May 2019

Beyond the Elements: *Erie* and the Standards for Preliminary and Permanent Injuctions

Michael T. Morley

BEYOND THE ELEMENTS:

ERIE AND THE STANDARDS FOR PRELIMINARY AND PERMANENT INJUNCTIONS

*Michael T. Morley**

INTRODUCTION

Substantial confusion exists about the standards federal courts must apply to determine whether to grant injunctions for state-law claims. This issue may arise in several different contexts,[1] including diversity cases,[2]

* Assistant Professor of Law, Florida State University College of Law. Climenko Fellow and Lecturer on Law, Harvard Law School, 2012–14; Yale Law School, J.D., 2003; Princeton University, Woodrow Wilson School of Public & International Affairs, A.B., *magna cum laude*, 2000. Special thanks to Caprice Roberts for her help in developing this topic. I am grateful to Michael Green, Camilla Alexandra Hrdy, Tracy Thomas, and the participants at the University of Akron School of Law symposium on "*Erie* at Eighty" for their valuable comments and feedback. I also appreciate the invaluable aid of Mary McCormick of the Florida State University College of Law Research Center, as well as research assistance from Lindsey Boudreau. I dedicate this piece to my wonderful sons, Zachary Blaise Morley and Nicholas William Morley.

1. Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 41 (2013).

2. 28 U.S.C. § 1332(a), (d)(2) (2011).

supplemental jurisdiction cases,[3] and those in which a state-law claim raises a "disputed and substantial" federal issue.[4] Much of this uncertainty arises from an anachronistic exception the Supreme Court created to the principles set forth in *Erie Railroad v. Tompkins*.[5]

Erie famously abolished general law, requiring federal courts to apply state substantive law when adjudicating claims arising under state law.[6] Seven years later, in *Guaranty Trust Co. v. York*, the Supreme Court held that federal courts must nevertheless continue to apply traditional equitable remedial principles tracing back to the English Court of Chancery in all cases that come before them, including state-law cases.[7] Since injunctions are a form of equitable relief,[8] *Guaranty Trust* requires federal courts to apply this body of traditional equitable principles—as interpreted by the federal courts themselves—when considering injunctive relief for state-law claims.[9] The Court has distilled these traditional principles into four-factor tests for preliminary[10] and permanent[11] injunctions. While some circuits expressly follow *Guaranty Trust*, others appear to be unaware of the ruling and apply their own varying approaches to determining the proper standards for injunctive relief for state-law claims.[12]

Guaranty Trust is wrong, erroneously treating equitable remedial principles as a lingering remnant of general law. In previous work, I explained that there is not a single uniform body of transcendental equitable remedial principles that federal courts must apply in all cases that come before them.[13] Rather, the body of equitable principles that applies to a claim depends on the source of law from which the claim arises.[14] For claims arising under state law, a federal court must apply that state's body of equitable principles.[15]

3. *Id.* § 1367(a) (2011).

4. *See* Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005); 28 U.S.C. § 1331 (2011).

5. 304 U.S. 64 (1938).

6. *Id.* at 78–80.

7. 326 U.S. 99, 105–06 (1945).

8. Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) ("It goes without saying that an injunction is an equitable remedy.").

9. *Guaranty Trust*, 326 U.S. at 105–06.

10. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

11. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); *see infra* notes 142–43 and accompanying text.

12. *See infra* notes 52–55, 97 and accompanying text.

13. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 257 (2018).

14. *Id*. at 275.

15. *Id*.

Building on that previous work, this article focuses on a different aspect of the issue. Federal courts frequently attempt to avoid choosing between federal and state equitable remedial principles when deciding whether to grant injunctive relief for state-law claims. Such courts usually declare that, since the relevant state's standards are materially identical to federal standards, or the litigants did not identify any differences between the two tests, they may simply apply federal equitable principles and, implicitly, federal precedents applying them.[16] This article argues that this dodge is invariably inaccurate; courts may not evade this important *Erie* issue so easily.

State standards for injunctive relief often involve somewhat different elements or are expressed in subtly different terms than federal standards. Even when state and federal factors governing injunctive relief appear identical, the manner in which different court systems have applied or construed them may substantially differ. When state and federal courts both require plaintiffs to demonstrate "irreparable injury" or the absence of an "adequate remedy at law," for example, they often disagree over whether certain harms qualify as irreparable or a potential remedy qualifies as adequate.

More broadly, different bodies of precedent provide different legal backdrops for adjudicating contested issues. Each element or factor of a doctrinal test from a particular jurisdiction should be viewed as a proxy for the body of precedent from that jurisdiction explaining or applying it. Each jurisdiction's precedents concerning an issue constitute a distinct, even unique, set of guideposts for adjudicating it. Federal and state courts' bodies of precedent concerning concepts like irreparability should not be treated as fungible, because they inevitably are comprised of different constellations of adjudicated fact patterns. Thus, even when federal and state standards for injunctive relief appear superficially identical, federal courts should still begin by determining which set of standards—and hence which body of precedent—governs state-law claims.[17]

Part I of this article begins by delving more deeply into *Guaranty Trust*'s "equitable remedial rights doctrine," which requires federal courts to apply a uniform body of federal equitable principles when deciding whether to grant injunctive relief for state-law claims. It then outlines my previous critique of the doctrine, summarizing why a federal court should

16. *See infra* note 141.

17. Moreover, the Supreme Court should overturn *Guaranty Trust* and hold that federal courts must apply state-law standards, including state-court precedents applying them, *cf. Erie*, 304 U.S. at 78–79, to determine the availability of equitable relief for state-law claims, while federal standards govern equitable relief for federal claims. Morley, *supra* note 13, at 275.

apply state-law standards, as construed by the courts of that state, to resolve such issues.[18] This part goes on to explain why this approach should apply equally to preliminary injunctions, which nearly every circuit in the nation erroneously treats as a procedural matter governed by federal law.[19]

Part II demonstrates that federal courts cannot avoid this choice-of-law problem, even when the federal and state requirements for injunctive relief appear identical. Most basically, facial disparities may exist between seemingly similar sets of standards that can create subtle, yet meaningful, differences in their requirements. And even when federal and state standards are completely identical, disparities inevitably exist between the bodies of caselaw construing them. Federal and state courts may interpret and apply identical elements differently. Even in the absence of direct conflicts between federal and state precedents, one court system may have squarely addressed certain issues that the other has not yet specifically resolved. Perhaps most importantly, the specific fact patterns of the cases adjudicated in each system will always differ, providing different sets of guideposts to influence a court's exercise of its equitable discretion.

Part III concludes by exploring other circumstances in which courts should resolve choice-of-law issues concerning the standards governing injunctive relief, rather than simply declaring competing sets of potential standards to be identical. Most obviously, state courts should apply federal law in reverse-*Erie* cases in which they must decide whether to grant injunctive relief under federal statutes, even if federal and state standards appear similar. Correspondingly, when deciding whether to grant an injunction in a traditional choice-of-law case, the court should apply the standards of the state whose substantive law gave rise to the underlying cause of action.

More generally, even outside the context of injunctions, declining to determine which jurisdiction's law governs an issue when the elements of competing jurisdictions' standards are similar or identical can lead to inaccurate results. It ignores the numerous ways in which different jurisdictions' bodies of precedent applying and interpreting those standards inevitably differ. Rather than taking competing legal standards at face value, courts should view them as proxies for distinct, and inevitably differing, bodies of caselaw crafted by different court systems.

18. *See* Morley, *supra* note 13, at 275.
19. *See infra* note 97.

I. INJUNCTIVE RELIEF FOR STATE-LAW CLAIMS IN FEDERAL COURT

Many U.S. Courts of Appeals follow *Guaranty Trust*'s "equitable remedial rights doctrine" in deciding whether to grant permanent injunctions for state-law claims. Under this doctrine, federal courts must apply an independent body of equitable principles tracing back to the English Court of Chancery, as interpreted by the federal judiciary itself, to decide whether to grant equitable relief. And virtually every circuit applies these traditional principles in deciding whether to grant preliminary injunctions for state-law claims, as well, albeit for somewhat different reasons. This part surveys the current state of the law, briefly outlines my objections to the equitable remedial rights doctrine, and responds to the major counterarguments to my critique. It begins by discussing permanent injunctions, then turns to the special considerations that apply exclusively to preliminary injunctions.

A. Guaranty Trust *and Permanent Injunctions*

Equitable remedies remain a glaring exception to the *Erie* doctrine. In *Erie*, the Supreme Court held that federal courts may no longer craft and apply their own body of general law in diversity cases.[20] Rather, a federal court sitting in diversity must use state law, including common-law holdings from state judicial opinions, as the rule of decision[21] unless the U.S. Constitution, a federal statute, or federal common law governs the issue.[22] *Erie* attempted to ensure that both the federal and state courts within a state apply that state's law uniformly.[23] *Hanna v. Plumer* later added that Federal Rules of Civil Procedure may also displace state law,[24] so long as they are authorized by the Rules Enabling Act.[25]

20. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938).

21. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (formerly codified at 28 U.S.C. § 724 (1938), presently codified as amended at 28 U.S.C. § 1652 (2012)).

22. *Erie*, 304 U.S. at 72–73 ("[I]n all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written."). Although Justice Brandeis boldly proclaimed in *Erie*, "There is no federal common law," he gave lie to that assertion in another ruling he authored and issued the same day, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). *Hinderlider* held, "[W]hether the water of an interstate stream must be apportioned between . . . two States is a question of 'federal common law' upon which neither the statutes nor the decisions or either State can be conclusive." *Id.*

23. *Erie*, 304 U.S. at 75.

24. 380 U.S. 460 (1965).

25. 28 U.S.C. § 2072 (1990).

Justice Felix Frankfurter's opinion for the Court in *Guaranty Trust* created an anomalous exception to these principles.[26] *Guaranty Trust* confirmed that the *Erie* doctrine generally applies equally to state-law claims regardless of whether they arise at law or in equity, requiring federal courts to apply state law—including state court precedents—when determining litigants' substantive rights in diversity cases.[27] *Erie* itself had addressed only common-law cases. It focused in part on the proper interpretation of the Rules of Decision Act[28] which, at the time, applied only to actions at law.[29]

Notwithstanding this expansion of *Erie*, however, *Guaranty Trust* went on to hold that uniform federal standards continue to govern the availability of equitable relief in federal court, even for claims arising under state law.[30] *Guaranty Trust* explained that, while federal courts sitting in equity must respect the substantive rights states recognize, "[t]his does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court."[31] It held that a federal court may grant equitable relief only if a claim is "within the traditional scope of equity as historically evolved in the English Court of Chancery."[32]

---

26. 326 U.S. 99 (1945).

27. *Id*. at 111 ("To make an exception to *Erie R. Co. v. Tompkins* on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision."). The Court had previously declared, without explanation or analysis, that "[t]he decision in *Erie R. Co. v. Tompkins*. . . . applies though the question of construction arises not in an action at law, but in a suit in equity." Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 205 (1938).

28. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (formerly codified at 28 U.S.C. § 724 (1938), presently codified as amended at 28 U.S.C. § 1652 (2012)).

29. *Erie*, 304 U.S. at 71.

30. *Guaranty Trust*, 326 U.S. at 105.

31. *Id*. The Court later reiterated, "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." *Id*. at 106.

32. *Id*. at 105. The opinion later noted that, historically, federal courts "enforced State-created substantive rights" in diversity cases only "if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure." *Id*. at 106.

> Wright & Miller's treatise construes *Guaranty Trust* somewhat narrowly, suggesting qualifications on the equitable remedial rights doctrine that do not appear in the opinion itself. The treatise interprets *Guaranty Trust* as concluding that, when state law either "does not provide a specific remedy" or "generally proscribes a remedy similar to traditional equitable relief," a federal court may apply federal standards in deciding whether to grant an injunction, "because no real conflict is presented." CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2943 (3d ed. 1995). The treatise also contends that federal courts adjudicating state-law claims may "resort[] to the flexibility of their equity powers" instead of employing state-law standards "in exceptional cases in order to effect justice

Guaranty Trust did not explain the source of this limitation. The cases the Court cited, however,[33] declare that this restriction arose from the Judiciary Act's grant of jurisdiction to federal courts over cases in equity.[34] That jurisdictional grant confers "an authority to administer in equity suits the principles of the system of judicial remedies" that the English Court of Chancery employed at the time of American independence.[35] The grant implicitly "prescribes the body of doctrine which is to guide [federal courts'] decisions and enable them to determine" when equitable relief is "appropriate."[36] Those cases, in turn, rely on a series of pre-*Erie* precedents that likewise interpret grants of

expeditiously or creatively and in a manner consistent with the substance of state-created rights of the parties." *Id*. § 4513. They must exercise this discretion, however, "with considerable delicacy." *Id*. Moore's treatise does not discuss *Guaranty Trust* in this context. *See* 13 JAMES WM. MOORE, FEDERAL PRACTICE - CIVIL § 65.07[2] (2013).

33. Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939).

34. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (formerly codified at 28 U.S.C. § 41(1)); *cf*. U.S. CONST. art. III, § 1, cl. 2.

35. *Atlas Life Ins. Co.*, 306 U.S. at 568; *see also Sprague*, 307 U.S. at 164–65 ("The suits 'in equity' of which [federal] courts were given 'cognizance' ever since the First Judiciary Act, constituted 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.").

Atlas is the first post-*Erie* case to trace a federal court's duty to apply a uniform body of federal equitable principles in diversity cases to the statute granting federal courts jurisdiction over cases in equity. The *Atlas* Court emphasized that federal standards govern not only the scope of a federal court's equitable jurisdiction, but also a litigant's entitlement to equitable relief. The plaintiff insurance company had filed a diversity suit in federal court to cancel insurance policies it had issued, alleging that the insured had lied on his application. *Atlas*, 306 U.S. at 566–67. The beneficiary had already sued the insurance company in state court for the policies' proceeds. *Id*. at 566. The Supreme Court held that the federal suit fell within the district court's equitable jurisdiction because the insurance company lacked an adequate remedy at law. *Id*. at 569. The insurance company's ability to assert a fraud defense in the pending state court proceedings did not preclude federal equitable jurisdiction; because a remedy at law was deemed adequate only if a litigant could assert it in federal court. *Id*.

The *Atlas* Court further held, however, that while the district court had equitable jurisdiction over the case, the company was not entitled to equitable relief under traditional principles because it did not face irreparable injury. *Id*. The company's apparent ability to assert a fraud defense in state court alleviated any threat posed by the allegedly invalid insurance policies. *Id*. at 570–71 ("[T]he insurance company's defense may be protected [in state court] as well as in a federal court, and in that case there is no threat of irreparable injury."). The Court derived this irreparable injury requirement from the traditional principles governing equitable relief, which applied as a result of Congress's grant of equity jurisdiction to federal courts. *Id*. at 568, 571; *see also Sprague*, 307 U.S. at 167 (holding that, where a trust beneficiary successfully sued in equity and set a precedent that would aid identically situated beneficiaries suing the same defendant, the district court had discretion under traditional equitable principles to award a portion of those other beneficiaries' trusts in the defendant's possession to the plaintiff to defray its attorneys' fees).

36. *Atlas Life Ins. Co.*, 306 U.S. at 568.

equity jurisdiction to the federal courts as requiring them to apply traditional equitable principles.[37]

Guaranty Trust also identified other, more limited constraints that contributed to disparities in the availability of equitable relief in state and federal court. It noted that Section 16 of the Judiciary Act—which has since been repealed and lacks any current statutory analogue[38]—allowed federal courts to exercise equitable jurisdiction over a case only when no "plain, adequate and complete remedy at law"[39] was available in federal court.[40] Moreover, federal laws such as the Norris-LaGuardia Act[41] limit federal courts' equitable powers in certain kinds of cases, such as labor disputes.[42] And the Seventh Amendment[43] requires trial by jury in cases that traditionally would have been considered legal rather than equitable.[44] These other constraints, however, do not support *Guaranty Trust*'s broad holding that federal courts must apply an independent body of traditional equitable principles in deciding whether to grant equitable relief in all cases that come before them, including cases arising under state law.

Guaranty Trust is consistent with another post-*Erie* Frankfurter opinion issued only a few years earlier, *Sprague v. Ticonic National Bank*.[45] *Sprague* held that a federal court must apply traditional equitable principles rather than state law to decide whether to award attorneys' fees in a diversity case in equity. The plaintiff had deposited funds in trust with the defendant bank, which used them to purchase certain bonds.[46] When the bank became insolvent, the plaintiff successfully sued to impose a lien on the proceeds from the sale of those bonds.[47] She asked the court to

37. *See, e.g.*, Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868) ("The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union."); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222 (1818) ("[T]he remedies 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.").

38. *See* H.R. REP. NO. 80-308 at A236 (1947).

39. Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (codified as amended at 28 U.S.C. § 384 (1946), *repealed* Act of June 25, 1948, ch. 646, § 39, 62 Stat 869, 996).

40. Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945).

41. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 28 U.S.C. §§ 101-–104 (1934)).

42. *Guaranty Trust*, 326 U.S. at 105.

43. U.S. CONST. amend. VII.

44. *Guaranty Trust*, 326 U.S. at 105 (citing Whitehead v. Shattuck, 138 U.S. 146 (1891)).

45. 307 U.S. 161 (1939).

46. *Id.* at 162.

47. *Id*.

award her attorneys' fees out of bond proceeds the bank owed other, similarly situated depositors. She claimed that, because the precedent she had set confirmed those other depositors' rights against the bank, they should bear part of her litigation costs.[48] The Supreme Court held that the district court should have applied traditional equitable principles in deciding whether to grant the request.[49] Under those traditional principles, the court had discretion to treat the matter as equivalent to a common fund case, in which a litigant who wins a pool of money that will benefit numerous rightholders may recover attorneys' fees from those funds.[50]

Reiterating a principle that the Court had repeatedly applied in equity cases throughout the pre-*Erie* era, *Sprague* declared, "The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, constituted 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."[51] Thus, even after *Erie*, the Court treated Congress's grant of equity jurisdiction to the federal judiciary as not simply conferring power on federal courts to adjudicate cases in equity, but also presumptively requiring them to apply traditional equitable remedial principles in such cases, as well.

Several circuits, recognizing the continued vitality of *Guaranty Trust*'s equitable remedial rights doctrine, have held that federal courts must apply this uniform body of traditional equitable principles as interpreted by federal courts, rather than state law, in deciding whether to

48. *Id*. at 163.
49. *Id*. at 164–65.
50. *Id*. at 166.
51. *Sprague*, 307 U.S. at 164.

grant injunctions[52] or other forms of equitable relief[53] in diversity cases. Other rulings recognize the doctrine's continued vitality without

52. *See, e.g.*, SSMC, Inc. v. Steffen, 102 F.3d 704, 708 (4th Cir. 1996) (holding that *Guaranty Trust* permits a federal court sitting in diversity to award injunctive relief regardless of whether the state's version of the UCC permits it, because the court's "equitable powers can extend to setting aside or enjoining the enforcement of rights purportedly created by a tainted transaction" (citation omitted)); Perfect Fit Indus. v. Acme Quilting Co., 646 F.2d 800, 805-06 (2d Cir. 1981) (upholding a recall order in a diversity case as "well within the district court's broad powers as a court of equity," even though it was an "unusual, and perhaps unprecedented, remedy for a violation of New York's law of unfair competition" because, under *Guaranty Trust*, "[s]tate law does not govern the scope of the equity powers of the federal court . . . even when state law supplies the rule of decision"); Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54, 57 (5th Cir. 1970) ("Neither the Federal Rules of Civil Procedure nor the *Erie* doctrine deprive[s] Federal courts in diversity cases of the power to enforce State-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in the courts of the State." (citing *Guaranty Trust*)); *accord* Crossno v. Crossno, No. 87-762, 1987 U.S. Dist. LEXIS 5637, at *3 (E.D. La. June 18, 1987) ("[P]laintiff is entitled to the equitable remedy of injunction even though that remedy might not be available to a state court litigant." (citing *Clark Equip. Co.*)); *see also* Sindi v. El-Mosalimany, 896 F.3d 1, 40 n.22 (1st Cir. 2018) (Barron, J., concurring in part and dissenting in part) ("'[E]quitable relief in a federal court is of course subject to restrictions'—including that 'the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery.'" (quoting *Guaranty Trust*)); Bacardi & Co. v. N.Y. Lighter Co., No. 97-CV-7140 (JS) (WDW), 2000 U.S. Dist. LEXIS 19852, at *47–49 (E.D.N.Y. Sept. 5, 2000) (holding that, even though an order to seize goods that infringed the plaintiff's trademark was not authorized by federal trademark law, such relief was a valid exercise of the court's "traditional equitable powers as well as Rule 65" to remedy violations of the plaintiff's rights under state trademark and unfair competition law).

53. *See, e.g.*, Canada Life Assur. Co. v. LaPeter, 563 F.3d 837, 843 (9th Cir. 2009) (applying federal standards for appointing receivers (citing *Guaranty Trust*)); Rodriguez v. Quicken Loans, Inc., 257 F. Supp. 3d 840, 851 (S.D. Tex. 2017) (holding that federal equitable principles governed the availability of attorneys' fees for a defendant that successfully defended against the plaintiff's state-law claim, even where its contract with the plaintiff authorized their recovery (citing *Guaranty Trust*)); *In re* Checking Account Overdraft Litig., MDL No. 2036, 2013 U.S. Dist. LEXIS 190562, at *42 n.3 (S.D. Fla. Aug. 2, 2013) (holding federal law governed attorneys' fees in a common fund diversity case arising under state law (citing *Clark Equip. Co.*)); Sears, Roebuck & Co. v. Am. Plumbing & Sup. Co., 19 F.R.D. 334, 345 (E.D. Wis. 1956) (citing *Guaranty Trust* and applying independent federal standards for imposing a constructive trust in a diversity case); *see also* Mintzer v. Arthur L. Wright & Co., 263 F.2d 823, 826 (3d Cir. 1959) (Goodrich, J., concurring) (declaring, with regard to receiverships, "we do not feel bound by state law in determining whether an equitable remedy is to be given or whether a plaintiff is relegated to his remedies at law"); Canal Ins. Co. v. Flores, No. 3:06-CV-84-KC, 2009 U.S. Dist. LEXIS 37013, at *51 n.20 (W.D. Tex. Apr. 13, 2009) (reiterating "a federal court is not deprived of equitable remedies simply because those equitable remedies do not exist in state courts" and concluding that state laws may neither limit the federal declaratory judgment remedy nor alter its equitable nature (citing *Guaranty Trust*)). *But see* Zippertubing Co. v. Teleflex, Inc., 757 F.2d 1401, 1411 (3d Cir. 1985) (holding that state law governs the availability of accounting as a remedy in diversity suits because "[t]he equitable or legal nature of the relief does not relieve the federal forum of the obligation to afford the same relief which a state court would afford with respect to state law claims"); Cendant Corp. v. Forbes, 70 F. Supp. 2d 339, 344–45 (S.D.N.Y. 1999) (holding that *Guaranty Trust*'s equitable remedial rights doctrine must give way to the *Erie* doctrine, since the former is statutory and the latter is constitutional).

addressing its precise scope.[54] Some circuits have adopted conflicting positions in separate opinions that neither engage with each other nor recognize the intracircuit conflict.[55] The Supreme Court, for its part, has declined subsequent opportunities to address, clarify, or reconsider the issue.[56]

I have explained in previous work that *Guaranty Trust*'s preservation of the equitable remedial rights doctrine is inconsistent with *Erie* from

54. *See, e.g.*, Niemi v. Lasshofer, 728 F.3d 1252, 1258 (10th Cir. 2013) (recognizing viability of equitable remedial rights doctrine under *Guaranty Trust*); Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1319 n.3 (9th Cir. 1982) (rejecting the premise "that state law necessarily controls all questions of . . . equitable remedies" in diversity cases); Hertz v. Record Publ'g Co. of Erie, 219 F.2d 397, 398 n.2 (3d Cir. 1955) ("[A] federal court can enforce a state-created substantive right and fashion its own remedy, especially where the result would be substantially the same as in a state proceeding. Federal remedies are not limited or affected by state law.").

Other rulings approvingly quote the key language from *Guaranty Trust* out of context in disputes over procedural rules rather than equitable remedies. *See, e.g.*, Bryan v. Kershaw, 366 F.2d 497, 504 n.5 (5th Cir. 1966) (quoting *Guaranty Trust* in support of applying federal rather than state pleading standards to a prayer for injunctive relief); Oskoian v. Canuel, 269 F.2d 311, 316 (1st Cir. 1959) (quoting *Guaranty Trust* in support of applying Rule 23, rather than state law, to determine the propriety of class certification in a federal case involving both federal and state-law claims); E. Sav. Bank, FSB v. Souphaphone, No. 3:13-CV-01459 (JCH), 2014 U.S. Dist. LEXIS 48873, at *8–9 n.4 (D. Conn. Apr. 9, 2014) (quoting *Guaranty Trust* to establish that federal courts need not follow state-court mediation procedures mandated by state statute).

55. In *Capital Tool & Mfg Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988), without mentioning the U.S. Supreme Court's rulings in *Guaranty Trust* or *Sprague*, the Fourth Circuit held that federal courts must apply state law to determine the availability of permanent equitable relief (but not preliminary injunctions, *see infra* Section I.B) in cases arising under state law. *See also* Lord & Taylor, LLC v. White Flint, L.P., 780 F.3d 211, 215 (4th Cir. 2015) (citing *Capital Tool*, 837 F.2d at 172). In its subsequent ruling in *SSMC*, 102 F.3d at 708, however, the Fourth Circuit reaffirmed a federal court's authority to grant equitable relief based on independent federal standards in diversity cases regardless of whether state law allows it, without discussing *Capital Tool*. *See also* Purcell v. Summers, 145 F.2d 979, 990 (4th Cir. 1944) (holding, prior to *Guaranty Trust*, that the Supreme Court's ruling in *Sprague* requires federal courts to apply traditional equitable remedial principles, as construed by the federal courts, in diversity cases); *cf.* Johnson v. Collins Entm't Co., 199 F.3d 710, 726–27 (4th Cir. 1999) (holding the trial court should have abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), rather than exercising inherent equitable authority to enjoin state gambling laws).

56. *See, e.g.*, Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 336 n.3 (1939) (declining to consider whether "the availability of [an] injunction under Rule 65 should be determined by the law of the forum state" or "federal equity principles" since "this argument was neither raised nor considered below"); Stern v. S. Chester Tube Co., 390 U.S. 606, 609–10 (1968) ("We need not decide whether this is a case where such a federal 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." (internal citations omitted)); *cf.* Russell v. Todd, 309 U.S. 280, 294 (1940) (declining, during the period between *Erie* and *Guaranty Trust*, to "consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies").

virtually every perspective, and will only briefly sketch out those arguments here.[57] The modern Rules of Decision Act no longer distinguishes between actions at law and in equity,[58] eliminating any statutory basis for treating equitable remedies (or equity in general) any differently from common-law issues, which state law governs in diversity cases. From a federalism perspective, no constitutional grants of authority to any branches of the federal government empower the government to establish a uniform body of equitable remedies for federal courts to apply in all cases that come before them, including those arising under state law.[59] Neither Congress nor the Supreme Court may establish substantive doctrines governing the availability and calculation of damages for all state-law claims that happen to be heard in federal court;[60] there is no reason the federal government's power over equitable remedies in such cases would be greater.

Likewise, from a separation-of-powers perspective, Congress has not enacted any laws purporting to empower courts to establish or enforce such a uniform body of equitable remedial principles in state-law cases.[61] *Atlas Life*[62] and *Sprague*[63] hold, and some commentators have argued,[64] that grants of jurisdiction to federal courts over "suits . . . in equity"[65]

57. Morley, *supra* note 13, at 250; *see also* 13 MOORE, *supra* note 32, § 65.07[2].

58. 28 U.S.C. § 1652 (1948). As originally enacted, the Rules of Decision Act applied only to suits at common law. *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (formerly codified at 28 U.S.C. § 724 (1938), presently codified as amended at 28 U.S.C. § 1652 (2012)). Despite that limitation, the Supreme Court held that *Erie* applied equally to cases in equity. *See* Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 205 (1938); *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 105–06 (1945). A few years after *Guaranty Trust*, the Rules of Decision Act was amended as part of the codification of Title 28 to apply to "any civil action." Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 944 (1948).

59. Morley, *supra* note 13, at 267–70.

60. Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 278 (1989) ("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."); *see also* Gasperini v. Ctr. for Humanities, 518 U.S. 415, 431 (1996) ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."); *cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407–08 (2010) (holding 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)).

61. Morley, *supra* note 13, at 270–73.

62. Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939).

63. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939).

64. *See, e.g.*, Charles T. McCormick & Elvin Hale Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126, 139 (1938).

65. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (granting jurisdiction over cases at law and in equity in which the United States was the plaintiff, an alien was a party, or the litigants were citizens of different states, in which the amount of controversy exceeded $500); An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary, ch. 231, 36 Stat. 1087, 1091 (1911) (codified

implicitly authorize or require them to apply the same equitable principles that the English Court of Chancery did in 1789. Professor John Cross makes a similar argument based on Article III's grant of the "judicial power" to the federal courts,[66] which he maintains requires them to apply equitable discretion pursuant to "uniform national rules that originated in England and are fleshed out in federal precedent."[67]

As a general matter, jurisdiction to adjudicate a case is distinct from the authority to craft the law to be applied in that case.[68] Under *Erie*, federal courts may not apply their own bodies of general law or federal common law instead of state law[69] simply because they have jurisdiction over either "cases[] in law"[70] in general, or diversity cases[71] in particular. The same reasoning applies with equal force to cases in equity.[72] *Guaranty Trust* itself holds that—with the unfortunate exception of equitable remedial principles[73]—federal courts are generally required to follow state law in equity cases.[74]

A few narrow, specialized jurisdictional grants, such as the authority to adjudicate disputes between states[75] and admiralty cases,[76] are interpreted as authorizing federal courts to craft and apply their own federal common law standards.[77] Even those jurisdictional grants, however, do not freeze in place a particular body of law, requiring federal

as amended at 28 U.S.C § 24(1) (1911)); *cf*. 28 U.S.C. § 1332 (2011) (grant of jurisdiction over diversity cases, regardless of whether they arise at law or in equity).

66. U.S. CONST., art. III, § 1.

67. John Cross, *The* Erie *Doctrine in Equity*, 60 LA. L. REV. 173, 214 (1999).

68. Tex. Indus. Inc. v. Radcliff Mats. Inc., 451 U.S. 630, 640–41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973)); *see also* Patchak v. Zinke, 138 S. Ct. 897, 907 (2018) ("[W]ith limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power.").

69. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72–73 (1938) (holding that the Rules of Decision Act "make[s] certain that, in all matters except those in which some federal law is controlling, the federal courts *exercising jurisdiction* in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written" (emphasis added; citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

70. U.S. CONST., art. III, § 2, cl. 1.

71. *Id*., art. III, § 2, cl. 7; 28 U.S.C. § 1332 (2011).

72. *See* Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 205 (1938).

73. *See supra* notes 30-32 and accompanying text.

74. Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945) ("To make an exception to *Erie R. Co. v. Tompkins* on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision.").

75. U.S. CONST. art. III, § 2, cl. 5; 28 U.S.C. § 1251(a) (1978).

76. U.S. CONST. art. III, § 2, cl. 3; 28 U.S.C. § 1333 (1949).

77. Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 20 (1963); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

courts to apply whatever rules and doctrines existed in 1789; rather, they empower federal courts to develop and apply evolving federal common law standards.[78] Thus, neither constitutional nor statutory jurisdictional grants should be interpreted as implicitly authorizing the equitable remedial rights doctrine.

Applying a traditional unguided *Erie* analysis, equitable remedies should be deemed substantive and therefore governed by state law, rather than procedural and subject to federal standards. The manner in which a jurisdiction chooses to protect an entitlement—particularly, whether to do so through liability rules or property rules[79]—is an important policy choice that inherently shapes the nature of that entitlement.[80] The nature of a right is fundamentally different depending on whether a rightholder may judicially insist that a specific entitlement be enforced and upheld, or instead must settle for a judicially determined "equivalent" amount of money as compensatory damages.[81] Moreover, considering the "twin aims of the *Erie* rule," disparities between federal and state courts in the availability of equitable remedies will induce forum shopping and lead to inequitable administration of the laws.[82]

Other types of remedies, such as compensatory and punitive damages, are recognized as substantive and governed by state law.[83] And in the context of criminal law, the Supreme Court has rejected attempts to distinguish sentencing factors, which the government must prove to trigger an enhanced sentence, from elements of the underlying criminal offense.[84] The Court recognized that both are simply facts the government must prove to obtain a particular result.[85] Likewise, the elements of a

78. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (recognizing the "established and continuing tradition of federal common lawmaking in admiralty"); *see, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397, 409–410 (1975) ("[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime . . . There is no reason why the Supreme Court cannot at this late date 'confess error' and adopt the proportional fault doctrine without Congressional action." (quotation marks omitted)).

79. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1110 (1972) (defining and contrasting liability rules and property rules).

80. Morley, *supra* note 13, at 265.

81. Though exceptions exist, most forms of equitable relief tend to be "specific", while most forms of legal relief tend to be "substitutionary." John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 865 (2013).

82. Hanna v. Plumer, 380 U.S. 460, 467–68 (1965); Morley, *supra* note 13, at 259–61.

83. *See* supra note 60.

84. Apprendi v. New Jersey, 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.").

85. *Id.* at 478, 480, 492.

cause of action and the requirements for equitable relief are both simply facts the plaintiff must prove to obtain the desired outcome. They are equally substantive, and should be governed by the same body of law.[86]

Finally, no compelling policy considerations allow federal courts to craft and apply an independent body of federal equitable remedial principles as a type of federal common law.[87] The federal government lacks a strong interest in the availability of equitable relief for state-law claims. Nor is national uniformity concerning equitable relief for state-law claims in federal court particularly necessary or desirable. Indeed, the sometimes substantial variations that exist among states' causes of action strongly suggests that similar differences concerning the availability of equitable relief are acceptable.

The strongest argument for allowing federal courts to apply their own uniform body of equitable remedial principles in state-law cases is that the federal judiciary must be able to protect itself from being forced to administer and enforce potentially onerous and time-intensive forms of equitable relief that states may authorize. Such concerns do not justify *Guaranty Trust*'s equitable remedial rights doctrine, however, for several reasons. First, federal courts may not modify the elements of state-created causes of action on the grounds they are too onerous or time-consuming to adjudicate. There is no basis for affording them greater latitude to disregard state-law requirements for equitable relief.

Second, far more appropriate ways exist to protect federal courts from having to award or oversee burdensome equitable remedies. For example, Congress could strip federal courts of jurisdiction to hear state-law claims in which unduly burdensome forms of equitable relief are sought[88] or, perhaps, federal courts could simply abstain from hearing them.[89] Exercising jurisdiction over a case while changing the outcome that state law dictates on institutional convenience grounds is the worst combination of responses. Purporting to enforce state-created rights divorced from the remedies the state creates for them undermines state policy. Scholars such as Professor Marin K. Levy express strong reservations about courts promoting their institutional self-interest at the

86. Morley, *supra* note 13, at 266–67.

87. *Id.* at 274.

88. *Cf.* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329-30 (1938) (enforcing special jurisdictional limitations that Congress imposed on the federal judiciary's power to issue injunctions for causes of action relating to labor disputes, including claims arising under state law).

89. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) ("[A] federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity.'" (quoting Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 120 (1981) (Brennan, J., concurring))).

expense of litigants' rights by limiting the availability of equitable relief those litigants would otherwise receive.[90]

Finally, concerns about the federal judiciary's institutional capacity could be addressed by implementing a far less extreme escape valve. Federal courts could be required to apply state law when deciding whether to award equitable relief for state-law claims, unless awarding a particular type of relief authorized or mandated by state law would impose a severe and unusual strain on federal judicial resources. There is little reason to believe that federal courts would have to invoke such an escape valve very often. Applying state equitable remedial principles across the great run of cases in which they do not threaten the federal judiciary's institutional resources is far more consistent with *Erie* than categorically applying a uniform body of federal equitable remedial principles to all cases arising under state law.

The first edition of Hart & Weschler's treatise *The Federal Courts and the Federal System* raised the possibility that federal courts should apply their own body of equitable remedial principles in diversity cases to "giv[e] a fuller and fairer remedy in the enforcement of state-created rights and obligations," which the treatise suggested would constitute a "kind of juster justice."[91] Whether particular remedies are adequate, just, or sufficiently fair, however, are exactly the kinds of substantive policy-related questions that *Erie* leaves to the states. State law is a vector; it establishes both the direction and magnitude of a particular policy.[92] Changing the nature of the protection the state affords a right may over- or under-enforce that right in ways that undermine the state's substantive policy decisions[93] or the compromises that allowed recognition of the right.[94]

90. *See* Marin K. Levy, *Consequentialist Courts* (work in progress) (manuscript on file with author); *cf.* Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 344 (1976) ("[A]n otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.").

91. HENRY M. HART, JR. & HERBERT WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 652 (1st ed. 1953).

92. *See* Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988) ("Law is like a vector. It has length as well as direction. . . . To find length we must take account of objectives, of means chosen, and of stopping places identified.").

93. *Cf.* Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 887 (1999); Calabresi & Melamed, *supra* note 79, at 1110 (recognizing that a lawmaker must decide both which competing claimant should receive an entitlement and the manner in which that entitlement shall be protected).

94. *See, e.g.*, William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1449 (2008) (examining the role of compromise in legislation).

Professor Henry Smith has characterized equity as a "second-order" system that modifies outcomes dictated by the common law to achieve more desirable results.[95] Building on this theory, Jeffrey Steven Gordon contends that equity cannot function effectively as a second-order system if federal courts must apply state-law standards for awarding equitable relief in cases arising under state law.[96] A complete analysis of the extent to which modern equity continues to function as a second-order system is beyond the scope of this article. Nevertheless, my proposal does not preclude federal courts from imposing second-order interventions in state-law cases. When federal courts sitting in diversity exercise their equitable discretion pursuant to state-court precedents, equity plays as much a second-order function as it would in state court. Federal courts may apply equity as a second-order system just as well by implementing a state's conception of equity as with an independent body of uniform federal equitable principles.

Thus, properly understood, *Erie* should dispel the notion that federal courts are obligated to apply a uniform body of equitable principles to all cases that come before them. Equitable relief for state-law claims, like state-law causes of action themselves, should be governed by state law. *Guaranty Trust*'s equitable remedial rights doctrine should be discarded.

95. Henry Smith, *Fusing the Equitable Function in Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY 173, 175–76 (Kit Barker et al. eds., 2017).

96. Jeffrey Steven Gordon, *Our Equity: Federalism and Chancery*, 72 U. MIAMI L. REV. 176, 226–27 (2017).

B. The Special Case of Preliminary Injunctions

Nearly every circuit to consider the issue,[97] as well as some commentators,[98] have concluded that federal courts must apply traditional equitable principles as interpreted by the federal judiciary when ruling on requests for preliminary injunctions in diversity cases. These rulings generally do not rely on *Guaranty Trust* or the equitable remedial rights doctrine, however.[99] Rather, most circuits have declared preliminary injunctions to be a procedural mechanism governed by Federal Rule of Civil Procedure 65[100] and subject to federal standards under the *Erie* doctrine.[101]

Some jurisdictions have reached the unusual compromise conclusion that, although federal law governs the elements for preliminary injunctions, federal courts must apply the state-law definitions of each element.[102] The Third Circuit instead applies traditional federal standards to motions for preliminary injunctions but, for the likelihood-of-success-on-the-merits prong, requires the movant to show it will likely qualify for a permanent injunction under state law at the end of the case.[103] This approach effectively requires movants to satisfy both federal and state

97. Most of these cases involved claims for equitable relief in causes of action arising under state common law. *See* Campbell Soup Co. v. Giles, 47 F.3d 467, 470 (1st Cir. 1995); Baker's Aid v. Hussmann Foodservice Co., 830 F.2d 13, 15 (2d Cir. 1987); Sys. Ops., Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977); Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991); Cert. Restor. Dry Cleaning Net., L.L.C. v. Tenke Corp., 511 F.3d 535, 541 (6th Cir. 2007); Healthcare Mgmt. & Inv. Holdings, L.L.C. v. Feldman, No. 03-4140, 2004 U.S. App. LEXIS 28854, at *2–3 (6th Cir. Apr. 8, 2004); Gen. Elec. Co. v. Am. Wholesale Co., 235 F.2d 606, 608 (7th Cir. 1956); Safety-Kleen Sys. v. Hennkens, 301 F.3d 931, 935 (8th Cir. 2002); Flood v. ClearOne Commc'ns, Inc., 618 F.3d 1110, 1117 (10th Cir. 2010); Equifax Serv., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990); Ferrero v. Assoc. Materials, Inc., 923 F.2d 1441, 1148 (11th Cir. 1991). Some, however, involved requests for preliminary injunctions under state statutes. *See* Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules, 837 F.2d 171, 172 (4th Cir. 1988); S. Milk Sales, Inc. v. Martin, 924 F.2d 98, 101-02 (6th Cir. 1991); *see also* Star Fuel Marts, LLC v. Sam's E., Inc., 362 F.3d 639, 651–52, 652 n.5 (10th Cir. 2004).

98. *See, e.g.*, WRIGHT, *supra* note 32, §§ 2943, 4513; David E. Shipley, *The Preliminary Injunction Standard in Diversity: A Typical Unguided* Erie *Choice*, 50 GA. L. REV. 1169, 1217–18 (2016); Gordon, *supra* note 96, at 180.

99. *See infra* note 106 and accompanying text. Indeed, a few circuits expressly distinguish between preliminary and permanent injunctions in diversity cases, applying federal law to the former and, notwithstanding *Guaranty Trust*, state law to the latter. *See, e.g.*, *Capital Tool & Mfg. Co.*, 837 F.2d at 172–73 (4th Cir. 1988).

100. FED. R. CIV. P. 65.

101. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965).

102. *See, e.g.*, Heil Trailer Int'l Co. v. Kula, 542 F. App'x 329, 335 (5th Cir. 2013); JAK Prods., Inc. v. Wiza, 986 F.2d 1080, 1084 (7th Cir. 1993); *Safety-Kleens*, 301 F.3d at 935.

103. Sys. Ops., Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1141, 1143 (3d Cir. 1977).

standards. Only the Ninth Circuit[104] and a few stray opinions from other circuits that do not appear to reflect those jurisdictions' dominant positions on the issue[105] apply exclusively state-law standards for preliminary injunctions on state-law claims.

Wright & Miller's treatise, which many circuits cite on this point,[106] explains the prevailing approach.[107] It contends that Rule 65[108] "may be read as a codification of the traditional federal equity practice."[109] Pursuant to *Hanna v. Plumer*,[110] such a rule trumps contrary state laws and policies.[111] The treatise also argues that applying uniform federal standards to requests for preliminary injunctions for state-law claims "would not impair state interests in any substantial way."[112]

Notwithstanding this widespread consensus, preliminary injunctions for state-law claims in federal court should be governed by the same body of law—state law—as permanent injunctions, for several reasons.[113] First,

104. Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 647 (9th Cir. 1988).

105. *See, e.g.*, Outsource Int'l, Inc. v. Barton & Barton Staffing Sols., 192 F.3d 662, 666 (7th Cir. 1999); Bogosian v. Woloohojian Realty Corp., 923 F.2d 898, 904 (1st Cir. 1991); Franke v. Wiltschek, 209 F.2d 493, 497 (2d Cir. 1953) (applying both state choice-of-law principles and state law to determine whether to issue a preliminary injunction in a trade secrets case arising under state law). Moore's treatise has recognized the split on the issue. 17A MOORE, *supra* note 32, § 124.05.

106. *Sys. Ops., Inc.*, 555 F.2d at 1141; Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991); Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules, 837 F.2d 171, 172 (4th Cir. 1988); Equifax Serv., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990); Ferrero v. Assoc. Materials, Inc., 923 F.2d 1441, 1448 (11th Cir. 1991). Even some courts that do not cite Wright & Miller's treatise have adopted the same analysis. *See, e.g.*, S. Milk Sales v. Martin, 924 F.2d 98, 101–02 (6th Cir. 1991). Many other courts simply rely on these precedents without independently analyzing the issue. Baker's Aid v. Hussmann Foodservice Co., 830 F.2d 13, 15 (2d Cir. 1987); *Heil Trailer Int'l*, 542 F. App'x at 335 & n.22–23; Healthcare Mgmt. & Inv. Holdings, L.L.C. v. Feldman, No. 03-4140, 2004 U.S. App. LEXIS 28854, at *2–3 (6th Cir. Apr. 8, 2004); Star Fuel Marts, LLC v. Sam's E., Inc., 362 F.3d 639, 651–52, 652 n.5 (10th Cir. 2004).

107. WRIGHT, *supra* note 32, §§ 2943, 4513.

108. FED. R. CIV. P. 65.

109. WRIGHT, *supra* note 32, § 2943.

110. 380 U.S. 460, 471 (1965).

111. WRIGHT, *supra* note 32, §§ 2943, 4513.

112. *Id.* § 2943.

113. In the horizontal choice-of-law context involving competing states' laws, courts often hold that the law of the forum state governs the availability of preliminary injunctions since it is a procedural issue. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 130 & cmt. a; *see, e.g.*, Apache Vill., Inc. v. Coleman Co., 776 P.2d 1154, 1155 (Colo. App. 1989); Glass, Lewis & Co., LLC v. McMahon, No. 13-C-05-61604, 2005 Md. Cir. Ct. LEXIS 11, at *10-11 (Md. Cir. Ct. Aug. 19, 2005). I believe this approach is also misguided; the body of equitable principles governing the availability of injunctive relief, whether interim or permanent, arises from the law creating the underlying cause of action. *See generally* Morley, *supra* note 13. Nevertheless, my arguments here do not necessarily require any change in doctrine concerning horizontal choice-of-law. *Guaranty Trust*, 326 U.S. at 108–09, emphasizes that whether a concept is deemed "substantive" or "procedural" under the *Erie* doctrine is independent of its characterization in other contexts, including horizontal choice-of-law. Thus, preliminary injunctions may be deemed substantive for *Erie* purposes

as I have argued elsewhere,[114] Wright & Miller's analysis is based on a misreading of Rule 65. That rule does not provide substantive standards for courts to apply in deciding whether to grant any form of injunctive relief, except for the requirement that a litigant seeking an *ex parte* temporary restraining order demonstrate that waiting for the other side to be heard would cause "irreparable injury, loss, or damage."[115] When the Supreme Court identified the requirements for preliminary injunctions in *Winter v. NRDC*[116] (as well as for permanent injunctions in *eBay Inc. v. MercExchange, L.L.C.*[117]), it traced them to traditional equitable principles without mentioning Rule 65.

Shortly after the Federal Rules of Civil Procedure were adopted, Armistead M. Dobie, a member of the Advisory Committee on Rules of Civil Procedure that drafted them, explained the Committee's handiwork in a *Virginia Law Review* article entitled *The Federal Rules of Civil Procedure*.[118] With regard to injunctions, he stated that the issue was "so loaded with potential dynamite that the committee played quite safe and made very few changes in the existing practice."[119] He further explained, "Rule 65 affects only the procedural aspects of injunctions, not jurisdiction *and not the propriety of issuing them*."[120] The advisory committee notes accompanying the rule do not specifically address the issue. Thus, Rule 65 neither establishes the standards governing preliminary injunctions nor requires federal courts to apply a uniform body of federal equitable principles when adjudicating requests for preliminary injunctions in cases arising under state law.

The treatise also errs in concluding that the application of federal standards would not impair state interests.[121] As discussed earlier, a state has the same interest in determining the nature of the entitlements it creates and how those entitlements will be protected as it does in determining whether to create them in the first place.[122] If state law allows a court to immediately enjoin certain harmful acts, the state has an interest in having that standard apply, rather than an alternate body of law that

yet procedural for choice-of-law purposes. Indeed, that is exactly how *Guaranty Trust* treated state statutes of limitations for equitable claims arising under state law. *Id*. at 109–10.

114. Morley, *supra* note 13, at 252–55; *see also* Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 646 (9th Cir. 1988).

115. FED. R. CIV. P. 65(b)(1)(A).

116. 555 U.S. 7, 20 (2008).

117. 547 U.S. 388, 391 (2006).

118. Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261 (1938).

119. *Id*. at 301.

120. *Id*. at 302 n.182 (emphasis added).

121. WRIGHT, *supra* note 32, § 2943.

122. *See supra* notes 79–81 and accompanying text.

may allow such acts to occur while a case is being litigated. Likewise, if a particular showing is insufficient under state law to warrant injunctive relief, the state has an interest in allowing the underlying conduct to continue without being blocked by a federal injunction.

Second, state law should govern preliminary injunctions because they are a substantive remedy, not a procedural tool. Preliminary injunctions regulate (or, if not issued, fail to regulate) litigants' primary conduct outside of court and do not directly govern the court's fact-finding process. Accordingly, they do not "concern[] merely the manner and the means by which a right to recover, as recognized by the State, is enforced."[123] Unlike injunctions under the All Writs Act, which are issued to protect a federal court's jurisdiction,[124] preliminary injunctions protect a party's legally cognizable interests—which are a function of state law—while a case is pending. They directly implicate questions of substantive law, including whether a defendant is permitted to engage in certain actions, the showing that is necessary to prevent the defendant from taking those actions, and a plaintiff's entitlement to be free of certain harms. This is equally true whether the restrictions on the defendant are temporary or permanent.

Third, applying different bodies of law to determine the availability of interim and permanent injunctive relief[125] could lead to contradictory results. Awarding a preliminary injunction under federal equitable principles in cases where state standards bar such relief at the end of trial forestalls harms against which state law does not actually protect—and that will occur following trial even if the plaintiff prevails. Conversely, if federal standards prohibit a preliminary injunction when state law would authorize a permanent injunction following trial, then the court would be permitting irreparable harm that state law seeks to avoid. Thus, applying substantially different standards could lead to irrational and internally inconsistent results at odds with the litigants' rights under state law. The need for consistency between the standards for preliminary and permanent injunctions is likely one reason why the Supreme Court has recognized that the requirements for both types of relief under federal law are virtually identical, except a plaintiff must demonstrate a likelihood of

123. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945); *see also* Shipley, *supra* note 98, at 1210–11.

124. 28 U.S.C. § 1651(a) (1949).

125. Some courts have contemplated the possibility of applying federal standards to preliminary injunctions and state standards to permanent injunctions. *See, e.g.*, Sensormatic Elec. Corp. v. Tag Co. U.S., LLC, 632 F. Supp. 2d 1147, 1181–82, 1187, 1192–93 (S.D. Fla. 2008); Dunkin' Donuts Inc. v. N.A.S.T., Inc., 428 F. Supp. 2d 761, 775 (N.D. Ill. 2005).

success on the merits to obtain a preliminary injunction and actual success on the merits for a permanent injunction.[126] As the Court itself has recognized, "[T]he burdens at the preliminary injunction stage track the burdens at trial."[127]

Fourth, the "twin aims of *Erie*" are served as much by applying state-law standards to preliminary injunctions as to permanent injunctions.[128] Differences among courts in the likelihood or difficulty of obtaining a preliminary injunction are likely to drive forum shopping.[129] And allowing a defendant's ability to engage in particular conduct while a case is pending to vary based on the forum is a paradigmatic example of "inequitable administration of the laws."[130]

Finally, the Ninth Circuit has held that a federal court's decision as to whether to issue a preliminary injunction should be treated as part of a case's outcome.[131] Such rulings determine whether a defendant may "accomplish[] what [state law] has prohibited," even if for only a limited period of time.[132] Thus, state law should govern preliminary injunctions for state-law claims.

Professor David E. Shipley, defending the prevailing consensus, contends that applying federal law to preliminary injunctions for state-law claims best serves the "twin aims of *Erie*" because litigants are unlikely to base their choice of forum on the standards governing interim relief.[133] He argues that other factors, such as "differences in jury selection practices, differences in discovery, differences in docket management, and perceptions about appointed judges instead of elected judges" are far more important considerations in deciding where to file, or whether to remove, a case.[134] Given the frequent importance of immediate injunctive relief, however, differences in standards governing preliminary injunctions are likely to be a major factor—outweighing most of the other considerations Shipley identifies—in many cases.

Shipley also asserts that differences in preliminary injunction standards do not affect a case's outcome because, by definition, they

126. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987) ("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."); *accord* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 32 (2008).

127. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 429 (2006).

128. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

129. *Id*.

130. *Id*.

131. Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 647 (9th Cir. 1988).

132. *Id*.

133. Shipley, *supra* note 98, at 1217–18.

134. *Id.* at 1217.

pertain only to interim relief.[135] But even if limited in duration, the grant or denial of an order allowing, mandating, or prohibiting a defendant from engaging in certain activity affects the primary legal relations between the plaintiff and defendant. Such determinations—whether the defendant was permitted to engage in certain conduct for a particular period—are properly considered part of a case's outcome.

He further points out that federal and state standards for preliminary injunctions will often lead to the same conclusion.[136] That possibility is sometimes overstated[137] and, in any event, does not resolve the issue of what federal courts should do when the standards materially diverge. Finally, Shipley contends that imposing different standards for preliminary injunctions in state and federal court "do[es] not raise the kind of litigant inequality issues that concerned the Supreme Court in *Erie* and its progeny."[138] Yet the availability of injunctive relief affects the nature of a plaintiff's rights—determining whether the plaintiff can demand specific entitlements and attempt to prevent violations *ex ante*, or instead must settle for *ex post* compensation.

Jeffrey Steven Gordon contends that federal standards govern "equitable relief which merely facilitates or aids a final merits decision," such as a preliminary injunction, unless the relief "is functionally equivalent to a final decision."[139] Federal law "presumptively governs preliminary injunctions," Gordon argues, "because they merely seek to minimize the risk of irreparable injury pending litigation on the merits."[140] A party's right to avoid irreparable injury—and even which harms are deemed irreparable—however, are substantive matters that should be governed by state law.

The fact that a lawsuit has been filed does not empower a federal court to prohibit the primary substantive conduct at issue in the case if state law would allow it to occur (albeit subject to *ex post* compensatory damages), or to permit such conduct when state law would enjoin it. Moreover, the facilitative power of which Gordon speaks was primarily a function of having separate courts of law and equity with different procedures staffed by different judges. In our post-merger world, in which

135. *Id.* at 1218.

136. *Id.* at 1219.

137. *See infra* Part II.

138. Shipley, *supra* note 98, at 1221.

139. Gordon, *supra* note 96, at 180; *see also id.* at 260 (arguing that federal courts may grant equitable relief pursuant to independent federal standards if it "is preliminary or auxiliary to, or merely facilitates the determination of . . . state-created right[s]").

140. *Id.* at 180. He also echoes Shipley's argument that preliminary injunctions are not outcome-determinative. *Id.* at 262.

federal cases at law and in equity are both governed by the Federal Rules of Civil Procedure, there is no need for an ancillary body of facilitative law to govern the relationship between competing judicial systems. Thus, when federal courts adjudicate claims arising under state law, they should apply the law of that state in determining whether to grant either preliminary or permanent injunctions.

II. COMPARING FEDERAL AND STATE STANDARDS FOR INJUNCTIVE RELIEF

Many federal courts avoid determining whether to apply federal or state law to requests for injunctions for state-law claims by declaring that both sets of standards are identical.[141] Such courts typically go on to apply federal standards and caselaw.

The fact that the elements of federal and state standards for injunctive relief are often comparable does not mean those standards are identical and interchangeable, due to both *facial disparities* and *precedential disparities*. Facial disparities concern the formal articulation of the standards themselves. In many cases where federal and state standards facially appear to incorporate the same elements, important differences often nevertheless exist, including the precise phrasing of the elements and the way in which they relate to each other.

Even when federal and state standards are facially identical in every respect, however, precedential disparities unavoidably exist. Each of the elements comprising a legal standard established by a particular jurisdiction is not a freestanding self-defined concept, but rather a proxy for that jurisdiction's body of precedent construing it. Identical federal and state elements are proxies for completely different bodies of caselaw interpreting them. Many states have interpreted and applied concepts such as *irreparable injury* and *inadequate remedy at law* differently than federal courts in several respects. Even when federal and state holdings do not expressly or directly conflict, different bodies of precedent inherently provide different guideposts and points of comparison for

141. *See, e.g.*, Ocean Spray Cranberries, Inc. v. Pepsico, Inc., 160 F.3d 58, 61 (1st Cir. 1998); Fed. Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 499 n.4 (4th Cir. 1981); Travelers Cas. & Sur. Co. of Am. v. W.P. Rowland Constructors Corp., No. CV-12-00390-PHX-FJM, 2012 U.S. Dist. LEXIS 68147, at *5–6 (D. Ariz. May 15, 2012); *In re* Light Cigarettes Mktg. Sales Practices Litig., 751 F. Supp. 2d 183, 190 n.9 (D. Me. 2010); U.S. Cable Television Grp., L.P. v. Osage City, No. 91-4195-R, 1991 U.S. Dist. LEXIS 14148, at *6 (D. Kan. Sept. 5, 1991); Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 849 n.8 (E.D.N.Y. 1971); *cf.* Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 828 n.18 (D.C. Cir. 1984) (avoiding choosing between D.C. law and traditional equitable principles as construed by the federal judiciary by predicting that the District of Columbia would adopt and follow those principles).

resolving future disputes. Thus, federal courts should engage in an *Erie* analysis to determine whether federal or state law governs injunctive relief, even when the competing sets of standards appear comparable or identical, to ensure they apply the correct body of precedent.

A. Facial Disparities

Although federal and state standards for injunctive relief often appear to involve the same elements, the standards frequently differ from each other in subtle, yet important ways. In *eBay Inc. v. MercExchange, L.L.C.*, the U.S. Supreme Court held that, to obtain a permanent injunction under the traditional equitable principles that federal courts apply, a plaintiff must demonstrate:

> (1) that it has suffered an irreparable injury;
> (2) that remedies available at law are inadequate to compensate for that injury;
> (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
> (4) that the public interest would not be disserved by a permanent injunction.[142]

Winter v. NRDC adopted similar factors for preliminary injunctions, requiring a plaintiff to show:

> (1) that he is likely to succeed on the merits,
> (2) that he is likely to suffer irreparable harm in the absence of preliminary relief,
> (3) that the balance of equities tips in his favor, and
> (4) that an injunction is in the public interest.[143]

Some states have comparable frameworks[144] while others' substantially differ.[145] Several omit references to equitable balancing,

142. 547 U.S. 388, 391 (2006).

143. 555 U.S. 7, 20 (2008); *see also* Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987).

144. *See, e.g.*, Okla. Pub. Emps. Ass'n v. Okla. Military Dep't, 330 P.3d 497, 509 (Okla. 2014); Wayne Cty. Emps. Ret. Sys. v. Corti, 954 A.2d 319, 329 & n.16 (Del. Ch. 2008) (quoting *In re* Checkfree Corp. S'holders Litig., No. 3193, 2007 Del. Ch. LEXIS 148 (Del. Ch. Nov. 1, 2007)); His Way, Inc. v. McMillin, 909 So. 2d 738, 744 (Miss. Ct. App. 2005); Van Loan v. Van Loan, 895 P.2d 614, 617 (Mont. 1995).

145. *See, e.g.*, City of Baton Rouge/Par. of E. Baton Rouge v. 200 Gov't St., LLC, 995 So. 2d 32, 35 (La. Ct. App. 2008). Some jurisdictions combine or separate elements in various ways that do

declining to take into account either balance-of-hardship or public interest considerations.[146] The South Carolina Supreme Court, for example, has stated, "[T]he 'balancing the equities' requirement is neither necessary nor appropriate in a preliminary injunction case."[147] Other states echo the first three elements of the federal tests while omitting the public interest as a separate consideration.[148]

In addition to the factors identified in these federal tests, several states require that the plaintiff's rights be "certain and clearly ascertainable,"[149] an additional constraint some plaintiffs may be unable to satisfy. Maine instead requires a heightened showing of likelihood of success on the merits when a plaintiff seeks a mandatory, as opposed to prohibitory, preliminary injunction.[150]

While some states apply their usual standards for injunctive relief when a statute or ordinance authorizes an injunction as a remedy,[151] others

not appear to substantively affect the federal standard. *See, e.g.*, Langlois v. Bd. of Cty. Comm'rs of El Paso, 78 P.3d 1154, 1157-58 (Colo. App. 2003); Life of the Land v. Ariyoshi, 577 P.2d 1116, 1118 n.2 (Haw. 1978).

146. *See, e.g.*, Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); Messerli v. Dep't of Nat'l Res., 768 P.2d 1112, 1122 (Alaska 1989); Thompson v. Planning Comm'n of Jacksonville, 464 So. 2d 1231, 1236 (Fla. Dist. Ct. App. 1985); Wash. Fed'n of State Emps. v. State, 665 P.2d 1337, 1343-44 (Wash. 1983); Zebra v. Sch. Dist., 296 A.2d 748, 750 (Pa. 1972); *see also* AFSCME v. City of Detroit, 652 N.W.2d 240, 250 n.5 (Mich. Ct. App. 2002).

147. Poynter Invs. v. Cent. Builders of Piedmont, 694 S.E.2d 15, 17 (S.C. 2010); *see* Denman v. City of Columbia, 691 S.E.2d 465, 470 (S.C. 2010); *see also* Shaw v. Tampa Elec. Co., 949 So. 2d 1066, 1069 (Fla. Dist. Ct. App. 2007) (omitting the balance-of-hardships analysis).

148. *See, e.g.*, Alsworth v. Seybert, 323 P.3d 47, 54 (Alaska 2014); City of Duluth v. Riverbrooke Props., Inc., 502 S.E.2d 806, 814 (Ga. Ct. App. 1998); SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998); Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637, 639 (Iowa 1991); Bank of New England, N.A. v. Mortgage Corp. of New England, 567 N.E.2d 961, 965 (Mass. App. Ct. 1991) ("Massachusetts law differs from Federal law in that the public interest is not ordinarily considered in determining whether to grant a preliminary injunction."); Shearson Lehman Bros. Holdings, Inc. v. Schmertzler, 500 N.Y.S.2d 512, 513 (N.Y. App. Div. 1986); Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n, 661 P.2d 254, 256 (Colo. 1983).

149. Lee/O'Keefe Ins. Agency, Inc. v. Ferega, 516 N.E.2d 1313, 1317 (Ill. App. Ct. 1987); *see also* Gulf Power Co. v. Glass, 355 So. 2d 147, 148 (Fla. Dist. Ct. App. 1978) ("A mandatory injunction is proper where a clear legal right is at stake . . . ."); Platinum Coast Fin. Corp. v. Farino's, Inc., 662 So. 2d 724, 724 (Fla. Dist. Ct. App. 1995); Wash. Fed'n of State Emps. v. State, 665 P.2d 1337, 1343 (Wash. 1983); Zebra v. Sch. Dist., 296 A.2d 748, 750 (Pa. 1972).

150. Dep't of Envtl. Prot. v. Emerson, 563 A.2d 762, 768 (Me. 1989).

151. *See, e.g.*, P&G v. Stoneham, 747 N.E.2d 268, 274 (Ohio Ct. App. 2000) ("When a statute merely provides that a party is entitled to injunctive relief as well as other types of relief . . . the party requesting the injunction must use the general equitable principles governing the issuance of injunctive relief."); Bally Mfg. Corp. v. JS&A Grp., Inc., 410 N.E.2d 321, 326 (Ill. App. Ct. 1980) ("The customary standards governing the issuance of preliminary injunctions should continue to be followed in determining whether to grant preliminary injunctive relief pursuant to section 3 of the [Uniform Deceptive Trade Practices Act]."); *see also* East Providence v. R.I. Hosp. Tr. Nat'l Bank, 505 A.2d 1143, 1145–46 (R.I. 1986) (holding that a statute authorizing courts to grant injunctions against zoning violations neither "mandate[s] issuance of such relief" nor was "intended . . . to divest

have adopted special rules for such statutory injunctions. Many state courts either automatically issue injunctions to government entities when a defendant has violated a state law or local ordinance that authorizes injunctive relief,[152] or waive certain elements for government plaintiffs.[153] Some jurisdictions excuse both private and public plaintiffs from demonstrating irreparable injury[154] or lack of an adequate remedy at law[155] when seeking statutory injunctions, or even waive the traditional equitable factors completely.[156]

---

the courts of their authority to determine the appropriateness of, and to formulate, equitable relief"); State *ex rel.* Cox v. Davidson Indus., Inc., 635 P.2d 630, 637 (Or. 1981); Shapleigh v. Shikles, 427 A.2d 460, 464–65 (Me. 1981); Salt Lake Cty. v. Kartchner, 552 P.2d 136, 138–39 (Utah 1976); *cf*. Worthington v. Kenkel, 684 N.W.2d 228, 233–34 (Iowa 2004) (assessing "the design of the statute" to determine whether the legislature intended to dispense with traditional equitable principles and require automatic issuance of injunctions when the statute was violated).

152. State *ex rel.* Office of the Att'y Gen. v. NOS Commc'ns, Inc., 84 P.3d 1052, 1053-55 (Nev. 2004) (per curiam) ("To obtain injunctive relief in a statutory enforcement action, a state or government agency need only show, through competent evidence, a reasonable likelihood that the statute was violated and that the statute specifically allows injunctive relief."); Midland Enters., Inc. v. City of Elmhurst, 624 N.E.2d 913, 920 (Ill. App. Ct. 1993) ("The general rule that a statutory claim need not satisfy the traditional principles of equity is based upon the presumption that public harm occurs when the statute is violated."); State v. Tex. Pet Foods, Inc., 591 S.W.2d 800, 805 (Tex. 1979); Lloyd A. Fry Roofing Co. v. State Dep't of Health Air Pollution Variance Bd., 553 P.2d 800, 808 (Colo. 1976); State by Heltzel v. O.K. Transfer Co., 330 P.2d 510, 513 (Or. 1958) (holding that, when a statute authorizing injunctive relief has been violated, "[i]t is enough if the statutory conditions are made to appear").

153. *See, e.g.*, Forest Cnty. v. Goode, 579 N.W.2d 715, 728 (Wis. 1998) (eliminating irreparable injury requirement for government entities seeking injunctions against violations of zoning ordinances); City of Snyder v. Cogdell, 342 S.W.2d 201, 202-03 (Tex. App. 1960) (same); Ackerman v. Tri-City Geriatric & Health Care, Inc., 378 N.E.2d 145, 148-49 (Ohio 1978) ("[W]here an injunction is authorized by a statute designed to provide a governmental agent with the means to enforce public policy, no balancing of equities is necessary." (quotation marks omitted)).

154. *See, e.g.*, Jurisch v. Jenkins, 749 So. 2d 597, 599 (La. 1999) ("A petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, *i.e*., when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right."); Thompson v. Smith, 129 A.2d 638, 651-52 (Vt. 1957) (eliminating irreparable injury requirement for plaintiffs seeking injunctions against violations of zoning ordinances).

155. Conservation Comm'n v. Price, 479 A.2d 187, 196 (Conn. 1984) ("[T]he enactment of the statute by implication assumes that no adequate alternative remedy exists and that the injury was irreparable, that is, the legislation was needed or else it would not have been enacted." (quotation marks omitted)).

156. Edwards v. Emperor's Garden Rest., 130 P.3d 1280, 1285 (Nev. 2006) (holding that the trial court "improperly looked to traditional equitable grounds in considering a statutory injunction request"); Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 206 (Fla. Dist. Ct. App. 2001) ("If injunctive relief is the specified, primary remedy to correct a violation of a public duty and to vindicate the right of a person affected by the violation of that duty, it can properly be deemed a rule that the Legislature has created, not a grant of discretion."); Va. Beach S.P.C.A., Inc. v. S. Hampton Rds. Veterinary Ass'n. 329 S.E. 2d 10, 13 (Va. 1985). ("When a statute empowers a court to grant injunctive relief, the party seeking an injunction is not required to establish the traditional

Some injunctions granted by state courts are based on completely different elements from the traditional equitable principles identified by the U.S. Supreme Court. New York courts, for example, recognize *Yellowstone* injunctions.[157] A *Yellowstone* injunction stays the deadline specified in a commercial lease for the tenant to cure an alleged breach while the tenant seeks a final judgment as to whether a breach actually exists.[158] A tenant may obtain a *Yellowstone* injunction in New York state court by showing that it holds a commercial lease, received a notice of default or threat of termination from the landlord, sought the injunction prior to termination, and "is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises."[159] Tenants seeking *Yellowstone* injunctions are not required to satisfy the traditional requirements for injunctive relief, including irreparable injury or even likelihood of success on the merits.[160] New York federal courts will not grant such relief, however, unless the plaintiff satisfies federal standards.[161]

Even states that have adopted the same basic frameworks for injunctive relief as the federal courts often articulate some of the factors differently. For example, federal standards require a plaintiff to show that a preliminary injunction would affirmatively be "in the public interest,"[162] while many states require the plaintiff instead to show only that the "public interest will not be adversely affected by granting the injunction."[163] Likewise, while *Winter* requires a plaintiff to demonstrate that it "is *likely* to succeed on the merits,"[164] many states require only a

prerequisites . . . before the injunction can issue."); Little Joseph Realty, Inc. v. Town of Babylon, 363 N.E. 2d 1163, 1168 (N.Y. 1977) (holding that zoning violations must be "enjoined unconditionally");

157. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 237 N.E.2d 868, 870-71 (N.Y. 1968); *see also* TAG 380, LLC v. ComMet 380, Inc., 890 N.E.2d 195, 198 (N.Y. 2008).

158. Post v. 120 E. End Ave Corp., 464 N.E.2d 125, 127 (N.Y. 1984).

159. Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 613 N.Y.S.2d 402, 404 (N.Y. App. Div. 1994); *see also* Jemaltown of 125th St., Inc. v. Leon Betsch/Park Seen Realty Assocs., 496 N.Y.S.2d 16, 16-18 (N.Y. App. Div. 1985).

160. *Post*, 464 N.E.2d at 127; *see also Jemaltown*, 496 N.Y.S.2d at 17-18 (overturning trial court ruling because it applied the traditional standards for injunctive relief, rather than the elements for a *Yellowstone* injunction).

161. Children's Place Retail Stores, Inc. v. Pyramid Co., No. 97-CV-1047 (FJS) (GLS), 1998 U.S. Dist. LEXIS 23599, at *5-8 (N.D.N.Y. Aug. 13, 1998).

162. Winter v. Nat. Res. Def. Council Inc., 555 U.S. 7, 20 (2008).

163. Ingraham v. Univ. of Me., 441 A.2d 691, 693 (Me. 1982) (per curiam); *see also* Harvest Ins. Agency, Inc. v. Inter-Ocean Ins. Co., 492 N.E.2d 686, 688 (Ind. 1986).

164. 555 U.S. at 20 (emphasis added).

reasonable likelihood[165] or reasonable probability[166] of success. Some are even more forgiving, requiring only that the plaintiff "raise 'serious' and substantial questions going to the merits of the case."[167] Maine requires a plaintiff to "exhibit[] a likelihood of success on the merits (at most, a probability; at least, a substantial possibility)."[168]

Similarly, federal courts require the plaintiff to show "that he is *likely* to suffer irreparable harm."[169] *Winter* held that the lower court had erred by granting a preliminary injunction "based only on a 'possibility' of irreparable harm."[170] The Supreme Court explained that this "'possibility' standard is too lenient."[171] It emphasized, "Issuing a preliminary injunction based on the possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[172]

In some states, in contrast, "the possibility of irreparable injury" is sufficient to warrant injunctive relief.[173] The Arizona Court of Appeals, for example, has held that while *Winter* "requires the party seeking an injunction to demonstrate that irreparable injury is likely," Arizona law requires only that the injury be "merely possible."[174] Other states, rather than inquiring into irreparable harm at all, require only injury that is "actual and substantial."[175] Still others, in contrast, have arguably higher

165. Lee/O'Keefe Ins. Agency, Inc. v. Ferega, 516 N.E.2d 1313, 1317 (Ill. App. Ct. 1987); *accord Harvest Ins. Agency*, 492 N.E.2d at 688.

166. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998); *accord* Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n, 661 P.2d 254, 256 (Colo. 1983).

167. Messerli v. Dep't of Nat'l Res., 768 P.2d 1112, 1122 (Alaska 1989). Some federal circuits, notwithstanding *Winter*, apply this approach for preliminary injunctions. *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2010) ("[T]he 'serious questions' approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met."); Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 35 (2d Cir. 2010) ("The 'serious questions' standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction.").

168. *Ingraham*, 441 A.2d at 693.

169. Winter v. Nat. Res. Def. Council Inc., 555 U.S. 7, 20 (2008) (emphasis added).

170. *Id*. at 21.

171. *Id*. at 22 (emphasis added).

172. *Id*.

173. *E.g.*, Kanter & Eisenberg v. Madison Assocs., 508 N.E.2d 1053, 1055 (Ill. 1987).

174. IB Prop. Holdings, LLC v. Rancho Del Mar Apts. Ltd. P'ship, 263 P.3d 69, 71 (Ariz. Ct. App. 2011) (citing Shoen v. Shoen, 804 P.2d 787, 792 (Ariz. Ct. App. 1990)).

175. Wash. Fed'n of State Emps. v. State, 665 P.2d 1337, 1343 (Wash. 1983).

standards, requiring the plaintiff to show it "*will* suffer irreparable injury"[176]

Courts also differ in how the various elements relate to each other. Some states, like many circuits' interpretation of the Supreme Court's standards,[177] require that each element be independently satisfied.[178] Others specify that the criteria "are not to be applied woodenly or in isolation from each other; rather, the court of equity should weigh all of these factors together in determining whether injunctive relief is proper in the specific circumstances of the case."[179] Some of these states[180]—like some federal circuits[181]—expressly adopt a sliding scale, under which a stronger showing for some factors may offset weaker showings on others. Such differences can affect how courts apply facially identical sets of elements.

B. Precedential Disparities

The choice between federal and state equitable remedial principles determines not only the elements (or factors) governing the availability of

176. Ingraham v. Univ. of Me., 441 A.2d 691, 693 (Me. 1982) (per curiam) (emphasis added).

177. Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016) ("[A]ny modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible."); Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 457 (5th Cir. 2016) ("[S]atisfying one requirement does not necessarily affect the analysis of the other requirements."); Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 347 (4th Cir. 2009) ("*Winter* articulates four requirements, each of which must be satisfied as articulated.").

178. *See, e.g.*, Shaw v. Tampa Elec. Co., 949 So. 2d 1066, 1069 (Fla. Dist. Ct. App. 2007) ("[I]f a plaintiff fails to prove one or more of the elements required for an injunction, the trial court is clearly required to deny injunctive relief."); Wash. Fed'n of State Emps. v. State, 665 P.2d 1337, 1343 (Wash. 1983).

179. Dep't of Envtl. Prot. v. Emerson, 563 A.2d 762, 768 (Me. 1989).

180. Smith v. Ariz. Citizens Clean Elections Comm'n, 132 P.3d 1187, 1191 (Ariz. 2006) ("The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be."); DMF Leasing, Inc. v. Budget Rent-A-Car of Md., Inc., 871 A.2d 639, 649 (Md. Ct. Spec. App. 2005); Wells v. Auberry, 429 N.E.2d 679, 684 (Ind. Ct. App. 1991) ("[W]here there is a great danger of irreparable harm to the petitioner or the public, there is less of a need to go beyond the establishment of a prima facie case on the merits. . . . Conversely, as the imminence of irreparable harm is reduced, the prima facie case requirement expands to the test of probability of recovery on the merits.").

181. *See, e.g.*, Hernandez v. Sessions, 872 F.2d 976, 990 (9th Cir. 2017) ("Under our 'sliding scale' approach, 'the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.'" (quoting Pimentel v. Dreyfus, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam))); Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) ("How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."); *see also* S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co., 860 F.3d 844, 849 (6th Cir. 2017) ("We have often cautioned that these are factors to be balanced, not prerequisites to be met.").

equitable relief, but the body of precedent the court must consider in applying them. Even when the elements comprising federal and state standards for injunctions appear facially identical, federal and state courts may interpret and apply those elements very differently, creating different combinations of doctrines, presumptions, and holdings. An element is not a freestanding, self-defined concept, but rather a proxy for a particular jurisdiction's body of cases identifying various sets of circumstances that either satisfy, or fail to satisfy, that requirement. At the very least, the choice between federal and state law determines the set of cases the court must use as guideposts in deciding whether to grant preliminary or permanent injunctions.

Substantial discrepancies between some federal and state court rulings exist, for example, over the concept of irreparable injury. Numerous federal circuits have held that loss of employment, even when it involves reputational harm and total loss of income, does not qualify as irreparable injury because it constitutes a financial loss that post-trial damages could remedy.[182] The U.S. Supreme Court adopted this conception of irreparability in the context of public employment cases. In *Sampson v. Murray*, it held that a terminated government employee's "loss of income . . . falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction."[183] The Court added, "[An] insufficiency of savings or difficulties in immediately obtaining other employment . . . will not support a finding of irreparable injury, however severely they may affect a particular individual."[184]

182. *See, e.g.*, Hetreed v. Allstate Ins. Co., 135 F.3d 1155, 1158 (7th Cir. 1998); Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297, 300 (8th Cir. 1996); *see also* Hyde v. KLS Prof'l Advisors Group, LLC, 500 F. App'x 24, 25-26 (2d Cir. 2012); Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346, 1349 (7th Cir. 1982) ("[A] temporary loss of income does not usually constitute irreparable injury because this deprivation can be fully redressed by an award of monetary damages.").

183. 415 U.S. 61, 91-92 (1974).

184. *Id.* at 91 n.68; *see also* Beberman v. U.S. Dep't of State, 675 F. App'x 131, 134 (3d Cir. 2017) ("Even if [the plaintiff's] position were no longer available for reinstatement at the time of judgment, a court could fashion a substitute alternative remedy as necessary."); Beatrez v. Merit Sys. Prot. Bd., 399 F. App'x 581, 582 (Fed. Cir. 2010) (order) ("[L]oss of federal employment and earnings, humiliation, or damage to one's reputation are not irreparable harms warranting interim relief in a case involving discipline of a federal employee."); Overstreet v. Lexington-Fayette Urban Cty. Gov't, 305 F.3d 566, 579 (6th Cir. 2002) ("The fact that an individual may lose his income for some extended period of time does not result in irreparable harm, as income wrongly withheld may be recovered through monetary damages in the form of back pay."); Ciechon v. City of Chi., 634 F.2d 1055, 1057 (7th Cir. 1980) (holding that discharged civil service employees' "loss of wages, employee benefits, and opportunities for promotion during the suspension period" did not constitute irreparable injury).

Some state courts have rejected this approach.[185] The Michigan Supreme Court, for example, declared, "We can envision a variety of circumstances which might, in appropriate civil servant discharge cases, warrant a finding of irreparable injury sufficient to support the grant of a preliminary injunction."[186] It held that "the absence of usable resources and of obtainable alternative sources of income with which to support one's self and one's dependents" could constitute irreparable injury.[187]

Other deviations between federal courts' and some state courts' conceptions of irreparability relate to real estate. Federal courts apply the traditional rule that, because real estate is presumed to be unique, both buyers and sellers may specifically enforce a contract to convey an interest in land.[188] The New Jersey Chancery Division, however, has held that only buyers suffer irreparable harm when real estate contracts are breached.[189] Even if land is categorically unique, the seller in a real estate contract typically loses only an ascertainable sum of money, which may be recovered in an action at law.[190] The court consequently concluded, "[S]pecific performance relief should no longer be automatically available to a vendor of real estate, but should be confined to those special instances where a vendor will otherwise suffer an economic injury for which his damage remedy at law will not be adequate."[191]

States have sometimes departed from federal courts' interpretations of traditional equitable principles in other areas, as well. The Delaware Chancery Court, for example, has held that a company's failure to provide material disclosures to shareholders in advance of a shareholder vote is

185. *See, e.g.*, Stanton v. City of Chi., 532 N.E.2d 464, 468 (Ill. App. Ct. 1988) (affirming temporary restraining order prohibiting a city from forcing a police captain to retire); State Emps. Ass'n v. Dep't of Mental Health, 365 N.W.2d 93, 100 (Mich. 1985) ("To the extent that *Sampson* appears to have been understood as a preclusion per se to a finding of irreparable injury in civil servant discharge cases, we decline to adopt that rationale."); *cf.* Caras v. Am. Orig. Corp., Civ. No. 1258 (1987), 1987 Del. Ch. LEXIS 467, at *5 (Del. Ch. July 31, 1987) (holding the plaintiff "will suffer irreparable harm if he cannot accept employment with his proposed new employer").

186. *State Emps. Ass'n*, 365 N.W.2d at 100 (emphasis omitted).

187. *Id.* at 101.

188. RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (AM. LAW INST. 1981). ("[T]he seller who has not yet conveyed is generally granted specific performance on the breach by buyer."); *see* 12 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 63.10 (2018); *see, e.g.*, Stewart v. Griffith, 217 U.S. 323, 326, 332 (1910) (Holmes, J.) (affirming, in a pre-*Erie* ruling, a decree granting the seller specific performance of a contract for the sale of land); Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 278 (1831) (Marshall, C.J.) ("The right of a vendor [of land] to come into a court of equity to enforce a specific performance is unquestionable.").

189. Centex Homes Corp. v. Boag, 320 A.2d 194, 196 (N.J. Super. Ct. Ch. Div. 1974).

190. *Id.*

191. *Id.* at 198; Suchan v. Rutherford, 410 P.2d 434, 444 (Idaho 1966) (denying petition for rehearing and reaffirming the court's refusal to adopt "the majority rule that specific performance is available to a vendor upon breach by the vendee of a contract for the sale of real estate").

per se irreparable harm,[192] while federal courts require shareholders to make further, case-specific showings of irreparability.[193] Likewise, under Ohio law, a former employer suffers *per se* irreparable harm when an employee "with detailed and comprehensive knowledge of [its] trade secrets and confidential information" is hired by a competitor;[194] again, federal courts have concluded otherwise.[195] Florida courts have held that the existence of a common-law cause of action constitutes an adequate remedy at law that precludes injunctive relief, regardless of whether the defendant would be able to satisfy a judgment.[196] Numerous circuits have held, in contrast, that "difficulty collecting a damage judgment may support a claim of irreparable injury."[197]

While many state courts allow a trust beneficiary to enjoin a trustee from breaching its fiduciary duties without regard to whether legal remedies could compensate the beneficiary for any harm it suffers, federal courts still require the beneficiary to show the breach of trust will cause irreparable harm.[198] State courts have also held that a seller's breach of contract inflicts irreparable injury when replacement products are not "readily" available or would be inconvenient to acquire.[199] The U.S. Court of Appeals for the Fourth Circuit, in contrast, held that a seller's failure to

192. *See In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 360-61 & n.48 (Del. Ch. 2008); Wayne Cty. Emps. Ret. Sys. v. Corti, 954 A.2d 319, 329 (Del. Ch. 2008).

193. *See, e.g.*, Stein v. 1-800-Flowers.com, Inc., No. 16-CV-6252 (RRM) (RLM), 2016 U.S. Dist. LEXIS 167147, at *14-15 (E.D.N.Y. Dec. 2, 2016); Silberstein v. Aetna, Inc., No. 13 Civ. 8759 (AJN), 2014 U.S. Dist. LEXIS 49369, at *10-11 (S.D.N.Y. Apr. 9, 2014); Masters v. Avanir Pharm., Inc., 996 F. Supp. 2d 872, 885-86 (C.D. Cal. 2014).

194. Proctor & Gamble Co. v. Stoneham, 747 N.E.2d 268, 278-79 (Ohio Ct. App. 2000); *see also* Levine v. Beckman, 548 N.E.2d 267, 271 (Ohio Ct. App. 1988).

195. Healthcare Mgmt. & Inv. Holdings, L.L.C. v. Feldman, No. 03-4140, 2004 U.S. App. LEXIS 28854 (6th Cir. Apr. 8, 2004); *see also* First W. Cap. Mgmt. Co. v. Malamed, 874 F.3d 1136, 1143 (10th Cir. 2017).

196. *See, e.g.*, *In re* Estate of Yerex, 651 So. 2d 220, 222 (Fla. Dist. Ct. App. 1995) (citing Oxford Int'l Bank & Trust, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 374 So. 2d 54, 56 (Fla. Dist. Ct. App. 1979)).

197. Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 206 (3d Cir. 1990) ("[T]he unsatisfiability of a money judgment can constitute irreparable injury . . . ."); Tri-State Gen. & Trans. Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986); *see* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984) ("A damages remedy can be inadequate . . . [when] [d]amages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected." (citing Signode Corp. v. Weld-Loc Sys., Inc., 700 F.2d 1108, 1111 (7th Cir. 1983))); Cent. States, S.E. & S.W. Areas Pension Fund v. Adm. Merch. Maj. Freight, Inc., 511 F. Supp. 38, 42 (D. Minn. 1980), *aff'd* 642 F.2d 1122 (8th Cir. 1981).

198. *See* Benedict v. Amaducci, No. 92 Civ. 5239 (KMW), 1993 U.S. Dist. LEXIS 3556, at *36 n.13 (S.D.N.Y. Mar. 18, 1993).

199. Sedmak v. Charlie's Chevrolet, Inc., 622 S.W.2d 694, 700 (Mo. Ct. App. 1981).

convey a corporate jet did not irreparably harm the buyer, even though only three other similar planes were on the market.[200]

Thus, federal and state courts may interpret and apply requirements for equitable relief such as irreparable injury or inadequate remedy at law differently. Accordingly, even when federal and state standards for injunctive relief appear facially identical, a federal court should still determine which body of law applies under *Erie*.[201]

III. CONCLUSION: DIFFERENT BODIES OF PRECEDENT

A court should determine the proper body of law that governs the availability of injunctive relief, even when competing sets of standards involve facially identical elements, rather than simply assuming the choice-of-law issue doesn't matter or that forum law automatically applies.[202] It should treat each element within each potentially applicable jurisdiction's standard as a proxy for a distinct body of precedent from that jurisdiction that presents different guideposts for resolving the issue.

This principle obviously applies in the traditional *Erie* context, in which a federal court must decide whether federal or state law governs the availability of preliminary or permanent injunctions for state-law claims. It likewise applies in reverse-*Erie* situations[203] in which a state court must decide whether to award injunctive relief under a federal statute,[204] as well

200. Klein v. PepsiCo, Inc., 845 F.2d 76, 78, 80 (4th Cir. 1988).

201. As noted earlier, the Supreme Court should partly reverse *Guaranty Trust* and hold that federal standards govern the availability of preliminary and permanent injunctions for claims under the U.S. Constitution, federal statutes, or federal regulations, while state-law standards govern injunctive relief for state-law claims. *See supra* Part I.

202. Because each element of a jurisdiction's doctrinal test is linked to the body of precedents from that jurisdiction interpreting or applying that element, it is incoherent for courts to apply federal standards for injunctive relief while interpreting them based on state law. *See supra* note 102. Of course, a federal court applying federal standards for injunctive relief must consider state-law issues to determine a plaintiff's "likelihood of success on the merits" of a state-law claim or the availability of alternate state-law remedies. Federal law, however, would still govern *how* likely to succeed on the merits the plaintiff must be, whether alternate remedies qualify as adequate, how to apply the other factors governing injunctive relief, and how the various factors relate to each other (*i.e.*, whether each must be independently satisfied, or they should instead be considered collectively under a sliding-scale approach).

203. *See* Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 20-21 (2006).

204. The propriety of injunctive relief under a federal statute is a matter of statutory interpretation. To determine whether and when a federal statute authorizes, mandates, or prohibits injunctive relief, a court (whether federal or state) must apply the standards that the statute itself explicitly or implicitly establishes. A federal statute that does not specify a remedy implicitly authorizes a court to grant equitable relief when traditional equitable principles, as construed by the U.S. Supreme Court, are satisfied. A federal statute that authorizes, but does not mandate, equitable relief—particularly as one remedial option among others—likewise permits such relief when traditional equitable principles are satisfied. However, when a federal law either mandates or prohibits

as in horizontal choice-of-law cases in which a court must decide which state's law governs injunctive relief.[205] The fact that federal and state standards, or competing states' standards, for injunctive relief involve facially identical elements should not deter the court from deciding which body of law applies. Although beyond the scope of this article, such an approach might be even more broadly applicable to other choice-of-law situations, as well.

A court should not require litigants to affirmatively demonstrate that competing bodies of equitable remedial principles may lead to different results before engaging in an *Erie* analysis. Once a party raises an *Erie* issue concerning the standard governing equitable relief,[206] the court should generally adjudicate it without requiring that party to identify potentially dispositive distinctions between the competing bodies of precedent. Even when competing jurisdictions have not interpreted an element for injunctive relief in conflicting ways, their bodies of caselaw are not fungible. Differences will always exist among the fact patterns of the cases that have been adjudicated in each jurisdiction, the specific issues each jurisdiction has already addressed or has yet to confront, and how broadly or narrowly they cast their precise holdings in each case. It would be tremendously wasteful to require counsel (and the court itself) to parse two or more jurisdictions' bodies of precedent to catalogue these innumerable subtle points of divergence before determining which body of equitable remedial principles applies. Particularly if courts come to agree that the body of equitable principles governing a claim derives from the same source of law from which the claim itself arises,[207] these *Erie* and choice-of-law questions can be resolved with virtually no effort, eliminating any potential efficiency gains from requiring litigants to show that the competing bodies of law materially differ from each other.

When confronted with a doctrinal test such as a jurisdiction's standards governing injunctive relief, we should "pierce the veil" of the elements themselves, seeing through them to the body of precedents from that jurisdiction represented by each element. This approach offers a much

injunctive relief, or clearly and explicitly identifies the circumstances under which an injunction should issue, those requirements supersede traditional equitable principles and must be applied. *See* Morley, *supra* note 13, at 277-78.

205. As discussed earlier, however, choice-of-law determinations made pursuant to the *Erie* doctrine may differ from horizontal choice-of-law issues. *See supra* note 113.

206. Courts generally do not raise choice of law issues *sua sponte* when the parties do not dispute the applicable law. *But see, e.g.*, Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 303-04 (2014) (demonstrating courts need not necessarily accept erroneous stipulations of law).

207. *See supra* Part I; Morley, *supra* note 13.

more accurate, vibrant conception of the law,[208] preventing courts from being misled by facial similarities between different jurisdictions' doctrinal tests.

208. *See* KARL LLEWELLYN, THE BRAMBLE BUSH 46-47 (2008).