

May 2019

Remedies, Equity & *Erie*

Caprice L. Roberts

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <https://ideaexchange.uakron.edu/akronlawreview>

Part of the [Civil Procedure Commons](#)

Recommended Citation

Roberts, Caprice L. (2019) "Remedies, Equity & *Erie*," *Akron Law Review*: Vol. 52 : Iss. 2 , Article 11.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol52/iss2/11>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

REMEDIES, EQUITY & *ERIE*

Caprice L. Roberts*

I.	Introduction	494
II.	Remedies and Outcomes	495
III.	Federal Equity Power	500
IV.	The Staying Power of Equity.....	500
V.	Federal Courts Sitting in Diversity Handling Remedies	503
VI.	Particular Problems that Federal Courts Face Regarding Remedies	513
	A. Elusive Categorization Problems—Disgorgement and Hybrid Remedies.....	513
	B. Punitive Damages Attendant to Equitable Rulings	516
	C. Conflicts and Power Attendant to Contempt Relief.....	517
VII.	An Analogy to the Supreme Court’s Original Jurisdiction.....	517
VIII.	Benefits of Federal Development of Equitable Remedies and Defenses	520
	A. System of Equity.....	520
	B. Promotion of Uniformity	520
	C. Accountability.....	521
	D. Bounded Discretion	521

* Visiting Professor of Law, University of Florida Levin College of Law. Thank you to the Center for Constitutional Law at Akron and the *Akron Law Review* for the opportunity to present a working draft of this article. Thanks especially to fellow Remedies scholar, Tracy Thomas, for the invitation to contribute to this worthwhile discussion about lingering implications of *Erie* across our respective fields. As always, thanks to Doug Rendleman for thoughtful suggestions. Also, thanks to William Ford for securing historical sources and my assistant Victoria Redd for meticulous editing.

SYMPOSIUM, *ERIE* AT EIGHTY: CHOICE OF LAW ACROSS THE DISCIPLINES

IX.	Costs of Federal Equity	522
	A. Judicial Overreaching	522
	B. Federalism and State Sovereignty.....	523
	C. Risk of Rigidity.....	524
	D. Risk of Imperfection	526
X.	Conclusion	528

*Remedies is about the intersection of things.*¹

I. INTRODUCTION

Remedies do not fit neatly into law’s boxes. Remedies as a legal subject matter is complex. It cuts across categories—the topic is trans-substantive by nature. Further, within the field, specific remedies often defy categorization. For example, certain remedies, such as restitutionary disgorgement, may straddle the law-equity divide. To complicate the inquiry of this article more, Remedies lies at the intersection of procedure and substance. Remedies connects substantive fields and delivers any ultimate entitlements—or their monetary substitute—to the winning claimant.

It is no wonder that remedies in individual cases pose significant challenges to any simple application of the *Erie* analysis.² Remedies are neither procedure nor substance except when they are.³ Remedies aid substance and require procedure to deliver on plaintiff’s substantive

1. Caprice L. Roberts, *Teaching Remedies from Theory to Practice*, 57 ST. LOUIS U. L.J. 713, 713 (2013).

2. See Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 219 (2018) (“[M]any remedies issues fit awkwardly at best within the Erie framework.”).

3. A related point is that the size of the right is a part of the right. Tunks, *Categorization and Federalism: “Substance” and “Procedure” After Erie Railroad v. Tomkins*, 34 ILL. L. REV. 271 (1939); WALTER WHEELER COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS 163–65 (1942). For helpful considerations of the substance-procedure divide, explore the *Restatement (Second) of Conflicts*. Consider also the choice-of-law treatment of remedies as procedural, but this frame does not inherently govern in the *Erie* context. See SYMEON C. SYMEONIDES, CHOICE OF LAW 69, 72 (2016) (explaining that remedies are classified as procedural rather than substantive for choice-of-law purposes, but also noting that analysis is “not necessarily” the same when determining “the line separating procedure for ‘Erie purposes’”). See also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAW 59–62 (5th ed. 2006) (explaining that the determination of whether a rule is substantive or procedural in the conflict-of-law context requires balancing the forum’s difficulty in applying the foreign rule against the probability of affecting the case’s outcome and encouraging forum shopping). Accordingly, proceed with caution: “Matters of ‘substance’ and matters of ‘procedure’ are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, ‘substance’ and ‘procedure’ are the same key-words to very different problems. . . . Each implies different variables depending upon the particular problem for which it is used.” *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

entitlements. But where exactly do remedies fit? In searching a law library for Dobbs' original Remedies treatise, the entire treatment may well be housed under "Procedure."⁴ Why? A relic of the development of the subject of Remedies as a course?⁵ Or due to its precursor course, Equity?⁶ Or based on the roots of equitable jurisdiction versus a court of law? Or a result of intentional or accidental line-drawing by courts after *Erie*?

But what is in a label anyway?⁷ Even the Supreme Court quickly recognized the shortcomings of assuming labels lead to definitive classifications.⁸ For that reason, the Court has suggested focusing on *Erie*'s driving purpose—uniformity—and developed the outcome-determinative test.⁹ Yet, that test is not the end of the story, at least when it comes to equitable remedies.

It is a mistake to assume that Remedies as a field does not contain its own doctrines and goals. It does. But the principles of Remedies may conflict or parallel the underlying substantive law of the cause of action.¹⁰ If conflict arises, federal court treatment of remedies doctrines under *Erie* has heightened import.

II. REMEDIES AND OUTCOMES

*After all, the remedy that a court grants is the "outcome" of the case.*¹¹

The Supreme Court in *Erie Railroad v. Tompkins* proclaimed that a federal court exercising jurisdiction based on diversity of citizenship must follow state law.¹² This edict of *Erie* applies with equal force to

4. It would be interesting to conduct a library survey for classification of the Remedies treatise. I found Dobbs's initial edition under "Procedure" at the Lawton Chiles Information Center at the University of Florida's Levin College of Law.

5. See generally Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008) (examining the development of the modern American law of remedies).

6. *Id.*

7. The law-equity determination cannot be based on choice of labels. See, e.g., *Dairy Queen v. Wood*, 36 U.S. 469, 476–79 (1962) (refusing to permit plaintiff's selection of an accounting remedy and characterization as purely equitable govern the constitutional right to a jury trial).

8. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

9. *Id.*; see also John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173, 173 (1999) ("Recognizing that the terms substance and procedure are mere labels, the *York* Court analyzed the question in light of the purpose of *Erie*, which was to ensure uniformity in result between federal and state courts.").

10. Roberts, *supra* note 1, at 713.

11. Cross, *supra* note 9, at 174. This quote is more controversial for remedies that precede a trial on the merits such as preliminary injunctions. Still, a federal court's grant of preliminary relief may well be the first and last word of the case. OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* (2d ed. 2001).

12. 304 U.S. 64, 78 (1938).

supplemental jurisdiction over state law claims.¹³ *Erie*'s primary holding represented a complete break from the reasoning of *Swift v. Tyson*¹⁴ that had countenanced the development of "federal general common law."¹⁵ The guiding force behind *Erie* and its preservation to date remains the interest in uniformity.¹⁶

The Court further interpreted *Erie* in *Hanna v. Plumer* to direct federal courts to resolve choice-of-law issues by applying federal law to procedural issues and state law to substantive issues.¹⁷ The unanimous decision emphasized federal judicial authority under The Rules Enabling Act to control its own practice and pleading procedures.¹⁸ According to the Court, the federal service-of-process rule at issue fell within the Enabling Act power.¹⁹ This procedural power is explicitly limited, however, by the constitutional right to a jury trial: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury."²⁰ The Court reasoned that the procedural rule did not violate any constitutional requirements.²¹ Due to conformity with the Enabling Act and the Constitution, the Court determined that the federal service rule was the proper standard to apply in a case sitting in diversity jurisdiction,²² notwithstanding that such a procedural difference would be outcome-determinative.²³

Despite *Erie*'s underlying value,²⁴ the *Hanna* Court concluded: "To hold that a Federal Rule of Civil Procedure must cease to function

13. *Felder v. Casey*, 487 U.S. 131, 151 (1988) (ruling that *Erie* applies to the same extent as diversity when federal courts exercise pendent jurisdiction over state-based claims).

14. 41 U.S. 1 (1842).

15. *Erie*, 304 U.S. at 78.

16. *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 HARV. L. REV. 966, 974 (1946) (reasoning that states courts hearing cases involving federal law must carry out *Erie*'s "main theme" of uniformity by applying federal law if a federal court would have applied federal principles to resolve the issue).

17. *Hanna v. Plumer*, 380 U.S. 460, 464–65 (1965).

18. *Id.* at 464 (citing The Rules Enabling Act, 28 U.S.C. § 2072 (1958)).

19. *Id.* at 463–64.

20. *Id.* at 464 (citing 28 U.S.C. § 2072 (1958)).

21. *Id.*

22. *Id.*

23. *Id.* at 468–69.

24. Yet, outcome-determinativeness is not *Erie*'s sole value: "The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of justice." *Id.* at 468. Justice Harlan's concurring opinion in *Hanna* laments the oversimplification of all of these tests for proving too much; instead

the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human

whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."²⁵ *Hanna* provides a proper pedigree route to the choice between a federal and state prescription. For example, pursuant to *Hanna*'s rationale, a valid federal rule, such as Federal Rule 65 for injunction procedure, governs in federal cases under diversity jurisdiction. Still, finding the proper balance between federal and state law and the exact line between substance and procedure is often debatable.²⁶

What of equity? Twenty years before *Hanna*, the Court revisited *Erie*'s command in the context of equity.²⁷ In *Guaranty Trust Co. v. York*, the plaintiff sought an equitable accounting remedy and claimed the right to sue under a New York statute that provided beneficiaries the power to sue their trustees.²⁸ Defendant argued the arrangement was not a trust, and that the federal court sitting in diversity should dismiss the suit based on the state's statute of limitation.²⁹ The Second Circuit ruled that laches was a matter of remedy rather than right such that federal law must apply.³⁰ The Supreme Court reversed and applied state law to block the matter.³¹

Yet in its reasoning, the Supreme Court refined *Erie*'s reach and clarified federal equity power. It reasoned that traditional, federal principles of equity must continue despite *Erie*'s disdain for federal common law.³² Equity was unique and special, and its power traced back to the English Court of Chancery.³³ In fact, the Court explained that a federal court sitting in diversity as an alternative forum to the state court

conduct which our constitutional system leaves to state regulations. If so, *Erie* and the Constitution require the state rule prevail, even in the face of a conflicting federal rule. *Id.* at 475 (Harlan, J., concurring).

25. *Id.* at 473–74.

26. In *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), the Court examined the federal district court's posture sitting in diversity but also confronting the federal constitutional right to jury trial. Pursuant to *Erie*, the lower court looked to New York state law for how to assess excessiveness of damages; specifically, it applied a New York statute mandating the judge review the verdict for "material deviation" from reasonable compensation. *Id.* at 425. The Supreme Court reasoned that the state law at issue "contains a procedural instruction, but the State's objective is manifestly substantive." *Id.* at 429.

27. *Guaranty Trust*, 326 U.S. at 109.

28. *York v. Guaranty Trust Co.*, 143 F.2d 503, 511 (2d Cir. 1944).

29. *Id.*

30. *Id.* at 522–23.

31. *Guaranty Trust*, 326 U.S. at 112.

32. *Id.* at 104.

33. *Id.*; see also Morley, *supra* note 2, at 218 (discussing and critiquing the "so-called equitable remedial rights doctrine" as unfounded and otherwise problematic).

may “afford an equitable remedy not available in a State court”³⁴ as long as within the federal court’s traditional equity power³⁵ and not otherwise constitutionally or congressionally restricted.³⁶ Ultimately, the Court reasoned that despite caselaw characterizing such rules as remedial and procedural,³⁷ the state statute’s complete barrier to recovery aligned more with a right than a remedy: it would “so intimately affect recovery or nonrecovery” such that the federal court in diversity jurisdiction must follow the state bar.³⁸ Still, *York*’s broader rationale carving out space for federal courts to render equity interpretations when sitting in diversity remains. “Dicta” will continue to “be cited characterizing equity as an independent body of law.”³⁹ Though brooding omnipresent equity is now “replaced by a shaper analysis of what federal courts do when they enforce rights that have no federal origin,”⁴⁰ independent federal equity continues.

John Cross explored and confirmed the justifications for the equity exception to *Erie*.⁴¹ He acknowledged that equity is an accident of history.⁴² Ultimately, however, he demonstrated sufficient reasons for equity to be treated differently than *Erie* convention dictates.⁴³ Though the outcome may be different, Cross concluded that federal courts must garner significant discretion in the interpretation and application of equitable procedure, remedies, and defenses.⁴⁴ This logic remains enticing despite risks of undermining *Erie* and underappreciating state prerogatives.

Doug Rendleman provides a useful reexamination⁴⁵ of the powerful charge that equity had gone too far in swallowing the common law as advanced in Steve Subrin’s seminal work, *How Equity Conquered the*

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

35. *Id.* (noting the restrictions on equity relief in federal court including “the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery” and “a plain, adequate and complete remedy at law must be wanting.”).

36. *Id.* (detailing other restraints including that Congress may restrict equity powers and that any exercise of federal equity power may not violate the constitutional right to a jury trial).

37. *Id.* at 109 (“It is therefore immaterial whether statutes of limitation are characterized either as ‘substantive’ or ‘procedural’ in State court opinions in any use of those terms unrelated to the specific issue before us.”).

38. *Id.* at 110.

39. *Id.* at 112 (“To the extent that we have indicated, it is.”).

40. *Id.* (distinguishing modern federal equity after *Erie* from older sweeping notions).

41. Cross, *supra* note 9.

42. *Id.* at 232.

43. *Id.* at 231–32.

44. *Id.* at 174.

45. Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397 (2015).

Common Law.⁴⁶ Subrin decried the expansion of equity at the expense of the common law.⁴⁷ For example, he criticized the breadth of equity's conquest over the common law by creating new rights in more relaxed, dynamic ways.⁴⁸ Subrin, however, did not call for the eradication of equity, but rather, for revitalization of the common law and its adjudicative tools.⁴⁹ In revisiting Subrin's work, Rendleman thoughtfully explores the nature of equity and the "stages of equitable discretion."⁵⁰

Rendleman details the pathway of a hypothetical nuisance case in federal court under diversity jurisdiction.⁵¹ He examines earlier charges regarding the problems of "on-the-spot" decisionmaking and amorphous, unmoored discretion of equity determinations.⁵² But, discretion abounds in procedure, equity, and beyond.⁵³ Rendleman ultimately seeks balancing; he warns that courts should not exceed their power with "unprincipled discretion" hidden behind the cloak of equity's "ancient language."⁵⁴

The modern dilemma, in my opinion, is how to retain the historical power and flexibility of equity while maintaining limits to ensure the use of reasoned discretion. Only then⁵⁵ will we make the most of the federal courts increasing remedies-diversity docket.

46. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

47. *Id.* at 1001 ("The total victory of equity process has caused us to forget the essence of civil adjudication: enabling citizens to have their legitimate expectancies and rights fulfilled.").

48. *Id.*

49. *Id.* at 1001–02.

50. Doug Rendleman, *supra* note 48, at 1410–50.

51. *Id.* at 1400, 1409.

52. *Id.* at 1410–50.

53. *Id.* at 1405.

54. *Id.* at 1450.

55. A counterargument is to simply view all of equity and law as one system and move forward, especially if one thinks the specialness of equity is greatly exaggerated and over mythologized. *See generally* Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53 (Summer 1993). Still, the Supreme Court has maintained the distinction between law and equity. Rendleman, *supra* note 48, at 1404. Equity maintains its magnetic pull.

III. FEDERAL EQUITY POWER⁵⁶

Federal equity power arises from Article III⁵⁷ and the Judiciary Act of 1789.⁵⁸ According to Laura Fitzgerald, the Act “authorized the federal judiciary to develop for itself a uniquely federal law of equity.”⁵⁹ Within this power,⁶⁰ federal courts maintain the ability to discern equitable procedures, remedies, and defenses.⁶¹ The power is delicate and must not be abused. Federal courts should be careful to articulate its bases of power and their boundaries.⁶²

Even a strong view of federal equity power, however, does not mean that such power should lack restraint. Federal jurists themselves must exercise restraint. Justice Stone advanced this stance and relied on principles, precedent, institutional bounds, and federalism as compelling limits.⁶³ Equity has always been perceived as, and remains, “a potentially dangerous but nonetheless essential judicial power.”⁶⁴ Federal courts must exercise this power of equity carefully, as unbridled discretion diminishes respect for the rule of law generally.

IV. THE STAYING POWER OF EQUITY

The law-equity divide remains vital for Seventh Amendment, for defenses, and more. Some scholars lament the persistence of equity and call for further fusion.⁶⁵ Two primary counterarguments exist on

56. For an in-depth examination of the history of the federal court equity power, see Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249 (2010). See also Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530 (2016).

57. U.S. CONST. art. III, § 2.

58. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

59. Laura S. Fitzgerald, *Is Jurisdiction Jurisdiction?*, 95 NW. U. L. REV. 1207, 1263 (2001).

60. For a thoughtful exploration of the complex and evolutionary history of judge-made law and the federal court equity power as a “story of change,” see generally Collins, *supra* note 59.

61. Cf. Morley, *supra* note 2, at 220 (maintaining the assertion of federal equity power “exceeds . . . the scope of federal courts’ Article III judicial power,” as well as “federalism-based limits on the federal government’s power as a whole”).

62. Controversy surrounds claims of inherent federal court powers. See, e.g., Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006) (suggesting the Supreme Court’s power to prescribe procedural rules for lower federal courts lies more in constitutional supremacy than Article III’s grant of inherent authority).

63. Gary L. McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power*, 7 HARV. J.L. & PUB. POLICY 507, 511, 515, 519 (1984).

64. *Id.* at 507.

65. See, e.g., Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBLEMS 53 (1993); Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63 (2007).

descriptive and normative grounds. The first is that complete fusion is unattainable because of the constitutional lines of demarcation. The United States Constitution⁶⁶ and state constitutions⁶⁷ explicitly distinguish law from equity for the purposes of providing constitutional rights to jury trials in certain civil cases. History also supports rationales for distinct treatment.⁶⁸ The second counterargument is that equitable remedies, doctrines, and defenses comprise a distinct, historical system and that it is one worth maintaining.⁶⁹

Is federal equity power as exercised pursuant to *Guaranty Trust* a problem? Michael Morley, examining equitable injunctions under *Erie*, concluded that federal equity power to develop uniform doctrines is unauthorized.⁷⁰ He laments the extent to which *Guaranty Trust* thwarts *Erie*'s purpose of ending the development of general common law by federal courts: "Despite *Erie*'s purported abolition of general law and relegation of federal common law to a few distinct areas in which federal interests predominate, equity lingers as a vestigial 'brooding omnipresence' that may dictate the results of diversity and supplemental jurisdiction cases."⁷¹ Morley ultimately recommends finishing what *Erie* started with respect to dismantling general law by eliminating "the lingering remnants of the old federal equity power."⁷² His suggestion would give substantial power to states to develop the doctrines of procedure and remedies doctrines in addition to the existing authority to dictate substantive law. Benefits include finishing the merger effort and eliminating anachronistic, confusing categories. Many of Morley's critiques have traction, but his conclusion is less persuasive. He asserts that federal courts deem all remedies "categorically substantive"⁷³ despite any arguments of the mixed procedural and substantive nature of remedies.⁷⁴

66. U.S. CONST. amend. VII.

67. See, e.g., FLA. CONST. art. 1, § 22; GA. CONST. art. 1, § 1, ¶ 11; N.Y. CONST. art. I, § 2.

68. Cf. Morley, *supra* note 2.

69. Bray, *The System of Equitable Remedies*, *supra* note 59.

70. Morley, *supra* note 2, at 220, 278 (maintaining that nothing in federal law, the Federal Rules of Civil Procedure, or the Constitution "authorizes federal courts to craft and apply a uniform body of equitable principles, including equitable remedial principles, to all claims that come before them, regardless of the source of law from which a claim arises.").

71. Morley, *supra* note 2, at 249.

72. *Id.* at 279.

73. *Id.* at 263.

74. *Id.* ("Some scholars contend that remedies exist in the hazy hinterlands between the much more familiar realms of 'substantive' and 'procedural' rights. Whatever the merits of such arguments, remedies should be deemed substantive under the *Erie* Doctrine.").

As a Federal Courts professor as well as Remedies, I am protective of federal court power and domain, though cognizant of limits by constitutional design as well as the import of judicial restraint. My protective stance makes me wary of Morley's overall project, though one cannot ignore certain valid critiques he raises such as the anachronistic and confusing nature of the law-equity divide. On whole, however, I conclude that federal courts have the constitutional, historical, and precedential power to develop federal equity doctrines and remedies. Federal courts, however, can and should vigilantly respect state's domain with respect to substantive doctrines as best it can. The reason for courts to hedge the best they can is to acknowledge that the line between procedure and substance and law and equity are not always clear.

In a follow-up piece,⁷⁵ Morley reinforces his prior position. He examines the conflicting treatment between federal and state courts on what he deems similar elements.⁷⁶ He argues that courts must look beyond the listed elements to the underlying body of precedent.⁷⁷ He maintains that state law should control equitable remedies, as they do state substantive causes of action.⁷⁸ According to Morley, this result should occur without a litigant proving the issue is outcome determinative.⁷⁹ Rather, federal courts should reach the *Erie* analysis.⁸⁰ Morley calls for overturning the Supreme Court's precedent on the *Erie* exception for the development of federal equity: "*Guaranty Trust's* equitable remedial rights doctrine should be discarded."⁸¹

Federal courts are capable and tasked with drawing those lines. Take Rule 65 of the Federal Rules of Civil Procedure.⁸² It directs federal courts on the procedure to be followed when analyzing a motion for an injunction. Generally, federal rules govern procedure, while state law governs substance.⁸³ This distinction persists despite friction with

75. Michael T. Morley, *Beyond the Elements: Erie and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 455 (2019).

76. *Id.* at 478-88.

77. *Id.* at 488-490 (analogizing to "pierc[ing] the veil" to discern the body of precedent the elements represent).

78. *Id.* at 468.

79. *See id.* at 489 ("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.").

80. *Id.* at 479, 489.

81. *Id.* at 471.

82. FED. R. CIV. P. 65.

83. *See Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965) (defining procedure as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering

methods of enforcing state-created rights.⁸⁴ And even though the procedures of the federal system and state vary.⁸⁵ Federal courts, including the Supreme Court, have developed caselaw interpreting the broader doctrines to be met when seeking such an equitable remedy in federal court. Shouldn't state law be relevant to that determination if the federal court's jurisdiction hinges on diversity? But it is relevant through application of the federal factors, and this respect for state substantive law strikes a proper balance. The federal court would look to Rule 65 and federal precedent such as *eBay*, but when considering one of the federal injunction factors—the likelihood of success on the merits—the federal court properly examines state law on the potential merits of the underlying state cause of action.

To the extent we determine that controversial uses of remedies need adjustment, federal rules must be able to reach and shape the behavior. Imagine we change Federal Rule 65 to combat the perceived rise and perhaps abuse of the so-called nationwide⁸⁶ injunction, as Sam Bray has proposed.⁸⁷ It is imperative that any federal court, whether the case arises under federal law or falls under diversity jurisdiction, would need to follow any new constraints. If instead the federal court completely deferred to state law on such standards as injunctions, then Congress's power to remedy federal court overreaching via remedies in federal cases would be undermined if not eliminated. Yet, Article III plainly intends extensive federal congressional authority over federal court power.

V. FEDERAL COURTS SITTING IN DIVERSITY HANDLING REMEDIES

The existing balance of powers is not broken. Maintaining the existing system is worth it even if some inconsistencies, some overreaching, and some gray areas persist. Such flaws suggest reforms should be moderate rather than radical. Of course, checks on power remain wise, but sufficient checks already exist. Litigants and their

remedy and redress for disregard or infraction of them" and noting that congressionally proscribed rules must conform to the power granted by the Rules Enabling Act).

84. *See id.* at 473 ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.").

85. *Id.*

86. The nationwide label is a misnomer. *See, e.g.,* Howard Wasserman, "Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate: On the Scope of Injunctions in Constitutional Litigation, 22 LEWIS & CLARK L. REV. 335 (2018).

87. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

lawyers help ensure proper consideration of relevant state doctrines. Federal appellate courts provide opportunities to review the appropriate balance between federal and state law. Another formidable way to alter the balance are the Federal Rules of Civil Procedure and any necessary amendments.

Federal courts sitting in diversity generally do and should apply federal equitable remedies standards. For example, take a request for a preliminary injunction in federal court considering a state law claim under diversity jurisdiction. The federal standards for preliminary injunctions should apply.⁸⁸ Of course, there are federal courts sitting in diversity that have not looked to federal standards when determining equitable remedies.⁸⁹

Consider a few examples showing how federal courts sitting in diversity or evaluating supplemental state-based claims regularly and effectively balance federal procedure with state substantive law. The cases may reflect imperfection in citation choices, but overall, federal courts generally achieve a healthy balance of honoring *Erie*, developing federal equity under *Guaranty Trust*, and respecting state prerogatives when approaching substance.

For example, a federal district court evaluating a request for a preliminary injunction, sought to balance Florida state law on contracts with federal standards for injunctive relief.⁹⁰ Regarding the preliminary

88. See David E. Shipley, *The Preliminary Injunction Standard in Diversity: A Typical Unguided Erie Choice*, 50 GA. L. REV. 1169 (2016); see also Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011); DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES—CASES & MATERIALS 125 Comment 4 (9th ed. 2018).

89. See, e.g., *Charles Simkin & Sons v. Massiah*, 289 F.2d 26 (3d Cir. 1961) (plaintiff sought injunctive relief, essentially “equitable replevin,” to get equipment returned, yet judge cited only New Jersey state-court opinions on the remedy standards); see also RENDLEMAN & ROBERTS, *supra* note 88, at 1181–83. On the concept of injunctive relief as equitable replevin, see Von Hecke, *Equitable Replevin*, 33 N.C. L. REV. 57 (1954).

90. *Fla. Panthers Hockey Club, Ltd. v. Miami Sports & Exhibition Auth.*, 939 F. Supp. 855 (S.D. Fla. 1996), *aff’d sub nom. Florida Panthers v. City of Miami*, 116 F.3d 1492 (11th Cir. 1997). The *Florida Panthers* case also included federal antitrust counts, though one of defendant moved to dismiss that count on immunity grounds and another defendant planned to file a motion to dismiss. *Id.* at 856 n.1. Based on the antitrust claims, Plaintiff asserted federal question as the basis for jurisdiction with supplemental jurisdiction over the state law breach of contract claim. Given the motion to dismiss, the federal court held the antitrust counts in abeyance and thus considered only the state law breach of contract claim when it considered Plaintiff’s request for a preliminary injunction. *Id.* Though “where the jurisdiction of the federal court depends on a federal statute, the evils which the *Erie* doctrine was designed to prevent are not present, and so the same need does not exist for requiring the federal court to follow state law.” *Exceptions to Erie*, *supra* note 17, at 970. Still, the principles of *Erie* loom over the supplemental state law claim. Regardless, the federal court’s injunctive relief discussion remains useful to see how the federal court honors state doctrines versus

injunction standard, the federal district court cited federal circuit and district court cases.⁹¹ This method stayed intact for both the burden and the elements of the injunctive relief sought. But as the court drifted toward the potential strength of the underlying claim,⁹² it cited Florida state court cases.⁹³ For the proposition raised by defendant that specific performance will not lie for personal service contracts, the federal court cited both a federal and a state case.⁹⁴ Perhaps the court simply cited both by virtue of defendant's pleading and to note that both federal and state law support defendant's assertion. The court reasoned, however, that the blackletter barrier was not applicable to the type of contract at issue. It determined that the equitable remedy of specific performance should be available where the underlying sports contract amounted to "a lease agreement" because "such an agreement may be subject to specific performance."⁹⁵ The court cited no case law for this determination, but opted to close the analysis on this point with a recognition of state law boundaries for the availability of specific performance for certain types of contractual obligations. The remainder of the court's analysis on the likelihood of

federal law where the cause of action at issue is a state-based contract claim seeking equitable remedies (preliminary injunction that would achieve specific performance of the contract). *See also* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 643 n.112 (citing *Arias v. Solis*, 754 F. Supp. 290 (E.D.N.Y. 1991); *Lewis v. Rahman*, 147 F. Supp. 2d 225 (S.D.N.Y. 2001)). In *Arias v. Solis*, the federal court, sitting diversity jurisdiction, approved court power to enforce negative covenant upon finding of uniqueness. *Arias*, 754 F. Supp. at 290. It cited to both state and federal cases. *Id.* at 293–95. The court relied solely on federal rules and federal cases to rule that plaintiff satisfied the proper amount-in-controversy for diversity jurisdiction; it did so without assessing comparative merits of substantive claims. *Id.* at 292–93. It relied on federal rules and federal cases for consideration of the requisite security bond for the injunction and determined the federal court maintained discretion in setting the amount. *Id.* at 295–96. Similarly, in *Lewis v. Rahman*, the federal court, sitting in diversity jurisdiction, equitably enforced negative employment covenant causing the boxer to put his career on hold for eighteen months. *Lewis*, 147 F. Supp. 2d at 225. The court cited to New York caselaw on contract liability, *id.* at 233–35, but it analyzed federal precedent on injunctive power and relief. *Id.* at 237–38. Interestingly, the court entertained defendant's citation to a New York case on lack of mutuality but concluded the doctrine was inapplicable. *Id.* at 237. Note that the citation of federal cases does not necessarily translate into reliance on federal principles. Often the citations are to federal cases that also sat in diversity jurisdiction and themselves included citation to state and federal precedents. This blended approach shows comity while also permitting federal courts to enunciate and interpret the boundaries of its equity power while cognizant of state maxims.

91. *Fla. Panthers*, 939 F. Supp. at 858–59 (citing cases from the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Florida).

92. The specific analysis falls under Part III.A of the court's opinion entitled, "Substantial Likelihood of Success on the Merits." *Id.* at 858.

93. *Id.*

94. *Id.*

95. *Id.*

success on the merits focused on the contract language at issue without citation to any caselaw.⁹⁶ For the other injunction factors, the court cites to federal case law.

Overall, the *Florida Panthers* court balanced its consideration of federal caselaw on equity standards with a nod to state law on contract law. It may be that the court did more than it needed to, given that the point for which it cited state law was also an equitable remedies doctrine related to specific performance. There is no Federal Rule of Civil Procedure on the point. Federal cases exist, and the court cited those as well as a state case.⁹⁷ This blend shows comity for the state's doctrines that touch on how the substance of contract law ties to equitable requests for relief like specific performance where the whole point is to order the defendant to do exactly what the contract promises.

Perhaps the *Florida Panthers* court would have been wise to cite only federal precedent on the basis that federal law governs not just federal procedure but also requests for equitable remedies per the *Erie* exception created by *Guaranty Trust*. Simply because federal courts have the power to develop federal equity does not mean that federal courts must toil in the interpretive field alone. Further, if the equitable remedy is closer to the ground—meaning closer to the underlying body of substantive state law—federal courts are wise to not ignore a robust body of law already developed by the state

This dynamic is likely true for the specific performance remedy for state law breach of contract claims. Federal doctrines of equity generally align with state doctrines of equity regarding the availability of specific performance. Alignment makes the absence of citation less problematic. Even in well developed areas of doctrine, however, variations can develop. For example, a federal court very familiar with the *eBay* line of cases might interpret the Court's reasoning to show general disdain for any presumed factors in the quest for any equitable remedies; meanwhile a state court might continue to presume uniqueness and irreparability for certain contracts like real estate.

How do federal judges handle choice of law regarding consideration of legal remedies in cases in federal court under diversity jurisdiction? Are the principles of *Erie* and its progeny frustrated when federal courts technically follow *Erie* by ultimately acknowledging the state's substantive law but provide an opinion filled with dicta on how the sitting federal judge would treat the remedy? In other words, what if the judge

96. *Id.* at 858–59.

97. *Id.* at 858.

uses the federal moment to signal and shift jurisprudence of the underlying state? A detour with now retired Judge Posner will show artful attempts in dicta to influence the state's substantive law. Are such signals permissible under *Erie*? Beyond the federal court's Article III power? If within the federal court's power, are such federal pockets of reasoning wise? At minimum these opinions raise federalism concerns.

Take *Mindgames, Inc. v. Western Publishing Co.*⁹⁸ Plaintiff Mindgames alleged that Defendant Western Publishing Company breached the contract for failing to promote Plaintiff's board game, *Clever Endeavor*.⁹⁹ Plaintiff sought expectancy damages in the form of anticipated royalties that would have flowed had Defendant not breached the contract.¹⁰⁰ The *Mindgames* contract included a choice of law clause in favor of Arkansas.¹⁰¹ Sitting in diversity, the federal district court relied upon a 1924 Arkansas case¹⁰² to rule that the new business rule barred plaintiff from recovering any lost profits thus dictating summary judgment for defendant.¹⁰³ Judge Posner, considering the appeal on behalf of the United States Court of Appeals for the Seventh Circuit, sidesteps Arkansas law and instead inserts his own views in order to propel the jurisprudence toward a standard rather than an outmoded rule that bars recovery to new businesses.¹⁰⁴

Judge Posner reasons that the Arkansas Supreme Court, if presented with the opportunity to review its 1924 precedent, would reconsider the prohibition and instead adopt a more lenient standard.¹⁰⁵ According to Judge Posner, "[t]hat is the best prediction in this case."¹⁰⁶ Judge Posner rejects the state of Arkansas's bright-line prohibition to recovery for all new businesses.¹⁰⁷ Instead, he endorses a more fluid standard that permits the recovery of lost profits for a new venture as long as the evidence is not unduly speculative.¹⁰⁸ Under the standard, he then determines that plaintiff failed to establish the reasonable degree of certainty required.¹⁰⁹

98. *Mindgames, Inc. v. Western Publishing Co.*, 218 F.3d 652 (7th Cir. 2000); see also RENDLEMAN & ROBERTS, *supra* note 88, at 820–27; Victor P. Goldberg, *The New Business Rule and Compensation for Lost Profits*, 1 CRITERION J. INNOVATION 341 (2016).

99. *Mindgames*, 218 F.3d at 653.

100. *Id.* at 654.

101. *Id.* at 653.

102. *Marvell Light & Ice Co. v. General Elec. Co.*, 259 S.W. 741 (Ark. 1924).

103. *Mindgames*, 218 F.3d at 655.

104. *Id.* at 656.

105. *Id.* at 658 ("Abrogation of the 'new business' rule does not produce a free-for-all.").

106. *Id.* at 656.

107. *Id.* at 658.

108. *Id.*

109. *Id.* at 659.

Plaintiff's lack of a track record establishes the speculative nature of proving lost royalties.¹¹⁰ Also, Judge Posner views Plaintiff as the least cost avoider in that it made no efforts to distribute the game by other means, which Judge Posner sees as "telling evidence of a lack of commercial promise unrelated to Western's conduct."¹¹¹ Ultimately, Plaintiff loses despite the more favorable standard that Judge Posner adopts.¹¹²

Judge Posner not only predicts what the Arkansas high court would do if it reexamined its precedent on the new business rule, but then also rules as a matter of law that Plaintiff fails to meet the freshly adopted standard of reasonable certainty. The dissenting judge called for a remand of the issue because the appellate court "cannot say on this record, as a matter of law, that Mindgames cannot prove to a reasonable certainty that Western's failures to perform, if proved, caused a loss of sales."¹¹³

Compare the judicial restraint showed by the federal district court judge in *Rhodes v. E.I. Du Pont De Nemours and Co.*¹¹⁴ Plaintiffs filed a class action seeking medical monitoring for fear of developing cancer after exposure to toxins but before succumbing to any disease or physical injury from the exposure.¹¹⁵ Judge Goodwin expresses explicit disdain for the relaxed substantive standards in West Virginia law regarding the remedy sought.¹¹⁶ He rules that Plaintiffs' medical monitoring claim survives because West Virginia law has recognized a cause of action to recover such costs if proven "necessary and reasonably certain to be incurred as a proximate result of the defendant's tortious conduct."¹¹⁷ But Judge Goodwin shows reasonable methods for registering skepticism

110. *Id.* at 658.

111. *Id.* at 659.

112. Goldberg, *supra* note 98, at 361 ("*MindGames* is a classic case of a plaintiff winning the battle but losing the war."). To add insult to injury, plaintiff's failure to seek nominal damages squandered its chance to receive an attorney fee award under Arkansas's prevailing party in a breach of contract action. *Id.* (citing *MindGames*, 218 F.3d at 654).

113. *Mindgames*, 218 F.3d at 660 (Fairchild, J., dissenting).

114. *Rhodes v. E.I. Du Pont De Nemours and Co.*, 657 F. Supp. 2d 751 (S.D. W. Va. 2009).

115. *Id.*

116. *See id.* at 775. Judge Goodwin traces the Supreme Court's developing jurisprudence on fear of cancer claims. He then cites and explains precedent contrary to West Virginia's despite a similar claim. He explains that the Michigan high court denied a relief for medical monitoring where plaintiffs alleged injuries were "wholly derivative of a possible, future injury rather than an actual, present injury." *Id.* (quoting *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 691 (2005)). Judge Goodwin appreciates the policy concern the Michigan court expressed regarding the alternative universe in which a limitless pool of plaintiffs arises. *Id.* He also cites scholarly works that support the Michigan approach and criticize West Virginia's stance. *Id.*

117. *Id.* at 773-74 (quoting *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999) (cleaned up)).

while following *Erie* by applying a state substantive rule that he deems dubious. He emphasizes the judicial binding within which he finds himself sitting in diversity jurisdiction: “I am bound to apply West Virginia substantive law in this diversity case.”¹¹⁸

In contrast, Judge Posner in *Mindgames* shows far less deference in content and tone. Judge Posner is more brazen in his approach: he again offers pages and pages of his federal circuit reasoning but in the final disposition notes the *Erie* constraint and offers that state law—albeit on different grounds—leads to the result he reaches. Could Judge Posner’s opinion in *Mindgames* be an aberration?

Consider Judge Posner again in two negligence cases involving attempts to recover purely economic losses: *Evra Corp. v. Swiss Bank Corp.*¹¹⁹ and *Rardin v. T & D Machine Handling, Inc.*¹²⁰ Most jurisdictions handle such a problem in one of two ways: either bar the claim under the common law economic loss rule¹²¹ or allow plaintiff to proceed to the jury if plaintiff can show defendant owed a special duty rendering plaintiff’s lost profits within the proximately caused harms¹²² pursuant to *Palsgraf*.¹²³ Judge Posner finds these traditional paths intellectually unsatisfying, so he offers a contractual path to resolve these non-contracts cases. Despite the lack of privity and lack of a breach of contract claim, Judge Posner uses the federal platform to lobby for curtailing these rippling waters¹²⁴ of injury by the more limiting contract

118. *Id.* at 775 (“Accordingly, I must apply the cause of action for medical monitoring recognized in *Bower*.”).

119. *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

120. *Rardin v. T & D Machine Handling, Inc.*, 890 F.2d 24 (7th Cir. 1989).

121. *See, e.g.*, *Local Joint Exec. Bd., Culinary Workers Union v. Stern*, 651 P.2d 637, 638 (Nev. 1982) (applying the “well established common law rule” to bar recovery in negligence for purely economic loss “absent privity of contract or an injury to person or property”); *Trans-Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex. App. 2002). *Cf.* *Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Co.*, 110 So.3d 399 (Fla. 2013) (limiting economic loss rule’s application to application only in the products liability context).

122. *See, e.g.*, *J’aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979) (rejecting common law economic loss rule in favor of tort duty and foreseeability analysis); *Aikens v. Debow*, 541 S.E.2d 576 (W. Va. 2000); *E. Steel Constr., Inc. v. City of Salem*, 549 S.E.2d 266 (W. Va. 2001).

123. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

124. *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969):

While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

See also RENDLEMAN & ROBERTS, *supra* note 88, at 703–04 (quoting the same and exploring the justifications for the common law bar to recovery of purely economic losses in negligence).

principles of *Hadley*¹²⁵ foreseeability. Once under a *Hadley* frame, plaintiff will not have communicated with defendant the prospect of consequential damages at the time of contracting because plaintiff did not enter into a contract with defendant. Accordingly, Judge Posner distills the *Hadley*-based analysis down to who is the least cost avoider. Then, to not much surprise, he finds that plaintiffs in both of the cases were in a better position at the front to prevent the losses suffered.¹²⁶

All the while, Judge Posner skips over any state law precedent, offers a new standard, and analyzes the facts under the new standard to reach his preferred conclusion. The lower federal court in the *Evra* case followed Illinois state law and entered judgment for the plaintiff for the economic losses proximately caused by the defendant.¹²⁷ After examining a choice of law issue between Illinois and Switzerland, the federal trial judge in a bench trial determined that Plaintiff satisfied Illinois negligence law for recovery of its lost profits in the amount of \$2.1 million plus attorney fees.¹²⁸ In the appellate proceeding, Judge Posner leaves open the choice of law question as unnecessary because he views the recovery of Plaintiff's lost profits unattainable under Illinois law. But as soon as Judge Posner begins on the merits of the claim, he cites a non-Illinois case and a non-contracts case: *Hadley*.¹²⁹ Judge Posner later cites Illinois cases, but they are contracts cases and he uses them to show Illinois approval of *Hadley*.¹³⁰ He does not show Illinois rejection of the negligence cases and doctrines cited by the lower court. On the merits, Judge Posner reverses Plaintiff's lost profits recovery. He does not return to a consideration of state law or any real assessment of the district court judge's reasoning under tort law. Instead, Judge Posner confidently concludes that the matter is clear under the principles he analyzed as framed under *Hadley*. He does not mention *Erie*; presumably he may have assumed his citation of Illinois contract cases showed all the deference state law required. For Judge Posner, Plaintiff's award of lost profits is a clear-cut loser: "We could remand for new findings based on the proper legal standard, but it is unnecessary to do so. The undisputed facts, recited in this opinion, show

125. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Exch. 1854).

126. *Evra*, 673 F.2d at 957; *Rardin*, 890 F.2d at 28.

127. *Evra Corp. v. Swiss Bank Corp.*, 522 F. Supp. 820 (N.D. Ill. 1981) (awarding lost profits caused by defendant's negligence in failing to wire money in timely fashion), *aff'd in part, vacated in part, rev'd in part*, 673 F.2d 951 (7th Cir. 1982).

128. *Id.*

129. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Exch. 1854).

130. *Evra*, 673 F.2d at 956.

as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank.”¹³¹

In *Rardin*, Judge Posner doubles down on his *Hadley* contractual pathway into negligence claims for pure economic losses. Plaintiff in *Rardin* was less fortunate than in *Evra*: Plaintiff lost in the lower court. On appeal, Judge Posner once again explores *Hadley* at length and then reinforces his reasoning and ruling from *Evra*. He begins with citation to federal cases, but eventually reaches Illinois caselaw. Fortunately, this time he cites to tort cases on point that stand in favor of the common law economic loss rule, which creates a barrier to recover for purely economic loss cases.¹³² At minimum, he could have saved all the dicta on his preference for contractual limitations for torts in the commercial context.

Ultimately, Judge Posner stops just short of ignoring state law doctrine. At the close of *Rardin*, Judge Posner gives a nod to the substance of state law regarding the remedial doctrine.¹³³ He shows a modicum of restraint in acknowledging that it is the job of the Supreme Court of Illinois rather than the Seventh Circuit to resolve the regrettable state of the law: “[T]hat is a task for the Supreme Court of Illinois rather than for us in this diversity case governed by Illinois law.”¹³⁴ But Judge Posner is resourceful in the end. He finds a way to reach the same result he seeks—to foreclose Plaintiff’s opportunity for recovery of pure economic loss for a negligence claim in a commercial setting: “It is enough for us that Illinois law does not permit a tort suit for profits lost as the result of the failure to complete a commercial undertaking.”¹³⁵ Judge Posner justifies his “protracted analysis” as “necessary to address the parties’ contentions,” even though the parties did not raise *Hadley* foreseeability as the standard to resolve the disputes. He offers that his contractual reasoning “underscores the desirability—perhaps urgency—of

131. *Id.* at 959. *Cf.* *Morin Bldg. Prods. v. Baystone Constr., Inc.*, 717 F.2d 413, 416–17 (7th Cir. 1983) (Posner, J.) (noting that diversity jurisdiction obligates the court to interpret Indiana’s common law of contracts and then, after much speculation on the proper contract interpretation of a satisfaction clause, deferentially declaring: “When in doubt on a difficult issue of state law, it is only prudent to defer to the view of the district judge, here an experienced Indiana lawyer who thought this the type of contract where the buyer cannot unreasonably withhold approval of the seller’s performance.”).

132. Judge Posner does not address that the plaintiff in question suffered injury to property. Plaintiff did not sue to recover that injury because Plaintiff settled with the party with which it held privity. The contract, however, contained a limit on liability against consequential damages. Accordingly, Plaintiff sued for pure lost profits from the negligent subcontractor with whom Plaintiff lacked privity.

133. *Rardin*, 890 F.2d at 30.

134. *Id.*

135. *Id.*

harmonizing the entire complex and confusing pattern of liability and nonliability for tortious conduct in contractual settings.”¹³⁶

Though Judge Posner ends the opinion with a pivot back to recognizing the *Erie* constraint of Illinois law, the damage is done. This assessment is true *even if* Judge Posner’s analysis is an improvement to traditional treatment of pure economic loss cases under tort law. The reason why it is damaging is not about the merits of the arguments he makes. Rather, it is whether the federal court has exceeded its authority by demonstrating a lack of respect for the state supreme court’s authority. Whatever the federal judge’s intellectual views, the reasoning must begin with a good-faith exploration of the existing state precedent on the remedies doctrine in question. Instead, Judge Posner charges directly into lengthy alternative analysis, and he leaves jurisprudential breadcrumbs for the next federal court sitting in diversity to consider the topic. By the time he hits his next opportunity to address a similar case, he is able to cite and discuss the prior Seventh Circuit case as if it is precedent, even though state law should have led the inquiry all along. No surprise that the federal court cites to *Rardin* and *Hadley* (including the least cost avoider) rather than *Palsgraf* or the common law economic loss bar.¹³⁷ Of course, the underlying states can reject the analysis or admonish Judge Posner for his attempts to alter treatment of such cases to a contractual rather than tortious plane, but any opportunity for dialogue must await a relevant case to reach the state high court.

Federal district courts are playing an increasingly important role in the development of common law.¹³⁸ One cannot expect to learn what the state of blackletter law is by examining and counting only state high court decisions.¹³⁹ Scholars lament the hollowing out of common law.¹⁴⁰ Meanwhile, law professors increasingly focus on public and specialized areas rather than core doctrinal areas of private law. As long as judges are honest about discussing state law precedential constraints and prerogatives, it is valuable to permit federal judges to develop equity. State precedents gather dust while more state-based claims arrive in

136. *Id.*

137. *Valenti v. Qualex, Inc.*, 970 F.2d 363 (7th Cir. 1992) (affirming summary judgment against pure economic loss claim brought for negligence handling of film processing).

138. Richard L. Revesz, *The Director’s Letter*, *Restatements and Diversity Jurisdiction*, 40 A.L.I. REP. No. 4 (Fall. 2018), at 1.

139. *Id.* at 3 (emphasizing that “simply counting how many state supreme courts adopted a particular rule will not do the trick”).

140. Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law* (Oct. 10, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261372 [<https://perma.cc/2TXR-NLLX>].

federal court pursuant to diversity jurisdiction, removal, and supplemental jurisdiction. Federal court interpretations of equity will be central to equity's success. Ideally, federal judges will exercise this power wisely.

But what if federal judges interpreting equity do so in a manner potentially inconsistent with state preferences? The *Erie* doctrine seeks to ensure uniformity. Yet, significant disformity exists.¹⁴¹ Uniformity is a worthy goal, but it is elusive across broad swaths of cases involving various remedies. Discretion may well cut against pure uniformity and equity inherently involves more judicial discretion. The import of *Erie* may be a reminder that our goal remains: treating like cases alike, especially as it translates to rights. Yet, *Guaranty Trust* carves out space for federal court development of equity and that development may not align with state doctrines. As discussed below, horizontal uniformity will exist if federal courts oversee federal equity, but some vertical disformity may arise.

As long as the federal judge is cognizant of the distinct treatment and provides principled reasoning for the federal path, disformity may be tolerable and worth it. Disformity may be palatable if it is just enough to give care to cases but not so much as to generate hyper-forum shopping. Is a gray area preferred or a blended approach?

VI. PARTICULAR PROBLEMS THAT FEDERAL COURTS FACE REGARDING REMEDIES

A. *Elusive Categorization Problems—Disgorgement and Hybrid Remedies*

What if a remedy fails to fit neat categorization? Certain remedies defy consistent categorization as equitable versus legal. For example, courts have treated disgorgement inconstantly. Sometimes the characterization is driven by statute. But other times, the remedy is attendant to a common-law, state-based claim. Some courts look to disgorgement's historical proximity to the equitable remedy of accounting.¹⁴² Yet, disgorgement of profits may tie more closely to legal

141. See, e.g., Bray, *Multiple Chancellors*, *supra* note 87, at 421 (“Our system already tolerates a substantial amount of legal disuniformity” by state courts and lower federal courts); Sharon K. Sandeen, *The Myth of Federal Uniformity in IP Law*, 24 J. INTELL. PROP. L. 277 (2017).

142. See, e.g., *Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015); *Roberts v. Sears, Roebuck & Co.*, 617 F.2d 460, 465 (7th Cir. 1980) (“Restitution for the disgorgement of unjust enrichment is an equitable remedy with no right to a trial by jury.”); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1054 (10th Cir. 2006) (disgorgement as equitable remedy for FDCA violation); *Castrol, Inc. v.*

restitution when used as a remedy for opportunistic breach of a contract and may warrant the constitutional right to a jury trial.¹⁴³ State law would govern liability issues and the requisite intent threshold, and the remedy under such a characterization. But if disgorgement is equitable, then a federal judge sitting in diversity can determine whether and how much to award. Is the question of whether a remedy is equitable or legal a matter of state or federal law?¹⁴⁴

What happens in cases where a federal court issues or approves a remedy that defies clear classification, or is otherwise novel, due to their hybrid nature? A couple examples include remedies in fear of cancer cases and remedies involving comprised chattels of fluctuating value. Like the Judge Posner examples, these cases often involve intense use of pontification and signaling, but ultimately apply state law on the right and the remedy. Though the remedy is sometimes undertheorized.

Fear of cancer cases are fraught with peril, even where liability lies. The conundrum arises because the more one reconceptualizes the harm, the more likely that remedies may flow to one class of borderline plaintiffs while another more serious class may arise later when the money runs dry.¹⁴⁵ In one perplexing case, a federal district judge reluctantly allowed a medical monitoring claim to survive without a showing of present physical injury.¹⁴⁶ The district judge, sitting in diversity jurisdiction, bristled at having to apply questionable state-law precedent.¹⁴⁷ Still, the court felt bound by *Erie* to permit the stretching substantive law,¹⁴⁸ which in turn opened up the avenue to the novel remedy of medical monitoring.

Pennzoil Quaker State Co., 169 F. Supp.2d 332 (D.N.J. 2001) (disgorgement as equitable under the Lanham Act); *Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784, 785, 789 (D.N.J. 1986).

143. See, e.g., *SEC v. Lipson*, 278 F.3d 656, 662–63 (7th Cir. 2002) (“Disgorgement is a form of restitution, as Judge Friendly noted . . . and restitution, as we have noted in several non-SEC cases, is both a legal and an equitable remedy.”); George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 *FORDHAM J. CORP. & FIN. L.* 1, 48 (2007) (maintaining disgorgement may be either equitable or legal). Cf. Robert M. Langer, John T. Morgan & David Belt, 12 *CONN. PRAC., UNFAIR TRADE PRACTICES* § 6.9 (2018) (exploring the complexity of categorizing disgorgement). Regarding the right to a jury trial for legal restitution generally, see *First Nat’l Bank of DeWitt v. Cruthis*, 203 S.W.3d 88 (Ark. 2005).

144. For example, if the claim is a state common law breach of contract, then state law should determine if request for legal versus equitable for the purposes of right to a jury trial. But, if the jury trial right exists, federal jury protocol would apply for empaneling the jury.

145. See *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 170–81 (2003) (Kennedy, J., concurring in part and dissenting in part).

146. *Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 776 (S.D. W. Va. 2009), *aff’d in part, dismissed in part*, 636 F.3d 88 (4th Cir. 2011).

147. *Id.* at 774–75 (detailing contrary precedent but noting what West Virginia law required per *Erie*).

148. *Id.* at 775 (“I am bound to apply West Virginia substantive law in this diversity case. [citing *Erie*]. Accordingly, I must apply the cause of action for medical monitoring recognized in *Bower*.”).

When exploring the remedy, plaintiffs and federal courts show the complexity of the hybrid remedy. Toxic tort claims for medical monitoring abound on the state and federal level.¹⁴⁹ Plaintiffs pursue varied remedies including legal monetary lump-sum awards,¹⁵⁰ injunctive orders,¹⁵¹ or hybrid requests for court involvement in funding or a voucher system.¹⁵²

A federal appellate court confronted a thorny remedies problem regarding the conversion of stocks.¹⁵³ Louisiana law governed the appropriate “measure of damages”¹⁵⁴ for this tort of conversion. The appellate court cited Louisiana law to resolve the matter,¹⁵⁵ but noted, pursuant to federal caselaw, that it must show “great deference . . . to a district judge’s interpretation of the law of his or her state.”¹⁵⁶ The typical conversion measure is the fair market value at the time and place of conversion, but this measure may well fall short when the property fluctuates in value, as this case shows. Ultimately, the federal appellate artfully interpreted the spirit of the Louisiana “elderly” and analogous cases to find remedial discretion, which enabled it to approve the district court’s novel solution: ordering the defendant to “procure and deliver” the quantity and type of stock wrongfully converted.¹⁵⁷ Maybe the court viewed it as a proxy for replevin (though the later property is not plaintiff’s original property)? New York would have solved the measurement issue by granting the tort victim the highest market value

149. See, e.g., Herbert L. Zarov, Sheila Finnegan, Craig A. Woods & Stephen J. Kane, *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 7 (2009); in the broader toxic tort context: George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227 (1993).

150. For an exploration of the variety of remedies employed to achieve medical monitoring, see Adam P. Joffe, *The Medical Monitoring Remedy: Ongoing Controversy and a Proposed Solution*, 84 CHI. KENT L. REV. 663, 664 (2009).

151. See D. Scott Aberson, *A Fifty-state Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WILLIAM MITCHELL L. REV. 1095 (2006).

152. Albeit in a state-court context, Plaintiff requested a unique remedy: “a court-supervised medical monitoring program funded by defendant;” the state supreme court found the claim not cognizable. *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 714–15 (Mich. 2005). See also *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984) (using a voucher technique).

153. *Trahan v. First Nat’l Bank of Ruston*, 690 F.2d 466 (5th Cir. 1982).

154. *Id.* at 466.

155. *Id.* at 467 (“In order to reach this conclusion, we must blow a little dust from some cases decided around the turn of the century.”).

156. *Id.* at 468, quoting *O’Toole v. N.Y. Life Ins. Co.*, 671 F.2d 913, 914 (5th Cir. 1982) (cleaned up).

157. *Id.* at 466, 468.

within a reasonable time after discovering the conversion.¹⁵⁸ The usual treatment may stem from the fact that Louisiana maintains a civil law system. Still, it is disconcerting that the question presented was how to properly measure legal damages for conversion, but the solution appeared reminiscent of equity. Would contempt have lied if defendant refused to deliver? If so, were there questions of federal equity power unconsidered? As the real facts unfolded, by the time Defendant transferred the stocks the price had vastly plummeted; the district judge agreed that the remedy failed and granted plaintiff's request for recovery of the earlier value, but the appellate court disagreed.¹⁵⁹ Maybe a restitution theory would best serve Plaintiff if Defendant wrongfully profited upon the initial conversion of plaintiff's security of stock?¹⁶⁰ But, under such an unjust enrichment claim, the court must again traverse the legal-equitable divide regarding a disgorgement of unjust gain remedy.

B. *Punitive Damages Attendant to Equitable Rulings*

For states that have abolished common-law punitive damages,¹⁶¹ a federal court sitting in diversity should not award punitive damages. Historically, the Court of Chancery did not issue punitive relief because it lacked the power: punitive damages exceeded equitable jurisdiction.¹⁶² Yet, since the merger of courts of equity with courts of law, "any civil court has the 'power' to impose punitive damages."¹⁶³ Perhaps as an unintended consequence, some courts considering purely equitable claims and remedies have imposed punitive damages under a notion of the court's obligation "to afford the plaintiff complete relief."¹⁶⁴ Vindicating plaintiff's claim as well as punishing and deterring tortious behavior may warrant a punitive award theoretically. But the standards for state law punitive claims are set by the state in question. Constitutional rights to a

158. *Ahles v. Aztec Enters., Inc.*, 502 N.Y.S.2d 821, 823 (App. Div. 1986); *Transcon. Oil Corp. v. Trenton Prods. Co.*, 560 F.2d 94 (2d Cir. 1977); RESTATEMENT (SECOND) OF TORTS § 927(1)(b) (AM. LAW INST. 1977); *see also* RENDLEMAN & ROBERTS, *supra* note 88, at 1051.

159. *Trahan v. First Nat'l Bank*, 720 F.2d 832, 834, *reh'g denied*, 724 F.2d 127 (5th Cir. 1983).

160. RENDLEMAN & ROBERTS, *supra* note 88, at 1051 Comment 4.

161. *Id.* at 1118 (listing Louisiana, Massachusetts, New Hampshire, and Washington as states that lack common-law punitive damages, and Nebraska as a state that constitutionally prohibits all punitive damages).

162. *Id.* at 168.

163. *Id.* at 399.

164. *Id.*; *see, e.g.*, *I.H.P. Corp. v. 210 Cent. Park S. Corp.*, 189 N.E.2d 812, 812–14 (N.Y. 1963) (approving the imposition of punitive damages as incidental to injunctive relief).

jury trial remain unless waived.¹⁶⁵ Federal courts that award punitives attendant to a state common-law claim of a state that does not authorize punitive damages¹⁶⁶ dishonor *Erie*, disrespect state preferences, and exceed historical federal equity power.

C. *Conflicts and Power Attendant to Contempt Relief*

The arena of contempt raises complex possibilities for conflict between federal and state strictures. For example, certain states such as California and Texas reject the collateral bar rule in criminal contempt. Imagine a diversity-jurisdiction defendant breaches a federal injunction, for example an injunction enforcing a covenant not to compete. In defendant's criminal contempt, would the collateral bar rule block the merits? One federal judge considered whether a state-court injunction would be sheltered by the collateral bar rule in federal habeas corpus and decided no.¹⁶⁷

A similar dilemma arises in a state like California that lacks compensatory contempt. Imagine a diversity-court defendant violates a federal injunction, would the federal judge follow federal compensatory contempt or send plaintiff to a second lawsuit for damages? Efficiency would be better served by permitting federal compensatory contempt. But would the federal court have the power? It fits within the federal judiciary's traditional equity power, but a federal judge would need to weigh if use of the power impinged too much on our federalism given California's contra prerogative.

VII. AN ANALOGY TO THE SUPREME COURT'S ORIGINAL JURISDICTION

Thorny issues of federalism are not unique to diversity jurisdiction cases grappling with the *Erie* doctrine. Valuable insights lie in examining other contexts in which federal courts face tension on choice-of-law grounds. A case of original jurisdiction before the United States Supreme Court sometimes raise tension between federal power and proper respect for state law doctrines.

165. *I.H.P. Corp.*, 189 N.E. at 812–14 (finding Defendants had waived their constitutional rights to a jury trial on punitive damages).

166. This statement would not apply to state statutory claims unless the statute fails to authorize punitive damages or the state is Nebraska where all punitive damages are prohibited.

167. *Pedini v. Bowles*, 940 F. Supp. 1020, 1022 (N.D. Tex. 1996); see also RENDLEMAN & ROBERTS, *supra* note 88, at 485.

For example, in *Kansas v. Nebraska*,¹⁶⁸ a case of original jurisdiction rather than diversity, the Supreme Court resolved a provocative remedies issue arising from one state's breach of an interstate water compact.¹⁶⁹ Though state disputes about water rights are generally mundane to observers not invested in the particular stakes, *Kansas v. Nebraska* is controversial and groundbreaking.¹⁷⁰ It also provides relevant considerations toward the delicate federal-state balance *Erie* seeks to foster.

The most controversial part of the majority's opinion is the award of partial disgorgement in addition to compensation for Nebraska's breach of the compact.¹⁷¹ Kansas alleged, and the Court agreed, that Nebraska knowingly breached by consciously disregarding Kansas's water rights under the compact.¹⁷² Justice Kagan, writing for the majority, endorsed the Special Master's ruling of \$1.8 million in partial disgorgement of Nebraska's ill-gotten gain—over and above an award for Kansas's \$3.7 million compensatory loss caused by Nebraska's rerouting of water allocated to Kansas.¹⁷³ Disgorgement of profits as a remedy for wrongdoing is not unprecedented, but as a remedy for a breach of compact or breach of contract is novel.¹⁷⁴

Justice Thomas wants the application of state contract law¹⁷⁵ to govern rather than the Court's vast equitable analysis of the Restatement. He asserts that prior cases followed state law rather than reaching toward

168. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015); see also Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1424–26 (2016) (examining the Supreme Court's disgorgement award in *Kansas v. Nebraska*, a breach of water compact case).

169. *Kansas*, 135 S. Ct. at 1049.

170. Roberts, *Supreme Disgorgement*, supra note 168 (analyzing the Court's reasoning and arguing for principled advancement of the law of restitution through the use of its disgorgement remedy for opportunistic breaches of contract from public to private settings).

171. *Kansas*, 135 S. Ct. at 1046, 1059 (granting partial disgorgement of \$1.8 million in addition to compensatory damages; Nebraska had conceded breach and compensatory harm in the amount of \$3.7 million for Kansas's losses).

172. *Id.* at 1051.

173. *Id.*

174. Caprice Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991, 1026 (2009); Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131, 134 (2008). Dissenting opinions in *Kansas* quoted my work regarding the novelty of the remedy to contract law. *Kansas*, 135 S. Ct. at 1064 (Scalia, J., concurring in part and dissenting in part) (criticizing the Court for exceeding its equitable powers by following the *Restatement (Third) of Restitution and Unjust Enrichment* and creating a “novel extension” of the law that finds little if any support in case law”); *id.* at 1064–69 (Scalia, J., concurring in part and dissenting in part) (accord).

175. If state law did govern, the Court would need to resolve choice of law questions regarding which state's law should control. Three states were signatories of the original compact. A choice of law clause would dictate the determination, if present in the compacts.

equitable powers to fill gaps in the law. Justice Thomas's dissent repeatedly emphasizes the importance of honoring state substantive law, as a matter of respect for federalism principles and state sovereignty.¹⁷⁶

The purpose of the American Law Institute's Restatement of the Law, upon its founding, was to clarify doctrinal uncertainties by pronouncing leading blackletter law.¹⁷⁷ The organization has a broader mission today: "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law."¹⁷⁸ Of course, it continues to enunciate a clear vision of general common law in the subject area.¹⁷⁹

The *Kansas* majority opinion answers the critique: "Far from claiming the power to alter a compact to fit our own views of fairness, we insist only upon broad remedial authority to enforce the Compact's terms and deter future violations."¹⁸⁰

So, although *Kansas v. Nebraska* is not a diversity jurisdiction case, the tension between equity power and state sovereignty over the development and application of state law doctrines is palpable. There is much we can learn from the discussion so that in future cases we can strike the ideal balance of power vis-à-vis federal courts and state law. Ideally, the Court could exercise its broad remedial equity power while also showing a modicum of comity toward state law prerogatives regarding remedy.

This article affirms that federal courts possess power to apply federal procedure for equity but should exercise that power wisely and with restraint. Namely, federal courts should use comity toward state variances especially where outcome determinative. If the federal court wishes to exercise equity power, plaintiff must still establish violation of the underlying right.

176. *Kansas*, 135 S. Ct. at 1066–67 (Thomas, J., concurring in part and dissenting in part) ("Authority over water is a core attribute of state sovereignty, and '[f]ederal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States.'") (quoting his own concurrence in *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995)).

177. A.L.I., *About ALI*, <https://www.ali.org/about-ali/> [<https://perma.cc/CX5N-XREG>] (last visited Feb. 1, 2019) ("The Committee recommended that the first undertaking should address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was. The formulation of such a restatement thus became ALI's first endeavor."). *But cf.* *Kansas*, 135 S. Ct. at 1064 (Scalia, J., concurring in part and dissenting in part) (criticizing the American Law Institute for departing from descriptions of the status of blackletter law in favor of opting "instead to set forth their aspirations for what the law ought to be").

178. THE AMERICAN LAW INSTITUTE, *supra* note 177.

179. *Id.*

180. *Kansas*, 135 S. Ct. at 1053 n.4.

VIII. BENEFITS OF FEDERAL DEVELOPMENT OF EQUITABLE REMEDIES AND DEFENSES

A. *System of Equity*¹⁸¹

Equity is discrete and valuable, historically and conceptionally.¹⁸² Important principles of equity exist within federal precedents. Equity power has a rich history in the federal judiciary; a history worth remembering and revisiting. Federal judges should continue to resolve vexing questions regarding how to craft equitable remedies and when to apply equitable defenses. This article maintains they should do so whether the claim is based on federal or state law. Federal equitable doctrines, remedies, and defenses are worth saving. Federal judges should exercise restraint as they oversee federal equity's development and refinement.

B. *Promotion of Uniformity*

To the extent that uniformity remains an important goal under *Erie* and beyond, maintaining federal court as an arbiter of proper equitable doctrine and scope will help serve uniformity. Of course, complete uniformity will remain elusive. For example, a state court hearing an identical state-based claim may deny an equitable remedy that a federal court sitting in diversity might have granted, and vice versa. Although perfect uniformity is not attainable, development of federal equity will promote horizontal equity across the federal system whether the claim is based on federal or state law. For state-based claims, the substance still depends on the state law's requirements.¹⁸³ The contours of the application of equitable remedies and defenses, however, would rest with

181. Bray, *The System of Equitable Remedies*, *supra* note 59.

182. *Id.*

183. If a state statute dictates or prohibits an equitable remedy for a state statutory claim, it raises a more striking conflict for a federal court to disregard state explicit prerogatives. Again, the federal court would need to keep apprised of the letter of state law and ensure that the substantive claim is proven before any federal equitable remedy could lie. By comparison, a federal court maintains equitable discretion to grant or deny relief unless a federal statute clearly and explicitly forecloses that discretion. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (ruling that the federal judiciary maintained the authority to deny injunctive relief despite violation of a federal statute by the U.S. government's failure to obtain a permit for military test-bombing near Viéques Island off the coast of Puerto Rico). Importantly, in the federal system, Congress has the power to curtail federal court jurisdiction including narrowing available remedies. *See* U.S. CONST. art. III, § 1. State legislatures have the power to curtail state court jurisdiction, but do not possess such direct authority over federal court power. What happens if a state deems its law substantive rather than procedural? *See* Kermit Roosevelt III & Bethan R. Jones, *Adrift on Erie: Characterizing Forum Selection Clauses*, 52 AKRON L. REV. 295 (2019) (maintaining every sovereign has the power to determine whether its laws are substantive or procedural).

the discretion of the federal judge bounded by federal equity doctrines and precedent. Federal judges will help shape and refine federal equity principles through enunciated reasoning.¹⁸⁴ That reasoning will sharpen from within federal courts and may influence state court determinations if a state court seeks guidance.

C. *Accountability*

Accountability is key. Federal judges have life tenure, but accountability in decision making remains through reputation, public opinion, and the appellate process. Judges are also bound by institutional constraints.¹⁸⁵ The more federal judges show their reasoning regarding equitable principles the better. Brooding, mystical equity has no place in modern law. Well-defined equitable doctrines and boundaries are in high demand. Litigants and their counsel will help guide federal court development. The appellate process will foster further refinement. Scholarly attention to this field will aid maintenance of a healthy system of federal equity.

D. *Bounded Discretion*

Discretion is at the heart of equity power. It is also the Achilles' heel. Discretion, if abused, will cause equity's demise. Judges must use restraint in the exercise of discretion to help maintain this important power. Restraint includes enunciating equity's principles more explicitly and following them unless there are valid reasons to refine the doctrine. It also includes recognizing the historical roots of equity jurisdiction authorizing federal courts to act in person on defendants in extraordinary ways. With each application of equity, the court must examine the breadth and depth of the scope of the remedy or defense. The broader the stroke, the more vulnerable to scrutiny the federal judiciary will be. Such power may be appropriate, but receptivity will depend on proof of the violated right as well as the federal equity precedent for the application.

184. This is an argument in favor of increasing judicial articulation of "reasoned elaboration." HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 143–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (theorizing that judges must demonstrate "reasoned elaboration" in opinion writing); see also Roberts, *Supreme Disgorgement*, *supra* note 168, at 1437, 1440.

185. Ronald Dworkin, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 254–58 (1978) (suggesting a certain kind of bounding through a coherent jurisprudence in that judges should decide cases with an eye toward crafting a coherent body of precedent); Stanley Fish, *Fish v. Fiss*, 36 *STAN. L. REV.* 1325, 1343–44 (1984) (exploring a judge's duty to maintain continuity).

Of course, equity power historically has included flexibility.¹⁸⁶ This feature at its best is adaptability to new forms of wrongdoing that might go unremedied and undeterred if the court were to be overly strict about specific methods of wrongdoing.¹⁸⁷ At its worst, however, equity becomes a shapeshifter that appears manipulable well beyond the scope of the right. To exercise equity power wisely, federal courts must show awareness of these concerns as well as other potential risks of equity. Ultimately, federal judges must balance the benefits accordingly.

IX. COSTS OF FEDERAL EQUITY

Federal development of equitable doctrines should continue. Still, there are dangers inherent in this conclusion. Serious dangers include judicial overreaching and federal encroachments on state sovereignty. Additional concerns include risks of judicial rigidity of doctrine, which dovetails with the risk of exacerbating imperfect and fundamentally flawed rulings. Overall, with certain safeguards, the development of federal equity is worth the risks.

A. *Judicial Overreaching*

In developing remedies jurisprudence, federal judges may overreach. Important criticisms of nationwide injunctions exist.¹⁸⁸ Federal judges are at the heart of these controversies as the ones who sometimes are issuing injunctions benefitting nonparties. Note, however, that the national injunction cases arise under federal law,¹⁸⁹ so development of federal

186. See, e.g., *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) (describing how flexibility rather than rigidity has been the hallmark of equity).

187. GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS & TRUSTEES* § 471 Definition of Constructive Trusts (rev. ed. 1978) (“The court does not restrict itself by describing all the specific forms of inequitable holding which will move it to grant relief but rather reserves freedom to apply this remedy to whatever knavery human ingenuity can invent.”); see also DOBBS & ROBERTS, *supra* note 90, § 4.1(2); RENDLEMAN & ROBERTS, *supra* note 88, at 569–70.

188. See, e.g., Bray, *Multiple Chancellors*, *supra* note 59; Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. __ (forthcoming 2019); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Wasserman, *supra* note 86.

189. See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 at *2–*3 (W.D. Wash. Feb. 3, 2017) (granting an injunction blocking the United States from any enforcement of President Trump’s travel ban), *stay denied*, No. 17–35101, 2017 WL 526497 (9th Cir. Feb. 9, 2017) (per curiam); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (affirming a similarly broad injunction), *vacated*, 138 S. Ct. 377 (Mem.), *remanded to* 874 F.3d 1112 (9th Cir. 2017). President Trump altered the underlying executive proclamation, mooting cases pending before the Supreme Court. More broad

equity has costs beyond the federal-state balance that *Erie* struck. To the extent federal equity is engaging in tightening of equity through additional rigors, this danger is slight.

B. Federalism and State Sovereignty

Federal judges handling cases that include state law claims must remain aware of state law prerogatives. A remedy may not issue without the establishment of a proven right. For cases in diversity, this means that plaintiff must meet state law thresholds for the right, though standards for any equitable remedy derive primarily from the federal court's precedent.

This balance may be tricky with equitable remedies such as preliminary injunctions that precede full trials on the merits. For example, in such moments, federal procedure would govern the quantum of proof for the likelihood of success on the merits, and federal equity principles would govern whether access to the remedy ultimately should lie under the court's equity power. The assessment of the merits themselves, however, would still be on the underlying state law creating the substantive claim.

This may result in a plaintiff or defendant forum shopping. Parties forum shop for all sorts of reasons. Empirical works beyond the scope of this article may shed light on the level and motivations behind such choices. On whole, however, it is more likely that litigants prefer certain districts (or particular judges) within the federal system than litigants viewing the entire federal system as more or less lenient on remedies than the whole state system. Still, assuming that some litigants may seek a federal forum purely to get a more favorable reception for an equitable remedy (or defense), why shouldn't the issuing federal court—subject to appellate review within the federal system—control whether it will lend its equitable hand to securing the right at stake?

No doubt, allowing federal courts to continue to plow the fields of equity comes with risks. It is critical to be mindful of the risks and vigilant with critiques. For better or worse, federal opinions garner more visibility. This phenomenon will help ensure accountability and, ideally, course correction.

injunctions followed in this area and other arenas. The ultimate fate of this type of injunction is unknown.

C. *Risk of Rigidity*

In certain areas, the Supreme Court, in particular, has developed what may be overly rigid doctrines of equity. The Court may well be responding to perceived criticisms regarding the unmoored nature of equity. For example, if one views equity as subjective fairness, then there is a risk of favoritism and bias. A rational response is to show that *equity follows the law*.¹⁹⁰ This notion means both that equity can go nowhere without respecting the underlying right, but it also connotes that equity follows principles, doctrines, and precedent.

Accordingly, it makes sense that one who cares about restoration of respect for equity and equitable remedies might reinstate an overt formalism.¹⁹¹ This path appears to be Justice Thomas's approach to remedies and equity. It is commendable, although it may be imperfect and overly rigid in certain arenas. Dictating strict adherence to four-factor tests for preliminary or permanent injunctions may strangle lower federal court good-faith developments.

For example, the Supreme Court's accidental revolution with *eBay* struck a wise blow to unelucidated, categorial federal equity rulings. But it may have swung the pendulum too far the other direction by stifling the ability to have variation in accomplishing the same goals. In other words, lower federal courts may honor equity's overarching requirements for exercise of equity power, but they may execute equity in a variety of ways. This experimentation may remain necessary, especially across different substantive areas—pursuant to both state and federal law claims. For instance, there were historic reasons why injunctions sought in certain substantive areas were disfavored and garnered heightened burdens.¹⁹² There may also be valid reasons for sliding scales.¹⁹³

190. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA; ADAPTED FOR ALL THE STATES, AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE, Vol. I, § 363 (John Norton Pomeroy, Jr., ed., 4th ed. 1918) (detailing equity's maxims); *see also* RENDLEMAN & ROBERTS, *supra* note 88, at 425 (exploring the same).

191. *See* Ernest A. Young, *Erie as a Way of Life*, 52 AKRON L. REV. 193 (2019). (Professor Young eloquently defended *Erie*'s command and suggested a renewed interest in legal formalism.)

192. *See, e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc). The Supreme Court affirmed the decision without elucidation on the preliminary injunction standard. *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006).

193. *See, e.g.*, *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010) (applying a sliding-scale test); *cf. Salinger v. Colting*, 607 F.3d 68, 75 (2d Cir. 2010) (explaining the historical and policy rationale for presumptions and sliding scales in the Second Circuit, but declaring that the injunction standard of *eBay, Inc. v. MercExchange*, 547 U.S. 388, 390 (2006), extends to preliminary injunctions in the copyright context).

It remains unclear as to whether this type of alternative reasoning may persist post *eBay* and *Winter*. Justice Ginsburg maintains that the Supreme Court has not outlawed the use of such variations.¹⁹⁴ Her remarks came in dissent, though powerful on the need for flexibility in interpreting equity's standards to remain.¹⁹⁵ In a section aptly titled, "*Flexibility is a hallmark of equity jurisdiction[,]*" Justice Ginsburg explained that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."¹⁹⁶ Accordingly, the distinguishing characteristic is "[f]lexibility rather than rigidity."¹⁹⁷ In Justice Ginsburg's assessment, equity permits balancing considerations in varied ways:

Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high.¹⁹⁸

Justice Ginsburg's reasoning is compelling, but it has not garnered explicit adoption by the majority of the Court. Thus, the continued validity of variations remains unclear. The Court's explicit repetition of rote factors as the sole historical factors to be analyzed systematically causes a perception of extreme rigidity. Such rigidity may also stifle state court considerations.¹⁹⁹ The Supreme Court would be wise to reflect on overly rigid equity pronouncement so as not to foreclose avenues that foster valuable balancing between protection of rights and abuses of equity power.

194. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) ("This Court has never rejected that formulation, and I do not believe it does so today.")

195. *Id.*

196. *Id.* (emphasis added) (quoting *Weinberger*, 456 U.S. at 312); *Hecht Co.*, 321 U.S. at 329

197. *Id.* (quoting *Weinberger*, 456 U.S. at 312); *Hecht Co.*, 321 U.S. at 329.

198. *Id.* (emphasis added) (citing CHARLES ALAN WRIGHT, 11A FED. PRAC. & PROC.: FED. RULES OF CIV. PROC. § 2948.3 (West 2018)).

199. With respect to state court forums, note that there is a way to interpret federal law to allow states to apply their own procedure when an injunction sought in state court touches on federal law. Also, states remain free to apply their own procedures to requests for equitable remedies under state-based causes of action. *See, e.g.*, *InnoSys, Inc. v. Mercer*, 364 P.3d 1013, 1020 (Utah 2015). *Cf.* Morley, *supra* note 3, at 220 (maintaining state courts should have the authority to form its own equitable doctrines that apply "equally" in both state and federal court).

D. Risk of Imperfection

Just because federal courts have the power to develop equity jurisprudence for remedies, does not mean they will always get it right. For example, assume the Supreme Court develops federal principles for equitable remedies in flawed ways. The Court has imperfectly and rigidly declared the uniformity of the equitable test for preliminary and

permanent injunctions.²⁰⁰ It has slipped in other arenas as well including contempt,²⁰¹ disgorgement,²⁰² restitution,²⁰³ and more.²⁰⁴

200. See, e.g., Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 73, 76–77, 80 (2008); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 206–19 (2012) (examining multiple lower courts across the circuits that viewed *eBay* as altering traditional approaches). Federal courts are split on the extent to which they retain discretion to vary injunction standards. Compare *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (under federal question jurisdiction under the Copyright Act, the Second Circuit determines that it will follow *eBay* and *Winter* rather than its circuit precedent with long history of granting such preliminary injunctions to protect against copyright infringement), with *Citigroup Glob. Mkts*, 598 F.3d at 34 (in which the Second Circuit maintained a sliding scale methodology for injunction determinations).

201. The Supreme Court grappled with a tough issue over whether massive monetary contempt fines (\$52 million) amounted to criminal rather than civil coercive contempt. *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). The Court ruled the serious fines were criminal and thus required higher procedural standards. *Id.* at 824–38. This determination is defensible, and one would want to err on that side in the case of a close call. That said, a strange procedural wrinkle may demonstrate incomplete logic. The parties to the litigation had settled; the strike had ended and thus the behavior ceased. *Id.* at 825. The only contempt amount in question, the \$52 million, was an amount the circuit judge had ordered defendant to pay a non-party (certain counties and the Commonwealth of Virginia). The circuit judge had appointed a Special Commissioner, Bagwell, to collect the unpaid contempt amount. The Virginia intermediate appellate court accepted the parties' settlement and would have dismissed the whole matter, but the Virginia Supreme Court affirmed the contempt award in favor of Bagwell. This posture demonstrates why the Virginia Supreme Court should have vacated the fines upon the parties' requests, if indeed the contempt was civil, and why that court's insistence on keeping the fines to protect the court show the public purpose and therefore additional reasoning for determination that the fine was criminal. *Id.* at 847–48 (Ginsburg, J., concurring). Further, to what extent, should the case have continued up the chain to the Supreme Court if the only interest involved a nonparty? There are other worthy questions regarding federal court power to issue equitable relief that inures to the benefit of nonparties. Courts have also done similar maneuvers when routing part of punitive recoveries to state entities, though this result is usually by virtue of state statutes (Oregon for example).

202. Roberts, *supra* note 168, at 1431–35 & 1437–38 (criticizing the arbitrary and overcompensatory aspects of the Court's endorsement of the Special Master's determination of the amount of disgorgement and permitting its recovery along with compensatory damages). In the intellectual property area, the Supreme Court continues to spark controversy regarding the use, scope, and classification of disgorgement as legal versus equitable. See *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016) (interpreting statutory authorization to disgorge a design-patent infringer's "total profit."); see also Mark Gergen & Pamela Samuelson, *The Disgorgement Remedy of Design Patent Law*, 108 CALIF. L. REV. __ (forthcoming 2020) (articulating limits of causation and apportionment to define proper scope of the total-profits disgorgement remedy for fragmented designs in design patent law), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353536.

203. See John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great West*, 103 COLUM. L. REV. 1317 (2003); see also RENDLEMAN & ROBERTS, *supra* note 88, at 406–08.

204. For example, a possible regrettable course might be the hard shift away from a functional test of the legal or equitable nature of remedies sought, see, e.g., *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991); *Chauffeurs, Teamsters & Helpers, Local 391 v. Terry*, 494 U.S. 558, 572–80 (1990) (Brennan, J., concurring), to a much more historical emphasis in the

A stark example is *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*²⁰⁵ Justice Scalia held that a federal court lacked power to issue an asset freeze injunction²⁰⁶ because the court did not possess proper equity jurisdiction for this particular remedy historically.²⁰⁷ He reasoned that historic authority was lacking: “[T]he equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence.”²⁰⁸ This rigid view is overly constrained, as Justice Ginsburg’s dissenting opinion maintained.²⁰⁹ Justice Ginsburg asserted that federal equity jurisdiction is instead flexible and develops over time.²¹⁰ Absent a legislative prohibition, Justice Ginsburg argued that federal courts possessed the power to issue asset freeze injunctions.²¹¹ The *Erie* issue had not arisen in the lower federal court, and the Court declined to consider it on appeal.

Imperfections in classifications and reasoning may well continue. On balance, however, it is worth maintaining a federal system of equitable principles despite the risks. Ideally, a system that develops in a flexible yet principled fashion.

X. CONCLUSION

Federal equity power in fashioning remedies is worth maintaining. *Erie* generally dictates that federal courts sitting in diversity follow state substantive law. The Supreme Court also carved inartful inroads regarding equity. Such inroads established a pathway for federal courts to execute equity pursuant to traditional principles, even when resolving state substantive claims. The passage of time, the merger of law and equity, and fear of abuses endanger equity’s future. But equitable remedies and defenses, issued by federal courts sitting in diversity, remain vital to the protection of state-based rights pursued in federal court. Federal equity power cannot be boundless. Rather, federal courts must continue to

examination of the federal constitutional right to a jury trial, as implemented in *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998) (Thomas, J.).

205. *Grupo Mexicano de DeSarollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (5-4).

206. A preliminary injunction ordering a party not to dispose of assets pending adjudication.

207. *Id.* at 318–29. “We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.” *Id.* at 319.

208. *Id.* at 332. State courts, however, are not bound to follow the Court’s view of federal court power. *Scratch Golf Co. v. Dunes W. Residential Golf Prop., Inc.*, 603 S.E.2d 905 (S.C. 2004); *Grosshuesch v. Cramer*, 623 S.E.2d 833 (S.C. 2005).

209. *Grupo*, 527 U.S. at 333 (Ginsburg, J., dissenting).

210. *Id.* at 336 (Ginsburg, J., dissenting).

211. *Id.* at 342 (Ginsburg, J., dissenting).

develop and apply equity principles, but they must do so in a manner that demonstrates principled discretion in crafting remedies doctrines that balance the litigants, underlying rights, and state prerogatives. Federal judges must enunciate, clear reasoning to restore the best of equity's traditions of justice with an eye toward satisfying doctrinal requirements. If all that results is no more predictable than one Chancellor's foot, then federal courts will not have succeeded in this vital task. Instead, may equity continue to flourish with the wise exercise of federal judicial power and restraint.