



ON DOCTRINES THAT DO MANY THINGS

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EVERY KITCHEN HAS two kinds of tools. Some of these tools do many things well, like a chef's knife. Other tools do only one thing, but they are meant to do that one thing exceedingly well, like a garlic press.¹ The same distinction appears in legal doctrines.² Some doctrines do one thing and are meant to do it very well. Others do many different things. They serve multiple functions, though perhaps all imperfectly.³

Cooks and cookbook authors debate the relative merits of single-function tools and multi-function tools. So do legal scholars. It often happens that a scholar will criticize a legal doctrine because it serves multiple purposes and is therefore incoherent. That line of criticism has been developed against many doctrines, including the construc-

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¹ There is considerable debate about whether the garlic press does in fact do that one thing well. A single-function tool that is indisputably useful is the can-opener.

² This essay is not the first to compare law to cooking. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998).

³ The dichotomy is a relative one: no legal doctrine or kitchen tool is absolutely single-function. Also, the characterization of a doctrine or tool is not fixed. As time passes, it may gain or lose functions.

tive trust,⁴ the collateral source rule,⁵ the defense of unclean hands,⁶ the irreparable injury rule,⁷ the *Erie* doctrine,⁸ the strict scrutiny test in constitutional law,⁹ the standing requirement,¹⁰ the purpose inquiry in *Casey*,¹¹ the doctrine of unconstitutional conditions,¹² the process of interpreting a legal text,¹³ and the practice of judicial review.¹⁴ The critics of these doctrines usually prescribe a straightforward solution. The multi-function doctrine should be discarded and replaced with more doctrines, each of which will serve fewer functions. Thus Zechariah Chafee argued that the unclean-hands defense should be discarded and replaced with a number of more specific doctrines.¹⁵ Douglas Laycock has made a similar argument about the

⁴ Andrew Kull, *Deconstructing the Constructive Trust*, 40 CAN. BUS. L.J. 358 (2004).

⁵ Adam G. Todd, *An Enduring Oddity: The Collateral Source Rule in the Face of Tort Reform, the Affordable Care Act, and Increased Subrogation*, 43 MCGEORGE L. REV. 965, 971 (2012); see also John G. Fleming, *The Collateral Source Rule and Contract Damages*, 71 CAL. L. REV. 56, 57-60 (1983); Robert Hernquist, *Arthur v. Catour: An Examination of the Collateral Source Rule in Illinois*, 38 LOY. U. CHI. L.J. 169, 178-83 (2006).

⁶ Zechariah Chafee Jr., *Coming Into Equity With Clean Hands II*, 47 MICH. L. REV. 1065, 1091-92 (1949).

⁷ DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991).

⁸ Allan Erbsen, *Erie's Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579 (2013).

⁹ Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 443 (1997).

¹⁰ Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); Kenneth E. Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 645 (1973).

¹¹ Priscilla J. Smith, *If the Purpose Fits: The Two Functions of Casey's Purpose Inquiry*, 71 WASH. & LEE L. REV. 1135, 1137-39 (2014).

¹² Jonathan Romberg, *Is There A Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1076-80 (1995); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620-21 (1990).

¹³ Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95 (2010) (distinguishing interpretation and construction).

¹⁴ Girardeau A. Spann, *Advisory Adjudication*, 86 TUL. L. REV. 1289, 1344 (2012).

¹⁵ Chafee Jr., *supra* note 6, at 1091-92.

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irreparable injury rule.¹⁶ And Heather Elliott has argued that the standing requirement serves too many different separation-of-powers functions and should be replaced with more specific doctrines.¹⁷ Out with the chef's knife, and in with the garlic press, the tomato knife, the avocado knife, and the Norpro Lemon-Lime Slicer.

Behind these criticisms lies what might be called a preference for a single-function tool. There is much to be said for this preference. A multi-function tool is often not as good as a single-function tool for what the latter does. In the hands of a home cook, for example, it is hard for a knife to compete with the speed and uniformity achieved by a garlic press. A single-function tool also reduces cognitive demands – I don't have to decide how exactly to use the knife, or how small to dice or mince the garlic. Those decisions are made for me when I use a garlic press. And so with the single-function legal doctrine. If a general doctrine with multiple functions were to be replaced with a bevy of subrules (each serving only one function, or at least fewer functions), a judge would no longer need to decide how to use the general rule in some particular case – only how to use the narrower and less cognitively demanding subrule.

Of course there is also something to be said for a multi-function tool. It imposes more decisions about how the tool will be used, but it reduces decisions about which tool to pick up. When a legal doctrine serves multiple functions, a court will need to decide how to use the doctrine, but it will be easier to decide which doctrine to use.

Consider for example the constructive trust. It is an equitable remedy by which a court awards property and its traceable product, especially when the property “has changed form since it left the

¹⁶ LAYCOCK, *supra* note 7, at 265-83.

¹⁷ Elliott, *supra* note 10. Sometimes scholars call for a multi-function doctrine to be replaced with only one single-function doctrine. *See, e.g.*, Rubinfeld, *supra* note 9, at 443 (arguing against multiple functions for the strict scrutiny test, and calling for “[r]eturning strict scrutiny to its proper function” of “smoking out ulterior, unconstitutional purposes”); Scott, *supra* note 10, at 645 (arguing against multiple functions for standing doctrine, and calling for the doctrine to have the single function of “rationing a scarce resource”).



Multi versus single: A knife and a press in Professor Bray's kitchen.

plaintiff's hands.”¹⁸ This remedy is characteristically used in cases involving both a fiduciary or confidential relationship and some kind of unjust enrichment. The constructive trust is usually thought of as a single remedy, but it can be broken up into smaller components. The preeminent American restitution scholar, Andrew Kull, has called the constructive trust only “a figure of speech” and “manner of speaking” that in any particular case stands for one or more of the following propositions:¹⁹

1. In a contest of ownership between plaintiff and defendant as to this property, plaintiff wins.
2. Plaintiff is entitled to elect specific restitution, as opposed to some other form of relief. . . .
3. Plaintiff is entitled to proceeds, *i.e.*, plaintiff is entitled to follow the property into its product. . . .

¹⁸ WARD FARNSWORTH, *RESTITUTION: CIVIL LIABILITY FOR UNJUST ENRICHMENT* 119 (2014). See generally *id.* at 119-27, 132; *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 55 (2011).

¹⁹ Kull, *supra* note 4, at 360-61.

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4. Plaintiff is entitled to consequential gains, *i.e.*, to recover from the defendant more than plaintiff lost. . . .

5. Plaintiff is entitled to priority over any third parties. . . .²⁰

Kull's "unravelling" of the constructive trust into these five propositions is an illustration of the choice between multi-function and single-function tools. The constructive trust is a multi-function tool. By turns it may decide ownership, grant specific relief, allow tracing, give the plaintiff more than was lost, and grant priority to the plaintiff over other creditors. In any given case it usually does several of these things. But one could imagine discarding that multi-function tool and replacing it with a set of single-function tools. Instead of one doctrine of "constructive trust" there could be the five propositions offered by Kull.²¹ With the multi-function tool of the constructive trust, the judge has to make more decisions about use — what should be the scope and effect of the constructive trust in this case? But with the array of single-function tools, Kull's five propositions, a judge would have to make more decisions about tools — which of the five should the judge pick up in this case?

Thus each tool or doctrine brings clarity to one question. There will be clarity about which tool to pick up, or about how to use it. The complexity can be shifted, but it cannot be eliminated.²² So far,

²⁰ *Id.* at 361.

²¹ Note that Kull does not urge that in so many words, though he does say that the "figure of speech" of constructive trust "adds nothing" and "seems to obscure these questions at least as often as it elucidates them." *Id.* at 361, 362. The Restatement, for which Kull was the reporter, keeps the traditional categorization. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (2011); but cf. *id.* § 55 cmt b.

²² Cf. David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 867-872 (1999) (discussing the relative complexity of rules). There is at least one affinity between rules (in the technical sense) and tools that have only one function. When a legal norm will be applied frequently, rules are favored. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). Similarly, the justification for single-function tools is sometimes their repetitive use: an ordinary drinking glass might be used to make dozens of identical Christmas cookies, but a snowman cookie-cutter does so with greater ease.

though, the choice between one multi-function tool and several single-function tools might not seem consequential. Indeed, there might seem to be a conservation principle – the same quantum of decisions must be made, and they are merely relocated. But the choice does have other consequences.

One is about skill. The use of a multi-function tool may be taxing. Yet use can lead to skill, and skill to expertise, and expertise to mastery, a kind of hard-won excellence that is rarely possible with a single-function tool. Perhaps this is why those who are most adept at chopping, dicing, and mincing garlic often deride garlic presses, calling them “ridiculous and pathetic,”²³ even “abominations.”²⁴ Some disagree.²⁵ But it does tend to be the case that those who have greater experience and expertise prefer the chef’s knife, while those who have less of each tend to prefer the garlic press. Such tendencies suggest that any assessment of these tools also requires an assessment of the person who wields them: a tool that serves multiple functions can be mastered only by someone who is capable of achieving that mastery. And the same is true for mastering a doctrine that serves multiple functions. A person with skill in granting and fashioning a constructive trust may prefer the more general doctrine, with the possibility that one function will shade slightly into another, without the sharp and artificial choice imposed by the single-function tools. But that sharp and artificial choice may be appealing to one less skilled.

²³ Elizabeth David, *Garlic Presses Are Utterly Useless*, reprinted in *IS THERE A NUTMEG IN THE HOUSE?* (2000) (“Squeezing the juice out of garlic doesn’t reduce its potency, it concentrates it, and intensifies the smell.”).

²⁴ ANTHONY BOURDAIN, *KITCHEN CONFIDENTIAL: ADVENTURES IN THE CULINARY UNDERBELLY* 81 (2000) (“Misuse of garlic is a crime. Old garlic, burnt garlic, garlic cut too long ago, garlic that has been tragically smashed through one of those abominations, the garlic press, are all disgusting. Please, treat your garlic with respect. Sliver it for pasta, like you saw in *Goodfellas*, don’t burn it. Smash it, with the flat of your knife blade if you like, but don’t put it through a press. I don’t know what that junk is that squeezes out the end of those things, but it ain’t garlic.”).

²⁵ Cf. Felicity Cloake, *Is the garlic press a devilish invention?*, *The Guardian* (Feb. 1, 2010), available at www.theguardian.com/lifeandstyle/wordofmouth/2010/feb/01/garlic-press-chefs-method (last visited January 19, 2015).

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And time and chance happen differently to the two kinds of tools. A single-function tool might be perfect today but find itself unused when tastes change. When margaritas are popular, you may find yourself needing a Jimmy Buffet Margarita Maker. But it won't help to have one if margaritas fall out of fashion, and all you need is a slice of lime for a Corona. Thus a single-function tool may be more useful in the moment, but a multi-function tool is more adaptable. It may have a usefulness that is distributed over time. It is true that a designer of a single-function tool might try to think of how the tool could be adapted in the future, but distant uses are hard to predict. A single-function tool might require less of its user but more of its designer.

This is also true of legal doctrines. A single more general doctrine, such as the constructive trust, can be put to many different uses over time, and the identity and relative importance of its functions may alter through the years. The constructive trust might be used in ways that do not seem quite new, but over time it may become clear that something new has indeed emerged. But if the functions of the constructive trust were fixed in a list, even if the list were not thought of as closed, the form of the doctrine might make it harder for a new function to emerge. If Kull had “unravelling” the constructive trust a hundred years earlier, the list of functions might not have been the same. And a hundred years from now it might be different, too. This process of alteration might be smoother if the “figure of speech” of the constructive trust continues to exist.²⁶ And the same thing could be said of standing, the unconstitutional conditions doctrine, the irreparable injury rule, the collateral source rule, and so on.

But this analogy between kitchen tools and legal doctrines might seem to break down when scarcity is considered. Kitchens are small. Kitchen tools are expensive. The lemon-lime slicer that looked so good at Williams-Sonoma has to be put somewhere. And Williams-Sonoma offers not only a lemon-lime slicer but also a cheese slicer,

²⁶ Cf. Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. (forthcoming Apr. 2015).

a layer-cake slicer, an avocado slicer, a garlic slicer, an apple slicer, a strawberry slicer, a banana slicer, a peach pitter and slicer, a tomato slicer, and a bagel cutter. There is never enough cabinet space for all the single-function tools one could own. Perhaps the main reason that multi-function tools are pervasive in kitchens is that space and money are scarce. But legal doctrines have no sticker prices. They take up no physical space.

Yet when we consider how legal doctrine is developed “within the practice of legal argument,”²⁷ the analogy can be carried further. Attorneys throw into a brief every argument they can think of (even though they are wisely advised not to²⁸). When there are more single-function doctrines, there are more arguments for attorneys to make. And one of the opinion-writing norms in the United States is that a judge will discuss, and dispose of, each argument the parties advance. There are exceptions, such as the idea of constitutional avoidance, but the exceptions show the resilience of the norm. The more single-function doctrines there are, the more a judge must discuss – and reject. Not only does this take judicial time, but it also creates a jurisprudence of no. As parties throw in every single-function rule they can, the contours of any one of these “subrules” will be shaped by the many cases in which courts refuse to apply it, not by the few cases in which the doctrine is actually brought to bear. Like the back of a kitchen cabinet, the law can be cluttered with single-function rules that no longer seem as useful as they once did.²⁹

Nor is it an accident that the critics of multi-function doctrines tend to be scholars, and those who use and defend them tend to be judges. In making the choice between single-function doctrines and multi-function doctrines, the interests of the bench, the bar, and the

²⁷ Duncan Kennedy, *Toward a Critical Phenomenology of Judging*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 141, 166 (Allan C. Hutchinson & Patrick Monahan, eds. 1987) (emphasis omitted).

²⁸ See ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 22-23 (2008); Jonathan Mermin, *Bad Arguments*, 17 GREEN BAG 2D 435 (2014).

²⁹ See, e.g., Samuel Bray, *Rooker Feldman (1923-2006)*, 9 GREEN BAG 2D 317 (2006).

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academy do not align.³⁰ Judges are generalists. And attorneys are specialists who write for generalists. But scholars are specialists who write for other specialists.³¹ Those roles affect the preferences each actor has. A generalist judge might want a smaller number of doctrines, each serving multiple functions – a set of doctrines that can be resorted to again and again, even if each is used in different ways and for different purposes depending on the case. Specialists, especially those who do not write to persuade generalists, may seek an ever greater refinement of the rules, so that each rule fits its function exactly. The evidence is the enthusiasm that so many scholars have shown for critiquing multi-function doctrines and urging their replacement with single-function doctrines.³² But the bench has resisted this. Judges have shown no interest in these scholarly projects of deconstruction. They have not relinquished the unclean-hands defense, strict scrutiny, the standing doctrine, the irreparable injury rule, the unconstitutional conditions doctrine, or any of these other purportedly incoherent doctrines.³³ They continue to give plaintiffs the remedy of constructive trust, with no attention to the ways it can be deconstructed.

It would be silly of course to think that the law should be stocked only with multi-function doctrines, or only with single-function ones. For each kind of doctrine has its own use. And each has its own parsimony: A single-function doctrine is parsimonious at the level of functions, but a multi-function doctrine is parsimonious at the level of doctrines.

What the analogy does is illuminate a choice in the structure of legal doctrine. It also points to a difference in how scholars and judges tend to see that choice. And it suggests that the question for

³⁰ I am grateful to Richard Re for suggesting the point.

³¹ These are only generalizations. Sometimes, as in immigration courts, the judges are specialists but many of the attorneys are generalists.

³² See *supra* notes 4-17 and accompanying text.

³³ One area where the opposite tendency in doctrinal development can be seen is abstention: judges have developed many narrower abstention doctrines – *Burford* abstention, *Pullman* abstention, *Younger* abstention, and so on – instead of a more general doctrine of abstention.

scholars should not be whether a general legal doctrine can be replaced with a number of more specific doctrines, each serving fewer functions. It is always possible to replace a general doctrine with more specific ones. And vice versa. When one is developing or commenting on the development of legal doctrine, the questions that should be asked lie elsewhere. What are the distinct demands, the different parsimonies? How would mastery develop and what would it look like? Is this doctrine adapted to the moment or adaptable over time? Is this doctrine a chef's knife, a garlic press, or a lemon-lime slicer? These questions about doctrine are, of course, not the only ones to ask. It also matters what functions the doctrine is serving, the ends for which it is the means. Once again kitchen tools are not so very different. The choice of a single-function or multi-function tool is one thing, but the choice of what to make for dinner is something else entirely.

