# 1NC---Bankruptcy

### 1NC---OFF

#### The United States federal judiciary should find that the balance of equities favors labor organizations in proceedings that invoke section 1113 of the United States bankruptcy code.

#### That ensures solvency.

LII No Date. Cornell Legal Information Institute. “11 U.S. Code § 1113 - Rejection of collective bargaining agreements.” https://www.law.cornell.edu/uscode/text/11/1113

The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1)the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2)the authorized representative of the employees has refused to accept such proposal without good cause; and

(3)the balance of the equities clearly favors rejection of such agreement.

#### Assigning equitable remedies concretizes solvency and resuscitates the canon of equity.

Henry Smith 21. Fessenden Professor of Law and Director of the Project on the Foundations of Private Law, Harvard Law School; Notre Dame Law Review, “Putting the Equity Back into Intellectual Property Remedies,” 96 Notre Dame L. Rev. 1603, lexis

Nowhere is the question of remedies more front and center than in intellectual property. In recent years intellectual property cases have even exerted some influence on the law of remedies more generally. At the same time, equity and the traditions of equity are invoked in the very process of [\*1604] cutting back on injunctions and making them into a rare form of "supracompensatory" remedies. And nowhere is the mysterious role, if any, of equity more needed and less apparent than in intellectual property remedies. We have an equity deficit.

It is not as if uses of the word "equity" are lacking. Certain remedies are labeled "equitable," as are certain defenses. The United States Supreme Court points to the "traditions of equity" as a source of law for intellectual property remedies, among other things. 1And people seem to think that equity means discretion. 2Beyond that there be monsters - to the extent anyone is paying attention.

And yet equity shapes the law of intellectual property remedies in a more thoroughgoing way. I will claim that once we understand some of the true functions of equity, it probably should play a much greater and more explicit role in our law, 3and especially in intellectual property remedies.

One such function is meta-law. A theme of equity with deep roots in the Western tradition is its role in correcting the law when it failed because of its generality. Intellectual property and its associated remedies strive for simplicity and generality but fail in characteristic ways. These involve complexity and uncertainty that stem from interactions among parties, their activities, and the resources they employ to develop information. Of particular relevance is the possibility that informed parties, of which there is no lack in situations involving intellectual property, will bend the system to purposes for which it was not designed. This problem of opportunism is hard to specify in advance because such efforts invite further game playing. Announcing the line past which something will be treated as constructive fraud will allow the well informed to engage in "compliant non-compliance." 4Moreover, opportunism itself is multiparty, and multidimensional solutions to one party's opportunism often invite another's. Removing the leverage one party can obtain through an injunction can lead the other party to abuse a system based on (inevitably) imperfectly determined damages.

These problems are especially difficult to deal with head on, and I will argue that they are especially suited for treatment on another level - that of meta-law. 5Certain problems of great uncertainty and complexity call for an ex post intervention that ranges over the law and employs more context than the law usually does, in a process of adjustment. These problems include multipolar relations, conflicting rights, and opportunism. Each of these [\*1605] involves complex interaction, whether among multiple parties, among multiple presumptive rights, or among an unspecified set of other elements of the legal system. Even opportunism results from hard-to-foresee exploitation of the weaknesses thrown up by the law.

Existing approaches to intellectual property remedies suffer from underexploiting the potential of equitable meta-law. Frameworks for thinking about remedies, especially property rules versus liability rules, 6treat remedies along a spectrum of strength rather than as multidimensional and finely adjusted, as in traditional equity. The caselaw has partially followed this flattening of remedies. From the standard for injunctions to the underutilization of doctrines like estoppel, the law tries to do at one messy level what could be handled more effectively using equity as a second-order modulation of the law. This Essay will excavate the remnants of equitable meta-law in the area of intellectual property remedies. It will show how current approaches are lacking and how a reconstruction of equitable meta-law could solve some of these perennial problems without introducing new ones. Part I will show how the law of intellectual property remedies has been flattened in many respects. In Part II, I show how popular frameworks for thinking about remedies if anything go even further in this direction, leaving many loose threads. Part III then shows how bringing out the theme of meta-law among the equitable aspects of intellectual property law could help the law of intellectual property remedies more effectively address some common complaints about its current state. The Essay concludes with some thoughts about how to overcome the current impasse in intellectual property remedies. I. Intellectual Property Remedies Flattened Commentators and many courts have flattened the law of remedies. Indeed, they have flattened the law in general and in remedies in particular. The consequences for intellectual property are especially serious. What is flattened law? Implicit in much commentary about the law is the "heap" conception. Law is a heap of rules, each of which can be evaluated in isolation, because each contributes additively to the fitness of law (its efficiency, fairness, promotion of autonomy). This assumption traces back to legal realism and beyond and can be seen in proto form in Holmes's aphoristic admonition that "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." 7The legal realists assumed something along these lines in holding up legal doctrine to the light of policy and especially in assuming that property is not just a bundle of rights but metaphorically a [\*1606] "bundle of sticks." 8Sticks hardly interact with each other, and a bundle of noninteracting sticks can be optimized stick by stick. If we optimize one stick, we are improving the bundle and getting toward overall optimization. Making a stick better is overall improving because there is no room for a negative effect produced in tandem with other sticks. As an outgrowth of legal realism, much of law and economics adopts this atomizing reductive view of law as a heap when it analyzes "legal rules" for their efficiency. In keeping with the realist legacy, alternatives to the heap picture face some suspicion. The realists were expert at tarring alternatives as formalist and deductive, and claiming that such approaches could not handle the complexity of modern law and society (and that only realism could). 9While it is true that some approaches to "system" in the writings of the nineteenth century were rather formalist, a closer look reveals a variety of notions of system. 10In particular, it is decidedly not the case that all such notions were of logical or deductive systems. Thus, pace Holmes's aphorism "the life of the law has not been logic: it has been experience," 11we are not necessarily in the realm of logic but of experience when we regard law as a system. What kind of system is the law? That I leave for another day, but a glance at the modern notion of system from complex systems theory is illuminating. 12In complex systems theory, a system is a collection of interconnected elements, and a complex system is one in which the elements are so interconnected that they give rise to emergent properties. 13These properties hold of the system as a whole and cannot be traced to the individual contributions of elements taken individually. The connections between elements need not be deductive or logical. Thus, for instance, in the bundle of rights, the reason to cluster attributes together is that they are complementary; [\*1607] they are more valuable taken together. One reason would be that using one attribute affects the use value of another attribute. Given the patterns of use, we might find that attributes cluster into modules (there is a community structure that can be found using familiar algorithms) and these might correspond to legal things. 14(We might want to adjust the interface between such things and other things by suppressing unimportant connections and crystallizing others.) Likewise, notions of possession, definitions of legal thing, and tort causes of action can interact to produce an effect not reducible to single "rules." 15Thus, with aerial trespass, instead of looking for rules for aircraft, rules for drones, rules for overhanging eaves, etc., we see an interplay between a partially specified notion of legal thinghood (surface boundaries extended upward and downward indefinitely, but not infinitely, under ad coelum) along with definitions of possession (for buildings and activities) and rights to possess (for building upward and a lesser form of protection), safeguarded by trespass and supplemented by nuisance. 16The owner's protection is emergent out of this complex interplay of devices. Complexity comes in degrees. Despite the popular emphasis on chaos and the too-easy assumptions of simplicity, many systems fall somewhere in between the extremes of chaos and simplicity. If every attribute of every resource were maximally connected to every other, any change in one could set off massive ripple effects in terms of the value of the whole (unified) resource, which can result in genuine chaos. At the other pole (of simplicity) where attributes are not connected at all, the fitness landscape is correspondingly simple, with one maximum. However, interconnection may be less than maximal, and the interconnections may not be evenly distributed, a phenomenon known as "organized complexity." 17And correspondingly, a fitness landscape for organized complexity is jagged but shows local peaks and valleys. 18In organized complexity, spontaneous evolution may be enough for local maximization. Reaching some maxima may require larger [\*1608] changes. 19In any case, when it comes to entitlements, they are neither atomistic nor additive. Instead, attributes are likely to cluster into components or modules in which interaction is more intensive within the module than at the interface between the modules. To leave this out of the picture is to flatten the law in this respect. This flattening is quite apparent in the law of remedies. Damages involve assigning a monetary value to liability. Damages may reflect some combination of compensation, deterrence, and other, e.g., expressive, purposes. 20To the extent that damages are awarded by juries without special verdicts, they are the output of a black box. The determination of damages may be complex, but the complexity is not directly visible to the legal system. Equitable remedies are a more mixed picture. The most salient equitable remedy is the injunction, an order issued by a court to perform or refrain from some action(s). Violation of an injunction can lead to being found in contempt and jailed or fined. Injunctions are not as of right but are within the discretion of the court. Traditionally, there was a complex and interactive set of rules of thumb for considering an injunction. 21This set of rules of thumb had certain features in common across areas of law but would take on different shades depending on the question at hand. Thus, the inquiry for an injunction in a trespass case would differ from that in a nuisance case, and both would differ from the considerations involved in intellectual property injunctions. The traditional rules of thumb had to do with inadequacy of the legal remedy. Inadequacy of the legal remedy is a complex congeries of considerations of difficulty of valuation, inconveniences of repeated litigation, potential undermining of the right, and so on. 22The trigger for equity here would be the inadequacy of the legal remedy (which could stem from a variety of factors). Although this has been regarded as a vacuous "rule" because one can find examples of almost any kind of situation leading to an injunction, 23there is more to say in favor of this trigger for equity. 24As I have argued elsewhere, inadequacy of the legal remedy (or alternatively irreparable [\*1609] injury) is best regarded as a trigger for a complex equitable analysis. It shows that we have entered meta-law, where a different, more interactive and open-ended style of analysis is exceptionally called for. 25Also relevant to an injunction would be disproportionate hardship - does the injunction visit far more harm on the enjoined party than the small benefit it affords the movant? A range of third-party effects are also relevant, sometimes traveling under the heading of public policy. And key to the availability of an injunction or a defense would be the good faith and absence of unclean hands on the part of anyone seeking to benefit from any equitable remedy or defense. This approach to injunctions is, I will argue, well suited for intellectual property if its meta-law aspect is well understood. Nevertheless, there are initial challenges in applying injunctions in intellectual property, especially if meta-law is not foregrounded. For one thing, injunctions afford the movant a great deal of leverage, not keyed to how much might be "deserved" in any given case. For this, traditional equity employed the undue hardship defense, but this defense itself has been much misunderstood in recent times, being treated as an exception in favor of liability rules and a balancing in the sense of equipoise (would the injunction do more harm than good). 26 A major challenge to the use of traditional considerations in evaluating injunctions is how to implement the requirement of good faith. What constitutes good faith varies by context and presents some challenges specific to intellectual property. For boundary encroachments in real property, good faith means with knowledge of the rights violation. Disproportionate hardship can be invoked for minor encroachments made in good faith mistake. 27Good faith plays a much lesser role in nuisance because the point is reconciling conflicting rights, but even there maliciousness can be a factor in pointing toward an injunction. 28 In intellectual property, we might expect injunctions for knowing violations, but often the contention is that a violator did not know of a patent or [\*1610] reasonably thought the plaintiff's patent was invalid or did not cover the accused activity. 29To the extent that notice is difficult or ineffective, the standard for good faith in injunctions must be correspondingly more accommodating and the disproportionate hardship defense easier to invoke than in building encroachments. In recent times, the complexity of this picture of injunctions has been partially obscured, and partly in response to problems originating in intellectual property cases. Most notably, as part of its ostensible interest in equity, the U.S. Supreme Court in a patent case restated the test for injunctions. Despite invoking the "traditional principles of equity" and calling the test "well-established," 30the Court's four-part test was cribbed from the standard for preliminary injunctions, doubling up on irreparable harm. (Although the test was largely unheard of by remedies scholars, 31there were a few scattered antecedents in state and lower federal caselaw. 32) To obtain an injunction a movant must show: (1) That it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff [\*1611] and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. 33 The decision was 9-0, accompanied by concurrences pointing in opposite directions in terms of the availability of injunctions. 34As Mark Gergen, John Golden, and I have argued, this test is problematic for quite a number of reasons. 35It is not the traditional test, 36and for a reason. Perhaps in order to avoid presumptions in favor of injunctions, the test borrows from preliminary injunctions, where there is no reason to presume in the movant's favor. However, after a rights violation, the situation is different. Likewise "balance of hardships between the plaintiff and defendant" sounds like equipoise, which is more appropriate for preliminary injunctions. For permanent injunctions, it is not: the idea is to identify situations in which injunctions are usually called for and then use disproportionate or undue hardship - a gross imbalance of the hardship - as a safety-valve-style defense. 37The test also says nothing of the court's ability to delay an injunction and condition it in various ways, as well as to craft it to protect the right by going beyond the terms of the right. Finally and most glaringly, the test says nothing about good faith. This is especially damaging as the test has been used outside of intellectual property. 38In addition to the predicted effect of lowering the likelihood of obtaining an injunction in patent cases, especially by nonpracticing entities, it is not clear that the test captures what really goes on in injunction cases or is sanding away the useful details of that body of law. 39 [\*1612] Those details are associated with discretion, but the move away from traditional equitable standards is fraught with irony. In our system, the replacement for equity has not been more rules but even more discretion, whether as some diffuse generalized equity, vague standards, or multifactor balancing tests that afford decisionmakers great leeway. 40It is true that we could come up with some rules, such as nonpracticing entities never get injunctions. However, their likely overinclusiveness invites discretion on the micro level, so that even patterns of fewer injunctions do not show that judges are not empowered with discretion under tests like that in eBay. 41 The law of intellectual property is not unique in having been flattened. While developments in intellectual property remedies have been driven in part over concerns about hold-up, a lack of appreciation for the meta-law character of much of traditional equity, extending back at least to the realist era if not beyond, has allowed the law of intellectual property remedies to partake of the flattening of private law. II. Flattened Frameworks for Remedies The law of intellectual property remedies is in a state of flux, especially with respect to the issuance of injunctions. When it comes to the commentary and frameworks for thinking about remedies, this flattening of the law is even more pronounced. Flattening of the law is also characteristic of the framework of property rules and liability rules, initiated by Guido Calabresi and Douglas Melamed, especially as interpreted in the vast subsequent literature. 42A property rule is a remedy that is robust with a view to forcing the would-be taker of an entitlement to obtain the consent of its current holder. A liability rule allows a taker to violate or acquire the entitlement on condition of paying officially determined damages. These damages can be set at market compensation or some other amount (for example at 150% in an attempt to reflect subjective value). It has often been remarked that injunctions are not well captured by property rules. 43For all the reasons stated above, the conditionality and discretion [\*1613] involved in injunctions makes them more than a larger hammer compared to compensatory damages (liability rules). Injunctions are not just or mainly a supracompensatory remedy. In the next Part, I will show how injunctions diverge from damages along another dimension not unrelated to conditionality and discretion: equitable meta-law. Interestingly, the literature on liability rules makes some room for other dimensions of law in remedies, but mostly not in the places the law actually does - and not in the most effective ways either. Realizing that market damages or even average-harm damages can be improved upon, the academic literature is replete with complicated liability rules mimicking complex options, dual-chooser mechanisms, and even auctions. 44The idea is that some framework beyond one decisionmaker picking a monetary amount along one dimension can improve the system of damages. There is a theoretical case to be made for some of these schemes, in the sense that hypothetical auctions tend to look good outside of any institutional context. 45In real life, auctions are expensive and often vulnerable to manipulation. Moreover, the complex liability rule literature would be hard to implement, and the gap between it and the law is likely to remain large. The law does not exhibit the preference for liability rules one would expect on these theories, and liability rules are likely to be too complicated and under-protective in a wide variety of situations. 46Complex liability rules would require a lot of knowledge on the part of actors, if not judges and juries. More seriously, complex liability rules would have to be quite complex to avoid problems of manipulation. For example, an average-expected-harm rule would be vulnerable to savvy takers who could target assets that are likely to be undervalued by a court. 47 Perhaps most seriously, the liability rule literature, while promoting complexity in remedies and even entitlements, does not come to grips with [\*1614] the true complexity problems in property. 48If we think about resources as made up of valued attributes, there is a question of which go with which. Theoretically, we could imagine a world where entitlements corresponded to atomic attributes, the smallest aspect of a resource that has value. The problem is that some attributes are highly intertwined spatially and in terms of value with other attributes. Think water and soil or the right to farm and the right to air and light. What we treat as things is in part determined by what constitutes a convenient and somewhat separable unit of such valued attributes. However we define legal things, they can be somewhat malleable: if we tax some attributes we can expect reconfigurations. 49A simple example is a per unit tax on lightbulbs leading to substitution toward longer lasting light bulbs. 50Another example is how parcels tend to be configured into thin strips along rivers in order to maximize (misuse) riparian rights that attach to any riparian parcel regardless of the length of its border with the watercourse. 51Valued attributes do not contribute in additive fashion to clusters of such attributes. 52Instead, through everyday notions of things and through legal definitions of real property parcels and intangible rights, we find legal things corresponding to clusters of attributes that have some internal synergy and far less (even if still significant) connection to the rest of the world. In a flattened world, liability rules look better than they otherwise would. Liability rules are, however, not the default remedy in property, and holdout problems may be outweighed by other concerns like undercompensation. 53The need for injunctions goes beyond the benefits of the robustness of property rules: injunctions allow the system of remedies to respond in a strategic fashion to the strategic behavior of primary actors.

III. Equity as a Solution

In this Part, I propose a way out of these dilemmas of intellectual property remedies. Current frameworks and to some extent the law itself have mostly flattened the law of remedies, although not completely. Fragments of an older approach to equity are still present and can be reformulated into a [\*1615] potentially better solution to the problems of remedies in intellectual property. Those fragments go under the heading of "equity," and the missing aspect of the discussion on remedies is equity in one of its most important functions - as meta-law.

Although equity is often associated with remedies, a narrow focus on the remedial aspect of equity can obscure its role in promoting the correct valuation of assets. As meta-law, equity aims at keeping processes - other processes - from going too far astray. Equity itself works synergistically with these other processes to promote correct valuation as an emergent property. The most familiar equitable remedy, the injunction, is governed by proxies, presumptions, and rules of thumb that help it serve as meta-law - to alter the framework in which other processes, legal and economic, unfold. That synergistic effect is achieved by equity acting in tandem with the law of substantive rights. Equity ranges over the law and will modify the application of rights themselves.

A. Equity as the Meta-Law of Valuation Although equity was originally a product of courts with separate jurisdiction and the scope of that jurisdiction arose in part by happenstance, there are discernable themes to equity - themes that are relevant even today. In other work I have argued that equity acts as law about law, or meta-law. 54This view of equity can be traced back to Aristotle, for whom equity is "a rectification of law where law is defective because of its generality." 55Law seeks to be general and relatively simple, but at the cost of some inaccuracy in terms of efficiency and justice. Equity steps in to modify the result the law provides. Equity refers to the law, acts on the legal result, and sometimes molds the law, but not vice versa: the law can operate (sometimes badly) without equity's intervention. 56 Overlooking the separateness of equity and misunderstanding its specialized function make it look worse than it is. Equity is often criticized for being too vague and ex post (the Chancellor's foot), 57but as meta-law it has built- [\*1616] in constraints. Equity is not always applicable but is triggered only by certain proxies for problems of great complexity and uncertainty. Equity is not general, but comes into play only when certain proxies for complexity and uncertainty are present. These proxies relate to deception, bad faith, and skewed results (disproportionate hardship), and they vary by area of law (building encroachments versus nuisance, for example). What equity does not do is try to define such problems as opportunism ex ante or even ex post in any articulated fashion. Instead it looks for indicia of the problem at the first level (law) and kicks the problem up to equity (meta level), at which the situation is subjected to a more searching analysis in terms of a more open-ended set of contextual factors that are couched in terms of morality and fairness. Equity often sets the presumption against the one appearing to take advantage of another's vulnerability. Criticisms of equity that look to these moral formulations and presumptions and read them as "rules" or "directives" at the primary level of law miss the mark. Consistent with the lessons of complex systems theory, going to a meta-system is costly but especially suited for certain kinds of problems. 58These involve uncertainty and complexity and are inherently difficult to deal with ex ante and on the same level that they occur. Among such problems are multipolar (or polycentric) situations, conflicting rights, and opportunism. Polycentric scenarios involve multiple interacting elements and are almost by definition complex. 59Lon Fuller gives the example of dividing a collection of paintings under a will between two museums, given that the value of a painting to a museum depends on which others it has. 60In situations of conflicting rights, each party has a presumptive right, but the two sets of rights come into conflict and need to be reconciled. On one interpretation, [\*1617] this is what the law of nuisance accomplishes. 61Finally, opportunism is a pervasive problem familiar to traditional equity. Despite the broad definitions of opportunism that attempt to include all residual bad behavior - perhaps most famously the notion of opportunism in the work of Oliver Williamson 62- traditional equity took a more structured and thus constrained approach. Its triggers (variants on good faith, including violation of custom, and disproportionate hardship) were classed under "constructive fraud," which is activity that is not technically fraud or not provably so, but contains a high danger of behavior that amounts to fraud and would be treated as fraud if it were more directly definable. 63It is the compliant noncompliance well known in the regulatory and tax literatures. 64Elsewhere I have formulated opportunism for purposes of equity as "undesirable behavior that cannot be cost-effectively defined, detected, and deterred by explicit ex ante rulemaking. Opportunism is residual behavior that would be contracted away if ex ante transaction costs were lower." 65 By functioning as meta-law, equity and law can together do better than law or equity could on its own. 66Law can be simpler, more formal, and more general than it could if it had to deal directly with all of the misuse and opportunism as well as multipolar and conflicting rights situations. By the same token, equity can be more targeted and contextually sensitive than it could be if it had to apply across the board; if it were more general it could not retain these features. Analyzing the hybrid of law and equity (first-and second-order) at the margins of each "rule" gives a distorted picture. If law and equity work in tandem, the marginal effect is a marginal system effect. And if specialization of function is beneficial, then combining law and equity [\*1618] pushes out the production frontier for legal institutions in a way that is totally uncaptured on a conventionally reductive rule-by-rule analysis. 67 B. Injunctions and Meta-Law The law of intellectual property remedies raises acute problems of complexity and uncertainty of a kind that equity responds to. Equity typically looks at both sides (or all sides) of an interaction, with a view to their interdependence. 68In intellectual property remedies, this is especially necessary. Attempts to limit the leverage of patent holders' holdup can open the door to more holdout on the part of potential violators and those who could benefit from a license. Conversely, preventing violations adds to the patentee's leverage, which can be misused to extort a reward out of proportion to the contribution of the patent. This is especially serious where the violation is not in bad faith, in the sense that it is an understandable mistake - it would not be close to cost-effective to avoid it through more diligent search. 69 The law of injunctions fits into a larger complex system, as part of meta-law. It guides both the law of damages and the transacting process, but only indirectly. By "indirectly" I mean that the results of equitable intervention are emergent, not that equity does not "operate" directly on the rest of the law. Indeed, the contrast between the directness of its operation and the indirectness of the effects it achieves is one of the sources of misunderstanding about equity's role. Again, equity and law specialize, so that damages and injunctions, and rights and remedies, can work in tandem. It is not a tradeoff on a single spectrum but a dynamic process of increasing the production frontier. One such misunderstanding is to regard injunctions as merely a stronger version of damages. An injunction is not an "off switch" for infringement, but as John Golden argues, a "gateway" to contempt, and, as such, injunctions respond to many conflicting possible responses including importantly [\*1619] the possibility of designing around. 70In this, patent injunctions are like other injunctions, for as Doug Rendleman says, an adjudged infringer "may dissemble, may claim that the injunction is vague and impossible or difficult to understand, may seek delay, may search for loopholes, and may change as little as possible to 'obey.'" 71Golden points out that the formulation of an injunction and claim scope have similar effects on incentives. They achieve these effects differently, though. As Golden notes, injunction doctrine sometimes serves as a "safety valve[ ]" like equity. 72More generally, the way that the law of injunctions addresses incentives, as identified by Golden, can be seen as acting through its modulating effect on law as meta-law. 73 Of particular interest is the important role played by "colorable differences" injunctions, in which a court will enjoin not only infringing products but also those that are no more than colorably different. 74The notion of "colorable" has roots in equity as a response to potential opportunism. 75Here the opportunism is of someone expert who can exploit the inadequacies of ex ante delineation. Tracy Thomas notes that prophylactic injunctions are especially warranted when rights are difficult to specify ex ante (leaving the underlying right untouched), 76and under some circumstances one can, as Rafal Zakrzewski argues, see equitable remedies as modifying the rights structure itself. 77 Much of the discussion in patent remedies centers on holdup and to a lesser extent on holdout. 78There is a pervasive sense in which equity addresses the problem of holdup and holdout in intellectual property. The problem with the one-dimensional approach to remedies is that any solution to holdup is likely to make holdout worse and vice versa. A dose of meta-law [\*1620] has the potential to free us from this dilemma. Thus, an injunction can be conditioned on equitable behavior on the part of the patentee. In the traditional framework, disproportionate hardship is a defense. 79 The problems of polycentricity, conflicting rights, and opportunism are endemic in intellectual property, especially when it comes to remedies. The question of how one patent contributes to an overall product, especially in connection with a collection of other patents, is polycentric. Apportioning value for damages purposes has been a notorious problem in this area. 80Conflicting rights arise in situations of blocking, and the law - through equity - modulates the respective rights of earlier and later inventors through the doctrine of equivalents (and occasionally the reverse doctrine of equivalents). Finally, opportunism is the unforeseeable taking advantage of law contrary to its purpose (related to abuse of right in civilian legal systems). 81The problems of misuse of patent leverage on the one hand and bad faith refusals to license on reasonable terms on the other are examples of parties using the full extent of the advantages the law affords them even in situations in which the law is not aiming for such results.

C. Remedies and Meta-Law

The role of equitable meta-law in intellectual property is not solely a matter of remedies. Equitable remedies in intellectual property are integrated with equity as meta-law more widely. 82Especially after the merger of law and equity, the association of equity with remedies has led to an overly narrow view of equity as primarily or solely remedial, a view that misses a great deal. 83This narrow identification of equity with remedies is particularly a problem in intellectual property, where equitable meta-law has been misunderstood as a bad attempt at defining primary property rights. Instead, equitable remedies work with the rest of meta-law to achieve systems results, including better valuation of intellectual assets.

[\*1621] An important and emblematic example of the confusion of equity in intellectual property grows out of the law of misappropriation. The United States Supreme Court's decision in International News Service v. Associated Press 84is applauded or (more often) deplored as creating a fountainhead of intellectual property rights, in hot news or more widely in time-sensitive information. 85As I have argued elsewhere, this interpretation overlooks the Court's repeated insistence that the case was one of equity. 86Equity can have a limited role in protecting commercial custom within a defined group (here competitors), reflected in quasi-property not being in rem. 87

A similar systematic problem of law versus equity arises in trademark and unfair competition. These areas of law have a similar origin to misappropriation in equitable enforcement of commercial morality. Here the process of propertization went further, to much controversy. 88Nevertheless, because the activity here involves deception and even opportunism, it is inherently difficult to capture bad behavior using first-order law only. Not surprisingly, this has led to a proliferation of standards and to reliance on unfair competition as a backup source of liability. 89Understandably, and especially so after the merger of law and equity, thoughtful commentators have asked why we don't have one single overarching body of law to deal with trademarks and calibrate it ex ante (specifying pockets of nonliability if those seem to make sense). Or if equity is in the picture, it is sometimes suggested to bring back equity in the sense of discretion. I propose that unfair competition has a role to play in trademarks if and only if it can serve as a (limited) meta-law backup to trademark law itself (which, being more specialized and working in tandem with equity, could perhaps then be simpler and narrower). The need for meta-law is even greater if trademark is a more use-based and contextualized property right than is commonly thought. 90

#### Reviving an independent role for equity is key to restore the legitimacy of the judiciary.

Irit Samet 18. Professor in the Dickson Poon School of Law, “Equity’s Own Room,” Equity: Conscience Goes to Market, Oxford University Press, 2018, pp. 1–76

In this section I argue that Equity has work to do, work whose nature is brilliantly captured by the reference to conscience, and for the optimum performance of which Equity needs to remain an independent body of law.120 Equity operates on the side of the Common Law to promote a legal virtue which I call ‘Accountability Correspondence’:

When legal rules impose liability it should ideally correspond to the pattern of moral duty in the circumstances to which the rules apply.

Barring unusual cases, the best way in which law can serve morality is by complying with the Accountability Correspondence requirement, namely, by ensuring that where legal liability is attached to an action, it closely follows the matrix of moral accountability for this action.121 The impetus to implement the Accountability Correspondence ideal is vividly demonstrated in the slow but determined move to lessen the effects of ‘legal luck’ on criminal responsibility. The idea behind these efforts is that criminal responsibility should reflect the fact that (at least in principle) moral responsibility does not depend on factors over which the agent has no control.122 In spite of the debate about the extent to which legal luck ought to be eliminated, the criminalisation of attempts, for instance, is widely seen as ‘one of the most important steps in the humanization of criminal law’.123

Major reforms, designed to introduce greater convergence between legal liability and our perception of moral accountability, have been introduced in many areas of law.124 Sure enough, other considerations, such as spreading the loss in tort law, may justify a departure from the Accountability Correspondence ideal in specific cases.125 But the existence of cases where legal liability and moral duty plausibly come apart does not show that Accountability Correspondence is not a universal legal virtue; the burden is on those who wish to defend a rule in which liability does not tally with the pattern of moral accountability to show why it is a worthy rule notwithstanding. Indeed, rules that impose liability regardless of moral culpability (aka ‘strict liability’) raise such an instinctive discomfort, that legal philosophers go to great lengths to explain why, in spite of appearances, the law does not (completely) part company with morality even in this instance.126 Moreover, empirical research has shown that actual prosecutions for strict liability regulatory offences are rare.127 Presumably, the enforcement authorities are ill at ease with such departures from the Accountability Correspondence ideal, and thereby employ a selective enforcement policy to express their dissatisfaction.

They have good reason to do so. A law in which the legal result is out of kilter with our deep convictions about moral accountability is not only dubious from the perspective of justice, it is also bound to alienate its addressees— the judiciary as well as the citizens. The result could be a critical mass of disobedience that has a potential to eventually undermine the system itself. Law, like any social institution, requires legitimacy if it is to develop and operate effectively. Numerous legal policies seem to be premised on the thought that compliance is secured by the presence of sanctions for wrongdoers.128 But recent studies suggest that deterrence, although it sometimes significantly influences law- related behaviour, will, at other times, have no such effect. The case of intellectual property, and the failure to put an end to illegal copying and downloading, illustrates the great difficulty in securing compliance through the use of sanctions.129 People’s decisions to follow (or disregard) the law can be motivated just as much by personal commitment (or indifference) to law- abiding behaviour. 130 A decision to become ‘self- regulatory’, that is, adopt a proactive approach for rule following (rather than merely respond to external incentives) is much more likely to develop where the government and its institutions— like the police and the courts— are perceived as legitimate.131

Legitimacy here is understood as ‘a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just’.132 In the context of law, that would mean ‘the belief that the law and agents of the law are rightful holders of authority; that they have the right to dictate appropriate behaviour and are entitled to be obeyed’.133 Such sense of legitimacy can be rooted in different aspects of the authority’s actions and decisions. It has been shown that when legal enforcement institutions, like the police, follow principles of procedural fairness (understood mainly as allowing defendants a fair opportunity to state their case), it significantly reduces the cost and alienation that are associated with policies which rely on threats to secure obedience.134 Legitimacy perceptions, and the respect (or disrespect) for the law that follows, are also strongly influenced by people’s evaluation of the legal results as just (or unjust). So much so that, at the end of their classic empirical study of the correlation between community views and criminal codes, Paul Robinson and John Darley state that ‘the moral credibility of the criminal code is its single most important asset’.135 The ‘community views’ about how a certain set of circumstances should be resolved are ‘an essential consideration that ought to be an influential factor in the policy- making and code drafting process’, because ‘[t]he compliance power of criminal law is directly proportional to its moral credibility’.136

Perception of legitimacy translates into willingness to obey the law. When the criminal law gains a reputation for assigning liability in ways that track the moral convictions of the community as a whole, it is more likely to be viewed as authoritative, and people are more ready to defer to the commands of the law generally.137 The researchers show, moreover, that where criminal law has moral credibility, the citizens tend to take guidance from it even in situations where the harm underlying the prohibition is less than clear.138 This conclusion can be carried over to other areas of the law. I can see no reason why rules of private law, company law, administrative law, etc. which divert from the community’s strong moral intuitions will not have a parallel adverse effect on the citizen’s attitude to the law. Note that the damage to the sense of respect for the law is not limited to the specific area of law in which the perceived injustice is to be found. Research shows that in the face of a perceived injustice of a legal rule or result (in various areas from landlord and tenants to civil forfeiture) people tend to flout the law as a whole in many ‘subtle, lower- level and harder- to- detect ways’, such as littering, tax- avoidance, and services- theft.139 All these studies come together to support Roscoe Pound’s observation that ‘[the] law cannot depart far from ethical custom nor lag far behind it. For law does not enforce itself. Its machinery must be set in motion and kept in motion and guided in its motion by individual human beings’.140

Earlier, in the definitions of legitimacy, I emphasised the terms ‘psychological’ and ‘belief ’ in order to highlight the subjective nature of the community’s evaluation of the moral merits of a legal rule or doctrine. This is important because, in some cases, the need to set a rule that does justice in all disputes of a certain kind may lead to results that offend the common intuition about the just result in a specific case, for example when a bank seeks foreclosure against a poor widow.141 Most people, when they try to figure out the right result in a dispute, will see the human beings in front of them and hardly stop to reflect on the influence that the decision would have on other litigants in relevantly similar circumstances.142 But the law should impel us to lift our eyes from the particular litigants and consider the relationship between them in accordance with formulas that strip them off their particularity and treat them as merely litigants in private law disputes.143 According to functionalists, lawmakers should also consider the various societal relationships which are instantiated by the specific case (e.g. marriage, co- habitants, mortgagees, neighbours, etc.), as well as the broader context of the effect of our decision on the legal system as a whole. Proponents of Common Law supremacy would argue that when the Common Law applies legal rules pedantically it engages in exactly this kind of detachment exercise, as it prefers the comprehensive perspective of the ROL to an intuitive, but myopic, perspective that focuses excessively on the particularity of the case.

Alas, this keen adherence to the perspective of the ROL (at least in areas where we find interventions by Equity) is far from striking the right balance between attention to the particular circumstances of a case and detachment that begets just legal rules. Their fervent commitment to the dictates of the ROL led the Courts of Common Law to enforce bright- line rules of property and contract law and to refuse to make exceptions for situations where a hard- nosed party used these rules to relinquish their moral responsibility for the defendant in a way that offends the public’s sense of justice and fairness. Examples abound: in the context of negotiation to transfer rights in land, for instance, the Common Law allows A to evade responsibility for B’s detrimental reliance on A’s oral representation, and enforces the very clear rule that transfer of rights in land must be made in writing. Similarly, C could insist on enforcing a contract with D, regardless of the fact that it is clear to everyone that the document fails to accurately record the agreement of the parties as intended. And E would be allowed to keep property which she inherited in a will, even where she orally promised the deceased to hand it over to F, since such a gift to F does not abide by the writing formalities of the Wills Act. In these and many other cases, the claimants could prove the morally relevant facts of their case: the pledge, the reliance, the frustrated expectation, or the promise to a dying friend. But in Common Law the crystal- clear rules which regulate the transfer of property rights, the interpretation of contracts, or the bequests of property upon death trample the moral obligation under foot. The clarity, generality, and prospectiveness of the legal result— sanctified by the ROL— were keenly protected, while the lack of correspondence between the legal results and moral standards was passed over as a necessary evil (or not even that). Consequently, the Common Law’s reading of the rights of the parties in these (and many other) situations is afflicted with a dangerous fissure between the defendant’s (lack of ) legal liability and his moral duties towards the claimant. In Common Law, it was somewhat proudly said, we take no notice of what a person with a ‘tender conscience’ would have done, or ‘whatever may be the case in a court of morals’.144 Leaving behind the moral merits of the individual result, the Common Law is satisfied with a high place in the ROL league table:

In any individual case the application of these propositions may produce a result which appears unfair. So be it . . . I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals . . . [is] justice which flows from the application of sure and settled principles.145

When Equity intervened in the situations previously described (and many similar ones), the clarity, generality, and predictability of the Common Law rules were compromised in order to prevent dangerous cracks from opening between moral responsibility and legal liability. Instead of obsessing about ‘sure and settled’ rules, Equity pays close attention to the particularity of the situation, and employs open- ended principles that enable the judge to trace the pattern of moral responsibility in each case. Accordingly, in the examples above, writing formalities were waived so that defendants were made to account for a setback in the claimant’s life which they encouraged him or her to take; a gap between the wording of the contract and parties’ intention could give rise to a right to rescind it; and promisors were made to fulfil their promises to the deceased, even where testamentary rules were not complied with.146 This ethos has informed Equity right from its birth. What typified the court of the fourteenth- and fifteenth- century Lord Chancellor, says John Baker, was not a set of equitable doctrines which only he would apply, but rather the way in which his eyes ‘were not covered by the evidential blinkers of due process’. 147 Intensive engagement with the particularities of the case was a hallmark of Equity.148 What the Common Law rejected as a myopic engagement with the particular parties, Equity— both as a philosophical and as a legal concept— embraced as attention to a necessary perspective that is neglected by the general pre- fixed rules of Common Law.

The problem I am pointing to here is one of balance: in routinely preferring the cause of formal horizontal justice, Common Law lost sight of the importance of maintaining equilibrium between intuitive perception of the morally right result— that indeed tends to be tied more to the specific litigants— and abstract considerations of common good (in the form of unity and reliability). Imbalance of this kind, we saw, can have grave consequences for the legal system as a whole. As Justice Marshal noted in the US Supreme Court: ‘however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice [would] . . . diminish respect for the courts and for law itself ’.149 Equitable interventions that are designed to conjoin the defendant’s legal liability and moral responsibility, can stave off the dangerous process by which a largely ROL- focused approach erodes faith in the legal system. Next, I want to show how Equity’s unique mode of action is conducive to performing this balancing role.

#### Extinction

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We realize that “more perfect union” necessarily has many more meanings today, discovered and still undiscovered. The words express the hope that fifty states covering an abundant swath of planet earth can cooperate. There is of course nothing simple about the challenge of the governments of fifty states and the federal government getting along. But this is part of constitutional friendship. Today, it involves whether states can cooperate with each other and with the federal government over the biggest problems of our times. Public health, social justice, climate change, gun violence, terrorism at home and abroad, immigration, and a long list of other pressing issues need cooperative federalism.

From the very beginning one central reason for states to link arms within a federal system was security. No state, then or now, could defend itself by itself from existential threats from abroad. Or from within. A more perfect union has a poetic ring, but a pragmatic purpose of common security and defense.

The Preamble’s more perfect union is a dream in the sense that Martin Luther King, Jr. had a dream. The Preamble uses poetic-sounding language to express the unavoidable interdependency between We the People and their constituted governments—state, local, and federal. It is a dream based on the hard stuff of interdependency in a world where one person’s plastic ends up on another person’s shore. Or where an individual’s viral illness ends up infecting a community. Abraham Lincoln used the famous biblical metaphor of a house divided to express what’s at stake in our dream of union: “A house divided against itself cannot stand” (Mark 3:25). For the Preamble, for Lincoln and for us today, the hard work of getting along with each other and sacrificing some self-interest is a practical necessity if the republic is to stand.

The Preamble is realistic. It qualifies the word perfect with “more.” We don’t realistically expect that our neighborhoods or anything else in life will be perfectly perfect. But it is not too much to dream that our neighborhoods, along with our republic, can become better for more people.

Justice

What does the word justice mean to you? Recall those times in your life when you thought others didn’t treat you fairly. Our sense of justice is often based on our experiences with being treated fairly or unfairly. Our senses of justice, comparative treatment, and fairness start young.

“I can’t believe the ref called a foul on that.”

“Why was that store clerk so rude to me but so nice to that other person?”

“Everybody else on this highway is speeding and the cop pulls me over. What’s that about?”

The Preamble brings up “establish Justice” in the sixteenth and seventeenth words of the Constitution, signaling that justice is one of the nation’s first and top priorities. The historical context of these words is monumental, linking to the July 4, 1776 Declaration of Independence and the Revolutionary War. The Declaration was mostly, in terms of word count, a litany of injustices. The Declaration recited “a long train of Abuses and Usurpations” by King George III, referred to as “He” repeatedly so as to reinforce, like a jabbing finger of blame, where the injustices had come from. The Declaration, for all its universality, was also really personal, complete with the main villain. As the Declaration claimed independence from tyranny, the opposite of justice, the Preamble made establishing justice a top priority.

We also know how contingent and imperfect that eighteenth-century view of justice was. Later Amendments included African Americans, women, Native Americans, and others as an express term. We see that the word “equality” is missing from the Preamble, at least expressly in the text. We’ll see that later Amendments, especially post-Civil War Amendments, recognized equality more centrally within the composition.

The word justice links to what we today call America’s justice system: courts, judges, lawyers, prosecutors, public defenders, police, jails, and so on. “Equal justice under law” was engraved (in 1932) on the front of the U.S. Supreme Court building in Washington, D.C. American rule of law, despite many flaws and setbacks in actual practice, aspires to a preambular virtue of equal justice.

The Preamble’s Justice connects to other language in the text, especially Article III and judicial powers. Federal judges, also known as Article III judges, preside in ninety-four federal judicial districts, including at least one district in each state, in D.C. and in Puerto Rico. The U.S. courts of appeals (or circuit courts) are divided into thirteen circuits, each one hearing appeals from the district courts within their boundaries. At the top is the U.S. Supreme Court, currently with nine Justices.

The Constitution makes plenty of room for judicial power to be exercised with reason, wisdom, and compassion, because the absence of those qualities leads to what the founding generation was breaking away from: tyranny. Read in the Declaration of Independence the list of “Facts . . . submitted to a candid World” about who and what makes “a Tyrant.” How do we know a tyrant when we see one? Check the Declaration’s facts. A tyrant makes judges “dependent on his Will alone,” obstructs the administration of justice, and refuses to assent to laws that establish judicial powers independent of the tyrant’s will. American constitutionalism is indelibly stamped by the lived experience, by the real historical suffering and sacrifice, over the question: what makes a tyrant? Americans listed the facts of tyranny in the record, in the memory bank, of their founding document. Tyranny, in the American experience, is about arbitrary, coercive, unchecked, and unreasonable abuse of power. It ties to the Hamiltonian question of rule by force. What forms of tyranny do you think still exist today?

Preambular Justice has a context, a story that includes its past and its present, a story of Americans rejecting “justice” dressed up as the will of a tyrant and choosing instead the rule of law. The rule of law includes judges who know the limitations on their power, the constitutional job of deciding cases and controversies based on the facts and the law.

History influences the Supreme Court’s constitutional standing, legitimacy, and reputation. The current Supreme Court under Chief Justice John Roberts is concerned about how the Court is viewed by the American public during times of political fracture. (More on this later.) A public perception that the Court is just as politicized as everything else in government is a big concern. What the Court actually does and what the public perceives it as doing are not always the same thing.

With both judges and ordinary people (which judges are too), reputations are more easily lost than won. The Supreme Court’s reputation, its historic role in American constitutionalism, includes but goes beyond the words in the concise text of Article III. Yes, it must decide cases and controversies. Litigants who pass through its doors win or lose. But the Court must also have an ear attuned to We the People. The Court is, after all, the creation of the Constitution and is thus part and parcel of its principles, including popular sovereignty. That doesn’t mean that We the People should decide cases. Or that the Justices should check which way the winds are blowing and decide cases based on public opinion. It means instead that public trust and confidence in the Court and popular understanding of what judges do is essential to democracy.

The Court’s reputation and role turns critically on the principle of an independent judiciary. If the public believes judges are deciding cases not on what the law is, but on what the judges’ own politics and policy preferences are, the public will lose confidence not only in individual judges, but also more importantly in our Constitution’s highest Court which exceeds any individual judge. The Internet-juiced politicization of the Supreme Court nomination process and politically-charged Senate confirmation hearings feed the perception of pervasive politics.

You may have heard the over-used term “judicial activism.” This term is an example of rhetoric that has lost real meaning because it cuts both ways. Charges of judicial activism, across the Supreme Court’s history, have been launched on both sides, with both liberals and conservatives claiming the Court was making policy rather than clarifying what the law is. The political rhetoric about judicial activism usually is in the eye of the beholder, shifting according to which side is winning or losing. When my side wins, the Court is brilliantly constitutional. When my side loses, the Court is a bunch of judicial activists.

Domestic Tranquility

The Constitution’s choice to combine the words “domestic” and “tranquility” has multiple levels of meaning. Domestic as an adjective means relating to home or family relations. It also means existing within a country. To a generation that fought a war of independence, domestic tranquility meant peace and security in their new country, in their homes and their lives.

Peace in the home, in the homes of We the People. The Constitution wants home-and-homeland tranquility, peace in both settings. The Constitution’s domestication values, its respect for the homes of We the People, resonates from the Preamble to the Bill of Rights. We find “house” in the Third Amendment as well as “peace.” “No Soldier shall, in any time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” This is a recognition of the value of property, of one’s house. We see the word “consent” resonating with the idea of consent of the governed.

This goes beyond the bare fact of material property rights. To a Revolutionary War generation, no more monarchs would quarter troops in their homes without their consent. No King could forcibly enter the castles of We the People, their homes. How could one’s home be tranquil if soldiers could be quartered there without the owner’s consent? Further, the Third Amendment distinguishes “time of peace” and “time of war,” giving the government more leeway in the latter case to quarter soldiers in a house, but even then only by rule of law rather than royal decree. We the People were fed up with royal perks.

Hard on the heels of the Third Amendment is another echo of the preambular idea of domestic tranquility in the Fourth Amendment. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Again, we see the domestic tranquility theme in reference to “houses” but also, more broadly to “persons,” “papers,” and “effects.” Security of person. Security of home. Security of papers. Security of effects. The word “effects” means broadly personal belongings.

Again, the Constitution has an interest not only in material property rights, but in the security of people. And our stuff. Our cars and trucks, our phones, our apartments, our computers. Today “effects” is used in many homeowner insurance policies. Effects has even now entered our cyber world and biology. Our data, our blood, our DNA. Unreasonable searches and seizures by government actors without a court order, a warrant, are both unconstitutional and disruptive of domestic tranquility. The criminal justice system takes fingerprints, draws blood samples, swabs saliva for DNA, tests sperm. With a warrant, a cell phone can yield lots of clues and potential evidence at trial. In American law, search and seizure cases fill volumes and are a regular part of the dockets of our courts, especially in criminal cases.

Domestic tranquility relates to privacy. Privacy, in the concise summary of Supreme Court Justice Louis Brandeis, is the right to be left alone. Does that resonate with you? Do you like being left alone when you want to be? The right to privacy is today well-established in American constitutional law, albeit sometimes in controversial form as the basis for the Roe v. Wade abortion precedent.

Domestic tranquility is also about homeland security. In the history of American homeland security, the terrorist attacks of September 11 were a sea change. In November 2002, in response to 9/11, the federal government created the United States Department of Homeland Security or DHS. Today the DHS is the third-largest Cabinet department in the executive branch (behind Defense and Veteran Affairs) with an annual budget of roughly $50 billion and 240,000 employees. The American experience of September 11 has had a profound impact on American constitutionalism including the ongoing War on Terror, immigration policies and practices, border security, homeland security regulations, searches and seizures, cyber-security, data privacy and lack thereof, due process rights, and other legal areas.

Covid-19 has been another sea change in homeland security. Today, with over 400 million deaths globally from the pandemic, we are learning that domestic tranquility, the peace of our homes and homeland, depends on science and public health.

When the words “domestic tranquility” first entered the Constitutional lexicon, the United States was just beginning its role as a geopolitical power. A major reason to constitute the United States was to say boldly to the world: America is now stepping onto the world stage. We are no longer on the bench, second-string players to the British Empire. We will explore and expand across our “island” continent. We have enormous geographical and natural resources. Our enemies will need to cross oceans to disrupt our domestic tranquility. (Unless, that is, we grow our own enemies from within.)

After two-plus centuries, America’s role as a geopolitical power has a vastly different world context. Domestic tranquility is now, as never before, linked to world affairs and a world connected by tech. The security of “persons, houses, papers and effects” is now globally contingent. A virus spreads across the planet, starting from remarkably small and inconspicuous places. Trade wars spike and drop stock markets. “Build the wall” became a chant at political rallies. Computers are hacked. Domestic election interference crosses oceans (faster than sailing ships). Identities are stolen. Account data is breached. Globally, refugees flee hostile homelands. Xenophobia is widespread.

Domestic tranquility can seem very far away. But no falling short of our ideals is a reason to dismiss what our ideals are.