercises discretion in selecting the principles of

121. Powell, *supra* note 50, at 22.

122. *Id.* at 26.

123. *Id.* at 27. The views of Richard Posner seem to reinforce Cardozo's justification for the judicial exercise of discretion. For Posner, "the objectivity and therefore the legitimacy of the common law is a function of the extent to which social consensus prevails regarding the purposes and goals that it instantiates." Jack Knight & James Johnson, *Political Consequences of Pragmatism*, 24 POL. THEORY 68, 78 (1996). The cogency of Posner's position may depend in part on whether the notion of an existing social consensus can be sustained today. Even if it could, "[t]he clear objection is that consensus can be imposed by power asymmetries [in society] rather than produced through free and uncoerced assent." *Id.* at 78-79. "[Posner] nevertheless maintains that social consensus is a source of objectivity and legitimacy [of the common law]." *Id.* at 79. Posner seems to be saying that "[t]he social consensus surrounding an ethical principle may be evidence of its value, and courts may invoke it in support of their decisions. Here the justification [for judicial decisions] is a practical one. Regardless of how a society converged on a particular ethical principle, we may discover that it has socially desirable properties." *Id.* "For the pragmatist [i.e., Posner], consensus or convergence on a particular principle is evidence that it has demonstrated its value by virtue of having withstood the 'test of time'. On Posner's account, principles that demonstrate their utility over time and in the face of competing principles enjoy some presumption as to their socially desirable character." *Id.* at 80 (citation omitted).

124. *In re Quintan*, 348 A.2d 801, 816-17 (N.J. Super. Ct. Ch. Div. 1975) (quoting 1 POMEROY, EQUITY JURISPRUDENCE § 57, at 74 (5th ed. 1941)).

125. *Id.* at 817.

126. See *supra* text accompanying note 85.

127. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 252 (June 14) (separate opinion of Judge Weeramantry).

equity to be applied in a particular case¹²⁸ and in creating equitable rules when no rules are applicable.¹²⁹

In applying equity, the American courts strive to achieve justice. "To do justice between the parties is the object of a court of equity."¹³⁰ Not only an object which courts pursue, justice is also a non-negotiable mandate. "Equity *requires* doing justice to all parties in the action."¹³¹ The judge achieves justice by looking to a "high standard":

It has been stated that the power of equity is 'the power possessed by judges—and even the duty resting upon them—to decide every case according to the high standard of morality and abstract right; that is the power and duty of a judge to do justice' It involves the obedience to dictates of morality and conscience.¹³²

It would seem that American judges are not only required to do justice, but are also "obligated to construct visions of justice."¹³³

The idea of justice is prominent in the World Court's application of equity. "Equity in the sense of a quest for the just solution offers a firm substratum for a considerable part of the Court's reasoning."¹³⁴ The Court has noted that "[e]quity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it."¹³⁵ It follows that "[t]he task of the judge is to produce an equitable and just result in the particular case."¹³⁶

128. Franck & Sughrue, *supra* note 111, at 583.

129. Sohn & Gabriel, *supra* note 111, at 283.

130. *Rainer v. Holmes*, 75 N.W.2d 290, 292 (Wis. 1956). "The purpose of a court sitting in equity is to promote and achieve justice with some degree of flexibility." *Garrett v. Arrowhead Improvement Association*, 826 P.2d 850, 855 (Colo. 1992) (en banc).

131. *Folkers v. Southwest Leasing*, 431 N.W.2d 177, 182 (Iowa Ct. App. 1988) (emphasis added).

132. *In re Quinlan*, 348 A.2d 801, 816 (N.J. Super. Ct. Ch. Div. 1975) (quoting 1 POMEROY, EQUITY JURISPRUDENCE § 43, at 57 (5th ed. 1941)) (citation omitted).

133. Barnhizer, *supra* note 106, at 160.

134. *Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38, 240 (June 14) (separate opinion of Judge Weeramantry).

135. *Concerning the Continental Shelf* (Tunis. v. Libya), 1982 I.C.J. 18, 60 (Feb. 24). "As the Court said, it is a court of justice, and therefore it has to find a just solution or avoid unjust solutions." Sohn & Gabriel, *supra* note 111, at 282.

136. Nelson, *supra* note 110, at 858.

IV. MEANS-BASED VERSUS ENDS-BASED EQUITY

Between the American courts and the World Court equity has similar characteristics. Yet these similarities are eclipsed by a significant dissimilarity: in the American courts, equity is a means-based system; in the World Court, equity is an ends-based system.

American judges have inherited a tradition of equity in which the means used to achieve a result are the paramount consideration. The equity jurisprudence of the late nineteenth century provided for a means-/rule-based approach in which all disputes could be resolved through the use of general principles of equity:

The foundational general principles were fixed, and since those principles were ideal, their permanence presented no obstacle to rendering correct decisions in individual cases. On the other hand, more concrete principles and rules changed as new fact situations called for new concrete norms. The general principles, however, interacted with the novel fact situation to determine the more concrete elements.¹³⁷

The judge had the power to adapt general rules to achieve the correct result in an individual case; and a precise methodology was followed to that end:

Judicial decisionmaking . . . combined the constraint of permanent and determinate general principles with the flexibility of more concrete rules and principles sensitive to changing social facts. For late nineteenth century jurists, the virtues of equitable "flexibility" and "discretion" consisted in the fact that equity judges, rather than being bound to apply existing rules mechanically, were able to reason "scientifically" by inferring rules and principles from precedent, modifying those rules and principles when necessary, and spinning out the implications of the modified rules and principles in particular factual situations.¹³⁸

137. Bone, *supra* note 44, at 23 (footnotes omitted).

138. *Id.* at 24. When a judge reasons "scientifically," he, like any true scientist, uses the "scientific method" which consists of "(1) gathering evidence, (2) making a hypothesis, and (3) testing the hypothesis." CARROLL QUIGLEY, *THE EVOLUTION OF CIVILIZATIONS* 33 (Liberty Fund, Inc. 1979). The judge who reasons scientifically knows that "[s]cience is a method, not a body of knowledge or a picture of the world." *Id.* at 45. He does not harbor the "erroneous idea that scientific theories are true." *Id.* at 40.

No scientist ever believes that he has the final answer or the ultimate truth on anything. Rather he feels that science advances by a series of successive (and, he hopes, closer) approximations to the truth; and, since the truth is never finally reached, the work of scientists must indefinitely continue. Science . . . is like a

Like the natural scientist, who discovers an answer by positing hypotheses and testing them within a system of nature, so the judge in equity—by discovering how a particular result is achieved through the application of general principles—follows a similar methodology within a system of law.

Perhaps the modern American judge does not consider himself a scientist; but the nineteenth century's scientific, means-based approach to equity survives in modern jurisprudence.¹³⁹ The American judge may not first decide what the correct result is, and then use equity to achieve it. To the contrary, the correct result is a product of strict adherence to equitable rules.

Although it is the office of the American judge to exercise equitable discretion,¹⁴⁰ that discretion is means-based, and is always exercised within the rules of equity.¹⁴¹ Cardozo makes this notion plain:

single light in darkness; as it grows brighter it shows more clearly the area of illumination and, simultaneously, lengthens the circle of surrounding darkness.

Id. at 34.

139. As a general proposition, it may be said that American equity has not lost its connection to the past. With respect to equity precedent, for instance, "the nineteenth century is still thought to provide relevant guidance." Plater, *supra* note 105, at 525.

140. See Laycock, *supra* note 93, at 73; Powell, *supra* note 50, at 22; Guignard v. Atkins, 317 S.E.2d 137, 140 (S.C. Ct. App. 1984).

141. See *Rosenberg v. Haggerty*, 82 N.E. 503, 504 (N.Y. 1907) ("Broad as is the jurisdiction of a court of equity . . . it nevertheless is governed in the administration of relief by settled principles and the action of the court is dependent, not upon its pleasure, but upon the facts of the case and the condition of the parties."); *Youngs v. West*, 27 N.W.2d 88, 91 (Mich. 1947) ("[T]he granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case. Of course, this discretion is not an arbitrary one, but must be exercised in accordance with the fixed principles and precedents of equity jurisprudence, and in accordance with the evidence." (quoting 30 C.J.S. *Equity* § 10, at 328-29)); *Yuba Consolidated Gold Fields v. Kilkeary*, 206 F.2d 884, 889 (9th Cir. 1953) ("Equity jurisdiction being recognized, the question whether it will be exercised rests in the sound discretion of the chancellor. It must be a legal discretion based on principles of law and not on the arbitrary will of the chancellor."); *Burke v. Hoffman*, 147 A.2d 44, 48 (N.J. 1958) ("[T]he doctrine of equitable assignment involves the exercise of a sound discretion, according to the principles of equity and essential justice in the particular circumstances and the requirements of positive law and sound public policy."); *Kjeldgaard v. Carlberg*, 97 N.W.2d 233, 239 (Neb. 1959) ("[The] equitable remedy is not a matter of right but one that may be granted by the court in its sound judicial discretion, controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies." (quoting *Mainelli v. Neuhaus*, 59 N.W.2d 607, 608 (Neb. 1953))); *Zimmerman v. Campbell*, 245 N.W.2d 469, 471 (N.D. 1976) ("Where the overall facts indicate unfairness, artifice, sharp practice, overreaching, or the like, the court of equity, in its determination, will apply sound judicial discretion within the established principles which constitute the body of equity jurisprudence."); *MLZ Inc., v. Zuckerberg*, 470 F.Supp. 273, 276 (E.D. Tenn. 1978) ("The granting of preliminary injunctive relief pending final decision on the merits is a matter

In the award of equitable remedies there is often an element of discretion, but never a discretion that is absolute or arbitrary. In equity, as at law, there are signposts for the traveler. "Discretion . . . 'must be regulated upon grounds that will make it judicial.'"¹⁴²

The exercise of discretion may imply a resort to conscience. Indeed, "[i]n matters of equity the Court is one of conscience."¹⁴³ But the judge sitting in equity may not adopt as his creed, "[t]his above all, to thine own self be true."¹⁴⁴ The role of conscience in modern equity jurisprudence is set forth clearly by Judge Posner:

The moralistic language in which the principles of equity continue to be couched is a legacy of the time when a common lawyer could, without sounding too silly, denounce equity as "a Roguish thing" because "Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is equity." But the time itself is long past, and the proposition that equitable relief is "discretionary" cannot be maintained today without careful qualification. A modern judge, English or American, state or federal, bears very little resemblance to a Becket or a Wolsey or a More, but instead administers a system of rules which bind him whether they have their origin in law or in equity and whether they are enforced by damages or by injunctions. . . . Even when the plaintiff is asking for the extraordinary remedy of a preliminary injunction . . . the request is evaluated according to definite standards, rather than committed to a free-wheeling ethical discretion.¹⁴⁵

committed to the sound discretion of the trial court. Such relief is equitable in nature, and the Court's exercise of its discretion is to be guided by the general historical principles of equity.") (citations omitted).

142. *Evangelical Lutheran Church of the Ascension of Snyder v. Sahlem*, 172 N.E. 455, 457 (N.Y. 1930) (quoting *Haberman v. Baker*, 28 N.E. 370 (N.Y. 1891) (quoting *White v. Damon*, 7 Ves. 30, 35)).

143. *Holland v. Walls*, 621 S.W.2d 496, 497 (Ark. Ct. App. 1981).

144. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 1, sc. 3.

145. *Shondel v. McDermott*, 775 F.2d 859, 867-68 (7th Cir. 1985) (citations omitted).

In the case of *In re Quinlan*, in which a father, seeking to be appointed the guardian of his incompetent daughter, requested authorization to discontinue her life support, the role of the judge's conscience in exercising equitable discretion was set forth more starkly:

Equity speaks of conscience. That conscience is not the personal conscience of the judge. For if it were, the compassion, empathy, sympathy I feel for Mr. and Mrs. Quinlan and their other two children would play a *very* significant part in the decision. It is a judicial conscience—'a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles, and limited by established doctrines to which the court appeals, and by which it tests the conduct and right of the suitors.' The rationale behind not allowing the personal conscience and therefore the noted emotional aspects are that while it may result in a decision based on a notion of what is right for these individuals, the precedential effect on future litigation . . . would be legally detrimental.¹⁴⁶

The judge sitting in equity may not base his decision on what he believes to be right or wrong. His conscience works within, and is subordinated to, the established rules of equity.¹⁴⁷ The operation of this principle is

146. *In re Quinlan*, 348 A.2d 801, 816-17 (N.J. Super. Ct. Ch. Div. 1975) (quoting 1 POMEROY, EQUITY JURISPRUDENCE § 57, at 74 (5th ed. 1941)). The court further noted that "[t]his does not preclude the setting of a precedent; it merely requires the setting to be within the concept of judicial conscience." *Id.* at 817 n.7.

147. *See Hague v. Warren*, 59 A.2d 440, 443 (N.J. 1948) ("An 'equity' is not a chancellor's sense of moral right, or any vague or indefinite opinion as to altruism, but is a right cognizable in a court of chancery, governed by established rules and fixed precedents." (quoting *W. D. Cashin & Co. v. Alamac Hotel Co., Inc.*, 131 A. 117, 119 (N.J. Ch. 1925))); *American Oil Co. v. Carlisle*, 63 A.2d 676, 681 (Me. 1949) ("[I]t is well settled that judicial discretion must be exercised soundly according to the well-established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion." (quoting *Bourisk v. Mohican Co.*, 175 A. 345, 346 (Me. 1934))); *Cookston v. Box*, 146 N.E.2d 171, 174 (Ohio Ct. Common Pleas 1957) ("[A court of equity] is a court of conscience, must do equity and must apply 'rules of reason and righteousness.' But in doing so it must stay within the framework of those precedents and rules of law and equity which govern the pertinent facts before it." (quoting 20 O.Jur.2d 18)); *Las Cruces TV Cable v. Federal Communications Commission*, 645 F.2d 1041, 1048 n.14 (D.C. Cir. 1981) ("[T]he discretion [of an equity court] is not the mere personal discretion of the chancellor or judge, but is a judicial discretion, which means that the judge consults precedents to find the principles, as distinguished from strict rules, which are applicable to a given situation, and then determines, from all of the facts in the case, what relief will best give effect to the various principles involved." (quoting H. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 51-52 (1948))); *Lewandowski v. Beverly*, 420 N.E.2d 1278, 1280 (Ind. Ct. App. 1981) ("[J]udicial discretion is not . . . arbitrary . . . but is governed by and

apparent in the role which the judicial vision of justice plays in equitable decisionmaking. Not only are judges required to have visions of justice;¹⁴⁸ equity requires that judges achieve justice in each case.¹⁴⁹ But justice must be attained by adhering to equity's fixed rules. "[J]udges are neither philosopher-kings nor entitled to simply invent their own utopian fantasies in which they judge all before them in accordance with some fantastic standard"¹⁵⁰

Regardless of the equitable remedy sought, the American judiciary will not neglect to follow the rules of equity;¹⁵¹ it will not first settle upon a

must conform to the well-settled rules of equity."); *State v. Reed*, 421 So.2d 754, 755 (Fla. Dist. Ct. App. 1982) ("Judicial discretion' does not imply that a court may act, or fail to act, according to the mere whim or caprice of the presiding judge, but it means a discretion exercised within the limits of the applicable principles of law and equity, and the exercise of which, if clearly arbitrary, unreasonable, or unjust, when tested in the light of such principles, amounting to an abuse of such discretion, may be set aside on appeal. This is 'a government of laws and not of men.'" (quoting *Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241, 247 (Fla. 1930))); *County of Allegheny v. Commonwealth*, 480 A.2d 1330, 1333 (Pa. Commw. Ct. 1984) ("While equity springs from and is administered through the conscience, the exercise of discretion by a court of equity is not an arbitrary or capricious function, but is one directed within the channels of precedent. . . . Although we appreciate the County's plight, we cannot fashion a remedy to relieve the situation where it is clear that equity has no authority to intervene."); *Cordis Corporation v. Prooslin*, 482 So.2d 486, 491 (Fla. Dist. Ct. App. 1986) ("In exercising its discretion, the court is guided by established rules and principles of equity jurisprudence, in view of the particular facts presented in the case."); *Bercaw v. Bercaw*, No. 87-04-032, 1988 WL 25925, at *2 (Ohio Ct. App. Feb. 29, 1988) ("[T]he 'equity conscience' of a court is traditionally guided and controlled by definite and established rules." (quoting *Smith v. Smith*, 168 Ohio St. 447, 456 (1959))); *Thrifty Dutchman, Inc. v. Florida Supermarkets, Inc.*, 541 So.2d 634, 636 (Fla. Dist. Ct. App. 1989) ("[J]udicial discretion' means discretion exercised within the limits of recognized rules of applicable law and equity, which, if unjust, when tested in light of those principles may be set aside on appeal."); *Tiffany v. Forbes Custom Boats, Inc.*, No. 91-3001, 1992 WL 67358, at *8 (4th Cir. Apr. 6, 1992) (per curiam) ("A judge's discretion is not boundless and must be exercised within the applicable rules of law or equity."); *Commission on Human Rights and Opportunities v. Truelove and Maclean, Inc.*, No. 115306, 1995 WL 415808, at *8 (Conn. Super. Ct. June 28, 1995) ("That the court's discretion is equitable in nature . . . hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review It is true that [e]quity eschews mechanical rules . . . [and] depends on flexibility But when Congress invokes the Chancellors [sic] conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not equity [which] varies like the Chancellor's foot." (quoting *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415-23 (1975))).

148. See source cited *supra* note 133.

149. See *Folkers v. Southwest Leasing*, 431 N.W.2d 177, 182 (Iowa Ct. App. 1988).

150. *Barnhizer*, *supra* note 106, at 160.

151. See *Griffith v. Department of Motor Vehicles*, 598 P.2d 1377, 1383 (Wash. Ct. App. 1979); *Booras v. Uyeda*, 643 P.2d 413, 415 (Or. Ct. App. 1982); *Guignard v. Atkins*, 317 S.E.2d 137, 140 (S.C. Ct. App. 1984); *Bailey v. Christo*, 453 So.2d 1134, 1137 (Fla. Dist. Ct. App. 1984); *Given v. Cappas*, 486 N.E.2d 583, 591 (Ind. Ct. App. 1985); *Sarasota Beverage Co. v. Johnson*, No. 88-1265, 1989 WL 265294, at *2 (Fla. Dist. Ct. App. Feb. 10,

particular form of equitable relief and then seek legal justification for its decision. American equity's means-based approach to relief will not be subordinated to a judge's desire to achieve a particular end. The United States Court of International Trade has concisely summed up this sentiment by declaring that "this court's powers in equity are intended to enable it to give full effect to the requirements of justice. This tenet should not be misinterpreted to condone the circumvention of fundamental legal methods in order to achieve desired results."¹⁵²

When the American courts apply equity, the end does not justify the means. But when the International Court of Justice applies equity, the end does justify the means. The veracity of this statement is not immediately apparent because many of the Court's declarations seem to suggest that the equity it applies is a rule-driven, means-based system of jurisprudence. In the *North Sea Continental Shelf* cases, the Court noted that, in adjudicating a case of maritime delimitation:

[I]t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field¹⁵³

The Court in *Libya v. Malta* further clarified its position by stating that:

[T]he justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.¹⁵⁴

1989).

152. *Timken Company v. United States*, 777 F.Supp. 20, 27 (Ct. Int'l Trade 1991). See also *County of Allegheny v. Commonwealth*, 480 A.2d 1330, 1333 (Pa. Commw. Ct. 1984) ("Although we appreciate the County's plight, we cannot fashion a remedy to relieve the situation where it is clear that equity has no authority to intervene."); *First Federated Savings Bank v. McDonah*, 422 N.W.2d 113, 115 (Wis. Ct. App. 1988) ("The McDonahs do not cite an example of an equitable principle permitting delay to be a defense to a foreclosure action. They misinterpret 'equity' to mean that a court may ignore statutes and case law to enable it to assist someone in trouble. A court's equitable powers are not that all-encompassing.").

153. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 47 (Feb. 20).

154. *Concerning the Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 39 (June 3).

More recently, the Court has maintained that it "and its predecessor have of course been careful to point out that the fact that it dispenses justice does not entitle it to ignore the rules of law."¹⁵⁵

Not only has the Court enunciated the rule-based nature of equity; it has also specifically defined the kind of equity it applies. There are at least five different kinds of equity which the Court might administer. Equity *ex aequo et bono* "refers to a decision untrammelled by rules of law but depending purely on the tribunal's sense of justice."¹⁵⁶ Absolute equity "connotes the application of a just and fair solution irrespective of whether it overrides existing rules or principles of positive law."¹⁵⁷ Equity *praeter legem* "refers to filling in gaps and interstices in the law."¹⁵⁸ Equity *infra legem* refers to the use of equity "within the law."¹⁵⁹ Equity *contra legem* is "the use of equity in derogation of the law."¹⁶⁰ The Court insists that when it applies equity, its decisions are always *infra legem*.¹⁶¹

The Court's declaration that it uses equity within the law suggests that its application of equity is in some sense rule-based and perhaps, therefore, means-based. A hint that this might not be the case stems from an appreciation that the Court, in delimiting maritime boundaries, seems to be consistently looking toward the end result of its decisionmaking. The importance of reaching an "equitable result" is often emphasized.¹⁶² Indeed, "[t]his concern with equitable results, despite the application of equitable principles, procedures and methods, is well founded in the Court's jurisprudence."¹⁶³ But because the Court might be guided by an international convention or a precedent from a previous case which calls for "an equitable solution" to maritime delimitation,¹⁶⁴ and because the Court might even be asked by the

155. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 240 (June 14) (separate opinion of Judge Weeramantry).

156. *Id.* at 230 (separate opinion of Judge Weeramantry). "[N]either [the International Court of Justice] nor [the Permanent Court of International Justice] has ever decided a case *ex aequo*." Franck & Sughrue, *supra* note 111, at 570 (footnote omitted). See also Edward McWhinney, *Equity in International Law*, in EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 582 (Ralph A. Newman ed., 1973).

157. 1993 I.C.J. at 230-31 (separate opinion of Judge Weeramantry).

158. *Id.* at 231 (separate opinion of Judge Weeramantry).

159. Sohn & Gabriel, *supra* note 111, at 278.

160. *Id.*

161. Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 58 (Feb. 3) (separate opinion of Judge Ajibola); ROSSI, *supra* note 6, at 141; Sohn & Gabriel, *supra* note 111, at 278.

162. See Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 82 (Feb. 24); Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 38 (June 3); Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 61-62 (June 14).

163. 1993 I.C.J. at 222 (separate opinion of Judge Weeramantry).

164. See, e.g., 1985 I.C.J. at 30.

litigants to execute delimitation with a view towards an equitable result,¹⁶⁵ it is improper to infer that, because of the Court's emphasis on equitable results, equity is necessarily an ends-based system.

But the ends-based nature of equity in the Court's jurisprudence need not be inferred: it has been expressly stated by the court. The *North Sea Continental Shelf* cases laid a foundation for ends-based equity in maritime delimitation by stating that, "[w]hatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."¹⁶⁶ Discussing methods of maritime delimitation, the Court asserted that "it is necessary to seek not one method of delimitation but one goal."¹⁶⁷ The ends-based nature of equity was further articulated in *Tunisia v. Libya*:

It is . . . the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term 'equitable principles' cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.¹⁶⁸

The Court approved of this position in the case of *Libya v. Malta* when it noted that "[i]t is . . . the goal—the equitable result—and not the means used to achieve it, that must be the primary element."¹⁶⁹ It seems clear that "the fundamental rule of delimitation . . . [is] that the method to be adopted should be justified by the equity of the result."¹⁷⁰ In the World Court, equity is used as a "self-justifying end."¹⁷¹

165. See, e.g., 1985 I.C.J. at 31.

166. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 48 (Feb. 20).

167. *Id.* at 50.

168. *Concerning the Continental Shelf* (Tunis. v. Libya), 1982 I.C.J. 18, 59 (Feb. 24).

169. *Concerning the Continental Shelf* (Libya v. Malta), 1985 I.C.J. 13, 38-39 (June 3).

170. *Id.* at 82-83; see also *Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38, 222-24 (June 14) (separate opinion of Judge Weeramantry). One commentator notes that in *Tunisia v. Libya*, "the whole process engaged in by the International Court of Justice was result-oriented rather than principle-oriented." Mark B. Feldman et al., *ICJ Decision in the Libya-Tunisia Continental Shelf Case*, 76 AM. SOC'Y INT'L L. PROC. 150, 153 (1982) (remarks by Sang-myon Rhee).

171. DeVine, *supra* note 3, at 155.

The equitable outcome achieved by the Court results from¹⁷² the application of equitable rules.¹⁷³ But this does not mean that the Court always uses the same rules in maritime delimitation. To the contrary, "the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at."¹⁷⁴ In searching for legal principles relevant to a particular case, the Court may choose from any number of equitable rules or considerations.¹⁷⁵ Once these legal principles are chosen, the Court applies them to the facts of the case. "All the relevant circumstances are to be considered and balanced; they are to be thrown together into the crucible and their interaction will yield the correct equitable solution of each individual case."¹⁷⁶

The Court achieves an equitable result by applying rules of equity.¹⁷⁷ This is an ends-based approach producing decisionmaking in which the Court "uses equity *a priori* to work towards a result, and *a posteriori* to check a result thus reached."¹⁷⁸ The *a priori* use refers to the Court's initial decisionmaking process in which the law of equity is applied, and a result is reached.¹⁷⁹ The adjudication is consummated with an *a posteriori* "test" of the result which assures that the result is not "inequitable."¹⁸⁰ Further elaborating on the *a posteriori* use of equity, the Court has observed that:

172. See 1982 I.C.J. at 59.

173. Under the general rubric of "equitable rules" or of "equitable considerations," "[t]he Court has distinguished between principles, criteria, and methods [of equity], although the Court has maintained that this list is not exhaustive." ROSSI, *supra* note 6, at 216 n.5. The term "rules" is here used to encompass the distinctions the Court has made under this general rubric. For a thorough, but not exhaustive, listing of particular principles, criteria, and methods used by the Court, see *id.* at 216-17 n.5.

174. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 49 (Feb. 20).

175. Sohn & Gabriel, *supra* note 111, at 278-79.

176. Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 109 (Feb. 24) (separate opinion of Judge Jimenez de Arechaga).

177. See 1982 I.C.J. at 59.

178. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 218 (June 14) (separate opinion of Judge Weeramantry).

179. *Id.* at 243 (separate opinion of Judge Weeramantry).

180. *Id.*

The use of equity in this sense is analogous to the use of injustice as a test of justice, which has a long history in philosophical thought. Although justice by its very nature is incapable of comprehensive formulation, injustice by its very nature is often a matter of instant detection. Likewise, though that which is equitable cannot be formulated in advance in terms of a comprehensive set of rules, that which is inequitable can be readily identified as such when a situation has occurred

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An example of the ends-based approach to equity announced by the Court may be seen in the 1993 case of *Denmark v. Norway*. Here the Court was asked to delimit the maritime boundary between Greenland (a member of the Danish kingdom) and the island of Jan Mayen (a member of the Norwegian kingdom).¹⁸² It was determined that the law to be applied in this case was Article 6 of the 1958 Geneva Convention on the Continental Shelf¹⁸³ (the "equidistance-special circumstances" rule) and customary international law of the fishery zone (the "equitable principles-relevant circumstances" rule).¹⁸⁴ The Court supposed the former rule "to be regarded as expressing a general norm based on equitable principles";¹⁸⁵ it viewed the latter rule as requiring an equitable solution.¹⁸⁶ The distinction between the rules was without a significant difference: it was noted that the purpose of the "special circumstances" rule of the Geneva Convention and of the "relevant circumstances" rule of the customary law was to achieve an equitable result, and that the application of either rule could lead to the same result in maritime delimitation.¹⁸⁷ It was also noted that "[t]he aim in each and every situation must be to achieve 'an equitable result.'"¹⁸⁸

On the basis of either the Geneva Convention or Court precedent, the

181. *Id.* (footnote omitted).

182. *Id.* at 42-44.

183. The Court here refers to the following language of the convention:

Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

1993 I.C.J. at 52 (quoting Geneva Convention on the Continental Shelf, Apr. 29, 1958, art. 6, para. 1, 15 U.S.T. 471, 474).

184. *Id.* at 58, 215 (separate opinion of Judge Weeramantry).

185. *Id.* at 58.

186. *Id.* at 59.

187. *Id.* at 62.

188. *Id.*

maritime area in controversy was to be delimited with a median line.¹⁸⁹ The line was drawn, but the case was far from resolved: the Court had not yet reached its desired end. The median line drawn was only ostensibly, but not conclusively, equitable.¹⁹⁰ It still remained for the Court "to ask whether 'special[/relevant] circumstances' require any adjustment or shifting of that line."¹⁹¹ The answer to this question required the Court to first note that:

[T]here is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.¹⁹²

The Court then cautioned that "although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures."¹⁹³ It was therefore concluded that, in order to properly weight various considerations, the circumstances in a given case, Court precedent, and State practice all would be referenced by the Court.¹⁹⁴

The Court found that the difference in length between the coast of Greenland and the coast of Jan Mayen was a relevant consideration since the coast of the latter was much shorter than that of the former.¹⁹⁵ Because the provisional median line did not ensure that Greenland (Denmark) would have "equitable access" to waters containing a particular species of fish, access to these waters was also considered a relevant consideration.¹⁹⁶ The presence of these relevant considerations dictated that the median line "would be inequitable in its effects."¹⁹⁷ The Court therefore concluded that the median line "should be adjusted or shifted to become a line such as to attribute a larger area of maritime space to Denmark than would the median line."¹⁹⁸

189. *Id.* at 61.

190. *Id.* at 62.

191. *Id.* at 61.

192. *Id.* at 63 (quoting 1969 I.C.J. at 50).

193. *Id.* (quoting 1985 I.C.J. at 40).

194. *Id.* at 63-64.

195. *Id.* at 68.

196. *Id.* at 70, 72. Considerations deemed not relevant by the Court were "the presence of ice in the waters of the region[.]" "the limited nature of the population of Jan Mayen or socio-economic factors[.]" "questions of security[.]" and "the conduct of the Parties . . . where such conduct has indicated some particular method as being likely to produce an equitable result." *Id.* at 72-75, 77.

197. *Id.* at 77.

198. *Id.*

V. ANALYSIS

Is something rotten in *Denmark*? The answer to this question requires an examination of some specific objections to the ends-based equity applied by the Court. A primary objection is that the use of this kind of equity leads to a lack of predictability in the Court's decisionmaking.

In *Denmark* the Court believed that it achieved an equitable result.¹⁹⁹ But there is no guarantee that under facts similar to those in *Denmark* a similar result will be achieved. The only thing certain is that, whatever result is reached, it will be "equitable."²⁰⁰ The considerations which may be relevant in achieving such a result are not fixed,²⁰¹ and it is up to the Court, in each individual case, to decide what these considerations should be.²⁰² It would therefore seem that "there is no equitable principle but that of the equitable result, a result to be achieved by the balancing of considerations the Court deems relevant to the situation of [the parties]."²⁰³ The equitable result arrived at may be "fair" to the parties; indeed, the ends-based equity applied by the Court may simply be a synonym for "fairness."²⁰⁴ But such a view of equity "assures shifting foundations, rather than emanations, of the Court's jurisprudence."²⁰⁵

In the American courts, litigants, looking to precedent to assess the strength of a claim which requires the application of equity, enjoy at least some modicum of predictability.²⁰⁶ By contrast, nation-states which contemplate the presentation of a claim before the International Court of Justice are faced with the insecurity of an unpredictable result. National litigants have no way of knowing what considerations the Court will deem relevant to the achievement of an equitable solution, and even if these considerations could be known in advance, it would be impossible to anticipate how, and to what extent, each of these considerations would figure into the Court's ultimate determination of what result is "equitable." The Court's assurance, in the midst of such uncertainty, that an equitable result is

199. *Id.*

200. *See* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 48 (Feb. 20).

201. *See* 1993 I.C.J. at 63 (quoting 1969 I.C.J. at 50).

202. *See* 1993 I.C.J. at 63-64.

203. DeVine, *supra* note 3, at 179-80.

204. *Id.* at 178.

205. *Id.*

206. Although equity may speak of "conscience" and "morality," a litigant in the American courts may always assume that the precedents from which guidance is sought are always established, not according to a judge's subjective notions of what is right, but "within the concept of judicial conscience." *In re Quinlan*, 348 A.2d 801, 817 n.7 (N.J. Super. Ct. Ch. Div. 1975).

the inevitable outcome of litigation will be no solace to national litigants, all of whom naturally have their own ideas of what result is equitable.²⁰⁷

Even if the Court's ends-based equity could produce predictable decisionmaking, there would exist a further objection: it is not clear that the use of ends-based equity is a suitable method of attaining "peace" between nation-states. A primary objective of the United Nations is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace.²⁰⁸

The International Court of Justice is the principal judicial organ of the United Nations.²⁰⁹ The essential purpose of the Court's international adjudication—indeed, a primary reason for the Court's existence—is to prevent war between nation-states.²¹⁰ The methods the Court employs in adjudication must therefore have the effect of producing peace.²¹¹ But although "justice

207. Bad legal reasoning also makes for unpredictability in the Court's decisions. "Though the Court always considers its opinions and decisions as based on law, none of [my] discussion supports the proposition that the Court always provides a well-reasoned decision." ROSSI, *supra* note 6, at 142. Discussing the portion of the Court's opinion in *Tunisia v. Libya* quoted *supra* at note 168, one commentator admits that "[t]he legal reasoning of the ICJ is not very convincing." GERARD J. TANJA, *THE LEGAL DETERMINATION OF INTERNATIONAL MARITIME BOUNDARIES* 193 (1990).

208. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bos. v. Yugo.*), 1993 I.C.J. 325, 391 (Sept. 13) (separate opinion of Judge Ajibola) (quoting U.N. CHARTER art. 1, para. 1).

There is indeed one outstanding idea to be found in the text of several Articles of the Charter in regard to the paramount importance of law and of the legal administration of justice between nations for the purposes of preserving the world from war and achieving the supreme goal of international peace.

Concerning the Northern Cameroons (*Cameroon v. U.K.*), 1963 I.C.J. 15, 178 (Dec. 2) (dissenting opinion of Judge Bustamante).

209. See *supra* text accompanying note 66.

210. Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (*Den. v. Nor.*), 1993 I.C.J. 38, 241 (separate opinion of Judge Weeramantry). "The International Court has been set up . . . as one of the principal organs of the United Nations and is thus obliged to act in the adjustment and settlement of international disputes 'in conformity with the principles of justice and international law.'" *Id.*

211. *Id.*

Equity as an inherent part of justice, if not of international law itself, thus enters into the Court's jurisprudence. Its significance in this regard can be measured from the fact that the maintenance of international peace and security being among the foremost of the objects of the United Nations and all its agencies, a

and equity are inherent attributes of peace itself,"²¹² the equity the Court uses, and the justice the Court achieves, may only lead to further conflict between nation-states if the litigants view the Court to be a provider of "fair" rather than "legal" remedies.

Cases brought before the court, particularly those concerning maritime delimitation, often involve issues which require the allocation of scarce resources.²¹³ Although the litigants expect the adjudication of this delicate matter to conclude with an equitable result, the presence of the litigants at the international bar indicates that the opposing parties have differing ideas regarding what result is equitable. At least one, and perhaps all, of the litigants will not be pleased with the Court's decision. If the Court's primary role is thought to be that of providing legal remedies by establishing the law between parties to international disputes, then perhaps even an otherwise belligerent litigant against which an adverse ruling has been entered will respect the Court's judgment. But if the role of the Court is believed to be nothing more than that of dispensing fairness, then a litigant, which perceives a judgment against it to be unfair, may be less inclined to respect the judgment of a Court which has apparently failed to fulfill its role. A subsequent resort to arms may be the choice of litigants which, after judgment, are still in search of an equitable result.²¹⁴

It may further be objected that ends-based equity produces an anarchic²¹⁵ form of adjudication. This objection may be illustrated by contrasting how the nature of power, and how the purpose for which such power is exercised, is perceived in the American courts and in the World Court. The American courts are means-based, characterized by limited power. The World Court is ends-based, characterized by expansive power.

Bound by constitutional and self-imposed restraints, the American courts engage in decisionmaking which is limited and means-based. American courts exercise limited power; they do so for the purpose of

primary means of achieving this object, namely, the principles of justice and international law must themselves have primary importance. Indeed, justice and equity are inherent attributes of peace itself, which is foremost among the objects international law aims at achieving.

Id. (footnote omitted).

212. *Id.*

213. *See, e.g.*, 1993 I.C.J. at 70-72.

214. It seems unlikely that the litigants in *Denmark v. Norway* would resort to arms upon the failure of the World Court to provide satisfactory conflict resolution. But in future international adjudication, the litigants might not be so docile.

215. "Anarchic" is here used to describe that quality of government in which power is not constrained by any constitutional check. That quality of government is well exemplified by Hobbes: "during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man." THOMAS HOBBS, *LEVIATHAN* 88 (Richard Tuck ed., Cambridge University Press 1992).

establishing the law between parties to a particular dispute. In the United States, federal judicial power is constrained by the Constitution: "The judicial Power . . . [is] vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."²¹⁶ State courts are similarly constrained by state constitutions. The limiting influence of the Constitution is apparent in that, although the federal judiciary wields governmental power like its sister branches, the power it wields is limited to the extent that it may only exercise "judicial Power."²¹⁷ In the absence of constitutional limits,²¹⁸ judiciaries of some form might continue to exist, but they would, in the absence of constitutional check, be free to exercise other kinds of power—such as legislative—which today is not delegated to them. In addition to constitutional limitations, the courts also adhere to the self-imposed constraint of *stare decisis*. Because the American judiciary must reach its end through the means provided by the Constitution and adherence to precedent, it seems that the power with which the American judiciary has been endowed should be viewed as limited and means-based.²¹⁹ So limited, the nature of American judicial power is well captured in the phrase, "this is a government of laws, and not of men."²²⁰

If in the American courts judicial power is perceived to be naturally

216. U.S. CONST. art. III, § 1.

217. [T]he only power the Constitution permits to be vested in federal courts is "[t]he judicial power of the United States." Art. III, § 1. That is accordingly the only kind of power that federal judges may exercise by virtue of their Article III commissions. . . . The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. See Art. III, § 2.

Young v. United States *ex rel.* Vuitton Et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring).

218. [That which prevents the abuse of power] is what is meant by CONSTITUTION, in its most comprehensive sense, when applied to GOVERNMENT. . . . [C]onstitution stands to government, as government stands to society; and, as the end for which society is ordained, would be defeated without government, so that for which government is ordained would, in a great measure, be defeated without constitution. But they differ in this striking particular. There is no difficulty in forming government. It is not even a matter of choice, whether there shall be one or not. Like breathing, it is not permitted to depend on our volition. Necessity will force it on all communities in some one form or another. Very different is the case as to constitution. Instead of a matter of necessity, it is one of the most difficult tasks imposed on man to form a constitution worthy of the name Constitution is the contrivance of man, while government is of Divine ordination.

John C. Calhoun, *A Disquisition on Government*, in UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 9-10 (Ross M. Lence ed., 1992).

219. See generally U.S. CONST. art. III. The Constitutional limits on the judicial power of the United States are set forth here.

220. See, e.g., *State v. Reed*, 421 So.2d 754, 755 (Fla. Dist. Ct. App. 1982).

constrained, in the World Court such power is perceived to be naturally expansive. This is not to say that the power exercised by the Court is unlimited: as the American courts, the World Court must operate within certain parameters.²²¹ But the Court's judicial power, particularly in the area of equity, is viewed within a context of expansion—of rising to the occasion to achieve a particular end. Results-oriented and not bound by *stare decisis*,²²² the Court's decisionmaking is typified by the use of judicial power in equity to achieve the goal of peace generally, and to achieve an equitable result specifically. Although the methods used to achieve an end result limit the Court's authority,²²³ the subordination of methods to ends causes the Court's exercise of judicial power to be better characterized by expansion of power than limitation of it.

Not bound by the limitations which adherence to equitable methods provides, the Court's adjudication is anarchic. Guided by passion,²²⁴ prejudice, or some other consideration, the Court uses its power to move toward a result which will meet the requirements of an "eternal, but paradoxically situational, and at any rate undefined, 'justice.'"²²⁵ The Court exercises judicial authority to pursue the equitable, just result as an end,²²⁶ but not in accordance with a precise, constraining legal method. As the Court's Judge

221. See, e.g., *supra* note 85.

222. See sources cited *supra* notes 112, 113.

223. In the American courts, such limitations arise from the methods imposed by the Constitution and *stare decisis*.

224. "The common meaning of 'passion' is unqualified desire—usually love or anger—but these are notoriously inconstant and chaotic in their objects." JACQUES BARZUN, *TEACHER IN AMERICA* 440 (Liberty Press 1981) (1954). As the current president of the International Court of Justice candidly observes, "justitia is too enticing a goddess not to arouse some naturally partisan passions." ROSENNE, *supra* note 66, at xii (quoting H. E. Mr. Mohammed Bedjaoui). But "passions" often operate against "reason." Early in the twentieth century one commentator remarked that "[t]he tendency for some time past has been to treat international law, not theoretically as an embodiment of reason, but positively as an embodiment of will." IRVING BABBITT, *DEMOCRACY AND LEADERSHIP* 292-93 (Liberty Fund, Inc. 1979) (1924). At least with respect to the body of legal doctrine which has developed in connection with the Court's exercise of "will" in equitable adjudication, the commentator's observation remains accurate.

225. DeVine, *supra* note 3, at 179. At this point in adjudication, "the slate is indeed clean, if clouded [T]here is no law." *Id.* This is because the Court seems to view its power in equity as necessary to the attainment of its goals. As one of the Court's jurists has observed, "[t]o say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 339 (June 21) (dissenting opinion of Judge Gros).

226. See *Concerning the Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 59 (Feb. 24).

Jennings has warned, "[t]he doctrine of the 'equitable result' . . . leads straight into pure judicial discretion and a decision based upon nothing more than the court's subjective appreciation of what appears to be a 'fair' compromise of the claims of either side."²²⁷

Unlike adjudication in the American courts, of which it might be said that "justice" is the result of the proper application of legal rules in accordance with established legal methods,²²⁸ in the World Court, "justice" reflects what a majority of judges believes to be fair and equitable. There is danger in such anarchic adjudication, particularly for wealthier countries which stand to lose much at the international bar should a redistribution of the world's resources become a goal of the Court's equity jurisprudence.²²⁹ Affluent

227. Nelson, *supra* note 110, at 853 (quoting Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27, 30 (1986)).

228. *Cf.* DeVine, *supra* note 3, at 219-20. Here DeVine discusses the concept of "principled interpretation" of legal rules. Judicial exercise of this concept "keeps the rule's situational manifestations in a more coherent succession than result-oriented equitable interpretation need produce, allowing one to label the sum of those manifestations 'law,' rather than 'justice,' 'fairness,' or 'equity.'" *Id.* at 219. He notes that principled interpretation "assumes that a legal rule contains, perhaps in latent form, the capacity to produce a just—a fair—result in a factual context to which the rule, by its terms, applies." *Id.* at 220. Perhaps the concept of principled interpretation resembles what American judges do when they refuse to apply a particular rule of equity on the ground that the rule cannot be applied to a particular situation. If so, the notion that a properly applied legal rule can produce justice may be common to both principled interpretation and decisionmaking in American equity.

229. The call for redistribution of wealth, and equity as a means of achieving it, appears to be growing louder. It has been said that "[t]he growing inequality in the distribution of desired goods indicates that the formal equality of states before the law must be tempered by some recourse to notions of fairness." Franck & Sughrue, *supra* note 111, at 594.

States associated with the New International Economic Order employ equity as a primary tactic to secure a division and use of resources according to the principle of *res communis*, when they are not able to secure an individual appropriation. . . . A rich and sophisticated jurisprudential history attaches to the construction given equity by the developing world, one completely consonant with the Western legal tradition. Many states and publicists from the developed world worry that the Court might give concrete legal expression to the developing world's construction [of equity]

ROSSI, *supra* note 6, at 199-200. The New International Economic Order has often been characterized by "socialist" ideas. See generally David George Anderson, *The New International Economic Order*, 87 AM. SOC'Y INT'L L. PROC. 459 (1993). "Collectivist" ideas have also been associated with the New International Economic Order. John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 86 (1992). The terms "socialist" and "collectivist" are often used interchangeably, and it seems doubtful that the terms have significantly different meanings. "The collectivist . . . proposes to put land and capital into the hands of the political officers of the community, and this on the understanding that they shall hold such land and capital in trust for the advantage of the community." HILAIRE BELLOC, *THE SERVILE STATE* 129 (Liberty Fund 1977) (1913). The "socialist" also espouses state-ownership of capital. V.I. LENIN, *STATE AND REVOLUTION* 17 (International Publishers Co., Inc. 1943). The socialist/collectivist approach is to be distinguished from the "distributivist" approach. The distributivist hopes "for a society in

which the determinant mass of families [are] owners of capital and of land; for one in which production [is] regulated by self-governing corporations of small owners; and for one in which the misery and insecurity of a proletariat [is] unknown." BELLOC, *supra* note 229, at 81-82. The distributivist sees in the European Middle Ages an ideal state of economic affairs:

The State . . . was an agglomeration of families of varying wealth, but by far the greater number owners of the means of production. It was an agglomeration in which the stability of this *distributive system* . . . was guaranteed by the existence of cooperative bodies, binding men of the same craft or of the same village together; guaranteeing the small proprietor against loss of his economic independence, while at the same time it guaranteed society against the growth of a proletariat. If liberty of purchase and sale, of mortgage and of inheritance was restricted, it was restricted with the social object of preventing the growth of an economic oligarchy which could exploit the rest of the community. The restraints upon liberty were restraints designed for the preservation of liberty; and every action of medieval society, from the flower of the Middle Ages to the approach of their catastrophe, was directed towards the establishment of a state in which men should be economically free through the possession of capital and of land.

. . . There was common land, but it was common land jealously guarded by men who were also personal proprietors of other land. Common property in the village was but one of the forms of property, and was used rather as the flywheel to preserve the regularity of the cooperative machine than as a type of holding in any way peculiarly sacred. The guilds had property in common, but that property was the property necessary to their cooperative life: their halls, their funds for relief, their religious endowments. As for the instruments of their trades, those instruments were owned by the individual owners, *not* by the guild, save where they were of so expensive a kind as to necessitate a corporate control.

Such was the transformation which had come over European society in the course of ten Christian centuries. Slavery had gone, and in its place had come that establishment of free possession which seemed so normal to men, and so consonant to a happy human life. No particular name was then found for it. Today, and now that it has disappeared, we must construct an awkward one, and say that the Middle Ages had instinctively conceived and brought into existence the distributive state.

That excellent consummation of human society passed, as we know . . .

. . . .

Those who favor [the distributive state] are the conservatives or traditionalists. They are men who respect and would, if possible, preserve the old forms of Christian European life. They know that property was thus distributed throughout the state during the happiest periods of our past history; they also know that where it is properly distributed today, you have greater social sanity and ease than elsewhere.

Id. at 80-81, 128. Hilaire Belloc believed that the distributive state failed because "Protestantism had produced free competition permitting usury and destroying the old safeguards of the small man's property—the guild and the village association." HILAIRE BELLOC, *THE GREAT HERESIES* 238 (Books for Libraries Press, Inc. 1968) (1938). In his view, the distributive state was replaced by the capitalist state. According to Belloc:

A society in which private property in land and capital, that is, the ownership and therefore the control of the means of production, is confined to some

number of free citizens not large enough to determine the social mass of the state, while the rest have not such property and are therefore proletarian, we call capitalist

HILAIRE BELLOC, *THE SERVILE STATE* 49 (Liberty Fund 1977) (1913). Belloc argued that a distributive economic system is more productive of human happiness than is a capitalist one. He indicated that, because the distributive system is rooted in doctrines of Catholic Christianity and because the capitalist system has a basis in Protestant Christianity, the systems are ideologically inconsistent with each other. Belloc explored the relationship between the Catholic doctrines he advocated and the industrial capitalist state in which he perceived himself to be living:

[N]o one will doubt that Catholicism is in spirit opposed to Industrial Capitalism; the Faith would never have produced Huddersfield or Pittsburg. It is demonstrable that historically Industrial Capitalism arose out of the denial of Catholic morals at the Reformation. It has been very well said by one of the principal enemies of the Church, and said boastfully, that Industrial Capitalism is the "robust child" of the Reformation

. . . Not only is Industrial Capitalism as a point of historical fact the product of that spirit which destroyed the Faith in men's hearts and eradicated it from society—where they could—by the most abominable persecutions; but, also in point of historical fact, Industrial Capitalism has arisen late in societies of Catholic culture, has not flourished therein, and, what is more, in proportion as the nation is affected by Catholicism, in that proportion did it come tardily to accept the inroads of Industrial Capitalism and in that proportion does it still ill agree with Industrial Capitalism. That is why the more Catholic districts of Europe have in the past been called "backward"

If we go behind the external phenomena and look at the workings of the mind we find the disagreement between Catholicism and Industrial Capitalism vivid and permanent. . . . [Industrial Capitalism is irreconcilable with] the whole scheme of Catholic morals in the matter of justice, and particularly of justice in negotiation. [It is also irreconcilable with] the great doctrine of Free Will. For out of the doctrine of Free Will grows the practice of diversity, which is the deadly enemy of mechanical standardisation, wherein Industrial Capitalism finds its best opportunity; and out of the doctrine of Free Will grows the revolt of the human spirit against restraint of will by that which has no moral authority to restrain it; and what moral authority has mere money? Why should I reverence or obey the man who happens to be richer than I am?

And, with that word "authority," one may bring in that other point, the Catholic doctrine of authority. For under Industrial Capitalism the command of men does not depend upon some overt political arrangement, as it did in the feudal times of Catholicism or in the older Imperial times of Catholicism, as it does now in the peasant conditions of Catholicism, but simply upon the ridiculous, bastard, and illegitimate power of mere wealth. For under Industrial Capitalism the power which controls men is the power of arbitrarily depriving them of their livelihood because you have control, through your wealth, of the means of livelihood and they have it not. Under Industrial Capitalism the proletarian tenant can be deprived of the roof over his head at the caprice or for the purely avaricious motives of a so-called master who is not morally a master at all; who is neither a prince, nor a lord, nor a father, nor anything but a credit in the books of his fellow capitalists In no permanent organised Catholic state of society have you ever had citizens thus at the mercy of mere possessors.

Hilaire Belloc, *The Faith and Industrial Capitalism*, in *ESSAYS OF A CATHOLIC* 288, 290-92

(Books for Libraries Press, Inc. 1967) (1931). Belloc desired that the capitalist state be reformed, and he believed that reformation should be achieved by changing the prevailing religious beliefs in the state. Seeming to adhere to the maxim that "how we live is so far removed from how we ought to live, that he who abandons what is done for what ought to be done, will rather learn to bring about his own ruin than his preservation[.]" NICCOLÒ MACHIAVELLI, *THE PRINCE* 84 (Luigi Ricci trans., NAL Penguin Inc., 1980), he also proposed that reformation should be gradual:

[R]eformation of our industrial society . . . must lie in our recognition of the true order of cause and effect. If we are to attack Industrial Capitalism we must do so because we are keeping in mind very clearly and continually the truth that religion is the formative element in any human society. Just as Industrial Capitalism came out of the Protestant ethic, so the remedy for it must come out of the Catholic ethic. *In other words, we must make the world Catholic before we can correct it from the evils into which the denial of Catholicism has thrown it.*

Consider what happened to the institution of slavery. The Church, when it began on earth its militant career, found slavery in possession. The antique world was a servile state; the civilized man of the Graeco-Roman civilization based his society upon slavery; so did (this must always be insisted upon because our text-books always forget it) the barbarian world outside.

There were plenty of revolts against that state of affairs; there was to our knowledge one huge servile war, and there was protest of every kind by the philosophers and by individuals. But they had no success. Success in this field, though it came very slowly, was due to the conversion of the Roman Empire to Catholicism.

The Church did not denounce slavery, it accepted that institution. Slaves were told to obey their masters. It was one of their social duties, as it was the duty of the master to observe Christian charity towards his slave. It was part of good works (but of a rather heroic kind) to give freedom in bulk to one's slaves. But it was not an obligation. Slavery only disappeared after a process of centuries, and it only disappeared through the gradual working of the Catholic doctrine upon the European mind and through the incompatibility of that doctrine with such treatment of one's fellow men as was necessary if the discipline of servitude were to remain efficient. The slave of Pagan times was slowly transformed into the free peasant, but he was not declared free by any definite doctrine of the Church, nor at any one stage in the process would it have entered into the Catholic mind of the day to have said that slavery was in itself immoral. The freedom of the peasant developed as the beauty of external art developed in its Christian form, through the indirect working of the Catholic ethic.

In the absence, the gradual decline (where it is declining) of the Catholic ethic, slavery is coming back. Anyone with eyes to see can watch it coming back slowly but certainly—like a tide. Slowly but certainly the proletarian, by every political reform which secures his well-being under new rules of insurance, of State control in education, of State medicine and the rest, is developing into the slave, leaving the rich man apart and free. All industrial civilization is clearly moving towards the re-establishment of the Servile State

To produce the opposite of the Servile State out of the modern inhuman economic arrangement, the Church, acting as a solvent, is the necessary and the

national actors which find themselves in an international dispute over scarce resources do well to flee from the Court's equity, for:

The science of law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what was just, our property . . . would be at the mercy of a fluctuating judgment, or of caprice.²³⁰

But affluent or not, all nation-states considering international litigation should proceed with caution. Although the Court intends to achieve an end in accordance with eternal justice,²³¹ "the pursuit of immutable principles sometimes results in decisions removed from reality."²³²

The most significant objection to ends-based equity, and perhaps the one which stands on the highest ground, is that it leads to an immoral form of decisionmaking. Ends-based philosophies are immoral; they abase the holder of the philosophy, and they injure others. Yet such philosophies have been attractive in the past and in modern times. "By plausible and dangerous paths men are drawn to the doctrine of the justice of History, of judgment by results . . ." ²³³ It seems that the Court's pursuit of peace and justice is noble, but the

only force available. The conversion of society cannot be a rapid process, and therefore not a revolutionary one. It is therefore also, for the moment, an unsatisfactory process. But it is the right process. There is a very neat phrase which expresses the whole affair, "in better words than any poor words of mine," as the parson said in the story. These words are to be found in the vernacular translation of the New Testament. They are familiar to many of us. "Seek ye first the kingdom of God and its justice and all the rest shall be added unto you."

Begin by swinging society round into the Catholic course, and you will transmute Industrial Capitalism into something other, wherein free men can live, and a reasonable measure of joy will return to the unhappy race of men.

But you must begin at the beginning.

Hilaire Belloc, *The Faith and Industrial Capitalism*, in *ESSAYS OF A CATHOLIC* 294-97 (Books for Libraries Press, Inc. 1967) (1931).

230. Thomas K. Landry, *Certainty and Discretion in Patent Law: The On Sale Bar, the Doctrine of Equivalents, and Judicial Power in the Federal Circuit*, 67 S. CAL. L. REV. 1151, 1205 (1994) (quoting DAVID D. FIELD, *MAGNITUDE AND IMPORTANCE OF LEGAL SCIENCE* (1859), reprinted in 1 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 517, 530 (A. P. Sprague ed., New York, D. Appleton & Co., 1884)).

231. See source cited *supra* note 225.

232. ROSSI, *supra* note 6, at 251-52.

233. John E. E. Dalberg-Acton, *Introduction to Burd's Edition of Il Principe by Machiavelli*, in 2 *SELECTED WRITINGS OF LORD ACTON* 479, 484-85 (J. Rufus Fears ed., 1988). "When Machiavelli declared that extraordinary objects cannot be accomplished under ordinary rules, he recorded the experience of his own epoch, but also foretold the secret of men since born." *Id.* at 479.

use of Machiavellian expediency to achieve such worthy objects tends to condemn to ignominy the Court's efforts.

Machiavelli, with whom the phrase "the end justifies the means" has become so closely associated, might view with dissatisfaction the infamy which history has heaped upon him. It seems difficult to impute to Machiavelli anything but the purest of motives in his advice to the prince. His desire was to see Italy liberated so that he and his countrymen might live in peace.²³⁴ It has been "wonder[ed] how so intelligent and reasonable a man came to propose such flagitious counsels."²³⁵ Although his motivation may never be satisfactorily explained, Machiavelli apparently thought that whatever harm the prince might do was justified by the removal of tyranny from Italy. Though possessed of good intentions, Machiavelli's modern imitators must, if nothing else, be prepared to accept the possibility that, as occurred with their mentor, "The evil that men do lives after them, The good is oft interréd with their bones . . ." ²³⁶

In its pursuit of peace through the adjudication of international disputes, surely the International Court of Justice can find a better philosophy on which to base its theory of equity. This is not to suggest that the methods the Court has thus far used to achieve equitable results have necessarily been "evil." But in this era of increasing international adjudication in which the Court's role is so prominent; in this age in which international disputes increasingly center around the allocation of natural resources which are becoming more and more scarce, whether the Court's judgments in exceedingly difficult cases become morally unacceptable must be determined by the methods the Court uses to justify the ends it reaches. If the Court can demonstrate that, not only does it utilize rules of equity, but that those rules have a constraining effect on the Court's power, then perhaps its decisions will be clothed with the dignity worthy of those rendered by judges who exercise limited power within the confines of a judicial tribunal. But if Court judgments manifest expan-

234. MACHIAVELLI, *supra* note 229, at 127.

This opportunity must not, therefore, be allowed to pass, so that Italy may at length find her liberator. I cannot express the love with which he would be received in all those provinces which have suffered under these foreign invasions, with what thirst for vengeance, with what steadfast faith, with what love, with what grateful tears. What doors would be closed against him? What people would refuse him obedience? What envy could oppose him? What Italian would withhold allegiance? This barbarous domination stinks in the nostrils of everyone. May your illustrious house therefore assume this task with that courage and those hopes which are inspired by a just cause, so that under its banner our fatherland may be raised up . . .

Id.

235. Dalberg-Acton, *supra* note 232, at 479.

236. WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2. Machiavelli has not been accused of performing any of the maciatal deeds he recommended; his obloquy continues simply for suggesting such deeds.

siveness; if they continue to reveal that "there is no equitable principle but that of the equitable result,"²³⁷ then the activity of the Court will fail to pass moral muster.

The example of Machiavelli speaks a clear warning to the Court, but the Court does well to consider words of caution from within its own ranks. In the case of *India v. Pakistan*, the Court heard an appeal from decisions rendered by the Council of the International Civil Aviation Organization.²³⁸ The Council had claimed jurisdiction over a dispute between the two parties, but India argued that the Council's decision was erroneous; that "it was vitiated by various procedural irregularities, and should accordingly . . . be declared null and void."²³⁹ The Court dismissed this argument, reasoning that, "[s]ince the Court holds that the Council did and does have jurisdiction, then, if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless, it would have reached the right conclusion."²⁴⁰

One dissenter was not well-impressed with the Court's legal reasoning. In the view of Judge Morozov:

This statement, to the effect that 'the position would be that the Council would have reached the right conclusion in the wrong way' but that 'nevertheless it would have reached the right conclusion,' to my mind goes too near saying that 'the end justifies the means' to be a proper legal argument for a court to use. The case is that the right judicial decision *can never be reached* by the wrong way. It is not possible to make such a distinction between the conclusion reached, and the way in which it is reached and the form in which it is embodied²⁴¹

237. DeVine, *supra* note 3, at 179.

238. Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), 1972 I.C.J. 46 (Aug. 18).

239. *Id.* at 69. "The argument was that, but for these alleged irregularities, the result before the Council would or might have been different." *Id.*

240. *Id.* at 70.

241. *Id.* at 159 (dissenting opinion of Judge Morozov) (emphasis added). Other Court jurists have disapproved of ends-based adjudication. See, e.g., *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 268 (July 20) (dissenting opinion of Judge Koretsky) ("The ends justify the means" is a "long ago condemned formula."); *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1962 I.C.J. 319, 468 (Dec. 21) (joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice) ("In the Anglo-Saxon legal tradition there is a well-known saying that 'hard cases make bad law', which might be paraphrased to the effect that the end however good in itself does not justify the means, where the means, considered as legal means, are of such a character as to be inadmissible."); *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6, 314 (July 18) (dissenting opinion of Judge Tanaka) ("The . . . contention of the Respondent that the policy of apartheid has a neutral character, as a tool to attain a particular end, is not right. If the policy of apartheid is a means, the

When engaged in equitable adjudication, the Court can do no better than to heed the Judge's admonition.

VI. CONCLUSION

Having originated in antiquity, equity remains a vital part of modern law although it manifests itself differently across different legal traditions. Between the American courts and the World Court, equity reveals itself as an often utilized source of law, as requiring the application of rules, as characterized by flexibility, as allowing the judge to use discretion, and as achieving justice. But the equity of the American courts is significantly different than that of the World Court in that, in the former, equity is a means-based system of adjudication, while in the latter, it is an ends-based system. The ends-based equity of the World Court may be objected to on various grounds: that it leads to a lack of predictability in the Court's decisionmaking; that it may not be a suitable method of attaining peace between nation-states; that it produces an anarchic form of adjudication; and that it leads to a morally unacceptable form of decisionmaking.

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axiom that the end cannot justify the means can be applied to this policy.”).

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