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## **The Federal Equity Power**

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# THE FEDERAL EQUITY POWER

MICHAEL T. MORLEY

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# THE FEDERAL EQUITY POWER

MICHAEL T. MORLEY\*

**Abstract:** Throughout the first century and a half of our nation’s history, federal courts treated equity as a type of general law. They applied a uniform, freestanding body of principles derived from the English Court of Chancery to all equitable issues that came before them, regardless of whether a case arose under federal or state law. In 1945, in *Guaranty Trust Co. v. York*, the United States Supreme Court held that, notwithstanding the changes wrought by the *Erie* Doctrine, federal courts may continue to rely on these traditional principles of equity to determine the availability of equitable relief, such as injunctions, even in cases arising under state law. This so-called “equitable remedial rights doctrine” is based on an anachronistic misunderstanding of the nature of the federal equity power. Equity should not be understood as a single, independent body of principles that a federal court must apply in all cases that come before it. Rather, a federal court’s power to impose an equitable remedy stems, if at all, from the legal authority that establishes the underlying right. For state-law claims, a federal court must apply state statutes and precedents—not uniform, centrally devised federal standards—to determine the availability of equitable relief. The manner in which state-created rights are protected is as much a matter of substantive state policy as a state’s initial creation and allocation of those rights. When adjudicating a federal statutory claim, the underlying federal statute itself governs the availability of equitable relief; a federal court may presume Congress intended that traditional equitable principles apply as a matter of statutory interpretation, unless the statute’s text or legislative history contains a clear statement to the contrary. Finally, for constitutional claims, federal courts may apply tra-

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ditional equitable principles as a matter of constitutional common law, unless Congress displaces them with a valid alternative remedial scheme.

## INTRODUCTION

Under what circumstances should a federal court grant equitable relief, such as an injunction, in a diversity case?<sup>1</sup> The answer to this deceptively simple question implicates profound issues going to the root of both federalism and separation of powers, and has wide-ranging ramifications for our modern conception of the federal judiciary's equity power. In 2006, in *eBay Inc. v. MercExchange, L.L.C.*, the United States Supreme Court articulated its well-known four-factor test for granting injunctive relief, which it claimed was derived from principles historically applied by the English Court of Chancery.<sup>2</sup> Many states, in contrast, have their own, differing standards for injunctive relief; rather than applying a balancing test, several states either require or prohibit the award of injunctive relief in certain types of cases.<sup>3</sup> A court's decision as to whether to apply federal or state standards for granting an injunction may, in many cases, determine a litigant's ability to obtain interim or final relief.

Part of the difficulty underlying this choice-of-law issue stems from *Erie Railroad Co. v. Thompkins*.<sup>4</sup> *Erie*, as construed in cases such as the 1965 Supreme Court decision *Hanna v. Plumer*, directs federal courts to apply state law for "substantive" issues and federal law for "procedural" issues in cases arising under state law.<sup>5</sup> Some scholars contend, however, that remedies are neither purely procedural nor substantive but rather share attributes of both (a position I reject).<sup>6</sup> Consequently, many remedial issues fit awkwardly at best within the *Erie* framework.<sup>7</sup>

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<sup>1</sup> This article's analysis applies to any claim in federal court arising under state law. Although diversity cases are the primary focus, its conclusions apply equally to claims within a federal court's supplemental jurisdiction. *Felder v. Casey*, 487 U.S. 131, 151 (1988).

<sup>2</sup> 547 U.S. 388, 391, 394 (2006); see *infra* notes 265–266 and accompanying text.

<sup>3</sup> See *infra* notes 415–431 and accompanying text.

<sup>4</sup> 304 U.S. 64, 78 (1938).

<sup>5</sup> *Hanna v. Plummer*, 380 U.S. 460, 464–65 (1965); *Erie*, 304 U.S. at 78.

<sup>6</sup> See, e.g., DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 1.1, at 2 (2d ed. 1993); David Crump, *The Twilight Zone of the Erie Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court a Block Away"?*, 1991 WIS. L. REV. 1233, 1235 (arguing that equitable remedies "look both substantive and procedural"); cf. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1 (4th ed. 2010) ("The law of remedies falls somewhere in between procedure and primary substantive rights. Remedies are substantive, but they are distinct from the rest of the substantive law, and sometimes their details blur into procedure.").

<sup>7</sup> See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 401–02 (2010) (holding that a federal court sitting in diversity may not apply a state law prohibiting class actions for statutory penalties on the grounds the issue is procedural).

More fundamentally, the federal judiciary's conception of its equity power is anachronistic, rooted in a pre-*Erie* framework. Federal courts often treat equity as an independent body of law that is binding upon them of its own force,<sup>8</sup> akin to the general law that *Erie* repudiated.<sup>9</sup> In 1945, in *Guaranty Trust Co. v. York*,<sup>10</sup> one of the United States Supreme Court's major post-*Erie* cases, the Court partly endorsed this understanding. *Guaranty Trust* requires federal courts to apply a uniform body of equitable principles tracing back to the English Court of Chancery—as interpreted by the Supreme Court—when deciding whether to grant equitable relief, regardless of whether the underlying claim arises under federal or state law.<sup>11</sup> Several commentators termed this principle the “equitable remedial rights doctrine.”<sup>12</sup>

This prevailing understanding of equity law is irredeemably flawed. This Article proposes a new understanding of the federal judiciary's equity power. Equity should not be understood as a single, freestanding body of principles that federal courts must apply regardless of whether a case arises under federal or state law. Neither the U.S. Constitution, federal law, nor the Federal Rules of Civil Procedure authorizes federal courts to craft and apply a uniform body of equitable principles, including equitable remedial principles, to all claims that come before them, regardless of the source of law from which a claim arises. The assertion of such authority exceeds federalism-based limits on the federal government's power as a whole, the scope of federal courts' Article III judicial power, the judiciary's authority under the Rules of Decision Act,<sup>13</sup> and the policy considerations underlying *Erie* itself.

The source of a federal court's power to impose an equitable remedy comes, if at all, from the legal authority that establishes the underlying right, whether it is state common law, a state statute or constitution, a federal statute, or the U.S. Constitution. Just as each state is free to craft its own body of common law that federal courts are bound to enforce, it should likewise have the power to develop its own equitable rules and principles that are equally binding in both state and federal court, even for remedial issues. Federal courts should apply state statutes and precedents, rather than federal equitable principles, in deciding whether to grant equitable relief for claims arising under state law.

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<sup>8</sup> See, e.g., *infra* note 23; see also *infra* notes 218–225 and accompanying text.

<sup>9</sup> *Erie*, 304 U.S. at 78.

<sup>10</sup> 326 U.S. 99, 104–05 (1945).

<sup>11</sup> *Id.*

<sup>12</sup> Comment, *The Equitable Remedial Rights Doctrine*, 55 YALE L.J. 401, 416–17 (1945); Note, *The Equitable Remedial Rights Doctrine: Past and Present*, 67 HARV. L. REV. 836, 836, 843–44 (1954) [hereinafter *Past and Present*].

<sup>13</sup> 28 U.S.C. § 1652 (2012).

Federal equity law should be reconceptualized as the body of principles that courts presumptively apply in the absence of contrary federal statutory requirements when deciding whether to grant equitable relief under the U.S. Constitution or a federal statute. Congress may decide how statutory rights it creates should be enforced.<sup>14</sup> When a federal law provides for an equitable remedy such as an injunction, a court may presume Congress intended to implicitly incorporate and rely upon traditional equitable principles as a matter of statutory interpretation, in the absence of express language to the contrary in the law's text or legislative history.<sup>15</sup> When enforcing constitutional restrictions, federal courts are free to apply those traditional equitable principles as a matter of constitutional common law, unless Congress displaces them with an alternate remedial scheme.<sup>16</sup> In short, in a post-*Erie* world, equity stems from and follows the law. *Guaranty Trust* should be interred as a lingering remnant of a pre-*Erie* legal positivist era.

Prior to *Erie*, numerous commentators explored the effects of state statutes and court rulings on federal equitable principles.<sup>17</sup> In the decades since,

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<sup>14</sup> Standing and related doctrines limit Congress' power to authorize the enforcement of federal laws through private rights of action. See Michael T. Morley, Spokeo: *The Quasi-Hohfeldian Plaintiff and the Non-Federal Federal Question*, GEO. MASON L. REV. (forthcoming 2018) (manuscript at 8–9), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2946482](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946482) [<https://perma.cc/A89R-TGWD>].

<sup>15</sup> See *infra* notes 432–436 and accompanying text. Of course, extensive debates exist over whether courts may rely on legislative history when construing or applying federal statutes. See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND MATERIALS ON THE CREATION OF PUBLIC POLICY 956 (3d ed. 2001) (collecting sources). This Article's conclusions apply with equal force even if limited solely to the text of the statute itself.

<sup>16</sup> See *infra* notes 437–439 and accompanying text.

<sup>17</sup> See, e.g., N.C. Collier, *Limitations on Federal Courts in Administering State Law*, 75 CENT. L.J. 330, 336 (1912) (arguing that a federal court in equity should act as “purely a substitute jurisdiction” for state courts, to protect defendants' rights); Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 301 (1927) (contending that the “truly national” system of equity had the “strength and flexibility” necessary to “meet the demands of changing conditions which require equitable treatment”); Note, *Effect of State Laws on the Equity Jurisdiction of the Federal Courts*, 3 VA. L. REV. 227, 230–32 (1915) [hereinafter *Effect of State Laws*] (explaining that state statutes may not expand a federal court's equity jurisdiction, yet sometimes effectively do so by creating new substantive rights that a federal court sitting in equity must enforce); Note, *The Effect of State Statutes on Equity Jurisdiction in the Federal Courts*, 33 YALE L.J. 193 (1923) [hereinafter *The Effect of State Statutes*] (arguing that federal courts should enforce state statutes creating new forms of equitable relief only when the common law did not provide relief under similar circumstances); Note, *Equity Jurisdiction of a Federal Court to Set Aside a Will by Force of a State Statute*, 3 COLUM. L. REV. 47 (1903) [hereinafter *Equity Jurisdiction*] (discussing various circumstances in which a federal court would not enforce state statutes in equity cases); Note, *State Laws in Federal Courts of Equity*, 4 COLUM. L. REV. 589, 590 (1904) (arguing that federal courts sitting in equity should apply uniform federal equitable standards in diversity cases, except “in matters which are essentially local,” such as property disputes or cases involving marital rights); Note, *State Statutes and the Federal Equity Courts*, 32 COLUM. L. REV.

some brief pieces considered the continuing validity of the equitable remedial rights doctrine.<sup>18</sup> Despite the voluminous body of literature on *Erie*, however, the issue remains unresolved<sup>19</sup> and books on remedies generally overlook it. Commentators continue to reach conflicting conclusions concerning the applicability of state equitable principles in federal court, and very few have offered a comprehensive analysis of modern federal equity.<sup>20</sup> The Supreme

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688 (1932) (discussing various doctrines that limit the obligation of federal courts sitting in equity to enforce state statutes).

<sup>18</sup> *The Equitable Remedial Rights Doctrine*, *supra* note 12, at 416–17 (arguing that federal courts should treat remedial issues as “substantive[,]” requiring them to apply state law); *Past and Present*, *supra* note 12, at 843–44 (arguing that a “federal court in diversity matters should ordinarily grant the same remedy that would be given in a state court” but apply federal standards to “matters of judicial housekeeping” such as “supervision of receivers” and “enforcement of injunctions”).

<sup>19</sup> RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 577 n.1 (6th ed. 2009) (“Scholars have disagreed on the appropriateness of recognizing a special role for federal equity in fashioning remedies in cases falling within the scope of the *Erie* doctrine.”); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1248 n.172 (2001) (“There remains some disagreement over the scope of a federal court’s authority when sitting in diversity to exercise federal equity powers in lieu of following state rules.”); *Past and Present*, *supra* note 12, at 839 (“[I]t is not clear whether the overruling of *Swift* by *Erie R.R. v. Tompkins* destroys the remedial rights doctrine, especially since many of the cases espousing that doctrine disregarded state statutes as well as decisions.”).

<sup>20</sup> Professor David Crump raised the equitable remedial rights issue as a vehicle for advocating that *Erie* questions be resolved based on a modified version of the interest-balancing test of *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958). Crump, *supra* note 6, at 1235, 1272–73 (concluding that federal courts should apply state law standards in determining whether to grant equitable relief for claims arising under state law, except when “strong federal interests overcome weaker state ones”); see also Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 47–48, 53 (2013) (arguing that, under *Hanna v. Plumer*, federal courts should apply state law to determine whether to issue a preliminary injunction); Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513, 519 (1958) (arguing that federal courts should apply state law equitable and remedial principles in state-law cases where the choice of such principles would “actually influence the parties’ prelitigation conduct” and uniform federal principles concerning equitable remedies in all other cases).

Professor John T. Cross urged the opposite perspective, arguing that the Constitution gives federal judges the power to apply “a separate body of federal equity law,” based on the principles that the English Court of Chancery employed in the eighteenth century, in both state and federal cases. John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 175, 214, 226 (1999). More recently, Professor David E. Shipley urged the same conclusion specifically with regard to the standards governing preliminary injunctions. David E. Shipley, *The Preliminary Injunction Standard in Diversity: A Typical Unguided Erie Choice*, 50 GA. L. REV. 1169 (2016). He contends that such standards are procedural because they are not likely to affect a plaintiff’s choice of forum, and neither dictate the ultimate outcome of a case nor create the type of inequality among litigants that *Erie* condemns. *Id.* at 1217–18, 1221. Wright and Miller’s *Federal Practice and Procedure* treatise adopts something of a compromise position, declaring that federal standards should govern interim relief such as preliminary injunctions, while state law standards generally should govern permanent relief, except in “exceptional cases” where applying federal standards would allow federal courts to “effect justice expeditiously or creatively.” 19 CHARLES ALAN

Court has recognized the choice-of-law problem concerning the proper standard for equitable relief in state-law cases, but declined to address it on the merits.<sup>21</sup> Lower federal courts have adopted a variety of approaches, many either avoiding the issue<sup>22</sup> or choosing to apply federal equitable standards pursuant to *Guaranty Trust*.<sup>23</sup> This Article presents a comprehensive analysis of *Erie*'s application to equity, offering a new understanding of the federal equity power, particularly with regard to remedial issues.

Part I of this Article begins by tracing the development of equity law in England.<sup>24</sup> Part II explores equity's adoption in the United States, explaining that federal courts treated it analogously to general law under the Supreme

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WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4513, Westlaw (database updated Apr. 2017).

An influential pair of articles discussed the scope of federal courts' equitable powers specifically in the bankruptcy context. Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1050 (1953) (arguing that a federal court may apply its own equitable judgment, rather than following state law, for issues within the scope of Congress' bankruptcy power); Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 669–70 (2004) (arguing that a federal court may use its own equity powers instead of applying state law when the federal bankruptcy statute authorizes it to do so).

A few commentators have touched on or acknowledged the issue without adopting a normative position in the course of developing largely unrelated arguments. See Fitzgerald, *supra* note 19, at 1270–73; Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 684–85 (2001); see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 511 (1954); Joan E. Schaffner, *Federal Circuit "Choice of Law": Erie Through the Looking Glass*, 81 IOWA L. REV. 1173, 1214 n.252 (1996); Kevin C. Mulder, Note, *The Extension of Comity: Fair Assessment in Real Estate Association v. McNary*, 32 AM. U. L. REV. 1123, 1152 n.167 (1986). For a thorough historical discussion of the federal judiciary's equitable powers, see generally Kristin A. Collins, "*A Considerable Surgical Operation*": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249 (2010).

<sup>21</sup> See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999) (declining to address the argument that the availability of injunctive relief in a diversity case "should be determined by the law of the forum State" rather than Rule 65 and "federal equity principles," because the issue "was neither raised nor considered below"); see also *Stern v. S. Chester Tube Co.*, 390 U.S. 606, 609–10 (1968) (declining to decide in a diversity case "where such a federal [injunctive] remedy can be provided even in the absence of a similar state remedy . . . because it is clear that state law here also provides for enforcement of the shareholder's right by a compulsory judicial order").

<sup>22</sup> See, e.g., *Charlesbank Equity Fund II, Ltd. P'ship v. Blinds to Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004); *Paradigm Biodevices, Inc. v. Centinel Spine, Inc.*, No. 11 Civ. 3489 (JMF), 2013 U.S. Dist. LEXIS 66858, at \*4 n.1 (S.D.N.Y. May 9, 2013); *Carlson v. JP Morgan Chase Bank, NA*, No. 10–272 (PJS/AJB), 2010 U.S. Dist. LEXIS 33072, at \*8–9 (D. Minn. Mar. 15, 2010).

<sup>23</sup> See, e.g., *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 806 (2d Cir. 1981); *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54, 57 (5th Cir. 1970); *N.Y. Life Ins. Co. v. Watt W. Inv. Corp.*, 755 F. Supp. 287, 290 (E.D. Cal. 1991). Other courts have held that the Federal Rules of Civil Procedure implicitly require federal courts to apply traditional equitable standards when deciding whether to grant an injunction or receivership in diversity cases. See, e.g., *infra* notes 270, 283 and accompanying text.

<sup>24</sup> See *infra* notes 30–80 and accompanying text.



Court's 1842 decision in *Swift v. Tyson*.<sup>25</sup> Part III goes on to show that the Supreme Court partly preserved this conception of federal equity law, despite *Erie*, in *Guaranty Trust*.<sup>26</sup> Part IV demonstrates that neither the U.S. Constitution, federal law, nor the Federal Rules of Civil Procedure provides a basis for recognizing a uniform or freestanding body of equitable principles that federal courts are bound to apply to all cases that come before them, including for remedial issues.<sup>27</sup>

This Part also offers a new conception of equity: the equitable principles a court must apply to a claim arise from the source of law giving rise to that cause of action. Equitable relief for state-law claims should be determined by state law, including state statutes and precedents. For federal statutory claims, a court may presume, in the absence of contrary evidence, that Congress implicitly incorporated into the statute traditional equitable principles of the English Court of Chancery as construed by the Supreme Court.<sup>28</sup> Likewise, for claims under the U.S. Constitution, courts may apply those traditional equitable principles as a matter of constitutional common law, unless Congress has created an alternate remedial scheme. In cases involving a mix of state and federal claims, a litigant may be entitled to equitable relief under one set of standards, but not the other. The Conclusion summarizes this Article's recommendations.<sup>29</sup>

Commentators have adopted numerous, conflicting interpretations of the *Erie* Doctrine. The arguments here are intended to be "*Erie* agnostic": equally applicable regardless of whether one believes the *Erie* Doctrine is rooted in federalism-based limits on the federal government's power, separation-of-powers limits on the federal judiciary's power, statutory interpretation of the Rules of Decision Act, or merely sound policy considerations.

## I. THE ORIGIN AND DEVELOPMENT OF EQUITY

The Supreme Court has repeatedly held that federal courts are generally required to apply the same principles of equity as the English Court of Chancery did in 1789.<sup>30</sup> Before assessing the legal and constitutional rationale for

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<sup>25</sup> See *infra* notes 81–181 and accompanying text.

<sup>26</sup> See *infra* notes 182–227 and accompanying text.

<sup>27</sup> See *infra* notes 228–441 and accompanying text.

<sup>28</sup> See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

<sup>29</sup> See *infra* Conclusion.

<sup>30</sup> *Grupo Mexicano*, 527 U.S. at 319 (considering whether “the relief respondents requested here was traditionally accorded by courts of equity”); *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939) (holding that federal courts have “authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries”).

this principle, it is helpful to lay a foundation by examining the nature and development of equity in England.

Equity evolved in England as a natural outgrowth of the King's inherent power and duty to do justice.<sup>31</sup> In the years following the Norman Conquest, most legal business was conducted in county or manorial courts; no royal courts existed at the time.<sup>32</sup> When a person could not obtain adequate relief from a local court—for example, due to the social position or connections of his adversaries<sup>33</sup>—he could directly petition the King for aid. As the “fountain[] of justice,”<sup>34</sup> the King could grant relief when ordinary legal institutions were insufficient, unwilling, or unable to do so.<sup>35</sup> The King could issue a writ directing the lord of the manor or some public official to do “full right” to the plaintiff, or else directly order a respondent to take (or refrain from taking) some action.<sup>36</sup>

By the late twelfth century, to alleviate the need for people to seek relief directly from the Crown, the royal courts of King's Bench, Exchequer, and Common Pleas began to develop outside the main legal system of county and manorial courts,<sup>37</sup> each with jurisdiction over different types of cases. There were very few statutes and precedents; these courts resolved disputes based on both law and equitable principles without distinguishing between them,<sup>38</sup> and granted relief such as the Writ of Prohibition and the Writ of Estrepment that resembled injunctions in many ways.<sup>39</sup>

To initiate a lawsuit in a royal court, a plaintiff had to obtain a royal writ from the Chancellor. The Chancellor was a member of the King's royal council, or *curia*, who kept the royal seal and issued documents in the name of the

<sup>31</sup> THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 681 (5th ed. 1956).

<sup>32</sup> GEO. TUCKER BISPHAM, *THE PRINCIPLES OF EQUITY* 3–4 (5th ed. 1893); JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 18–19 (2009).

<sup>33</sup> BISPHAM, *supra* note 32, at 11.

<sup>34</sup> D. KERLY, *A HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 13 (1890).

<sup>35</sup> See LANGBEIN, *supra* note 32, at 90–91; see also Statute of Westminster I, 3 Edw. 1, ch. 17 (1275) (declaring that “the King, which is Sovereign Lord over all, shall do Right there unto such as will complain”).

<sup>36</sup> MELVILLE M. BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* 151–52 (1880).

<sup>37</sup> LANGBEIN, *supra* note 32, at 118–22; PLUCKNETT, *supra* note 31, at 147–51; Harold D. Hazeltine, *The Early History of English Equity*, in *ESSAYS IN LEGAL HISTORY* 261, 262 (P. Vinogradoff ed. 1913).

<sup>38</sup> George B. Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 89 (1916); see also Hazeltine, *supra* note 37, at 262.

<sup>39</sup> David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 545–50 (1986).

Crown.<sup>40</sup> In the earliest years of the royal courts, the Chancellor had authority to craft writs based on the specific circumstances of each case, allowing plaintiffs to pursue claims as justice demanded.<sup>41</sup> Over the course of the thirteenth century, other governmental institutions greatly circumscribed the Chancellor's power to craft new types of writs. The royal courts often refused to accept new writs, asserting for themselves the prerogative to determine whether to recognize new rights.<sup>42</sup> Likewise, Parliament claimed for itself the power to create new writs.<sup>43</sup>

The Court of Common Pleas' refusal to recognize new writs caused the common law to ossify. As Common Pleas increased in size and grew more distant from the Crown over the mid-fourteenth century, it became reluctant to exercise the King's royal prerogative to adjudicate cases based on equitable considerations.<sup>44</sup> Moreover, the common-law lawyers who had largely supplanted clerics as judges on the court were more inclined to base their rulings on the common law rather than canon law or equitable principles.<sup>45</sup>

The reluctance of Common Pleas to embrace new grounds for relief compelled many people to seek relief directly from the King and his royal council. As the number of such petitions increased, the council delegated responsibility for considering them to the Chancellor.<sup>46</sup> By 1400, complainants presented their petitions directly to the Chancellor.<sup>47</sup> A Court of Chancery gradually developed around the Chancellor to facilitate his role.

During the early years of the Chancery Court, most Chancellors were bishops because they were among the only literate people in the government.<sup>48</sup> Chancellors thus tended to be familiar with, and rely upon, ecclesiastic and Roman law, as well as the writings of Catholic scholars such as Thomas Aquinas, rather than the common law.<sup>49</sup> It was through Aquinas' works that Aristotle's conception of equity made its way into English law.<sup>50</sup>

<sup>40</sup> Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 L. & HIST. REV. 245, 247 (1996).

<sup>41</sup> 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 398 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956).

<sup>42</sup> PLUCKNETT, *supra* note 31, at 164.

<sup>43</sup> See Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 HARV. L. REV. 834, 834-35 (1918).

<sup>44</sup> 1 HOLDSWORTH, *supra* note 41, at 447-48, 454.

<sup>45</sup> 2 *id.* at 345.

<sup>46</sup> 1 *id.* at 339-402, 404; PLUCKNETT, *supra* note 31, at 180-81; see also PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 26 (1990).

<sup>47</sup> J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 117 (3d ed. 1990).

<sup>48</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*47; Haskett, *supra* note 40, at 247.

<sup>49</sup> See CHRISTOPHER ST. GERMAN, THE REPLICATION OF A SERJEANT AT THE LAWS OF ENGLAND (1787), reprinted in J.A. GUY, CHRISTOPHER ST. GERMAN ON CHANCERY AND STATUTE 101 (J.A. Guy ed., Selden Soc'y 1985) (alleging that English Chancellors "had but superficial

Aquinas' *Commentary on the Nicomachean Ethics* explains, "[B]y equity a person is obedient in a higher way when he follows the intention of the legislator where the words of the law differ from it."<sup>51</sup> Aquinas emphasized that human reason is limited, and legislators therefore cannot perfectly recognize and capture all the details and nuances of natural law.<sup>52</sup> Judges must invoke equity to correct inevitable defects in the law, thereby better enforcing natural justice. In Aquinas' view, the "nature of the equitable is that it be directive of the law where the law is deficient for some particular case . . . . Because the material of human acts is indeterminate . . . the law[] must be indeterminate in the sense that it is not absolutely rigid."<sup>53</sup> Aquinas' *Summa Theologica* offered an affirmative response to the question of "Whether He who is Under a Law May Act Beside the Letter of the Law."<sup>54</sup> It explains that "if a case arise[s] wherein the observance of that law would be hurtful to the general welfare, it should not be observed."<sup>55</sup>

Applying this conception of equity, Chancellors exercised extremely broad discretion, doing justice in individual cases based on their personal notions of fairness, informed by natural law principles, despite the common law's limits.<sup>56</sup> "[E]quity courts interpreted documents loosely, often to the extent of rewriting them, in order to achieve a result that the Chancellor believed to be just . . . . Likewise, statutes which produced unjust results were interpreted in contorted and fanciful ways to avoid unjust outcomes."<sup>57</sup>

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knowledge of the lawes of the realme"); HENRY SUMNER MAINE, *ANCIENT LAW* 36 (Dorset Press 1986) (1861).

<sup>50</sup> Aristotle wrote that a statute may be unjust as applied to certain situations not contemplated by its drafters. He explained that *epieikeia*—which is typically translated as "equity" or "fair-mindedness," Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 *NOTRE DAME L. REV.* 119, 125–26 (1942); Lawrence B. Solum, *Natural Justice*, 51 *AM. J. JURIS.* 65, 99–100 (2006)—is the "correction of law, where law falls short because of its universality." ARISTOTLE, *RHETORIC* 1374a (David J. Furley & Alexander Nehamas eds. 1994). When a statute is broadly written, a court must apply it by "say[ing] what the legislator himself would have said had he been present, and would have put into his law if he had known [about this particular case]." ARISTOTLE, *NICOMACHEAN ETHICS* 141–42 (Martin Ostwald, trans. Bobbs–Merrill, 1962). "[W]hen the law speaks universally," he elaborated, "and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by oversimplicity, to correct the omission." *Id.*

<sup>51</sup> 1 THOMAS AQUINAS, *COMMENTARY ON THE NICOMACHEAN ETHICS* 466 (C.I. Litzinger trans., 1964).

<sup>52</sup> *Id.* at 467–68.

<sup>53</sup> *Id.* at 466.

<sup>54</sup> 1 THOMAS AQUINAS, *SUMMA THEOLOGICA* 1021 (Richard C. Meyer trans., 1947).

<sup>55</sup> *Id.*

<sup>56</sup> 1 HOLDSWORTH, *supra* note 41, at 467; F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 225–26 (H. Fisher ed. 1920).

<sup>57</sup> John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 *HOUS. L. REV.* 1425, 1435 (1998).

Commentators often claimed that the Chancellor applied natural law or followed the dictates of his “conscience.”<sup>58</sup> The unavoidably subjective aspects of equity led to the criticism that equity varied with the length of the Chancellor’s foot.<sup>59</sup>

The Court of Chancery was not bound by strict notions of precedent;<sup>60</sup> indeed, throughout Chancery’s early history, written rulings were not even published or widely available. The court recognized and enforced a broad range of equitable rights that could not be asserted in common-law courts, such as rights relating to trusts and uses.<sup>61</sup> It was primarily responsible for many other areas of law, as well, including agency law, partnerships, and suretyships, and recognized defenses unavailable at law, such as fraud.<sup>62</sup> Equity enabled the continued development of the law despite the rigidity of the common-law courts.<sup>63</sup>

Chancery also offered a much broader range of remedies than were available at law.<sup>64</sup> Whereas Common Pleas could only issue a judgment that entitled the plaintiff to attempt to obtain a specified amount of money from the defendant, equity could issue injunctions that prohibited the defendant from taking certain acts or required him to do so.<sup>65</sup> A court of equity could attempt to prevent harm before it even occurred, whereas the common law offered only an ex post remedy.<sup>66</sup> Relief in equity thus tended to be specific, rather than substitutionary.<sup>67</sup>

In 1528, Christopher St. Germain published *Doctor and Student*, a dialogue between a doctor of divinity and an English barrister, discussing the relationship between English law and personal conscience.<sup>68</sup> The book offered one of the first in-depth accounts of English equity and was among the most important compilations of English law prior to Blackstone’s *Commentaries*. St. Germain presented equity in terms of Aristotle’s conception of *epieikeia*.<sup>69</sup>

<sup>58</sup> HOFFER, *supra* note 46, at 26; *see also* BAKER, *supra* note 47, at 118 (describing Chancery as “a court of conscience, in which defendants could be coerced into doing whatever conscience required in the full circumstances of the case”).

<sup>59</sup> JOHN SELDEN, TABLE TALK 49 (Books for Libraries Press 1972) (1855).

<sup>60</sup> Kroger, *supra* note 57, at 1435.

<sup>61</sup> HOFFER, *supra* note 46, at 29.

<sup>62</sup> 5 HOLDSWORTH, *supra* note 41, at 292; PLUCKNETT, *supra* note 31, at 688–89.

<sup>63</sup> 2 HOLDSWORTH, *supra* note 41, at 346–47.

<sup>64</sup> 3 BLACKSTONE, *supra* note 48, at \*439.

<sup>65</sup> 1 HOLDSWORTH, *supra* note 41, at 458.

<sup>66</sup> *Id.*

<sup>67</sup> *Cf.* LAYCOCK, *supra* note 6, at 5–6 (discussing difference between specific and substitutionary relief).

<sup>68</sup> *See generally* CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT (1528).

<sup>69</sup> *See supra* note 50.

By this time, the Chancery Court was limited to equitable jurisdiction; it could grant relief only when a party lacked an adequate remedy at law.<sup>70</sup> The common law could be inadequate in many ways: a defendant may be too violent or powerful to sue in an ordinary court, the plaintiff might be unable to satisfy a technical element or evidentiary requirement for obtaining relief at law, the common law may lack a writ for the harm the plaintiff had suffered, a common-law jury could be prejudiced against the plaintiff, or the defendant may have subjected the plaintiff to multiple vexatious and frivolous suits at law.<sup>71</sup>

In 1617, Bacon became the Lord Chancellor of England, and he sought to transform equity into a more predictable, consistent system of law. He compiled a code of 101 orders derived from earlier Chancery rulings to guide chancellors in the exercise of their equitable discretion.<sup>72</sup> By using prior rulings as precedents, he enabled legal reasoning in Chancery to more closely approximate the common-law courts and ensured greater consistency among decisions.<sup>73</sup> As a result of Bacon's reforms, attorneys practicing in Chancery began to cite cases.<sup>74</sup>

During the English Civil War (1642-1651) and Interregnum (1649-1660), Chancery was viewed with great suspicion. "As a prerogative court, it was subject to the same suspicion as its far more obnoxious and politically active counterpart, the Star Chamber."<sup>75</sup> Following the Restoration, Chancery became more conservative, curbing its discretion.<sup>76</sup> After becoming Chancellor in 1673, Lord Nottingham—whom Holdsworth calls the "Father of Modern Equity"<sup>77</sup>—compiled a manual of Chancery practice setting forth principles to guide and restrict the availability of equitable relief such as injunctions. Though the manual itself was unpublished, Nottingham's rulings as Chancellor were consistent with it. Holdsworth explains that Nottingham "began the work of organizing and systematizing the principles upon which the court acted; and, as a result of his work, equity began to assume its final

<sup>70</sup> Raack, *supra* note 39, at 555.

<sup>71</sup> *Id.* at 555–61 (collecting cases).

<sup>72</sup> 15 THE WORKS OF FRANCIS BACON 347–72 (J. Spedding ed. 1861); *see also* 5 HOLDSWORTH, *supra* note 41, at 193.

<sup>73</sup> PLUCKNETT, *supra* note 31, at 690. Precedent was not universally accepted as a valid source of authority in Chancery. *See* Fry v. Porter, 86 ENG. REP. 898, 902 (1670) ("[I]f there be equity in a case, that equity is an [*sic*] universal truth, and there can be no precedent in it.").

<sup>74</sup> 5 HOLDSWORTH, *supra* note 41, at 337. Bacon was later impeached and removed from office for taking bribes, though King James I pardoned him. HOFFER, *supra* note 46, at 34–35. The possibility for such corruption was one source of concern about the Chancellor's purportedly unlimited discretion to apply equity according to his conscience.

<sup>75</sup> HOFFER, *supra* note 46, at 28.

<sup>76</sup> *Id.*

<sup>77</sup> 5 HOLDSWORTH, *supra* note 41, at 150.

form.”<sup>78</sup> Over the century that followed, the law of equity would become, in Holdsworth’s view, “completely fixed.”<sup>79</sup>

Thus, over time, equity matured from a series of ad hoc, case-by-case rulings to a set of principles structurally similar to—although different in substance from—the common law. As a result of the efforts of Chancellors such as Bacon and Nottingham, English equity could accurately be characterized as a distinct body of law. Blackstone concluded that equity is a “connected system, governed by established rules, and bound down by precedents, from which [Chancellors] do not depart, although the reason of some of them may perhaps be liable to objection.”<sup>80</sup>

## II. AMERICAN EQUITY PRIOR TO *ERIE*

The thirteen colonies adopted dramatically different approaches to equity.<sup>81</sup> Several colonies, following the English model, established separate common-law and chancery courts,<sup>82</sup> while others permitted their common-law courts of general jurisdiction to entertain equitable claims, as well.<sup>83</sup> Some colonies entirely excluded equity from their judicial systems,<sup>84</sup> instead allowing the governor and governor’s council to exercise the equity power.<sup>85</sup> Many Americans were deeply skeptical of the broad discretion entrusted to equity courts, finding the notion of equity antithetical to the rule of law. They regarded equitable discretion to temper or disregard legal principles “as an appanage of the Crown’s prerogative, and, therefore, inimical to their individual liberties.”<sup>86</sup>

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<sup>78</sup> *Id.*; see also MAITLAND, *supra* note 56, at 312; Dennis R. Klinck, *Lord Nottingham’s “Certain Measures,”* 28 L. & HIST. REV. 711, 746 (2010) (discussing Nottingham’s efforts).

<sup>79</sup> 5 HOLDSWORTH, *supra* note 41, at 547.

<sup>80</sup> 3 BLACKSTONE, *supra* note 48, at \*432. He elsewhere explained that “[i]f the rigor of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law.” *Id.* at \*60.

<sup>81</sup> HOFFER, *supra* note 46, at 49–51.

<sup>82</sup> See THE FEDERALIST NO. 83, at 435 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (identifying New York, New Jersey, Maryland, Virginia, and South Carolina as having separate chancery courts).

<sup>83</sup> *Id.* (identifying Pennsylvania, Delaware, and North Carolina as granting “equity jurisdiction” to their “common-law courts”).

<sup>84</sup> *Id.* at 435–36 (noting that Georgia had “none but common-law courts,” and that Connecticut, Rhode Island, Massachusetts, and New Hampshire permitted their common-law courts to exercise some equity jurisdiction, but “[i]n cases of importance, their General Assembly is the only court of chancery”).

<sup>85</sup> Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 449–450, 449 n.127 (2003).

<sup>86</sup> von Moschzisker, *supra* note 17, at 289.

At the Constitutional Convention, the original draft of the Constitution did not contain any references to equity.<sup>87</sup> The proposal to grant federal courts equity jurisdiction arose very late in the process, in late August. William Johnson “suggested[] that the judicial power ought to extend to equity as well as law.”<sup>88</sup> George Read, a delegate from Maryland, “objected to vesting these powers in the same court.”<sup>89</sup> Without further debate, the proposal passed by a vote of six states to two states.<sup>90</sup>

A few opponents of the Constitution objected to the judiciary’s equity power during the ratification debates, but it was not a major flashpoint.<sup>91</sup> One prominent Anti-Federalist, Brutus, warned that granting judges equitable powers would permit them to ignore the plain text of laws and constitutional provisions and enforce their personal will.<sup>92</sup> Another cautioned that it was “dangerous” to “vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate.”<sup>93</sup>

The *Federalist Papers* defended Article III’s jurisdictional grant over cases in equity by explaining that federal courts need the power to fairly adjudicate cases otherwise within their jurisdiction that involve “ingredients of fraud, accident, trust, or hardship.”<sup>94</sup> Alexander Hamilton later elaborated, “The great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules.”<sup>95</sup>

For more than a century after the Founding, federal courts treated equity as an independent body of law they were required to apply, typically regard-

<sup>87</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 186 (Max Farrand ed. 1911).

<sup>88</sup> *Id.* at 428.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution* (June 21, 1788) in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 565 (Jonathan Elliot ed. 1836) (statement of Grayson).

<sup>92</sup> Brutus, *The Supreme Court: They Will Mould the Government into Almost Any Shape They Please*, N.Y. J. (Jan. 31, 1788), reprinted in 2 THE DEBATE ON THE CONSTITUTION 129, 132 (Bernard Bailyn ed. 1993).

<sup>93</sup> *Letters from the Federal Farmer III* (Oct. 10, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (Herbert J. Storing ed. 1981).

<sup>94</sup> THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 82, at 415; see also 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. D at 263 (Philadelphia, William Young Birch & Abraham Small 1803) (noting that, in each of Article III’s jurisdictional fonts, “equitable circumstances may arise, the cognizance of which, as well as such as were strictly legal, would belong to the federal judiciary, by virtue of this clause”).

<sup>95</sup> THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 82, at 438.



less of state statutes or state court rulings to the contrary. They generally distinguished among four types of issues relating to equity to which different constitutional provisions, statutory restrictions, and other doctrines applied: jurisdictional, procedural, remedial, and substantive. Of course, the boundaries among these categories often were indistinct and an equitable issue could implicate multiple categories.

### A. Equity Jurisdiction

The Constitution provides that federal courts may exercise jurisdiction over cases and controversies “in Law and Equity.”<sup>96</sup> Congress implemented this jurisdiction in section 11 of the Judiciary Act of 1789,<sup>97</sup> which gave federal circuit courts “original cognizance, concurrent with the courts of the several States,” over certain “suits of a civil nature at common law or in equity.”<sup>98</sup> This jurisdictional grant extended to matters in which the amount in controversy exceeded \$500, and either the Government was a plaintiff, an alien was a party, or the case involved litigants from different states.<sup>99</sup> The Judiciary Act also authorized the Supreme Court to hear appeals from circuit courts in equity cases.<sup>100</sup>

Section 16 of the Judiciary Act went on to limit the federal courts’ equitable jurisdiction, stating, “[S]uits in equity shall not be sustained in . . . courts of the United States, in any case where a plain, adequate and complete remedy may be had at law.”<sup>101</sup> The Judiciary Act further provided that suits in equity were not to be tried by jury.<sup>102</sup> These restrictions complemented the Seventh Amendment,<sup>103</sup> which provides, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury

<sup>96</sup> U.S. CONST. art. III, § 2.

<sup>97</sup> Charles Warren’s magisterial work on the history of the Judiciary Act recounts the raucous debates in Congress surrounding the grant of equity jurisdiction to the federal courts. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 96 (1924).

<sup>98</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* § 22, 1 Stat. at 84.

<sup>101</sup> *Id.* § 16, 1 Stat. at 82; see *Dows v. Chicago*, 78 U.S. (11 Wall) 108, 112 (1870) (dismissing a federal suit seeking an injunction against allegedly illegal taxes because the plaintiffs had an adequate remedy at law “either by action against the officer making the collection or the body to whom the tax is paid”).

<sup>102</sup> Judiciary Act of 1789, § 12, 1 Stat. at 80; see also *Tull v. United States*, 481 U.S. 412, 417 (1987) (noting that “those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial” under the Seventh Amendment).

<sup>103</sup> *Root v. Ry. Co.*, 105 U.S. (15 Otto.) 189, 206 (1881) (“[T]his distinction of jurisdiction, between law and equity, is constitutional, to the extent to which the seventh amendment forbids any infringement of the right of trial by jury, as fixed by the common law.”).

shall be preserved . . . .”<sup>104</sup> The Seventh Amendment prohibits a federal court from hearing a case in equity when the plaintiff has an adequate remedy at law, thereby preserving the defendant’s right to a jury trial for common law claims.<sup>105</sup>

Together, the Judiciary Act and the Seventh Amendment created a remedial hierarchy, institutionalizing a preference for legal relief in the federal courts;<sup>106</sup> a claimant was relegated to legal, rather than equitable, relief when it was available.<sup>107</sup> These provisions greatly limited the range of state laws and precedents a federal court sitting in equity would follow and required legal and equitable claims to be adjudicated on different “sides” of the court.<sup>108</sup>

To determine whether a plaintiff’s claim—including claims arising under state law—sounded in law or equity for purposes of section 16 of the Judiciary Act and the Seventh Amendment, a federal court applied “the principles of common law and equity” from England.<sup>109</sup> The federal judiciary’s equitable jurisdiction “embrac[ed] all the subjects of which the High Court of Chancery in England had judicial cognizance at the time of the adoption of the Constitution.”<sup>110</sup> Federal courts sitting in equity could therefore hear any equitable claims that could have been brought before the English Court of Chancery in 1789, even in states that had granted their law courts jurisdiction over some or all traditionally equitable claims<sup>111</sup> or refused to recognize equi-

<sup>104</sup> U.S. CONST. amend. VII.

<sup>105</sup> See *Scott v. Neely*, 140 U.S. 106, 110 (1891) (“[W]henever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court,” in part “because the defendant has a constitutional right to a trial by jury . . . .”); accord *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1857); see also *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (holding that the Seventh Amendment’s guarantee of a civil jury applies in all “suits in which legal rights [a]re to be ascertained and determined, in contradistinction to those” in which “equitable rights . . . and equitable remedies” are at issue).

<sup>106</sup> OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 38 (1978).

<sup>107</sup> *Hipp*, 60 U.S. (19 How.) at 278.

<sup>108</sup> Main, *supra* note 85, at 450.

<sup>109</sup> *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 223 (1818); see also *Tull*, 481 U.S. at 417; *Parsons*, 28 U.S. (3 Pet.) at 447; *State Statutes and the Federal Equity Courts*, *supra* note 17, at 691.

<sup>110</sup> Benjamin F. Keller, *Jurisdiction of the Federal Equity Courts as Affected by State Statutes*, 47 AM. L. REV. 190, 190 (1913); accord *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869) (“The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses . . . .”).

<sup>111</sup> See *Miss. Mills v. Cohn*, 150 U.S. 202, 206 (1893) (holding that the plaintiff could proceed in equity in federal court, even though the law courts in the forum state could have entertained the plaintiff’s claims, because a federal court’s equitable jurisdiction depended on whether, under English equitable principles from “the time of the adoption of the Constitution . . . the relief . . . sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give”); *Sheffield Furnace Co. v. Witherow*, 149 U.S. 574, 578, 579 (1893) (holding

ty at all.<sup>112</sup> The Court repeatedly emphasized, “[T]he equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit.”<sup>113</sup>

Conversely, a federal court could not permit litigants to raise an equitable claim<sup>114</sup> or defense<sup>115</sup> in an action at law, even when state courts would permit them to do so.<sup>116</sup> Characterization of a claim or defense as legal or equitable depended on the historical practice of the English Court of Chancery, rather than the rulings, jurisdictional limits, or practice of state courts.<sup>117</sup> Consequently, all federal district courts exercised the same equitable jurisdiction, despite differences in state laws and state court rulings concerning equity.<sup>118</sup>

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that a federal court could entertain a bill in equity to enforce a mechanic’s lien, even though a state statute “provide[d] for an action at law” to enforce mechanic’s liens, because “foreclosure of a mechanic’s lien is essentially an equitable proceeding” and “a State, by prescribing an action at law to enforce even statutory rights, cannot oust a Federal court, sitting in equity, of its jurisdiction to enforce such rights, provided they are of an equitable nature”); *Payne*, 74 U.S. (7 Wall.) at 429–30 (holding that a federal court could exercise equity jurisdiction over a claim for an accounting against an estate administrator despite the fact that state law prohibited the state chancery court from hearing such claims and assigned exclusive jurisdiction to county probate courts).

<sup>112</sup> *Cohn*, 150 U.S. at 205.

<sup>113</sup> *Kirby v. Lake Shore & Mich. S. R.R.*, 120 U.S. 130, 138 (1887) (applying equitable tolling to state statute of limitations pursuant to federal equitable principles); see also *Payne*, 74 U.S. (7 Wall.) at 430 (“The equity jurisdiction conferred on the Federal courts is . . . subject to neither limitation or restraint by State legislation . . .”); Charles T. McCormick & Elvin Hale Hewins, *The Collapse of “General” Law in the Federal Courts*, 33 ILL. L. REV. 126, 139 (1938) (“State legislation or decisions could not enlarge or restrict the boundaries of Federal equity jurisdiction.”); *The Effect of State Statutes*, *supra* note 17, at 193 (explaining that state statutes cannot limit a federal court’s equitable jurisdiction); *State Laws in Federal Courts of Equity*, *supra* note 17, at 589 (“State statutes affecting equity in its concurrent jurisdiction were early held to have no effect on the federal courts.”).

<sup>114</sup> See *Stratton v. St. Louis Sw. Ry. Co.*, 284 U.S. 530, 534 (1932) (holding that a federal court could not enforce a state law authorizing equitable relief for overpayment of a tax because “the remedy by suit to recover a tax which has been paid is essentially a legal remedy, and it is not any the less so nor any the less adequate because the state practice has annexed to it an equitable remedy”); *Matthews v. Rogers*, 284 U.S. 521, 528–29 (1932) (same).

<sup>115</sup> *Lantry v. Wallace*, 182 U.S. 536, 549–50 (1901) (holding that a shareholder could not raise an equitable defense in an action at law brought by a corporation’s receiver); *Scott v. Armstrong*, 146 U.S. 499, 512 (1892) (holding that a federal court lacked jurisdiction to grant an equitable set-off in an action at law, even though state law abolished the distinction between law and equity); *Robinson*, 16 U.S. (3 Wheat.) at 220, 223 (holding that the defendant could not assert equitable title to land in a common-law ejectment action in federal court).

<sup>116</sup> See *The Effect of State Statutes*, *supra* note 17, at 194 (“[L]egal and equitable actions may not be united in the federal courts . . .”).

<sup>117</sup> *Robinson*, 16 U.S. (3 Wheat.) at 222–23.

<sup>118</sup> *Payne*, 74 U.S. (7 Wall.) at 430 (“The equity jurisdiction conferred on the Federal courts is . . . subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union.”); *United States v. Howland & Allen*, 17 U.S. (4 Wheat.) 108, 115 (1819) (holding that, because the Judiciary Act “confers the same chancery powers on all” federal

Similarly, when determining whether a litigant was barred from seeking equitable relief due to an adequate remedy at law, a federal court could consider only whether a legal remedy either existed under English common law in 1789 or subsequently had been created by Congress.<sup>119</sup> The adequacy of a litigant's remedy at law, and hence the availability of federal equitable relief, did not depend on the remedies actually available to it under state law at the time of the lawsuit. Consequently, a plaintiff for whom a legal remedy would have existed in 1789 could not seek equitable relief in federal court, even if a state statute or judicial ruling authorized it.<sup>120</sup> Conversely, a state statute or judicial ruling that created or recognized a new right that did not exist under English law at the time of the Constitution's ratification could not preclude a plaintiff from seeking equitable relief that was otherwise available in federal court.<sup>121</sup>

In many of these jurisdictional cases, the Court repeatedly emphasized that, because section 16 of the Judiciary Act established the federal judiciary's equity jurisdiction, states could not expand or restrict that jurisdiction by recognizing new common-law rights or refusing to recognize traditional ones.<sup>122</sup>

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courts, a federal district court's "jurisdiction in Massachusetts must be the same as in other states").

<sup>119</sup> *McConihay v. Wright*, 121 U.S. 201, 206 (1887) ("The adequate remedy at law, which is the test of equitable jurisdiction in these courts[] is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress."); Keller, *supra* note 110, at 191; *Effect of State Laws*, *supra* note 17, at 228.

<sup>120</sup> *Scott*, 140 U.S. at 109 (holding that a contract creditor could not seek equitable relief in federal court to set aside a fraudulent conveyance pursuant to a state law, because "new equitable rights created by the states" are unenforceable in federal court when they exceed the limits of federal courts' equitable jurisdiction or violate the Seventh Amendment guarantee of jury trials for common-law claims); see also *Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371, 379 (1893) (holding that a "simple contract creditor" may not seek equitable relief in federal court pursuant to a state statute, because "[t]he line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation").

<sup>121</sup> *Smyth v. Ames*, 169 U.S. 466, 516 (1898), *overruled in part on other grounds by Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am.*, 169 U.S. 418 (1942) ("One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."); *McConihay*, 121 U.S. at 206 (holding that a state statute creating a remedy at law of ejectment did not bar a federal court from entertaining a claim in equity to quiet title because "no change in state legislation giving . . . a remedy by action at law, can of itself curtail the jurisdiction in equity of the courts of the United States"); see also *Howland & Allen*, 17 U.S. (4 Wheat.) at 108 (holding that a federal court could exercise jurisdiction over an equitable claim, despite a state statute creating a remedy at law).

<sup>122</sup> *McConihay*, 121 U.S. at 206 (holding that a state statute creating a cause of action at law "cannot have the effect to oust the jurisdiction in equity of the courts of the United States"); *Robinson*, 16 U.S. (3 Wheat.) at 222 (holding that states could not "extinguish . . . the exercise of equitable jurisdiction" by federal courts by recharacterizing or refusing to recognize equitable claims or defenses).

Thus, federal courts determined the scope of their equitable jurisdiction by reference to the historic jurisdiction of the English Court of Chancery as modified by federal statutes, and generally did not take into account state statutes and judicial rulings.<sup>123</sup>

### B. Equity Procedure

Since the Founding, federal courts were never required to follow state-court procedure in equity cases.<sup>124</sup> The original Process Act, enacted just a week after the Judiciary Act in September 1789, provided that the “forms and modes of proceedings in causes of equity” in federal courts “shall be according to the course of the civil law,”<sup>125</sup> while the “modes of process” in “suits at common law” would be the procedures followed in the courts of each state as of 1789.<sup>126</sup> Although this statute was a temporary measure that was supposed to expire at the end of Congress’s next session,<sup>127</sup> Congress extended it twice, until 1792.<sup>128</sup>

The Process Act of 1792 retained the same provisions for common-law cases, but directed federal courts sitting in equity to apply “the principles, rules and usages which belong to courts of equity” unless the Judiciary Act, rules promulgated by the Supreme Court, or orders issued by individual courts specified otherwise.<sup>129</sup> Notwithstanding this law, the “mode of proof” of witness examination was to be identical in all federal courts, including in “the trial of causes in equity.”<sup>130</sup>

Shortly after the Process Act of 1792 was enacted, the Supreme Court issued an order declaring, “THE COURT considers the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court,” subject to future modification by the Court when neces-

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<sup>123</sup> *But see infra* notes 172–181 and accompanying text (discussing the murky exception for state laws creating substantive rights).

<sup>124</sup> *Effect of State Laws, supra* note 17, at 229 (“[A] change in the state law of procedure is ineffectual to alter the equity practice of the federal courts.”).

<sup>125</sup> Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94 [hereinafter Original Process Act].

<sup>126</sup> *Id.* at 93; *see also* *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524, 625 (1838) (recognizing that federal laws adopting state practices and processes have “always been considered as referring to the law existing at the time of adoption[,] and no subsequent legislation has ever been supposed to affect it”); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 32 (1825) (“The [Original Process Act] adopts the State law as it then stood, not as it might afterwards be made.”).

<sup>127</sup> Original Process Act, ch. 21, § 3, 1 Stat. at 94.

<sup>128</sup> Act of Feb. 18, 1791, ch. 8, 1 Stat. 191, 191 (1791); Act of May 26, 1790, ch. 13, 1 Stat. 123, 123 (1790).

<sup>129</sup> Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. Additionally, the Judiciary Act also required judges sitting in equity to issue written factual findings to explain their judgments. Judiciary Act of 1789, § 19, 1 Stat. at 83.

<sup>130</sup> Judiciary Act of 1789, § 30, 1 Stat. at 88.

sary.<sup>131</sup> In 1822,<sup>132</sup> and again in 1842,<sup>133</sup> the Supreme Court promulgated Federal Equity Rules to govern equity proceedings in the lower courts. Both sets of rules directed judges to follow the “practice of the High Court of Chancery in England” for any matters the rules themselves did not address.<sup>134</sup>

Pursuant to the Process Act of 1792 and the Federal Equity Rules, federal courts sitting in equity ignored state laws they deemed procedural<sup>135</sup> and applied uniform, national rules instead.<sup>136</sup> The Supreme Court repeatedly reiterated that, unless a federal rule provided otherwise, the equity side of federal courts was “regulated by the practice of the High Court of Chancery in England, so far as it can be applied consistently with the local circumstances and convenience of the district where the court is held.”<sup>137</sup> Federal courts sitting in equity likewise applied “principles of general equity jurisprudence” rather than state law to determine the admissibility of evidence.<sup>138</sup> The Process Act of 1792 remained in effect for federal equity cases until the Federal Rules of Civil Procedure were promulgated in 1938<sup>139</sup> pursuant to the Rules Enabling Act.<sup>140</sup>

<sup>131</sup> *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 413–14 (1792).

<sup>132</sup> *Rules of Practice for the Courts of Equity of the United States*, 20 U.S. (7 Wheat.) v, v–xiii (1822).

<sup>133</sup> *Rules of Practice for the Courts of Equity of the United States*, 42 U.S. (3 How.) xli, xli–lxx (1842).

<sup>134</sup> *Id.* at lxix, r. 90; *Rules of Practice for the Courts of Equity of the United States*, 20 U.S. (7 Wheat.) at xiii, r. 33; *see also* *Russell v. Farley*, 105 U.S. 433, 437 (1882) (holding that a federal court “is not governed in its practice in equity by the laws of the State in which it sits, but by the rules” promulgated by the Supreme Court, its own rules, and, “when these are silent, by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied”).

<sup>135</sup> *Noonan v. Lee*, 67 U.S. (2 Black) 499, 509 (1863) (holding that the rules of equity practice in federal courts are “unaffected by State legislation”).

<sup>136</sup> *Lehan Kent Tunks*, *Categorization and Federalism: “Substance” and “Procedure” After Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271, 271 (1939).

<sup>137</sup> *Clark v. Rayburn*, 75 U.S. (8 Wall.) 318, 323 (1869) (applying traditional English rules for redemption of equity); *accord* *Thompson v. R.R. Cos.*, 73 U.S. (6 Wall.) 134, 137 (1868).

<sup>138</sup> *Russell v. Southard*, 53 U.S. (12 How.) 139, 147 (1851) (“This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles.”).

<sup>139</sup> *See* *Cross*, *supra* note 20, at 177 n.25.

<sup>140</sup> *Rules Enabling Act*, Pub. L. No. 73–415, 48 Stat. 1064 (1934). The *Conformity Act of 1872*, ch. 255, § 5, 17 Stat. 196, 197 (1872), directed federal courts sitting at law to apply state court procedure as it existed at the time of the case, rather than as it existed in 1789 as required by the *Process Act of 1792*, *see supra* notes 126, 129 and accompanying text. The *Conformity Act* did not modify the *Process Act’s* requirements for cases in equity.

### C. Equitable Remedies

Since the Founding, the Supreme Court has repeatedly directed federal courts to apply equitable principles derived from the English Court of Chancery to determine whether a litigant is entitled to equitable relief. This requirement, known as the “equitable remedial rights doctrine,”<sup>141</sup> applied equally in federal question and diversity cases.<sup>142</sup> Federal courts applied these traditional “principles of equity” even when they conflicted with the “peculiar statute enactments of the state.”<sup>143</sup>

Uniform, federally established equitable standards governed all aspects of injunctive relief in both federal question and diversity cases, including whether such relief was available in a particular case,<sup>144</sup> the court’s ability to impose conditions on an injunction,<sup>145</sup> the injunction’s effects,<sup>146</sup> and the

<sup>141</sup> See *supra* note 12 and accompanying text.

<sup>142</sup> Hart, *supra* note 20, at 511 (“For a century and a half the lower federal courts, sitting in equity, had administered a uniform system of federal equitable remedies drawn from the remedies developed by the English chancellors.”); *State Laws in Federal Courts of Equity*, *supra* note 17, at 589–90 (stating that remedies in federal courts sitting in equity “cannot be controlled by State laws” because federal courts “occupy the field of equitable rights according to their own rules” and “determine what are the boundaries of that field”); see also Tunks, *supra* note 136, at 275 (“[N]o state statute widening the scope of equitable ‘remedies’ could be given effect in federal courts.”); Collier, *supra* note 17, at 335 (recognizing that enforcement of “new equitable rights . . . has in some instances been denied in federal courts”); *Effect of State Laws*, *supra* note 17, at 232 (claiming that the principle that federal courts must apply equity as administered by the English Court of Chancery “applies to the remedy only and not to the right”); *The Effect of State Statutes*, *supra* note 17, at 195 (recognizing that federal courts sitting in equity will not enforce new remedial rights created by state law).

<sup>143</sup> *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832); *accord Robinson*, 16 U.S. (3 Wheat.) at 222–23 (“[R]emedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.”); see also *Guffey v. Smith*, 237 U.S. 101, 114 (1915) (“[T]he remedies afforded . . . in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting.”).

<sup>144</sup> *Guffey*, 237 U.S. at 114 (upholding the availability of injunctive relief to leaseholders even though their option to surrender the lease rendered it unenforceable in state court under state law due to the lack of mutuality of obligation). It appears the first time the United States Supreme Court addressed the requirements for injunctive relief in federal court was in *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792), a case arising under state law. The Justices filed *seriatim* opinions, but each rested his analysis—without citation—on traditional equitable principles. See, e.g., *id.* at 405 (Johnson, J., dissenting) (“In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the court.”).

<sup>145</sup> *Russell*, 105 U.S. at 438 (“The power to impose such conditions [on injunctions] is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial.”).

availability of damages under an injunction bond.<sup>147</sup> Consequently, a federal court could issue an injunction in a diversity case that would have been unavailable in state court, while denying injunctive relief that a state court would have granted.<sup>148</sup> Federal courts likewise applied their own body of equitable principles to a wide range of other remedial issues in the cases before them, including equitable tolling, even where state courts had held their statutes of limitations could not be tolled;<sup>149</sup> laches, in cases in which state-law statute of limitations had not expired;<sup>150</sup> imposition of constructive trusts;<sup>151</sup> seizures of property;<sup>152</sup> and the appointment of receivers.<sup>153</sup> Remedial rights could be neither “enlarged”<sup>154</sup> nor reduced by state laws.

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<sup>146</sup> *Boyle*, 31 U.S. (6 Pet.) at 655 (holding that an injunction prohibiting the seizure of goods that was issued after the goods had already been seized to satisfy a judgment did not prevent their sale).

<sup>147</sup> *Russell*, 105 U.S. at 445–46.

<sup>148</sup> See Hill, *supra* note 20, at 1028 (“[I]n respect of a cause of action founded upon state substantive law, the federal equity courts asserted the right to grant an equitable remedy in general conformity with traditional English chancery practice even though such remedy might not be available in the courts of the state; and similarly an equity remedy available in the courts of the state would be denied by the federal courts if not conforming to traditional English chancery practice.” (footnote omitted)); *The Equitable Remedial Rights Doctrine*, *supra* note 12, at 836. As discussed earlier, federal courts would refuse to apply state statutes authorizing injunctive relief for plaintiffs who had an adequate remedy at law. *Henrietta Mills v. Rutherford Cty.*, 281 U.S. 121, 125–28 (1930) (holding that a plaintiff could not seek an injunction in federal court pursuant to a state statute against a county’s allegedly unconstitutional collection of taxes, because the plaintiff could have simply paid the taxes and sought a refund); see also *supra* notes 119–120 and accompanying text.

<sup>149</sup> *Kirby*, 120 U.S. at 136 (“[I]t is an established rule of equity, as administered in the courts of the United States, that, where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered.”).

<sup>150</sup> *Alsop v. Riker*, 155 U.S. 448, 461 (1894) (“[E]quity in the exercise of its inherent power to do justice between parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations.”)

<sup>151</sup> *Swan Land & Cattle Co. v. Frank*, 148 U.S. 603, 604, 609, 612 (1893) (holding that a plaintiff with unliquidated claims against corporations that had disbursed their assets to shareholders and ceased operations could not sue those shareholders in equity to recover the corporations’ assets under a constructive trust theory without first obtaining a judgment at law against the corporations).

<sup>152</sup> *Hollins*, 150 U.S. at 379 (“[C]reditors cannot come into a court of equity to obtain the seizure of the property of their debtor . . . notwithstanding [that] a statute of the state may authorize such a proceeding in the courts of the state,” because “[t]he line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation.”).

<sup>153</sup> *Gordon v. Washington*, 295 U.S. 30, 36 (1935) (holding, in a diversity case where the plaintiffs sought appointment of a receiver, that the district court should have “determined whether, in accordance with the accepted principles of equity,” the situation “called for the exercise of its extraordinary powers”); *Shapiro v. Wilgus*, 287 U.S. 348, 348, 355–56 (1932) (applying the “rule in the federal courts” that “a creditor who seeks the appointment of receivers must reduce his claim to a judgment and exhaust his remedy at law,” even though the Uniform Fraudulent Conveyance Act “may have relaxed that requirement in many of the states”); *Pusey & Jones Co. v.*



A pair of Supreme Court cases clearly illustrate the effects of the equitable remedial rights doctrine. In 1915, in *Guffey v. Smith*, the Court awarded injunctive relief in a diversity case despite state supreme court precedents holding that state law rendered such relief unavailable under the circumstances.<sup>155</sup> The plaintiff, a leaseholder of an oil and gas field, sued in federal court to enjoin competitors from attempting to drill for oil in the field under a subsequent, allegedly invalid lease.<sup>156</sup> Under state law, the plaintiff was entitled to sue only for damages and could not “directly or indirectly enforc[e] [its lease] in equity” because it contained a provision allowing the plaintiff to terminate it.<sup>157</sup> The Supreme Court nevertheless held that the plaintiff could seek injunctive relief in federal court because “it has long been settled that the remedies afforded . . . in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting.”<sup>158</sup>

Conversely, in the 1923 case *Pusey & Jones Co. v. Hanssen*, the Court refused to follow a state law authorizing a type of equitable relief unavailable in the English Court of Chancery.<sup>159</sup> A Delaware statute allowed an unsecured creditor of an insolvent corporation to seek appointment of a receiver.<sup>160</sup> The plaintiff sued under the statute in federal court to have a receiver appointed for the defendant, but the Supreme Court ultimately refused.<sup>161</sup> It held that, under general equitable principles, “an unsecured simple contract creditor has . . . no substantive right, legal or equitable, in or to the property of his debtor.”<sup>162</sup> The Court refused to implement the Delaware statute because it conflicted with those principles.<sup>163</sup> It explained:

That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear . . . . The fed-

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Hanssen, 261 U.S. 491, 497 (1923) (discussing general equitable principles governing the appointment of receivers).

<sup>154</sup> *Pusey & Jones Co.*, 261 U.S. at 497.

<sup>155</sup> 237 U.S. at 108.

<sup>156</sup> *Id.* at 110, 114.

<sup>157</sup> *Id.* at 114 (holding that the lease was “so lacking in mutuality” under state law, because the lessee had the “option to surrender it,” that the lessee could not “directly or indirectly enforc[e] it in equity” in state court).

<sup>158</sup> *Id.*; see also *Bodley v. Taylor*, 9 U.S. (5 Cranch) 191, 221 (1809) (holding that a federal court sitting in equity must adjudicate disputes “in conformity with the settled principles of a court of chancery,” which may require granting relief that “is not given by statute”).

<sup>159</sup> 261 U.S. at 494–95.

<sup>160</sup> *Id.* at 494 (citing DEL. CODE § 3883 (1915)).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 497.

<sup>163</sup> *Id.* at 497–98.

eral court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court. . . . [B]ecause that which the statute confers is merely a remedy, the statute cannot affect proceedings in the federal courts sitting in equity.<sup>164</sup>

Thus, federal courts effectively applied the equitable equivalent of general law, rather than state law, for all remedial issues in equity cases.

#### *D. Equity and Substantive Rights*

“[S]ettled principles of equity,”<sup>165</sup> rather than state statutes or court rulings,<sup>166</sup> presumptively governed the substantive aspects of both federal question and diversity cases brought on the equity side of federal courts, as well.<sup>167</sup> It was for the federal courts in general, and the Supreme Court “in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable . . . .”<sup>168</sup> The Court frequently emphasized that equity was “uniform[]” and “the *rule of decision* is the same in all” federal courts sitting in equity.<sup>169</sup> Accordingly, federal courts crafted their own standards for entire fields of law deemed to be equitable, such as trusts.<sup>170</sup>

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<sup>164</sup> *Id.* at 497–98, 499 (citations omitted); *see also* *Whitehead v. Shattuck*, 138 U.S. 146, 152 (1891) (dismissing a diversity suit in equity to quiet title to a parcel of land brought by an alleged landowner who was not in possession of it, despite a state statute expressly authorizing such claims, because he had an adequate remedy at law in the form of an ejectment action).

<sup>165</sup> *Kirby*, 120 U.S. at 137; *accord* *Barber v. Barber*, 62 U.S. (21 How.) 582, 604 (1859) (Daniel, J., dissenting); *see also* *Collins*, *supra* note 20, at 254, 265 (“[F]ederal courts generally applied a uniform body of nonstate, judge-made equity principles with respect to . . . in certain instances[] the primary rights and liabilities of litigants.”); *Main*, *supra* note 85, at 469 (“[T]he federal courts enunciated their own views of the principles of equity jurisprudence, without restriction by the decisions of state courts.”).

<sup>166</sup> *Burrill v. Locomobile Co.*, 258 U.S. 34, 38 (1922) (recognizing that “the laws of the States are the rules of decision” in common law cases in federal court, but equity “follows its own rules”).

<sup>167</sup> *See, e.g.*, *Cates v. Allen*, 149 U.S. 451, 457 (1893) (holding that, under a general equitable principles, a plaintiff may not sue in equity to set aside a defendant’s allegedly fraudulent conveyance without first obtaining a judgment at law against the defendant for breach of contract).

<sup>168</sup> *Neves v. Scott*, 54 U.S. (13 How.) 268, 272 (1852); *accord* *Guffey*, 237 U.S. at 114.

<sup>169</sup> *Boyle*, 31 U.S. (6 Pet.) at 654, 658 (emphasis added); *accord* *Howland & Allen*, 17 U.S. (4 Wheat.) at 115 (holding that the Judiciary Act “confers the same chancery powers on all [federal courts], and gives the same rule of decision”); *see also* *Kirby*, 120 U.S. at 138 (holding that the “rules and principles” that federal courts apply are “alike in every state”); *Neves*, 54 U.S. (13 How.) at 272 (holding that “the same principles of equity” would apply to a federal case, regardless of the district in which it were filed); *von Moschzisker*, *supra* note 17, at 300; *State Statutes and the Federal Equity Courts*, *supra* note 17, at 688.

<sup>170</sup> *Neves*, 54 U.S. (13 How.) at 273 (applying federal standards to determine whether a trust was formed).

Congress could displace such principles through a sufficiently clear statute.<sup>171</sup> Federal courts also would, in theory, apply state statutes creating new substantive equitable rights.<sup>172</sup> For example, in its 1839 *Clark v. Smith* decision, the Supreme Court ruled that a plaintiff who held legal title to, and was in possession of, a parcel of land could sue in equity in federal court to quiet title against “any other person setting up a claim.”<sup>173</sup> Such a plaintiff could not have brought a bill to quiet title in the English Court of Chancery without first obtaining successive judgments in his favor concerning the land.<sup>174</sup> The Supreme Court nevertheless held that the suit was permissible under a state statute creating the right to bring such claims.<sup>175</sup>

Notwithstanding cases like *Clark*, federal courts often avoided applying state statutes in equity cases on the grounds that they were procedural or remedial,<sup>176</sup> affected the federal courts’ equitable jurisdiction,<sup>177</sup> or would vio-

<sup>171</sup> *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836) (“The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.”); *see also Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 164–65 (1939) (holding that federal courts sitting in equity must apply “that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress” (citation omitted)).

<sup>172</sup> *Mason v. United States*, 260 U.S. 545, 557 (1923) (“[W]hile the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation.”); *see, e.g., Reynolds v. Crawfordsville First Nat’l Bank*, 112 U.S. 405, 410 (1884) (holding that a federal court must “look to the legislation of the State in which the court sits to ascertain what constitutes a cloud upon the title [to land]”); *see also Tunks, supra* note 136, at 271 (“It was said that state statutes might create ‘substantive rights’ which federal courts could recognize and enforce.”); *The Effect of State Statutes, supra* note 17, at 194 (“[W]here the state law provides for an enlargement of equitable rights, the federal courts will in the exercise of their already existing powers enforce the rights thus created.”).

<sup>173</sup> 38 U.S. (13 Pet.) 195, 202 (1839).

<sup>174</sup> *See Scott*, 140 U.S. at 115.

<sup>175</sup> *Clark*, 38 U.S. (13 Pet.) at 203 (holding that, the state “having created a right . . . no reason exists why it should not be pursued in the same form as . . . in the State courts”); *see also Mason*, 260 U.S. at 558 (applying a statute “establish[ing] a measure of damages” that applied to both common law and equity suits, because it had “nothing to do with the general principles of equity”); *Brine v. Ins. Co.*, 96 U.S. 627, 634 (1877) (holding that a federal court sitting in diversity must enforce a state statute creating a right of redemption in foreclosure proceedings, even though the English Court of Chancery did not historically recognize such a defense).

<sup>176</sup> *Pusey & Jones Co.*, 261 U.S. at 500 (holding that, where a state statute “confers . . . a substantive right,” a litigant in diversity “is entitled to the aid of the federal court for its enforcement,” but where the statute “is held merely to enlarge the equitable remedy, it will not support a bill in equity in the federal court”); *see also McCormick & Hewins, supra* note 113, at 140 (“[S]ubstantive rights (as distinguished from merely remedial ones) created by state statutes will be enforced in equity in the Federal courts . . .”); *Effect of State Laws, supra* note 17, at 228 (claiming that the principle that federal courts must apply equity as administered by the English Court of Chancery “applies to the remedy only and not to the right”); *Equity Jurisdiction, supra* note 17, at 48.

late the Seventh Amendment if enforced in federal court.<sup>178</sup> These restrictions collectively limited the states' power to create new substantive rights that federal courts would enforce in equity in often unpredictable and even arbitrary-seeming ways.<sup>179</sup> Consistent with the Supreme Court's 1842 *Swift* decision,<sup>180</sup> federal courts were most willing to apply state laws in equity cases they deemed purely local,<sup>181</sup> but federal standards still largely occupied the field.

Thus, throughout more than half of American history, the states' power to adopt substantive law enforceable in a federal court sitting in equity was highly circumscribed.

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<sup>177</sup> See, e.g., *Hollins*, 150 U.S. at 379 (“[Simple contract] creditors cannot come into a court of equity to obtain the seizure of the property of their debtor . . . notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation.”); *Scott*, 140 U.S. at 115 (refusing to allow a plaintiff in a federal diversity case to proceed in equity under a state law allowing contractual creditors to seek equitable relief); *Whitehead*, 138 U.S. 146 (refusing to allow a plaintiff in a federal diversity case to proceed in equity under a state law allowing a defendant in possession of land to be sued in equity to quiet title to it); see also McCormick & Hewins, *supra* note 113, at 140; von Moschzisker, *supra* note 17, at 300; *Effect of State Laws*, *supra* note 17, at 231; *Equity Jurisdiction*, *supra* note 17, at 48.

<sup>178</sup> See Keller, *supra* note 110, at 192 (declaring that federal courts would enforce “new equitable rights created by State statutes,” except where the Seventh Amendment prohibited it); Tunks, *supra* note 136, at 271 (“If the statute were ‘substantive,’ it would be given effect in the federal courts, but no state statute considered to narrow the right to jury trial as protected by the Seventh Amendment would be honored.”).

<sup>179</sup> See von Moschzisker, *supra* note 17, at 300 (“[I]t becomes an important question to determine whether a particular state enactment deals with substantive rights or privileges or with only remedial rights.”); *Effect of State Laws*, *supra* note 17, at 30 (arguing that, when state statutes create substantive rights, “the authorities present no well defined limits to the rule that equity will exercise that, and only that, jurisdiction possessed in 1789”); *Equity Jurisdiction*, *supra* note 17, at 49 (suggesting that some Supreme Court rulings enforcing state-created equitable rights concerning wills fail to account for certain limits the Court had placed on the application of state laws and precedents in equity).

<sup>180</sup> *Swift*, 41 U.S. (16 Pet.) at 18.

<sup>181</sup> *Mason*, 260 U.S. at 558 (applying state statute governing damages in a claim for conversion brought in equity because “[t]he entire cause of action is . . . local,” involving “title to land and seeking an injunction against continuing trespasses”); *Clark*, 38 U.S. (13 Pet.) at 203 (holding that “propriety and convenience suggest” that equitable rights and remedies “should not materially differ” between federal and state court “where titles to lands are the subjects of investigation”); see also McCormick & Hewins, *supra* note 113, at 140 (“Seemingly, also, the courts in equity, as at law, would defer to local substantive decisional rules . . . [that] constitute a local rule of property or a peculiar local usage.”); Tunks, *supra* note 136, at 285 (“[W]hile the federal equity jurisdiction has been administered independently for the most part, there has been reference to state statute and common law in ‘local’ matters . . .” (citing *Mason*, 260 U.S. at 558)); *State Laws in Federal Courts of Equity*, *supra* note 17, at 590.

### III. EQUITY IN THE POST-*ERIE* WORLD

This Part explores the Supreme Court's refusal to fully reassess its conception of the federal equity power in light of *Erie*. Section A compares the federal equity power to "general law," which *Erie* repudiated.<sup>182</sup> Section B discusses how, in *Guaranty Trust v. York*,<sup>183</sup> the Supreme Court refused to apply *Erie* to equitable remedies in federal court.<sup>184</sup>

#### A. *Erie* and General Law

From the Founding Era through *Erie*, the Supreme Court repeatedly affirmed the prerogative of federal courts sitting in equity to apply a unique body of principles derived from the English Court of Chancery. This power could be limited only by Congress or the highly circumscribed prerogative of states to create new substantive rights not traditionally recognized in equity.<sup>185</sup> Equity came to resemble the "general law" that federal courts applied on the common law side of their dockets.<sup>186</sup>

General law was often treated as a transcendental body of universal principles that was not imposed by, and did not receive its binding force from, any particular sovereign.<sup>187</sup> Federal courts viewed it as "the product of reason and the common practices of the civilized world."<sup>188</sup> Blackstone referred to it as a "great universal law."<sup>189</sup> Federal courts exercised their "independent judgment" in crafting general law<sup>190</sup>—though they would have described their adjudicative process as "discovering" or "applying" general law—rather than following state law.<sup>191</sup>

<sup>182</sup> See *infra* notes 185–210 and accompanying text.

<sup>183</sup> 326 U.S. 99 (1945).

<sup>184</sup> See *infra* notes 211–227 and accompanying text.

<sup>185</sup> See *supra* notes 171–181 and accompanying text.

<sup>186</sup> Hill, *supra* note 20, at 1050 ("Swift v. Tyson stood for a philosophy of law which had substantially the same implications on the equity side of the federal courts as on the law side . . ."); McCormick & Hewins, *supra* note 113, at 140 (explaining that several cases "support[] the view that substantive equity law is treated in the Federal courts as a matter of 'general law' not controlled by state decisions"); cf. Main, *supra* note 85, at 469 (arguing that *Swift v. Tyson* was "extended] . . . to equity cases in 1851" (citing *Russell v. Southard*, 53 U.S. (12 How.) 139 (1851))).

<sup>187</sup> William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

<sup>188</sup> Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 664 (2013); see also *Guaranty Trust Co.*, 326 U.S. at 102 (explaining that, when applying general law, "federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law").

<sup>189</sup> 4 BLACKSTONE, *supra* note 48, at \*67.

<sup>190</sup> *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 370–71 (1893).

<sup>191</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842) (holding that, when applying general law, federal courts "ascertain[] upon general reasoning and legal analogies . . . what is the just rule furnished by the [applicable legal] principles . . . to govern the case").

As its name suggests, general law governed “questions of a more general nature” in federal courts, such as “the construction of ordinary contracts or other written instruments, and especially . . . questions of general commercial law . . . .”<sup>192</sup> State courts were not bound to apply the federal judiciary’s view of general law, however, as they were with federal statutes and federal common law. Rather, state courts could adopt their own, contrary interpretations of general law as part of their state common law.<sup>193</sup> Consequently, the law governing a dispute—general law or state law—often depended entirely on whether the case was litigated in federal or state court, potentially leading to completely different results based solely on choice of forum.

General law was subject to two major limits. First, it did not reach matters governed by local law,<sup>194</sup> which included to state statutes and court rulings concerning real property or other purely internal matters that lacked interstate ramifications.<sup>195</sup> Over time, however, federal courts held that general law, rather than local law, applied to an increasingly large range of matters including torts, agency, punitive damages, and even some property rights.<sup>196</sup>

Second, section 34 of the Judiciary Act of 1789,<sup>197</sup> commonly referred to as the Rules of Decision Act, required federal courts to apply state statutes—though not state judicial rulings—in diversity cases and other disputes arising under state law. The Rules of Decision Act provided that “the laws of the several states . . . shall be regarded as rules of decision in trials at common law” in federal courts “in cases where they apply,” unless the U.S. Constitution, a federal law, or a treaty provided otherwise.<sup>198</sup> The Supreme Court interpreted the phrase “the laws of the several states” as referring exclusively to

<sup>192</sup> *Id.*; see also Fletcher, *supra* note 187, at 1519 (“In questions of commercial law, the decisions of Courts, in all civilized, and commercial nations, are to be regarded, for the purpose of establishing uniform principles in the commercial world.” (quoting ZECHARIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES. AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES, at ix (Hartford 1810))).

<sup>193</sup> Bellia & Clark, *supra* note 188, at 679.

<sup>194</sup> See *Detroit v. Osborne*, 135 U.S. 492, 498 (1890) (“There should be, in all matters of a local nature, but one law within the State, and that law is not what this court might determine, but what the supreme court of the State has determined.”).

<sup>195</sup> *Swift*, 41 U.S. (16 Pet.) at 18 (holding that federal courts are required to apply state statutes and court rulings concerning “rights and titles to things having a permanent locality, such as . . . real estate, and other matters immovable and intra-territorial in their nature and character”); *Jackson v. Chew*, 25 U.S. (12 Wheat.) 153, 162 (1827) (“[W]here any principle of law, establishing a rule of real property, has been settled in the State Courts, the same rule will be applied by this Court that would be applied by the State tribunals.”); see also Fletcher, *supra* note 187, at 1532–33.

<sup>196</sup> Bradford R. Clark, *Erie’s Constitutional Source*, 95 CALIF. L. REV. 1289, 1294 (2007); Bellia & Clark, *supra* note 188, at 698; see also *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75–76 (1938); *Baltimore & Ohio R.R. Co.*, 149 U.S. at 376–77.

<sup>197</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789).

<sup>198</sup> *Id.*

state statutes<sup>199</sup> and state court rulings interpreting those statutes.<sup>200</sup> By enacting a statute, a state could “localize” an area of general law, forcing federal courts to apply the rule crafted by the legislature instead of general law.<sup>201</sup> The Court explained that the Rules of Decision Act did not extend to state courts’ common-law rulings because, “[i]n the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are; and are not, of themselves, laws.”<sup>202</sup>

In 1938, in *Erie Railroad v. Tompkins*, the Supreme Court concluded that this interpretation of the Rules of Decision Act was incorrect and unconstitutional.<sup>203</sup> *Erie* held that the Constitution and the Rules of Decision Act require federal courts to apply both state statutes and state judicial precedents—including exclusively common-law rulings—in diversity cases and other matters arising under state law.<sup>204</sup> The Court held there is no such thing as “general law,” in the sense of a “transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”<sup>205</sup> In misleadingly overbroad language, it further declared that federal courts lack power to create federal common law.<sup>206</sup> Applying either general law or feder-

<sup>199</sup> *Swift*, 41 U.S. (16 Pet.) at 18 (“The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.”); see also *Shelby v. Guy*, 24 U.S. (11 Wheat.) 361, 367 (1826) (recognizing the obligation of federal courts to apply state statutes in diversity cases).

<sup>200</sup> *Swift*, 41 U.S. (16 Pet.) at 18 (holding that federal courts are required to apply “the positive statutes of the state, and the construction thereof adopted by the local tribunals”); *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825) (discussing “the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government”); see also *Green v. Lessee of Neal*, 31 U.S. (6 Pet.) 291, 298 (1832) (holding that federal courts are required to follow a state court’s interpretation of a state statute, even when the state court overturned an earlier interpretation). The Court required federal courts to defer to state courts’ interpretations of state laws “to preserve uniformity,” because disparate interpretations of a state’s laws by state and federal courts would produce “the greatest mischief and confusion.” *Jackson*, 25 U.S. (12 Wheat.) at 167; see also *M’Keen v. Delancy’s Lessee*, 9 U.S. (5 Cranch) 22, 32 (1809).

<sup>201</sup> *Fletcher*, *supra* note 187, at 1527; *Hill*, *supra* note 20, at 443; Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17, 35 (2013).

<sup>202</sup> *Swift*, 41 U.S. (16 Pet.) at 19.

<sup>203</sup> 304 U.S. 64, 71 (1938), *overruling Swift*, 41 U.S. (16 Pet.) at 18.

<sup>204</sup> *Id.* at 78 (“[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”).

<sup>205</sup> *Id.* at 79 (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370–72 (1910) (Holmes J., dissenting)).

<sup>206</sup> *Id.* at 78 (stating that “no clause in the Constitution purports to confer” upon federal courts the power to “declare substantive rules of common law applicable in a state”). Ironically, the same day the Court handed down *Erie*, it also issued its opinion in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102–03, 106 (1938), which relied in part on federal common law to determine states’ respective rights to a river that partly divided them. See Jay Tid-

al common law to a case on the grounds that a particular field does not qualify as “local” violates the states’ constitutionally protected powers.<sup>207</sup>

*Erie* went on to lament the “mischievous results” that arose from federal courts’ reliance on general law rather than state law in diversity cases.<sup>208</sup> Out-of-state parties involved in litigation against a state’s citizens could often obtain different results from federal courts applying general law than similarly situated litigants who were citizens of the forum state would receive from state courts applying state law.<sup>209</sup> Such differences were unjust and encouraged forum shopping. The Court also opined that general law tended to be highly subjective, with cases turning on “what the judge advancing the doctrine thinks at the time should be the general law on a particular subject.”<sup>210</sup>

### B. Guaranty Trust and Equity

One might have reasonably expected *Erie* to be the death knell for traditional notions of the federal equity power. Justice Frankfurter expressly declared that, prior to *Erie*, courts held “the same view[]” of common law and equity cases.<sup>211</sup> Indeed, the Court went so far as to refer to its body of federal equitable principles as “the common law of chancery.”<sup>212</sup> And shortly after *Erie*, the Court recognized that the reasoning underlying that case applies with equal force to equity.<sup>213</sup> Nevertheless, in 1945, the Court in *Guaranty*

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marsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 597–98 (2006).

<sup>207</sup> *Erie*, 304 U.S. at 80. Some language from this portion of the ruling appears to invoke the “reserved powers” doctrine under the Tenth Amendment, which the Supreme Court later repudiated. See *United States v. Darby*, 312 U.S. 100, 124 (1941) (rejecting the notion that the Tenth Amendment limits Congress’ enumerated powers by carving out a sphere of exclusive state authority); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (holding that the Tenth Amendment does not prohibit the federal government from regulating essential state functions).

<sup>208</sup> *Erie*, 304 U.S. at 74.

<sup>209</sup> *Id.* at 74–75, 78.

<sup>210</sup> *Id.* at 78 (quoting *Baltimore & Ohio R.R.*, 149 U.S. at 401 (Field, J., dissenting)).

<sup>211</sup> *Guaranty Trust Co. v. New York*, 326 U.S. 99, 102 n.1 (1945).

<sup>212</sup> *Id.*

<sup>213</sup> *Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 205 (1938) (“The decision in *Erie* . . . applies though the question of construction arises not in an action at law, but in a suit in equity.”). Some critics maintain that *Erie*’s constitutional holdings were *dicta* and that the Court should have ruled exclusively on statutory grounds by reinterpreting the Rules of Decision Act. See, e.g., Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278 (1946); McCormick & Hewins, *supra* note 113, at 134. *Ruhlin* confirms, however, that *Erie*’s constitutional analysis was a binding part of the ruling. See 304 U.S. at 205. *Ruhlin* was a case in equity but, at the time, the Rules of Decision Act applied only “in trials at common law.” Judiciary Act of 1789, § 34, 1 Stat. at 92 (1789). Consequently, *Erie*’s constitutional holdings were the only parts of that case applicable in *Ruhlin*.



*Trust Co. v. York* confirmed that federal law still governs equitable remedies in federal court.<sup>214</sup>

*Guaranty Trust* considered whether a federal court sitting in diversity was required to apply a state statute of limitations to an equitable claim for breach of trust.<sup>215</sup> Many passages in the opinion suggest that the Court would decline to apply independent federal equitable principles in state-law cases. For example, the Court stated, “[A] federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State.”<sup>216</sup> A federal court sitting in equity therefore generally cannot “deny substantive rights created by State law” or “create substantive rights denied by State law.”<sup>217</sup>

The Court went on to hold, however, that traditional principles of equity from the English Court of Chancery continue to govern equitable remedies in federal courts, even in diversity cases.<sup>218</sup> It explained, “Equitable relief in a federal court . . . must be within the traditional scope of equity as historically evolved in the English Court of Chancery . . . .”<sup>219</sup> The Court elaborated:

That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts. State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State’s courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.<sup>220</sup>

Thus, *Guaranty Trust* maintains the equitable remedial rights doctrine for state-law cases. Pursuant to *Erie*, state law governs substantive rights in diversity and supplemental jurisdiction<sup>221</sup> cases in equity,<sup>222</sup> but federal courts

<sup>214</sup> 326 U.S. at 99.

<sup>215</sup> *Id.* at 101.

<sup>216</sup> *Id.* at 108.

<sup>217</sup> *Id.* at 105; *see also id.* at 108–09.

<sup>218</sup> *Id.* at 108.

<sup>219</sup> *Id.* at 105.

<sup>220</sup> *Id.* at 106 (internal citations omitted).

<sup>221</sup> *Felder v. Casey*, 487 U.S. 131, 151 (1988) (holding that *Erie* applies equally whether a federal court is exercising “diversity or pendent jurisdiction over state-law claims”).

<sup>222</sup> *Guaranty Trust Co.*, 326 U.S. at 106 (holding that, when adjudicating equity cases arising under state law, federal courts “enforce[] State-created substantive rights,” but do so subject to “the traditional body of equitable remedies, practice and procedure”); *see Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939) (holding that state law governs the allocation of burdens of proof for causes of action in equity, because burdens of proof affect “substan[tive] right[s]” and are among the “assurance[s]” that the law provides to right-holders); *Ruhlin*, 304 U.S. at 205, 209 (holding that the *Erie* Doctrine requires a federal court to “apply the entire body of substantive law

must disregard both state statutes and judicial rulings of a “mere remedial character.”<sup>223</sup> Federal equitable principles continue to govern the availability of equitable relief in cases arising under state law.<sup>224</sup> In the 1941 case *Kelleam v. Maryland Casualty Co.*, for example, the Supreme Court overturned the district court’s appointment of a receiver because, although the ruling was proper under state law, it violated federal equitable principles.<sup>225</sup> Despite *Erie*’s purported abolition of general law and relegation of federal common law to a few distinct areas in which federal interests predominate,<sup>226</sup> equity lingers as a vestigial “brooding omnipresence”<sup>227</sup> that may dictate the results of diversity and supplemental jurisdiction cases.

#### IV. A NEW THEORY OF EQUITY

*Erie* heralded the end of general law in federal diversity cases. Some commentators, such as Professor Arthur Corbin, simply assumed without extensive analysis that *Erie* also eliminated federal equity as an independent body of law that federal courts must apply in all cases.<sup>228</sup> *Guaranty Trust* purported to extend *Erie* to equity cases, but preserved the “equitable remedial rights doctrine” that requires federal courts to apply a uniform body of federal equitable principles derived from the English Court of Chancery in de-

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governing an identical action in the state courts,” even for a “question of [statutory] construction [that] arises not in an action at law, but in a suit in equity”).

<sup>223</sup> *Guaranty Trust Co.*, 326 U.S. at 108 (quoting *Henrietta Mills v. Rutherford Cty.*, 281 U.S. 121, 128 (1930)).

<sup>224</sup> *Id.* at 105.

<sup>225</sup> 312 U.S. 377, 381–82 (1941). One author dismisses *Kelleam*, noting the Court’s alternate holding that the case should have been dismissed as a matter of comity because it concerned real property that was the subject of litigation in state court. *Past and Present*, *supra* note 12, at 841 (citing *Kelleam*, 312 U.S. at 382).

<sup>226</sup> See *United States v. Standard Oil Co.*, 332 U.S. 301, 308, 310 (1947).

<sup>227</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>228</sup> Arthur L. Corbin, *The Laws of the Several States*, 50 *YALE L.J.* 762, 764 (1941) (“[I]t appears that the Supreme Court informs the federal judges that hereafter, in all cases that are to be decided by the unwritten common law or equity, they must look for that law within the confines of some one state; and finding it there, they must not disapprove it as unsound or incorrect, but must apply it to the case before them even though they are sure that it is contrary to the common law inherited by us from England, . . . or to supposed principles of general jurisprudence and justice.”); see also Hart, *supra* note 20, at 511–12 (suggesting that the post-*Erie* Court would likely reject the equitable remedial rights doctrine because its *Erie* jurisprudence focuses primarily on preserving uniformity of outcome between state and federal courts); McCormick & Hewins, *supra* note 113, at 140 (“[T]here seems no escape from a similar conclusion in equity. The constitution can hardly be said to have conferred any greater power on Federal judges to make state equity law than to make state common law.”); Tunks, *supra* note 136, at 285 (“Certainly, the arguments in the *Tompkins* case apply equally to equity. Because a doctrine had its roots in the chancery office, it is no less discriminatory to apply different versions in state and federal courts than it would be to apply different rules of law.”).

ciding whether to grant equitable relief.<sup>229</sup> There is no basis under the Constitution, federal law, or the Federal Rules of Civil Procedure for federal courts to apply a freestanding, independent body of equitable principles to resolve all remedial issues that come before them, including in cases that arise under state law.

Section A of this Part explains that the Rules Enabling Act is inapposite because none of the Federal Rules of Civil Procedure set forth substantive standards governing equitable relief.<sup>230</sup> Section B shows that the Rules of Decision Act requires federal courts to apply state statutes and court rulings in deciding whether to award equitable relief in cases arising under state law, because such remedial issues are substantive rather than procedural.<sup>231</sup> Section C goes on to demonstrate that the Constitution does not authorize federal courts to craft a freestanding body of equitable remedial principles to apply in both federal and state cases.<sup>232</sup>

Section D sets forth a new vision of the federal equity power: equity follows the law.<sup>233</sup> The body of equitable principles that applies to a claim depends on the law from which the claim arises: federal equitable principles govern federal claims, while the equitable principles contained within a state's statutes and judicial rulings govern state claims—including all remedial issues in state-law cases. When federal statutes authorize equitable relief, a court may presume that Congress intended to apply traditional principles from the English Court of Chancery absent a clear statement in a statute's text or legislative history to the contrary. Likewise, federal courts may apply those traditional equitable principles in cases arising under the U.S. Constitution as a matter of constitutional common law, unless Congress establishes an alternate remedial scheme. This discussion concludes by examining the implications of this new approach for one of the most frequently invoked forms of equitable relief: injunctions.

### *A. Equity and the Federal Rules*

The current version of the Rules of Decision Act provides that “[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply,” unless the Constitution, a treaty, or a federal statute “otherwise require[s] or pro-

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<sup>229</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

<sup>230</sup> See *infra* notes 234–294 and accompanying text.

<sup>231</sup> See *infra* notes 295–352 and accompanying text.

<sup>232</sup> See *infra* notes 353–409 and accompanying text.

<sup>233</sup> See *infra* notes 410–441 and accompanying text.

vide[s].”<sup>234</sup> Unlike earlier versions of the statute,<sup>235</sup> the Rules of Decision Act now applies to cases in both law and equity.

One federal statute that frequently requires courts to ignore “[t]he laws of the several states”<sup>236</sup> in diversity and supplemental jurisdiction cases is the Rules Enabling Act.<sup>237</sup> The Rules Enabling Act provides that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . .”<sup>238</sup> In 1960, in *Hanna v. Plumer*, the Supreme Court held that the Rules Enabling Act requires a federal court to apply any valid Federal Rules of Civil Procedure in all cases before it, even when the claims arise under state law.<sup>239</sup> A rule is valid under the Rules Enabling Act so long as it is “arguably procedural.”<sup>240</sup>

*Hanna* requires a federal court adjudicating a state-law claim to ignore state statutes and judicial rulings in favor of a federal rule, however, only when there is a “direct collision” between state and federal authorities.<sup>241</sup> Federal courts interpret the Federal Rules narrowly when reasonably possible to avoid unnecessarily displacing state laws.<sup>242</sup> For example, in 1980, in *Walker v. Armco Steel Corp.*, the Supreme Court held that federal courts

<sup>234</sup> 28 U.S.C. § 1652 (2012).

<sup>235</sup> See *supra* notes 198, 213 and accompanying text.

<sup>236</sup> 28 U.S.C. § 1652.

<sup>237</sup> *Id.* § 2072(a).

<sup>238</sup> *Id.* The Supreme Court upheld the Rules Enabling Act as a valid exercise of Congress’ authority under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, to regulate the federal courts. See *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965); see also *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (“Congress, acting pursuant to its authority to make all laws ‘necessary and proper’ to their establishment, also may enact laws regulating the conduct of those courts . . . .” (footnote omitted)).

<sup>239</sup> *Hanna*, 380 U.S. at 473–74.

<sup>240</sup> *Id.* at 475 (Harlan, J., concurring).

<sup>241</sup> *Id.* at 472 (majority opinion); *accord Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980).

<sup>242</sup> *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 n.7 (1996) (“Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies.”); see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37–38 (1988) (Scalia, J., dissenting) (“[I]n deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.”). Similarly, the Court has opted to interpret rules as imposing narrow procedural requirements, rather than broader substantive restrictions, to ensure their validity under the Rules Enabling Act. See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–04 (2001) (holding that Rule 41(b) does not require that a federal court’s dismissal under a statute of limitations be afforded any res judicata effect, to avoid violating the plaintiff’s substantive rights); *Daily Income Fund v. Fox*, 464 U.S. 523, 544 n.2 (1984) (interpreting Federal Rule 23.1 as imposing a procedural pleading requirement that a complaint in a shareholder derivative suit specify whether the plaintiffs made a demand to the corporation’s board, rather than a substantive requirement that plaintiffs actually present such a demand, to avoid “alter[ing] substantive rights” in violation of the Rules Enabling Act).

should apply a state's rules for tolling its statute of limitations because Rule 3 of the Federal Rules did not directly address the issue.<sup>243</sup> Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court."<sup>244</sup> State law, in contrast, specified that an action was not deemed "'commenced' for purposes of the statute of limitations until" the summons was served on the defendant.<sup>245</sup>

The Court held there was no conflict between the federal rule and the state statute.<sup>246</sup> It explained, "There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations."<sup>247</sup> The state law, in contrast, reflects "a substantive decision . . . that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations."<sup>248</sup> The Court concluded that "[s]ince there is no direct conflict between the Federal Rule and the state law," *Hanna* and the Rules of Decision Act were inapplicable, and *Erie* itself required federal courts to apply the state statute's service requirement to prevent plaintiffs from obtaining disparate results in state and federal court.<sup>249</sup>

Particularly given the Court's strong preference for reading the Federal Rules consistently with state law, the Federal Rules do not preclude federal courts from following state statutes or judicial precedents concerning equitable remedies. This Section will discuss two examples: injunctions under Rule 65<sup>250</sup> and receivers under Rule 66.<sup>251</sup>

## 1. Injunctions Under Rule 65

Injunctions are the most commonly sought equitable remedy. Rule 65 of the Federal Rules sets forth the process for obtaining temporary restraining orders ("TROs") and preliminary injunctions, as well as a few additional rules governing all forms of injunctive relief (including permanent injunctions).<sup>252</sup>

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<sup>243</sup> 446 U.S. at 752–53.

<sup>244</sup> *Id.* at 750 (quoting FED. R. CIV. P. 3).

<sup>245</sup> *Id.* at 742 (quoting OKLA. STAT. tit. 12, § 97 (1971)).

<sup>246</sup> *Id.* at 751–52.

<sup>247</sup> *Id.* at 750–51.

<sup>248</sup> *Id.* at 751.

<sup>249</sup> *Id.* at 752–53. Likewise, in *Palmer v. Hoffman*, the Court rejected the argument that Rule 8(c) places the burden of proof for contributory negligence on the defendant. 318 U.S. 109, 117 (1943). It explained, "Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply." *Id.* (citation omitted).

<sup>250</sup> See *infra* notes 252–274 and accompanying text.

<sup>251</sup> See *infra* notes 275–294 and accompanying text.

<sup>252</sup> FED. R. CIV. P. 65.

The rule does not provide any substantive standards for courts to apply in awarding such relief, however.

Rule 65 specifies that a court may issue an *ex parte* TRO if the movant demonstrates that waiting until the other side is heard would cause “irreparable injury, loss or damage.”<sup>253</sup> The movant must either identify the efforts it made to notify its adversary or explain why notice “should not be required.”<sup>254</sup> A TRO may last no more than 14 days, although the court may extend that period for good cause for up to another 14 days (unless the other side consents to a longer extension).<sup>255</sup> After issuing such an *ex parte* order, the court must schedule a preliminary injunction hearing “at the earliest possible time.”<sup>256</sup> Even before that hearing, a party subject to the order may move to dissolve or modify it on two days’ notice to the original movant.<sup>257</sup>

Rule 65 provides that a preliminary injunction may be issued only on notice to the opposing party.<sup>258</sup> The court may consolidate its hearing on a preliminary injunction with a trial on the merits.<sup>259</sup> It also may require security for either a TRO or preliminary injunction to ensure the enjoined party is compensated if it turns out the order was issued erroneously.<sup>260</sup>

Rule 65 requires that every order—including TROs, preliminary injunctions, and permanent injunctions—specify the reasons it was issued, “state its terms specifically,” and “describe in reasonable detail . . . the act or acts restrained or required.”<sup>261</sup> All TROs and injunctions bind the litigants, their agents, and “other persons who are in active concert or participation” with the litigants or their agents, so long as they receive “actual notice” of the order through any means.<sup>262</sup>

Despite these specifications, Rule 65 does not actually identify the circumstances under which a court should issue a TRO, preliminary injunction, or permanent injunction,<sup>263</sup> apart from the requirement of “immediate and irreparable injury” for TROs.<sup>264</sup> The Supreme Court established the modern

<sup>253</sup> *Id.* R. 65(b)(1)(A)–(B).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* R. 65(b)(3).

<sup>257</sup> *Id.* R. 65(b)(4).

<sup>258</sup> *Id.* R. 65(a)(1).

<sup>259</sup> *Id.* R. 65(a)(2).

<sup>260</sup> *Id.* R. 65(c).

<sup>261</sup> *Id.* R. 65(d)(1)(A)–(C). A TRO must also set forth the date and time it was issued, the irreparable injury the movant faced, the reason the order was issued *ex parte*, and the order’s expiration date. *Id.* R. 65(b)(2).

<sup>262</sup> *Id.* R. 65(d)(2)(A)–(C).

<sup>263</sup> See Crump, *supra* note 6, at 1272–73 (recognizing that Rule 65 governs only the procedural aspects of injunctive relief).

<sup>264</sup> FED. R. CIV. P. 65(b)(1)(A).

standard for permanent injunctions in its 2006 *eBay Inc. v. MercExchange L.L.C.* decision—a standard the Court claimed stemmed from traditional equitable principles rather than Rule 65.<sup>265</sup> Under *eBay*, to obtain a permanent injunction, a plaintiff must not only prevail in its underlying cause of action, but further demonstrate that: 1) it has suffered an irreparable injury; 2) remedies available at law, such as monetary damages, are inadequate to redress that injury; 3) a remedy in equity is warranted considering the balance of hardships between the plaintiff and defendant; and 4) the public interest would not be disserved by a permanent injunction.<sup>266</sup>

Lower courts have applied *eBay*'s four-factor test in a wide range of contexts, including intellectual property cases, cases involving other types of economic harms, environmental cases, constitutional cases, and cases arising under various other statutes.<sup>267</sup> The Supreme Court's subsequent 2008 decision in *Winter v. Natural Resources Defense Council* held that the requirements for obtaining a preliminary injunction are similar, except that the plaintiff must demonstrate "that he is likely to succeed on the merits."<sup>268</sup>

Several courts, as well as noted treatise authors Wright and Miller,<sup>269</sup> view Rule 65 as the source of the standards governing preliminary injunctions; they contend that the Rule's drafters intended to implicitly incorporate traditional equitable requirements.<sup>270</sup> Rule 65, however, does not purport to

<sup>265</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 393–94 (2006) (describing the four-factor test derived from "well-established principles of equity"); see Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012) (recognizing *eBay* as establishing the definitive modern standard for injunctive relief).

<sup>266</sup> *eBay*, 547 U.S. at 391, 393–94; *accord Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–58 (2010); see also *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987).

<sup>267</sup> Michael T. Morley, *Enforcing Equality: Statutory Injunctions, Equitable Balancing Under eBay, and the Civil Rights Act of 1964*, 2014 U. CHI. LEGAL F. 177, 189–90 (collecting cases).

<sup>268</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see also *Amoco*, 480 U.S. at 546 n.12 ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."). But see *Brown v. Chote*, 411 U.S. 452, 457 (1973) (affirming issuance of preliminary injunction without regard to "the ultimate merits of [the plaintiff's] contentions").

<sup>269</sup> 19 WRIGHT ET AL., *supra* note 20, § 4513 ("[I]t seems reasonably clear that preliminary injunctions or temporary restraining orders may be issued in a diversity case in accordance with the terms of Rule 65 regardless of state practice, and further that federal law supplies the standards for their issuance.").

<sup>270</sup> See, e.g., *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991) (holding that Rule 65 "incorporates traditional federal equity practice" for preliminary injunctions, thereby implicitly establishing the substantive standards federal courts must apply in awarding such relief); *Office Depot, Inc. v. Impact Office Prods., LLC*, No. 1:09 CV 2791, 2011 U.S. Dist. LEXIS 117733, at \*34 (N.D. Ohio Oct. 12, 2011); *KV Pharm Co. v. Medecor Pharma, L.L.C.*, 354 F. Supp. 2d 682, 684 (E.D. La. 2003); see also *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1141 (3d Cir. 1977); *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224,

address the standards governing any form of injunctive relief.<sup>271</sup> And neither *eBay* nor *Winter* identifies Rule 65 as the source of those standards. To the contrary, the Supreme Court has declared that “[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.”<sup>272</sup> Thus, the circumstances under which a federal court may issue an injunction is not “governed by one of the Federal Rules;”<sup>273</sup> to the contrary, there is “no Federal Rule which cover[s] the point.”<sup>274</sup> Neither Rule 65, the Rules Enabling Act, nor *Hanna v. Plumer* requires federal courts to apply federal equitable principles when determining the propriety of injunctive relief in a state-law case.

## 2. Receivers Under Rule 66

Appointment of a receiver is another equitable remedy a court may grant to “preserve and protect” disputed property “pending its final disposition” by the court.<sup>275</sup> Such appointments are always “ancillary” to the “final relief” the court is being asked to award.<sup>276</sup> Federal Rule of Civil Procedure 66 provides that the Federal Rules govern “an action in which the appointment of a receiver is sought or a receiver sues or is sued.”<sup>277</sup> It further states that “the practice in administering an estate by a receiver or a similar court-appointed

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1243–44 (N.D. Iowa 1995); *Fed. Leasing, Inc. v. Underwriters at Lloyd’s*, 487 F. Supp. 1248, 1260–61 (D. Md. 1980), *aff’d on other grounds* 650 F.2d 495, 499 n.4 (4th Cir. 1981).

<sup>271</sup> *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 646 (9th Cir. 1988) (recognizing that Rule 65 “does not state that injunctive relief is available in any particular case,” but rather “sets out the procedural requirements for injunctions and restraining orders”); *see also* 13 WM. MOORE, FEDERAL PRACTICE – CIVIL § 65.07[2] (“Rule 65 merely sets forth the procedural terms for the issuance of injunctions and restraining orders, and does not itself authorize injunctive relief; that authority derives from the traditional equitable power of federal courts in cases of irreparable injury.”); *Crump*, *supra* note 6, at 1243 (arguing that “[l]ittle support” can be found in Rule 65(a) for the proposition that the rule governs the availability of injunctive relief); *Shipley*, *supra* note 20, at 1214–15 (concluding that Rule 65 “is silent on the specific grounds for granting provisional relief,” so “a federal court in a diversity case may be required to apply a state law for granting injunctive relief”).

<sup>272</sup> *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999) (quoting 11A WRIGHT ET AL., *supra* note 20, § 2941 (2d ed. 1995)).

<sup>273</sup> *Hanna*, 380 U.S. at 470.

<sup>274</sup> *Id.*

<sup>275</sup> *Gordon v. Washington*, 295 U.S. 30, 37 (1935).

<sup>276</sup> *Id.* at 38; *see also* *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923) (“[T]he appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief . . . . It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights.”).

<sup>277</sup> FED. R. CIV. P. 66. The rule also provides that “[a]n action in which a receiver has been appointed may be dismissed only by court order.” *Id.*



officer must accord with the historical practice in federal courts or with a local rule.<sup>278</sup>

Although this rule requires receivers to follow “historical practice” in administering estates, it does not specify the circumstances under which federal courts may, must, or cannot appoint a receiver.<sup>279</sup> Despite the rule’s silence on the issue, many federal courts have held that the availability of such relief, including in cases arising under state law, is governed by traditional equitable principles from the English Court of Chancery as construed by the federal judiciary.<sup>280</sup> Those equitable principles do not provide a “precise formula” for appointing receivers.<sup>281</sup> Instead, they require courts to weigh a wide range of factors, including “fraudulent conduct on the part of the defendant; imminent danger that property would be lost, concealed, injured, diminished in value, or squandered;” inadequacy of legal remedies; the balance of hardships; the plaintiff’s likelihood of success in the underlying action; and the possibility of irreparable injury to the plaintiff’s interests in the property.<sup>282</sup>

To the extent courts conclude that Rule 66 requires or authorizes them to apply uniform federal equitable standards when appointing receivers in state-law cases,<sup>283</sup> they are both overreading the rule and misapplying *Hanna*. As with injunctions, the simple fact that Rule 66 discusses receivers does not mean that federal law automatically governs all aspects of them. To the contrary, federal law is inapplicable to issues the rule completely fails to address,

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Canada Life Assurance Co. v. LePeter*, 563 F.3d 837, 843 (9th Cir. 2009) (“[F]ederal law governs the issue of whether to appoint a receiver in a diversity action.”); *Nat’l P’ship Inv. Corp. v. Nat’l Hous. Dev. Corp.*, 153 F.3d 1289, 1292 (11th Cir. 1998) (“[T]he appointment of a receiver by a federal court exercising diversity jurisdiction is governed by federal law.”); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993) (“The appointment of a receiver in a diversity case is a procedural matter governed by federal law and federal equitable principles.”); see also *Chase Manhattan Bank, N.A. v. Turabo Shopping Ctr., Inc.*, 683 F.2d 25, 26 (1st Cir. 1982) (discussing litigants’ agreement that “the appointment of receivers in federal court is controlled by federal law”).

<sup>281</sup> *Aviation Supply Corp.*, 999 F.2d at 316; accord *Canada Life Assurance Co.*, 563 F.3d at 844; see also *N.Y. Life Ins. Co. v. Watt W. Invest. Corp.*, 755 F. Supp. 287, 292 (E.D. Cal. 1991).

<sup>282</sup> *Chase Manhattan Bank, N.A.*, 683 F.2d at 26–27 (quoting *Commodity Futures Trading Comm’n v. Comvest Trading Corp.*, 481 F. Supp. 438, 441 (D. Mass. 1979) (footnotes omitted)); see also *Aviation Supply Corp.*, 999 F.2d at 316–17; *Fimbel v. Fimbel Door Corp.*, No. 14–1915 (FLW)(DEA), 2016 U.S. Dist. LEXIS 46917, at \*10–12 (D.N.J. Apr. 7, 2016) (discussing competing lists of factors).

<sup>283</sup> *Nat’l P’ship Inv. Corp.*, 153 F.3d at 1291 (“[T]o the extent Rule 66 dictates what principles should be applied to federal receiverships, courts must comply with the Rule even in the face of differing state law.”); accord *Canada Life Assurance Co.*, 563 F.3d at 843; see also *Aviation Supply Corp.*, 999 F.2d at 316 (citing Rule 66 for proposition that federal equitable principles govern appointment of receivers).

such as the circumstances under which they may be appointed.<sup>284</sup> Indeed, the rule's only reference to historical practice completely omits any mention of receivers' appointments.<sup>285</sup>

The Advisory Committee Note for Rule 66 asserts that the rule "assures the application of the [Federal Rules] in all matters except actual administration of the receivership estate itself."<sup>286</sup> Some courts have construed this comment as confirming that traditional equitable principles govern all aspects of receivership litigation, including the substantive standards for appointing receivers.<sup>287</sup> The comment, however, refers only to the portion of Rule 66 confirming that the rules of civil procedure apply to federal lawsuits "in which the appointment of a receiver is sought."<sup>288</sup> As discussed above, that language does not impose or incorporate any standards, including traditional equitable principles, for appointing receivers. Thus, neither the Federal Rules, the Rules Enabling Act, nor *Hanna* authorizes or requires courts to apply uniform federal equitable principles when determining whether to appoint a receiver in a diversity or supplemental jurisdiction case.

Numerous state statutes and court rulings provide standards for appointing receivers that materially differ from the federal factors identified above. For example, under Florida law, a litigant must show that an entity engaged in fraud or is insolvent to have a receiver appointed.<sup>289</sup> A Delaware statute allows a creditor of an insolvent corporation to seek appointment of a receiver,<sup>290</sup> while the traditional equitable principles that apply in federal courts allow such creditors to seek a receiver only after reducing their claims to judgment and exhausting their legal remedies for collecting the debts.<sup>291</sup> Likewise, Oklahoma law allows a surety to seek provisional remedies such as appointment of a receiver even before the underlying debt is due.<sup>292</sup> Traditional principles of equity, on the other hand, do not allow receivers to be appointed

<sup>284</sup> Cf. *supra* notes 241–249 and accompanying text.

<sup>285</sup> FED. R. CIV. P. 66; cf. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius* canon to the Federal Rules of Civil Procedure).

<sup>286</sup> FED. R. CIV. P. 66 advisory committee's note to 1946 amendments.

<sup>287</sup> See, e.g., *Nat'l P'ship Inv. Corp.*, 153 F.3d at 1291 (contending that the Advisory Committee Note "assert[s] the primacy of federal law in the practice of federal receiverships"); *Resolution Tr. Corp. v. Fountain Circle Assocs. Ltd. P'ship*, 799 F. Supp. 48, 50 n.1 (N.D. Ohio 1992) ("The intent of Rule 66 to apply federal law to the appointment of a receiver may be gathered from the note of the advisory committee."); *N.Y. Life Ins. Co.*, 755 F. Supp. at 290 (same).

<sup>288</sup> FED. R. CIV. P. 66.

<sup>289</sup> See *Nat'l P'ship Inv. Corp.*, 153 F.3d at 1290–91 (citing *McAllister Hotel, Inc. v. Schatzberg*, 40 So. 2d 201, 202–03 (Fla. 1949)).

<sup>290</sup> DEL. CODE ANN. tit. 8, § 291 (2017).

<sup>291</sup> See *Pusey & Jones Co.*, 261 U.S. at 497.

<sup>292</sup> See *Kelleam v. Md. Cas. Co.*, 312 U.S. 377, 381–82 (1941).

under such circumstances.<sup>293</sup> California similarly provides more liberal standards for receivers' appointments under certain circumstances, such as where a deed of trust expressly provides for it.<sup>294</sup> Thus, the choice between federal and state law can determine whether the court will appoint a receiver, in turn impacting a plaintiff's ability to ultimately recover from the defendant.

### *B. Equity and the Rules of Decision Act*

Because the Federal Rules of Civil Procedure do not provide substantive standards governing many equitable remedies, such as injunctions and receivers, and completely fail to mention others, such as constructive trusts or equitable liens, the Rules Enabling Act does not require federal courts to apply traditional equitable principles when considering them. Nor are there any other federal laws addressing the availability of equitable relief in federal court, either in general or specifically in cases arising under state law. Thus, the Rules of Decision Act, as construed in *Erie* and its progeny, controls whether federal or state law governs equitable remedies in such cases.<sup>295</sup>

The Rules of Decision Act provides that, when no federal rule or statute addresses an issue, federal courts must treat “[t]he law of the several states” as the “rules of decision.”<sup>296</sup> *Erie* interpreted this provision to mean that a federal court generally may not devise and apply “substantive rules of common law” in diversity cases.<sup>297</sup> Rather, the *Erie* Doctrine requires “federal courts sitting in diversity [to] apply state substantive law and federal procedural law.”<sup>298</sup>

In *Guaranty Trust Co v. York*, the Supreme Court adopted the “outcome-determination” test to distinguish between substantive and procedural law.<sup>299</sup> Under *Guaranty Trust*, an issue was deemed substantive, and therefore governed by state law, if it could “significantly affect the result of a litigation.”<sup>300</sup> In other words, federal courts sitting in diversity must apply state law when-

<sup>293</sup> *Id.* at 380.

<sup>294</sup> See *N.Y. Life Ins. Co.*, 755 F. Supp. at 292.

<sup>295</sup> John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698 (1974) (“[W]here there is no relevant Federal Rule of Civil Procedure or other Rule promulgated pursuant to the Enabling Act and the federal rule in issue is therefore wholly judge-made, whether state or federal law should be applied is controlled by the Rules of Decision Act, the statute construed in *Erie* and *York*.”).

<sup>296</sup> 28 U.S.C. § 1652 (2012).

<sup>297</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77 (1938).

<sup>298</sup> *Gasparini*, 518 U.S. at 427; see also *Hanna*, 380 U.S. at 465 (“[F]ederal courts are to apply state substantive law and federal procedural law.”).

<sup>299</sup> *Guaranty Trust Co.*, 326 U.S. at 109; see also *Hanna*, 326 U.S. at 468.

<sup>300</sup> *Guaranty Trust Co.*, 326 U.S. at 109.

ever the choice between state or federal law is likely to affect a case's outcome.

*Hanna v. Plumer* modified this standard.<sup>301</sup> *Hanna* recognized that applying virtually any federal requirement, including indisputably procedural rules, could affect a case's outcome.<sup>302</sup> The Court therefore held that "choices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion," but rather in light of "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."<sup>303</sup> Dean John Hart Ely emphasized that, under the Rules of Decision Act, "[t]he test is whether the choice between the [federal and state standards] is material in the sense *Hanna* indicated."<sup>304</sup>

Under the *Erie* Doctrine, state law—not traditional principles applied by the English Court of Chancery—should govern equitable remedial issues in federal diversity cases, for two reasons. First, *Hanna*'s modified outcome-determination test dictates that state law should govern equitable remedies because applying state law furthers the *Erie* Doctrine's objectives. Second, more broadly, remedies are properly considered substantive rather than procedural. Courts have recognized other types of remedies as substantive, and there is no reason equitable remedies should be treated categorically differently. Moreover, developments in the intriguingly analogous context of criminal law confirm that remedies should not be distinguished from the law governing an underlying cause of action.

### 1. Equity, *Hanna*, and the Twin Aims of *Erie*

Most basically, equitable remedies qualify as substantive under *Hanna*'s modified outcome-determination test.<sup>305</sup> As noted above, *Hanna* provides that an issue is substantive, and therefore governed by state law in diversity cases, when applying a distinct body of federal standards would lead to forum shopping and "inequitable administration of the laws."<sup>306</sup>

*Guaranty Trust* itself recognizes that the equitable remedial rights doctrine sometimes leads to substantial disparities in the relief a court may award

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<sup>301</sup> 380 U.S. at 468; see also Ely, *supra* note 295, at 717–18 (explaining that *Hanna* provided "a rejuvenated outcome determination test").

<sup>302</sup> *Hanna*, 380 U.S. at 468.

<sup>303</sup> *Id.* at 467–68.

<sup>304</sup> Ely, *supra* note 295, at 723.

<sup>305</sup> See Wolf, *supra* note 20, at 50 (arguing that federal courts should apply state-law standards for injunctions to discourage forum shopping and "prevent the inequitable administration of the law"); see also 19 WRIGHT ET AL., *supra* note 20, § 4513 ("[A]n independent federal law of remedies would be contrary to the twin aims of *Erie* as described in the *Hanna* decision, as well as Justice Brandeis' constitutional analysis in *Erie*.").

<sup>306</sup> 380 U.S. at 467–68.

based solely on choice of forum.<sup>307</sup> The ability to obtain certain types of relief can have a tremendous impact on a plaintiff's willingness to litigate in a particular forum. Even disparities in the ability to obtain interim relief, such as a preliminary injunction or receivership, can lead plaintiffs to suffer irreparable injury that would dramatically affect their choice of forum.<sup>308</sup> Equitable relief tends to be specific rather than substitutionary, allowing plaintiffs to enforce their actual rights, rather than having to accept their monetary equivalent as compensation for violations.<sup>309</sup> Such relief is also frequently *ex ante*, allowing plaintiffs to prevent violations of their rights before they occur or stop ongoing violations, rather than being relegated to seeking *ex post* compensation.<sup>310</sup> Thus, differences between state and federal standards for obtaining interim or permanent equitable relief are likely to weigh heavily in a plaintiff's choice of forum.<sup>311</sup>

Professor David E. Shipley disagrees, pointing out that plaintiffs typically consider a wide range of factors when selecting a court, including "differences in jury selection practices, differences in discovery, differences in docket management, and perceptions about appointed judges instead of elected judges."<sup>312</sup> Although such considerations might weigh more heavily than choice-of-law issues concerning equitable relief in some cases, the underlying point remains: when a plaintiff needs equitable relief, particularly immediate relief, differences in legal standards can substantially affect its choice of forum.

Likewise, basing the availability of either interim or permanent relief solely on whether litigants are "in a federal court instead of a State court a block away"<sup>313</sup> also leads to "inequitable administration of the laws."<sup>314</sup> Particularly because the type of relief (legal versus equitable) a court is likely to award is often very important to litigants, their equitable rights should not

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<sup>307</sup> 326 U.S. at 106 (rejecting the premise that "whatever equitable remedy is available in a State court must be available in a diversity suit" and emphasizing that "a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it" (citations omitted)).

<sup>308</sup> See *Winter*, 555 U.S. at 20 (holding that, under federal standards, "[a] plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief"); *Pennsylvania v. Williams*, 294 U.S. 176, 182 (1935) ("The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury.").

<sup>309</sup> Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 ALA. L. REV. 119, 134 (2006); see also DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 12–13 (1991).

<sup>310</sup> Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2480 (2014) (discussing distinction between *ex ante* injunctions and *ex post* damages).

<sup>311</sup> *Cf. id.* at 2465–80 (explaining that injunctions are the strongest available means of protecting an underlying public-law entitlement).

<sup>312</sup> Shipley, *supra* note 20, at 1217–18.

<sup>313</sup> *Guaranty Trust Co.*, 326 U.S. at 109.

<sup>314</sup> *Hanna*, 380 U.S. at 468.

hinge on “the fortuity that there is diversity of citizenship between [them]. The policies underlying diversity jurisdiction do not support such a distinction between state and federal [litigants].”<sup>315</sup>

*Guaranty Trust* does not provide any good reason to allow federal courts to maintain an independent body of law to govern equitable relief in both federal and state cases.<sup>316</sup> The Court declared that “[e]quitable relief in a federal court . . . must be within the traditional scope of equity as historically evolved in the English Court of Chancery”<sup>317</sup> without explaining why those principles apply in state-law cases. Despite *Erie*’s repudiation of general law, this holding treats equity as a comparable “transcendental body of law outside of any particular State” that binds federal courts in matters arising under state law.<sup>318</sup>

The *Guaranty Trust* Court further explained that, under section 16 of the Judiciary Act, a federal court may not award equitable relief unless “a plain, adequate and complete remedy at law [is] wanting.”<sup>319</sup> Due to the merger of law and equity, however, section 16 was omitted as obsolete from the modern Judiciary Code when it was recodified three years after *Guaranty Trust* was decided.<sup>320</sup> Because section 16 was repealed, it no longer directly binds federal courts.

One might respond by pointing out that section 16 “was but declaratory of the rule in equity, established long before its adoption.”<sup>321</sup> As discussed above, however, the traditional rules of the English Court of Chancery cannot apply of their own force in a post-*Erie* world. Of course, most states have incorporated this “inadequate remedy at law” principle into their own equity jurisprudence, so federal courts still must typically apply it in diversity cases

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<sup>315</sup> *Walker*, 446 U.S. at 753; cf. *Gasperini*, 518 U.S. at 431 (“*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.”).

<sup>316</sup> See *The Equitable Remedial Rights Doctrine*, *supra* note 12, at 417 (“The policy behind the *Erie* rule—uniformity within a state—would seem clearly to direct that remedies be classed with ‘substantive rights’ and controlled by state law.”); *Past and Present*, *supra* note 12, at 839 (“The federal court in diversity matters should ordinarily grant the same remedy that would be given in a state court.”).

<sup>317</sup> *Guaranty Trust Co.*, 326 U.S. at 105.

<sup>318</sup> *Id.* at 103 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); see also *Crump*, *supra* note 6, at 1272 (arguing that “applying federal equity principles to remedies[] obviously carries all the unfortunate baggage of *Swift v. Tyson*—which it was the Supreme Court’s entire purpose in *Erie* to reject”).

<sup>319</sup> *Guaranty Trust Co.*, 326 U.S. at 105 (citing Judiciary Act of 1789, § 16, 1 Stat. 73, 82 (codified at 28 U.S.C. § 384)).

<sup>320</sup> See Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869 (revising, codifying, and enacting title 28 of the United States Code).

<sup>321</sup> *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932); accord *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 569 (1939).

as a matter of state law.<sup>322</sup> And even if the Court were to somehow interpret Title 28 of the United States Code as a whole as implicitly retaining this “inadequate remedy at law” principle, it would be simply one federal side constraint that could be applied against the backdrop of state statutes and court rulings concerning equitable remedies.

*Guaranty Trust* also noted that “explicit Congressional curtailment of equity powers must be respected,” but such limitations are few and far between.<sup>323</sup> No federal statutes purport to either establish a code of federal equitable remedies or prohibit federal courts from applying state law when granting equitable relief.<sup>324</sup> *Guaranty Trust*’s discussion concluded by reaffirming that “the constitutional right to trial by jury cannot be evaded.”<sup>325</sup> Because juries typically play no role in equity, this restriction is unlikely to be significant. Even in cases where a state has authorized equitable relief under circumstances that would implicate the Seventh Amendment right to a jury in federal court, however, a federal court could apply state standards while allowing a jury to make any constitutionally required findings or judgments.

Wright and Miller’s *Federal Practice* treatise largely agrees with this analysis as applied to permanent injunctions although, even in that context, it contends that federal courts should reserve the power to ignore state equitable principles “in exceptional cases in order to effect justice expeditiously or creatively.”<sup>326</sup> Of course, speed and judicial creativity play no role in *Hanna*’s explanation of the *Erie* Doctrine. More significantly, the treatise contends that federal courts sitting in diversity may apply uniform federal standards to interim relief such as preliminary injunctions because they are not final judgments for purposes of any outcome-determination test, but rather “procedures for preserving the status quo pending a fair and complete adjudication of the merits.”<sup>327</sup>

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<sup>322</sup> Conversely, when a federal court applies principles such as the “inadequate remedy at law” rule in federal question cases, it does so as a matter of statutory interpretation or constitutional common law. See *infra* notes 432–439 and accompanying text.

<sup>323</sup> 326 U.S. at 105 (citing Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115)).

<sup>324</sup> Cf. *Stewart Org., Inc.*, 487 U.S. at 32 (holding that the federal venue statute, 28 U.S.C. § 1404(a), applies in all cases in federal court); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404–05 (1967) (holding that the Federal Arbitration Act applies in all cases in federal court).

<sup>325</sup> *Guaranty Trust Co.*, 326 U.S. at 105 (citing *Whitehead v. Shattuck*, 138 U.S. 146 (1891)).

<sup>326</sup> 19 WRIGHT ET AL., *supra* note 20, § 4513; see also *id.* § 2943.

<sup>327</sup> *Id.* § 4513; *ShIPLEY*, *supra* note 20, at 1218 (“[T]he final decision after a full trial on the merits should not be substantially affected by going with the federal standard instead of a state’s standard for provisional relief. A court’s ruling on a preliminary or interlocutory injunction is not final.”). Wright and Miller also contend that *Hanna* requires courts to apply federal standards to preliminary injunctions because Rule 65 discusses them. 19 WRIGHT ET AL., *supra* note 20,

This argument is unpersuasive in several respects. Most basically, Wright and Miller's analysis rests solely on *Guaranty Trust's* outcome determination test, ignoring the two-prong standard *Hanna* adopted in its place.<sup>328</sup> As this subsection has demonstrated, the "twin aims of *Erie*"<sup>329</sup> are best served by compelling a federal court to apply the same body of equitable remedial principles in diversity cases as a state court would, for both interim and final relief. Moreover, it seems strange that a federal court would apply different bodies of law at different stages of a case to determine a plaintiff's entitlement to an equitable remedy: federal law for interim relief, state law for permanent relief. Such inconsistency could prevent a federal court from enjoining irreparable injury that a plaintiff would ultimately be entitled to avoid.

Even considered on its own terms, however, Wright and Miller's argument is unconvincingly formalistic. An interim remedy changes at least one of the litigants' substantive rights—its power to perform certain primary actions in the ordinary world outside of court—even if only temporarily. Such an alteration in a party's rights can properly be regarded as part of a case's outcome, regardless of its duration.

Furthermore, interim relief affects the outcome of the case by helping preserve the possibility of a meaningful judgment on the merits. A preliminary injunction can prevent irreparable harm that would otherwise moot a case, precluding a judicial determination of the parties' rights. Similarly, a receiver can help preserve a defendant's assets ensuring that they remain available to satisfy a judgment. The outcome of a case thus can often depend on the availability of interim remedies. State law should therefore govern interim equitable relief as well as permanent relief.

Thus, *Guaranty Trust* retained the equitable remedial rights doctrine too reflexively without fully considering *Erie's* implications for it.<sup>330</sup> The ruling does not provide a valid basis for allowing federal courts to ignore state statutes and precedents when granting equitable relief in state-law cases. Under *Hanna's* modified outcome-determination test, federal and state courts should apply the state-law standards for awarding equitable relief in diversity cases to prevent forum shopping and avoid inequitable administration of the laws.

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§ 4513. The previous Section discussed the errors in that argument. See *supra* notes 269–274 and accompanying text.

<sup>328</sup> Wright and Miller suggest that *Guaranty Trust* rather than *Hanna* is the proper standard because *Hanna* did not "involve[] a question of remedies." 19 WRIGHT ET AL., *supra* note 20, § 4513. *Hanna* appears fully applicable to remedial issues, however. See *infra* notes 342–347 and accompanying text.

<sup>329</sup> *Hanna*, 380 U.S. at 467–68.

<sup>330</sup> John C. McCoid, II, *Hanna v. Plumer, The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 907 n.110 (1965) (arguing that *Guaranty Trust* "assumed . . . too easily, that variation in remedy does not impinge on substantive law").



The same reasoning mandating the extension of *Erie* to equity in general<sup>331</sup> applies with equal force to equitable remedies.

## 2. Remedies as Substantive Law

More broadly, remedies should be deemed categorically substantive, not procedural, for *Erie* purposes. Some scholars contend that remedies exist in the hazy hinterlands between the much more familiar realms of “substantive” and “procedural” rights.<sup>332</sup> Whatever the merits of such arguments, remedies should be deemed substantive under the *Erie* Doctrine.

Daryl Levinson cogently explains that rights are “inseparable from[] remedies.”<sup>333</sup> His theory of “remedial substantiation” teaches that “we should look at rights and remedies as part of a single package,” because “the practical value of a right is determined by its associated remedies.”<sup>334</sup> The substantive policies underlying rights created by state law can be frustrated by either ineffective or overly strict remedies, as well as unduly restrictive or liberal standards governing their availability.

Calabresi and Melamed’s seminal “cathedral” framework confirms the integral relationship between rights and remedies.<sup>335</sup> They explain that, for each legal right or entitlement, a state must decide not only which competing claimant should receive it, but also the manner in which it should be protected.<sup>336</sup> A right or entitlement may be protected by either a liability rule, meaning ex post compensatory damages, or a property rule, such as an ex ante injunction.<sup>337</sup> The choice of liability rule or property rule protection for an enti-

<sup>331</sup> *Guaranty Trust*, 326 U.S. at 105, 108–09; *Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 205 (1938).

<sup>332</sup> See *supra* note 6 and accompanying text.

<sup>333</sup> Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884 (1999).

<sup>334</sup> *Id.* at 888, 904.

<sup>335</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1110 (1972).

<sup>336</sup> *Id.* at 1092 (“The state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult . . . decisions. . . . [concerning] the manner in which entitlements are protected . . .”).

<sup>337</sup> In the cathedral framework:

A third party may violate an entitlement protected by a liability rule, without the entitlement holder’s consent, so long as it pays the entitlement’s fair market value (i.e., compensatory damages). The entitlement holder may not prevent third parties from violating the entitlement, but rather may insist only on receiving an objectively determined amount of compensation.

A property rule, in contrast, gives an entitlement holder the formal legal right to prevent third parties from violating his entitlement ex ante. An entitlement protected by a property rule cannot be transferred to a third party without the entitlement holder’s consent.

tlement “is often made because it facilitates a combination of efficiency and distributive results.”<sup>338</sup>

If a federal court grants property rule protection (by issuing an injunction) for an entitlement that a state chose to protect solely by liability rules, it may frustrate socially beneficial transactions. An entitlement protected by a property rule may be transferred only with the voluntary consent of the right-holder, but high transaction costs may frustrate or preclude such agreements, even when they would lead to Pareto superior outcomes.<sup>339</sup> Likewise, if a state allows property rule protection for an entitlement, but a federal court instead relegates a right-holder to liability rule protection (by refusing to issue an injunction), right-holders may be deprived of the specific entitlements the state sought to guarantee them and forced to accept cash equivalents instead.<sup>340</sup> A court’s choice of remedies thus directly implicates substantive policy considerations to the same extent as the underlying cause of action.<sup>341</sup>

The Supreme Court has repeatedly recognized that remedies are substantive in the *Erie* context.<sup>342</sup> For example, in *Browning-Ferris Industries v. Kelco Disposal*, the Court held, “In a diversity action, . . . the propriety of an award of punitive damages for the conduct in question, . . . and the factors the jury may consider in determining their amount, are questions of state law.”<sup>343</sup> Likewise, in *Gasperini v. Center for Humanities, Inc.*, the Court held that a state law requiring stricter appellate review of damages awards than federal law permitted was substantive and therefore applicable in diversity cases.<sup>344</sup> The *Gasperini* Court explained, “*Erie* precludes a recovery in federal court

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Morley, *supra* note 310, at 2488 (citing Calabresi & Melamed, *supra* note 335, at 1092). I have argued elsewhere that the traditional cathedral framework is incomplete, particularly for public law cases. It should further distinguish between “potential property rules,” which protect entitlements for which the right-holder has a substantial likelihood of being able to obtain injunctive relief, and “complete property rules,” which protect entitlements that are currently protected by an injunction. *Id.* at 2491–92.

<sup>338</sup> Calabresi & Melamed, *supra* note 335, at 1110.

<sup>339</sup> *Id.* at 1119. A “Pareto superior” transaction is one which “makes at least one person in the world better off and no one worse off.” P. SAMUELSON & W. NORDHAUS, *ECONOMICS* 966 (13th ed. 1989).

<sup>340</sup> See Morley, *supra* note 310, at 2480.

<sup>341</sup> See Crump, *supra* note 6, at 1272 (arguing that state policies governing equitable relief “are just as important as those defining underlying rights” and deserve to be “properly vindicated”).

<sup>342</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407–08 (2010) (recognizing that a rule is substantive for *Erie* purposes if it “alter[s] the rights themselves, the available remedies, or the rules of decision by which the court adjudicate[s] either” (emphasis added)).

<sup>343</sup> 492 U.S. 257, 278 (1989).

<sup>344</sup> 518 U.S. at 430–31.

significantly larger than the recovery that would have been tolerated in state court.”<sup>345</sup>

Outside the damages context, in *Bernhardt v. Polygraphic Co. of America*, the Court held that “the *remedy* by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State.”<sup>346</sup> The arbitrability of a case to which the Federal Arbitration Act did not apply therefore was a substantive issue governed by state law, rather than federal common law.<sup>347</sup> As remedial issues are generally considered to be substantive and governed by state law, there is no basis for treating equitable remedies differently.

The equivalence of the elements of a cause of action and the standards governing remedies is confirmed in the surprisingly analogous context of criminal law. In 2000, in *Apprendi v. New Jersey*, the Supreme Court held that a prosecutor must prove to a jury beyond a reasonable doubt any fact that could lead to an increase in the maximum sentence a defendant may receive.<sup>348</sup> The State of New Jersey had argued that, although the Constitution required the prosecution to prove elements of a criminal offense to the jury beyond a reasonable doubt, sentencing factors that merely increased a defendant’s sentence could be proved to the trial judge by a preponderance of the evidence.<sup>349</sup> In effect, the state tried to argue that a constitutionally relevant distinction existed between the elements of a crime and the facts necessary to impose sentencing enhancements.

The *Apprendi* Court flatly refused to distinguish between “an ‘element’ of a felony offense and a ‘sentencing factor.’”<sup>350</sup> Sentencing factors, like the elements of an offense, are simply “circumstances of [a] crime” that lead to a particular punishment.<sup>351</sup> The Court emphasized that “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”<sup>352</sup> The elements of a crime are analogous to the elements of a civil cause of action, and sentencing factors are comparable to the elements that must be proven to obtain a particular civil remedy, whether legal or equitable.

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<sup>345</sup> *Id.* at 431; *see also* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 260 n.31 (1975) (holding that a litigant’s entitlement to recover attorneys’ fees is substantive).

<sup>346</sup> 350 U.S. 198, 203 (1956) (emphasis added).

<sup>347</sup> *Id.*

<sup>348</sup> 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

<sup>349</sup> *Id.* at 469.

<sup>350</sup> *Id.* at 478.

<sup>351</sup> *Id.* at 480.

<sup>352</sup> *Id.* at 494.

*Apprendi* recognized that elements of an offense and sentencing factors are functionally interchangeable—both must be proven for a defendant to receive a particular sentence. So, too, the elements of a civil cause of action and the requirements for obtaining a particular remedy are likewise interchangeable. Both are simply facts a plaintiff must prove to be eligible to receive a particular form of relief. *Apprendi* thus confirms the substantive nature of remedies.

In short, the Rules of Decision Act requires federal courts to apply state law when determining the availability of relief, including equitable relief, in cases arising under state law. The equitable remedial rights doctrine cannot survive *Erie*; *Guaranty Trust* is an anachronism without a statutory basis.

### *C. Equity and the Constitution*

The Rules of Decision Act, properly interpreted, requires federal courts to apply a state's statutes and precedents concerning all equitable issues, including remedial issues, in diversity and supplemental jurisdiction cases.<sup>353</sup> Because *Guaranty Trust* is a long-established precedent, the Supreme Court may be reluctant to overturn it based solely on doubts about its reasoning.<sup>354</sup> Like the Supreme Court's *Swift v. Tyson* decision in 1842,<sup>355</sup> however, *Guaranty Trust*'s misinterpretation of the Rules of Decision Act raises constitutional problems, as well. Subsection 1 below explains how the equitable remedial rights doctrine violates principles of federalism.<sup>356</sup> Subsection 2 considers the separation-of-powers problems it creates.<sup>357</sup> Subsection 3 concludes by distinguishing equity from other bodies of federal common law that federal courts have constitutional authority to develop.<sup>358</sup>

#### 1. Federalism

The equitable remedial rights doctrine violates federalism-based restrictions on federal courts. The Constitution allows Congress to exercise only limited, enumerated powers, protecting the states' prerogative to exclusively govern other remaining fields, which the Framers did not deem to be of national concern.<sup>359</sup> Congress may not enact, or authorize federal courts to craft, either federal law, or general law governing only diversity cases, concerning

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<sup>353</sup> *Supra* notes 295–352 and accompanying text.

<sup>354</sup> *Cf. Erie*, 304 U.S. at 77 (“If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.”).

<sup>355</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>356</sup> *See infra* notes 359–376 and accompanying text.

<sup>357</sup> *See infra* notes 377–398 and accompanying text.

<sup>358</sup> *See infra* notes 399–409 and accompanying text.

<sup>359</sup> *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014); *cf.* U.S. CONST. amend. X.

areas outside the scope of its enumerated powers.<sup>360</sup> For the same federalism-related reasons, federal courts may not claim power (as they did in *Swift*) to develop substantive rules of decision concerning matters outside the scope of Congress' legislative authority.<sup>361</sup> The establishment and application of general law in diversity cases "invaded rights . . . reserved by the Constitution to the several states."<sup>362</sup>

These federalism-related limits preclude both Congress and the federal judiciary from establishing a uniform body of federal equitable principles governing remedies in diversity cases. Several provisions in Article I of the Constitution empower Congress to dictate remedies specifically for certain types of cases, such as disputes affecting interstate commerce<sup>363</sup> or patents.<sup>364</sup> Congress lacks broader authority, however, to establish a general law of equitable remedies that federal courts must apply in all equity cases.<sup>365</sup> Under *Erie*, it would therefore violate federalism-based limits on the national government's authority for a federal court to do so, either.<sup>366</sup>

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<sup>360</sup> *Erie*, 304 U.S. at 78 ("[Congress] has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general' . . ."). Dean Ely, adopting this federalism-based interpretation of *Erie*, explained that *Swift v. Tyson*'s recognition of federal courts' power to craft general law was "unconstitutional because nothing in the Constitution provide[s] the central government with a general lawmaking authority of the sort the Court had been exercising . . ." Ely, *supra* note 295, at 703.

<sup>361</sup> See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 395 (1964) ("[I]t would be even more unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not. . . . The spectacle of federal judges being able to make law without possibility of Congressional correction would not be a happy one.").

<sup>362</sup> *Erie*, 304 U.S. at 80. Scholars have pointed out that, in light of sweepingly broad modern interpretations of Congress' powers, these federalism-based restrictions are fairly minimal. See Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595, 612 (2008) ("The problem with *Erie*'s enumerated-powers argument is that any 'gap' between Article III diversity jurisdiction and Article I legislative power is too small to explain *Erie*, much less justify the wholesale reversal of *Swift*-era common law.").

<sup>363</sup> U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); see, e.g., *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012).

<sup>364</sup> U.S. CONST. art. I, § 8, cl. 8 (Patent Clause); see, e.g., 35 U.S.C. §§ 283–284 (2012).

<sup>365</sup> Cross, *supra* note 20, at 201 ("None of Congress's enumerated powers . . . are broad enough to cover the entire set of substantive rules that comprise the law of equity. Congress certainly has no power to regulate what remedies are available in cases arising under state law, even when those remedies are [sic] heard in federal court."). Congress likely could strip federal courts of their jurisdiction to grant particular remedies, however, including in diversity cases. Cf. U.S. CONST. art. I, § 8, cl. 9 (granting Congress power to "constitute tribunals inferior to the Supreme Court"); *id.* art. III, § 2, cl. 2 (providing that the Supreme Court's appellate jurisdiction is subject to "such exceptions . . . as the Congress shall make").

<sup>366</sup> Cf. Plank, *supra* note 20, at 670 ("[F]ederal courts in bankruptcy may not use their equity power to go beyond Congress's power under the Constitution. To the extent that equity plays a role in bankruptcy, that role must be confined to the limits of bankruptcy law.").

Some scholars reject this federalism-based interpretation of *Erie*, arguing that the Constitution's Diversity Jurisdiction Clause,<sup>367</sup> read in conjunction with the Necessary and Proper Clause,<sup>368</sup> permits Congress to either craft substantive rules of decision for diversity cases or authorize federal courts to do so.<sup>369</sup> Such arguments are unpersuasive. Although Congress' power to establish courts implicitly carries with it the prerogative to enact or authorize the creation of procedural rules to govern them,<sup>370</sup> it cannot reasonably be read as allowing Congress to establish rules of decision—substantive law—for those courts to apply.<sup>371</sup> If the power to create courts implicitly carried with it the power to enact substantive law for them to apply, then Article I's grants of lawmaking power over certain specified substantive areas would be largely unnecessary. Moreover, the notions of limited government and enumerated powers upon which Article I is based<sup>372</sup> would be undermined, at least within federal courts.<sup>373</sup>

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<sup>367</sup> U.S. CONST. art. III, § 2, cl. 7 (“The judicial power shall extend . . . to controversies . . . between citizens of different states.”).

<sup>368</sup> *Id.* art. I, § 8, cl. 18 (“Congress shall have power . . . [t]o make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”).

<sup>369</sup> Lawrence Earl Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L.J. 3 (1941) (arguing that Article III's jurisdictional grants permit federal courts to engage in substantive lawmaking); McCormick & Hewes, *supra* note 113, at 135 (“[T]he Judiciary article and the ‘necessary and proper’ clause could well be interpreted to confer” upon Congress power to “lay down rules of substantive law for controversies between citizens of different states.” (parentheses omitted)); *see also* Note, *Congress, the Tompkins Case, and the Conflict of Laws*, 52 HARV. L. REV. 1002, 1003–04 (1939) (“[T]he Judiciary Article and the ‘necessary and proper’ clause of Article One may fully authorize Congressional legislation prescribing the substantive law to be applied in the federal courts.”).

<sup>370</sup> *Hanna*, 380 U.S. at 472 (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts . . .”).

<sup>371</sup> *Id.* at 471–72 (“[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution.”); Ely, *supra* note 295, at 703–04 (“The Constitution’s reference to a diversity of citizenship jurisdiction had been intended as that and no more—a grant of power to provide courts for diversity cases and to prescribe the rules of practice and procedure by which they would manage their business, but not to go on and provide them . . . with rules that could not fairly be characterized as procedural.”); *see also* Plank, *supra* note 20, at 637 (“If Congress does not have the power under Article I of the Constitution to prescribe a rule to be applied in a particular controversy, then federal judges . . . must apply state law.”); *cf. infra* notes 387–393 and accompanying text (arguing that broad jurisdictional grants to courts do not inherently confer authority to craft substantive rules of decision).

<sup>372</sup> *See* U.S. CONST. art. I, § 1 (specifying that Congress may exercise only the legislative powers “herein granted”); *see also supra* note 359 and accompanying text.

<sup>373</sup> Cross, *supra* note 20, at 205; Friendly, *supra* note 361, at 396 (“[I]t would subvert the scheme of the Constitution . . . to read this auxiliary clause as a catch-all empowering Congress to enact a code of private law applicable to all relations between citizens, subject to the sole qualification” that one party can invoke federal jurisdiction.).

Judge Henry Friendly opined in his seminal article on *Erie* that “so important an assignment of legislative power could not fairly be hung on so inconspicuous a peg.”<sup>374</sup> He added that “[e]stablishing a body of substantive law for federal courts in matters not otherwise of federal concern is not a legitimate end within the scope of the Constitution”<sup>375</sup> for purposes of *McCulloch v. Maryland*.<sup>376</sup> Thus, under a federalism-based interpretation of *Erie*, because Congress lacks power to impose substantive standards governing equitable relief in diversity cases, federal courts may not do so, either.

## 2. Separation of Powers

Even if establishing a generally applicable body of equitable remedial principles for federal courts were within the federal government’s power, it would violate separation-of-powers restrictions for federal courts to assume such authority for themselves without statutory authorization. Under a separation-of-powers interpretation of *Erie*, federal courts may not establish general law or federal common law—including equitable remedial principles to apply in diversity cases—without some constitutional or statutory delegation of authority to do so.<sup>377</sup>

Congress has not enacted any laws granting federal courts general authority to establish equitable principles applicable to all cases (including diversity cases) that come before them.<sup>378</sup> When a particular federal statute allows courts to enjoin violations of its substantive provisions, a court may presume that Congress implicitly intended to incorporate traditional equitable standards.<sup>379</sup> But no comparable basis exists for applying such federal equitable standards in diversity cases that arise under state law. Federal courts sit-

<sup>374</sup> Friendly, *supra* note 361, at 394.

<sup>375</sup> *Id.* at 397.

<sup>376</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *McCulloch* famously interpreted the Necessary and Proper Clause by declaring, “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.* at 421.

<sup>377</sup> Clark, *supra* note 196, at 1290, 1302 (arguing that federal courts may not ignore state law unless authorized to do so by a source of law listed in the Supremacy Clause); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974) (“[That] Congress may have constitutional power to make federal law displacing state substantive policy does not imply an equal range of power for federal judges. Principles related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own.” (emphasis omitted)); see also Plank, *supra* note 20, at 649; *Congress, the Tompkins Case, and the Conflict of Laws*, *supra* note 369, at 1004.

<sup>378</sup> *Cf.* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (holding that the Labor Management Relations Act of 1947 authorizes federal courts to create a body of federal common law to govern collective bargaining agreements).

<sup>379</sup> See *infra* notes 432–436 and accompanying text.

ting in diversity should therefore apply the equitable principles, including equitable remedial principles, of the state whose law gave rise to the dispute.<sup>380</sup>

Some critics maintain that Article III's grant of diversity jurisdiction empowers federal courts to craft substantive rules of decision to govern diversity cases.<sup>381</sup> They point out that other jurisdictional grants, such as those concerning admiralty<sup>382</sup> and controversies between states,<sup>383</sup> allow federal courts to develop substantive law to apply in such cases.<sup>384</sup> Those other jurisdictional provisions, however, are fundamentally different from constitutional<sup>385</sup> and statutory<sup>386</sup> grants of diversity jurisdiction in a variety of respects.

The Constitution empowers Congress to enact statutes governing admiralty and most interstate disputes that are equally binding on federal and state courts, so no federalism concerns arise from federal courts crafting such rules as a matter of federal common law. Congress lacks comparable authority to adopt a body of rules for resolving disputes between citizens of different states,<sup>387</sup> so federalism considerations counsel against allowing federal courts to do so.<sup>388</sup> Moreover, admiralty cases and disputes between states involve narrow, specialized areas of the law that affect relatively few litigants.<sup>389</sup> A court's diversity jurisdiction, in contrast, "cover[s] almost the whole range of

<sup>380</sup> *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (holding that a federal court should not craft federal common law for an area simply because "Congress could under the Constitution readily enact a complete code of law governing [it]").

<sup>381</sup> *See, e.g., McCormick & Hewins, supra* note 113, at 135.

<sup>382</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>383</sup> *Id.* art. III, § 2, cl. 5. The Alien Tort Claims Act, 28 U.S.C. § 1350, has similarly been construed as not only a jurisdictional grant, but a limited delegation of authority to determine the substantive content of the law of nations (in arguable violation of Congress' responsibility under the Offenses Clause, U.S. CONST., art. I, § 8, cl. 10). *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109 (2003) (discussing the original conception of the phrase "law of nations").

<sup>384</sup> *See Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) ("Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law."); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.").

<sup>385</sup> U.S. CONST., art. III, § 2, cl. 7.

<sup>386</sup> 28 U.S.C. § 1332(a)(1) (2012).

<sup>387</sup> *See supra* notes 359–376 and accompanying text.

<sup>388</sup> Cross, *supra* note 20, at 205; Philip B. Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 189, 201 (1957); McCormick & Hewins, *supra* note 113, at 142.

<sup>389</sup> Cross, *supra* note 20, at 205.



ordinary legal disputes.”<sup>390</sup> The power to make substantive rules of decision for diversity cases would constitute virtually plenary power to regulate nearly all aspects of life, including torts, contracts, property, and other foundational fields of law. Neither the history nor structure of the Constitution suggests federal courts possess such authority, especially in equity, which many Framers particularly distrusted.<sup>391</sup>

Finally, the Supreme Court has become much more precise about distinguishing jurisdiction from other types of issues than it was in decades past.<sup>392</sup> This new line of authority provides further reason for distinguishing a jurisdictional grant from the power to create substantive rules of decision.<sup>393</sup> Thus, the fact that certain provisions in Article III, such as the Admiralty Clause, are interpreted as authorizing federal courts to craft rules of decision does not suggest the Diversity Jurisdiction Clause should be construed the same way. Federal courts sitting in diversity should defer to state law for any remedial or equitable matters for which Congress has not provided statutory standards.

Professor John T. Cross contends that federal courts may develop and apply independent federal equitable principles in diversity cases on somewhat different grounds. Although he recognizes that the Diversity Jurisdiction Clause does not itself authorize federal courts to craft such principles,<sup>394</sup> Professor Cross nevertheless contends that they have inherent power to do so. He argues that Article III requires federal courts to adjudicate rights in “roughly the same” way as English courts traditionally did, and the English Court of Chancery possessed “the ability to exercise discretion in determining whether and how to enforce a legal right.”<sup>395</sup> *Erie*, he maintains, does not limit this “traditional power to exercise discretion in matters involving whether and how a substantive right should be enforced.”<sup>396</sup> Federal courts should there-

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<sup>390</sup> McCormick & Hewins, *supra* note 113, at 142.

<sup>391</sup> See *supra* notes 89, 92–93 and accompanying text.

<sup>392</sup> See, e.g., *Dolan v. United States*, 560 U.S. 605, 610 (2010) (distinguishing jurisdictional issues from “claims processing rules”); *Kontrick v. Ryan*, 540 U.S. 443, 454–55 (2004) (reiterating that courts and litigants should not use the term “jurisdictional” for “claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (distinguishing merits-related issues from jurisdictional issues).

<sup>393</sup> See also Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 250 (2008) (“*Erie* . . . rejected the idea that the mere existence of jurisdiction carries with it the power to dictate substantive legal standards.”).

<sup>394</sup> Cross, *supra* note 20, at 201, 205.

<sup>395</sup> *Id.* at 207, 209.

<sup>396</sup> *Id.* at 213.

fore apply “uniform national rules that originated in England,” rather than state law, when granting equitable relief.<sup>397</sup>

Cross offers the most thorough modern defense of the equitable remedial rights doctrine. Although consistent with *Guaranty Trust*, his argument does not support such an exception to the modern *Erie* framework. The Constitution grants federal courts power to adjudicate various types of disputes, including diversity cases, in both law and equity.<sup>398</sup> Modern courts and commentators generally agree that Article III’s grant of jurisdiction over common-law disputes neither permits federal courts to apply their own conception of common-law principles (*i.e.*, general law) in diversity cases, nor requires them to adhere to the English common-law courts’ conception of the common law as it existed back in 1789.

The same is true of equity. The fact that the Constitution allows federal courts to adjudicate cases in equity neither inherently ties them to a particular body of equitable principles from over two centuries ago, nor requires them to ignore state equity laws and precedents in cases arising under state law. As discussed in the next Section, equity is not a single, uniform, freestanding body of principles that federal courts are required to apply to all cases that come before them. Rather, through statutes and judicial opinions, each state has developed its own, somewhat different body of equitable principles, often reflecting substantive policy determinations. Under *Erie* and *Hanna*, federal courts lack inherent power to set aside those policies in diversity cases. Thus, because Congress has neither displaced states’ respective equity systems nor authorized federal courts to do so—either in general or specifically with regard to remedies—separation-of-powers concerns counsel strongly against federal courts claiming such authority for themselves.

### 3. Equity and Federal Common Law

A final important consideration is that equity differs materially from the bodies of federal common law that the *Erie* Doctrine allows federal courts to create. *Erie*’s blanket declaration that “[t]here is no federal general common law” is admittedly overbroad.<sup>399</sup> Even after *Erie*, the Supreme Court has held that federal courts may craft federal common law to cover “cases raising issues of uniquely federal concern.”<sup>400</sup> The Court has approved the adoption of

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<sup>397</sup> *Id.* at 214.

<sup>398</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>399</sup> *Erie*, 304 U.S. at 78.

<sup>400</sup> *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95 (1981); *see also Wallis*, 384 U.S. at 66–67, 72 (holding that state law, rather than federal common law, governed a dispute among private parties concerning an oil and gas lease of federal land because, “[i]n deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a

federal common law for cases concerning “the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”<sup>401</sup> In state-law cases, neither equity in general, nor equitable remedial rights in particular, comes close to meeting this standard.<sup>402</sup>

Cases arising under state law that do not involve the federal government or federal officials as parties do not categorically implicate important federal interests.<sup>403</sup> The federal government is generally unaffected by whether state-created rights are protected by liability rules or property rules. Particularly because the law of each state differs, the government likewise lacks a strong interest in applying a uniform body of principles to govern remedies, including equitable remedies, in cases arising under state law throughout the nation. Unlike many other fields governed by federal common law, such as federal negotiable instruments,<sup>404</sup> federal contracts,<sup>405</sup> federal loan programs,<sup>406</sup> and liability for harming members of the Armed Forces,<sup>407</sup> the availability of equitable remedies in diversity and supplemental jurisdiction cases does not affect the government’s powers, rights, or liabilities. And unlike the federal common law governing disputes between states<sup>408</sup> or certain transnational disputes,<sup>409</sup> equity is not an area of peculiar national concern that is constitutionally committed to the national government.

Thus, there is no need for national uniformity and no federal interest to vindicate with respect to equitable remedies in cases arising under state law.

significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown”).

<sup>401</sup> *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted).

<sup>402</sup> *But see* von Moschzisker, *supra* note 17, at 289 (pre-*Erie* article supporting federal courts’ aggressive implementation of federal equitable principles to protect perceived federal interests).

<sup>403</sup> *See Miree v. DeKalb Cty.*, 433 U.S. 25, 31 (1977) (holding that a court should not apply federal common law “since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome”).

<sup>404</sup> *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366–67 (1943); *see also* *Bank of Am. Nat’l Tr. & Sav. Ass’n v. Parnell*, 352 U.S. 29, 34 (1956) (“Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves.”).

<sup>405</sup> *Miree*, 433 U.S. at 31 (stating that federal common law applies “in interpreting the rights and duties of the United States under federal contracts”).

<sup>406</sup> *See* *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726–27 (1979).

<sup>407</sup> *United States v. Standard Oil Co.*, 332 U.S. 301, 310–11 (1947) (holding that the Government’s ability to seek indemnification from tortfeasors who harm members of the military is “appropriate for uniform national treatment rather than diversified local disposition” and thus “more fittingly determinable by independent federal judicial decision than by reference to varying state policies”).

<sup>408</sup> *See, e.g., Hinderlider*, 304 U.S. at 110.

<sup>409</sup> *See generally* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

Equitable remedies in ordinary tort, property, and contract cases do not become appropriate subjects of federal common law simply because disputes arise between citizens of different states.

*D. A New Conception of Equity: Equity Follows the Law*

Federal courts should fundamentally reconceptualize their approach to the federal equity power. They should abandon their traditional understanding of equity as a freestanding body of principles derived from the English Court of Chancery that governs remedies either of its own force, or as a result of some grant of jurisdiction within Article III, in all cases that come before them.<sup>410</sup> Instead, modern equity is best conceptualized as an analogue to the common law and should be treated as such for *Erie* purposes, to the extent constitutionally permissible.<sup>411</sup>

The body of equitable principles, including remedial principles, that governs a claim is a function of the law that gave rise to that claim. When a claim arises under a state statute or state common law,<sup>412</sup> that state's body of remedial law—including its equitable principles—should determine the available remedies. The court should treat the requirements for equitable relief the same as it does the elements of the underlying cause of action. There is no freestanding body of general or federal equitable principles with the force of law that a court is required to apply.<sup>413</sup>

Such a repudiation of *Guaranty Trust* and the equitable remedial rights doctrine would have the most dramatic consequences for injunctive relief for state-law claims in federal court. As discussed earlier, the Supreme Court applies a four-factor test set forth in *eBay Inc. v. MercExchange L.L.C.* to determine whether to grant permanent injunctions and a similar test from *Winter*

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<sup>410</sup> See *supra* notes 165–181 and accompanying text.

<sup>411</sup> The Seventh Amendment right to civil jury trials is the most prominent example of a constitutional provision that sometimes requires federal courts to distinguish between legal and equitable claims. See U.S. CONST. amend. VII.

<sup>412</sup> The same principle holds true for state constitutional provisions, but the Eleventh Amendment will seldom permit federal courts to enforce them. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) (“[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself.”).

<sup>413</sup> As discussed in the previous Sections, there is no valid alternative to this approach. The Federal Rules of Civil Procedure do not provide substantive standards to govern equitable relief. See *supra* notes 241–294 and accompanying text. The Rules of Decision Act directs courts to apply state statutes and judicial rulings for claims arising under state law, and no other federal law authorizes federal courts to apply their own equitable remedial standards instead. See *supra* notes 295–352 and accompanying text. Federal courts lack constitutional authority to impose a uniform set of equitable principles in diversity cases, see *supra* notes 359–398 and accompanying text, and no important national interest exists warranting creation of federal common law to govern the issue, see *supra* notes 399–409 and accompanying text.

*v. Natural Resources Defense Council* for preliminary injunctions.<sup>414</sup> Some states have rejected the *eBay*<sup>415</sup> and *Winter* standards.<sup>416</sup> Others have laws expressly mandating the award of injunctive relief in situations where federal equitable principles would dictate that courts exercise discretion under *eBay*.<sup>417</sup> Several state statutes permit or require injunctive relief even when one or more of the traditional equitable requirements identified in *eBay* have not been satisfied.<sup>418</sup>

California law identifies seven types of cases in which injunctions may be issued, and seven types of injunctions courts may not grant.<sup>419</sup> For example, California law allows injunctive relief whenever an obligation arises from a trust.<sup>420</sup> New York<sup>421</sup> and Texas<sup>422</sup> also have statutes codifying standards for injunctive relief that differ from the federal tests.

Other states have adopted their own sets of standards, either in general or for particular types of cases,<sup>423</sup> in judicial opinions. In Alaska, for example, a plaintiff is required to make only “a clear showing of probable success” to obtain a preliminary objection.<sup>424</sup> Arkansas relies only on two elements: “whether irreparable harm will result in the absence of an injunction . . . [and] whether the moving party has demonstrated a likelihood of success on the

<sup>414</sup> See *supra* notes 266, 268 and accompanying text.

<sup>415</sup> See *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 627 (Pa. 2010) (holding that a plaintiff need not show irreparable injury to obtain a permanent injunction); *City of Houston v. Proler*, 373 S.W.3d 748, 764–65, 764 n.14 (Tex. App. 2012) (declining to apply *eBay* to injunctions under the Texas Commission on Human Rights Act and holding that the act “supersede[s] the equitable requirements generally applicable to common-law injunctive relief”), *aff’d in part and rev’d in part on other grounds*, 437 S.W.3d 529 (Tex. 2014); *Levisa Coal Co. v. Consolidation Coal Co.*, 662 S.E.2d 44, 53 (Va. 2008) (holding that a court must automatically issue a permanent injunction when a state statute authorizing injunctive relief is violated).

<sup>416</sup> See *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P’ship*, 263 P.3d 69, 72 (Ariz. Ct. App. 2011) (“The relevant difference between . . . *Winter* and [Arizona’s] standards is that *Winter* requires the party seeking an injunction to demonstrate that irreparable injury is likely, rather than merely possible.”).

<sup>417</sup> See, e.g., *People ex rel. Dep’t of Transp. v. Outdoor Media Grp.*, 17 Cal. Rptr. 2d 19, 22–23 (Cal. App. 1993) (citing CAL. BUS. & PROF. CODE § 5461).

<sup>418</sup> See, e.g., ARK. CODE ANN. § 14-268-105 (1969) (cited in *Hall v. City of Bryant*, 379 S.W.3d 727, 733 (Ark. App. 2010)).

<sup>419</sup> CAL. CIV. PROC. CODE § 526 (West 2017); see also CAL. CIV. PROC. CODE § 3422; see, e.g., *Sims Snowboards*, 863 F.2d at 646.

<sup>420</sup> CAL. CIV. PROC. CODE § 526(a)(7).

<sup>421</sup> N.Y. C.P.L.R. § 6301 (McKinney 2017) (preliminary injunctions).

<sup>422</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 65.011 (West 2017).

<sup>423</sup> See, e.g., *City of Okoboji v. Parks*, 830 N.W.2d 300, 309 (Iowa 2013) (establishing general standards for permanent injunctions that substantially differ from *eBay*); *Hirshfield v. Schwartz*, 110 Cal. Rptr. 2d 861, 867 (Cal. App. 2001) (establishing special standards for injunctions prohibiting encroachments on real property); *accord LSAC, Inc. v. State*, 222 Cal. App. 4th 1265, 1281 (Cal. App. 2014).

<sup>424</sup> *A.J. Indus. v. Alaska Pub. Serv. Comm’n*, 470 P.2d 537, 540 (Alaska 1970).

merits.”<sup>425</sup> The Massachusetts Supreme Judicial Court has held that a person suing as a “private attorney general” may obtain a preliminary injunction by demonstrating only a likelihood of success on the merits and that the requested relief would be in the public interest.<sup>426</sup>

Even where states have adopted standards comparable to *eBay* or *Winter*, the exact formulations of their elements often differ. For example, some states require a plaintiff to show a “reasonable likelihood of success on the merits.”<sup>427</sup> Other states require a “strong likelihood of success on the merits,”<sup>428</sup> and still others allow relief even if the plaintiff shows only “some possibility that the plaintiff would ultimately prevail on the merits of the claim.”<sup>429</sup> Likewise, some states require a plaintiff to show that the hardship an injunction would cause to the defendant does not outweigh the benefit the plaintiff would obtain from an injunction,<sup>430</sup> while others require the plaintiff to show “the balance of hardships” favors it.<sup>431</sup> Thus, a federal court’s decision to apply state law to equitable relief can have a substantial impact on whether a plaintiff is able to obtain a preliminary or permanent injunction.

In contrast, for claims arising under federal statutes, the standards governing equitable relief are a matter of statutory interpretation.<sup>432</sup> If a law does not provide a remedy for violations, federal courts may assume that Congress implicitly authorized them to award any appropriate remedy, including equitable relief pursuant to traditional principles.<sup>433</sup> When a statute provides for an injunction as a remedy, a court may likewise presume that Congress implicitly intended to incorporate traditional equitable principles as set forth in *eBay* and *Winter*.<sup>434</sup>

Congress may authorize or require courts to instead apply different factors, or even grant injunctive relief automatically, through express language in

<sup>425</sup> *Baptist Health v. Murphy*, 226 S.W.3d 800, 806 (Ark. 2006).

<sup>426</sup> *LeClair v. Town of Norwell*, 719 N.E.2d 464, 468 (Mass. 1999).

<sup>427</sup> *TFT, Inc. v. Warning Sys., Inc.*, 751 So. 2d 1238, 1242 (Ala. 1999), *overruled on other grounds*, *Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173 (Ala. 2008).

<sup>428</sup> *TP Racing, L.L.P. v. Simms*, 307 P.3d 56, 62 (Ariz. Ct. App. 2013).

<sup>429</sup> *Butt v. State*, 842 P.2d 1240, 1246 (Cal. 1992).

<sup>430</sup> *TFT, Inc.*, 751 So. 2d at 1242.

<sup>431</sup> *TP Racing*, 307 P.3d at 62.

<sup>432</sup> *Morley*, *supra* note 267, at 182–94.

<sup>433</sup> *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 63 (1975) (holding that, to obtain an injunction in an implied right of action, a plaintiff must “establish[] the traditional prerequisites of relief”); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”).

<sup>434</sup> *eBay*, 547 U.S. at 391–92 (holding that the *eBay* factors apply where “Congress intended” they do so); *see also Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946); *Morley*, *supra* note 267, at 183 n.28.

a statute's text or legislative history.<sup>435</sup> Under this "clear-statement" rule, a court must issue an injunction, rather than balancing equities in accordance with traditional principles, when a statute clearly mandates it.<sup>436</sup> In the absence of such clear language, the statute itself—not Article III, the Federal Rules of Civil Procedure, or some independent body of principles with the force of law—implicitly requires the court to apply traditional equitable principles in deciding whether to grant relief.

The same principle applies to federal constitutional violations. The Supreme Court has repeatedly recognized that Congress generally has ultimate control over the nature and scope of constitutional remedies.<sup>437</sup> When Congress has not provided a remedy for a constitutional violation, a federal court is free to apply traditional equitable principles as a matter of constitutional common law.<sup>438</sup> Congress retains authority to displace those traditional standards, however, by either broadening or restricting the circumstances under which equitable relief is available.<sup>439</sup>

When a plaintiff presents multiple claims in a diversity or supplemental jurisdiction case, a federal court should apply traditional equitable principles when considering relief for the federal causes of action (or whatever alternative standards Congress established within each federal statute at issue), and apply that state's body of equitable principles for the state-law claims. Depending on state law, a plaintiff may be able to obtain an injunction for her

<sup>435</sup> *Amoco*, 480 U.S. at 544 (holding that a federal court may issue a statutory injunction only when it is warranted under the traditional requirements for injunctive relief, unless there exists a "clear indication . . . that Congress intended to deny federal district courts their traditional equitable discretion"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (holding that "a major departure from the long tradition of equity practice should not be lightly implied"); see also *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944).

<sup>436</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978) (holding that injunctive relief was mandatory as a remedy for violations of the Endangered Species Act because allowing courts to "strike a balance of equities" to decide whether issuing an injunction furthers "the public weal" would "pre-empt" Congress' statutory scheme); *United States v. City of S.F.*, 310 U.S. 16, 30–31 (1940) (holding that the federal Raker Act "does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued").

<sup>437</sup> See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability" for constitutional violations.); see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2559 (1998) (arguing that Congress may limit remedies for constitutional violations, but must ensure the remedial structure it creates is "adequate to keep government generally within the bounds of law" (citing Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991))).

<sup>438</sup> See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

<sup>439</sup> See, e.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, 110 Stat. 1321 (1996) (imposing stricter standards for the issuance of injunctions concerning prison conditions).

federal claims, but not her state ones, or vice versa. To ascertain a state's body of equitable principles, a federal court should approach the issue in the same way it attempts to resolve any other question of state law under *Erie*.<sup>440</sup> By relying on state law to address equitable remedial issues in diversity and supplemental jurisdiction cases, the federal judiciary can inter the remaining lingering remnants of general law's brooding omnipresence.<sup>441</sup>

## CONCLUSION

From the nation's founding, the Supreme Court treated equity as a parallel body of general law to be applied in all cases that federal courts adjudicate. *Erie* laid to rest the vast majority of general law, but *Guaranty Trust* inexplicably exempted a substantial part of federal equity law from the *Erie* Doctrine. The time has come to complete the task that *Erie* started nearly a century ago and banish the lingering remnants of the old federal equity power.

The principles adopted by the English Court of Chancery are not binding on the federal judiciary, either of their own force or pursuant to Article III. And neither the Constitution, any federal statute (including the Rules of Decision Act), nor the Federal Rules of Civil Procedure requires or empowers federal courts to apply their own body of equitable principles in determining the proper relief in diversity and supplemental jurisdiction cases before them.

Equity follows, and arises from, the law. When a federal court adjudicates a state-law claim, the statutes and judicial precedents of that state should govern the availability of equitable relief. Conversely, when a federal court adjudicates a federal statutory claim that provides for equitable relief, it may presume that Congress implicitly intended to incorporate traditional equitable principles into the statute, unless its text or legislative history expressly provides otherwise. When adjudicating a federal constitutional claim, a federal court may apply traditional equitable principles as a matter of constitutional common law, unless Congress has provided otherwise.

Rights and remedies are inextricably intertwined, and the remedies a state chooses to recognize (or prohibit) for particular entitlements reflect that state's important policy decisions. A federal court may no more ignore a state's remedial requirements and restrictions than it may the state's underlying causes of action. Neither a litigant's ability to obtain relief, nor the nature

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<sup>440</sup> See Corbin, *supra* note 228, at 771 (concluding that, when a federal court must apply state law, it should employ the same range of "sources and processes" that a state trial court would use); Hart, *supra* note 20, at 510 (arguing that a federal court should "have the freedom at least of the state courts immediately inferior to the state's highest court" to determine a state's law on an issue).

<sup>441</sup> See *supra* note 227.



of relief a litigant may receive, should depend on whether the case is adjudicated in federal or state court.



