FREEZE FRAME: THE SUPREME COURT'S REAFFIRMATION OF THE SUBSTANTIVE PRINCIPLES OF PRELIMINARY INJUNCTIONS

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Though described as a "drastic and extraordinary remedy", the preliminary injunction is all too frequently viewed as a simple case management device that should be used frequently by courts. In practice, however, preliminary injunctions can be terribly unfair to defendants. The plaintiff is essentially seeking most of what she ultimately wants in the litigation with having to prove her entitlement to it. The defendant is forced to defend against the merits of the plaintiff's claims at the earliest stages of a lawsuit when she still investigating potential defenses to them. The timing of the motion is determined by the plaintiff and the resulting expedited discovery, briefing and hearing schedule on the motion will mostly be dictated by the plaintiff as the moving party urging the need for expedition.

If the motion is granted, the plaintiff will invariably get even more than what she wants. Most preliminary injunction orders restrain conduct beyond that which is alleged to be unlawful. Court are receptive to requests to include prophylactic measures in the injunctive decree so that the defendant will steer far clear of harming the plaintiff. Even if a court does not intend to prohibit conduct other than that alleged to be unlawful, it is often difficult to draft precise language that enjoins only the challenged conduct. The defendant can thus be precluded from engaging in conduct that is entirely lawful.

A preliminary injunction is a platform for future threats of contempt against the defendant. Now that the plaintiff has much of what she wants, she has no desire to proceed expeditiously to trial and instead strives to exert pressure on the defendant to persuade her to settle the case. She will seek to portray the defendant as disrespectful of the court's authority. A restrained defendant will typically forego what is arguably lawful conduct to avoid the unpleasant situation of having to defend against a contempt motion.

Courts spend significant resources adjudicating preliminary injunction motions, which frequently require prolonged evidentiary hearings that approximate full trials. Yet for all the time, money and effort that can go into these proceedings, they generate very little return to anyone but the prevailing party. Although a ruling on a preliminary injunction motion can impact the public in significant ways, the decision provides little legal guidance since it expresses only a tentative rulings on the merits. The uncertainty of that merits ruling is compounded on appeal since the order qualifies for only the narrowest form of abuse-of-discretion review.

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In a series of decisions over the past five years, the Supreme Court has restored the preliminary injunction device to its rightful place as a drastic provisional remedy that should be sparingly granted. The Court has confirmed that temporary injunctions should not issue unless the moving party demonstrates, at a minimum, that she will likely prevail at trial and suffer irreparable harm. In so ruling, the Court rejected several approaches to interlocutory injunctions that have been adopted by federal circuit courts to permit a grant of a preliminary injunction in the absence of proof of probability of success or irreparable injury (or both). Many lower federal courts eliminated any irreparable injury requirement by conclusively presuming it in large swaths of cases; others watered down the success on the merits element by deeming it satisfied upon a showing that the plaintiff has some chance of prevailing.

The Supreme Court's mandate that likelihood of success and irreparable injury are indispensible elements of a substantive preliminary injunction standard that should apply in all cases, absent a contrary indication from Congress, is a reaffirmation of the holdings of the earliest federal courts from the Marshall Court era. The approach used now and then is the judicial equivalent of a freeze frame technique[1]--the court encapsulates and applies the principles of equity that prevailed in English chancery courts at the time of separation of the two countries. That static, historical conception of equity drives the substantive standards for deciding whether to grant injunctive relief.

The Supreme Court's freeze frame approach here is consistent with its Seventh Amendment jurisprudence, which freezes the distinction between law and equity as it existed when the Constitution was adopted and uses it as a baseline for determining civil jury trial rights. The Court also uses a freeze frame approach to the scope of federal courts' equitable jurisdiction. Thus, the types of remedies that are available in modern equity are those that were typically awarded by the pre-revolutionary English chancellor.

A static approach to preliminary injunctions is also consistent with legal developments that arose during the 20th Century. The *Erie* doctrine's sweeping pronouncement that federal courts should not be exercising general common law-making powers, and the post-*Cort v. Ash* gradual realization that courts should not be creating or implying judicial remedies either, militate against a dynamic approach to substantive equity law. Judicial modification of the substantive principles of equity, in the absence of congressional authorization, offends separation of powers principles that dictate a limited role for an unelected judiciary in a democratic society.

This article analyzes the Supreme Court's approach to the substantive law of preliminary injunctions and argues that it is well supported by its earliest decisions on the subject and consonant with its approaches in closely-related areas. Part I traces the history of equity in pre-revolutionary England to determine how the substantive law of equity developed and influenced

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[1] A "freeze frame" is cinematographic technique of using a single camera shot to give the illusion of a still photograph. The technique is used to enhance a particular scene or an important moment in the movie. An early example of use of the freeze frame technique in cinema was Frank Capra's classic film, *It's A Wonderful Life* (1946), where the first appearance of the adult George Bailey (played by James Stewart) on-screen is shown as a freeze frame. http://en.wikipedia.org/wiki/Freeze_frame_shot.

the early federal courts' Seventh Amendment jurisprudence, which encompasses a static and historically-based inquiry into the practices of 18th Century English Chancery Court as a guide for determining civil jury trial rights. Part II explores federal court decisions since the founding to determine how preliminary injunction law developed and crystallized into the firm concepts of likelihood of success and irreparable injury. Part III addresses academic scholarship produced over the past few decades that advocated changes to the substantive law of injunctive relief. It also summarizes trends among federal circuit courts of taking significantly new approaches to injunctions that reduced the importance of proving likelihood of success or irreparable injury.

Part IV a summarizes recent Supreme Court cases that have categorically rejected the modified approaches of federal circuit courts and reaffirmed the indispensability of likelihood of success and irreparable injury showings. Part V analyzes how the Supreme Court's reinvigorated approach to injunctions is consistent with its modern Seventh Amendment jurisprudence, and to its approach to the scope of equity jurisdiction conferred to federal courts under the Judiciary Act of 1789[2] and the availability of equitable injunctive relief. Part VI considers developments in the law that occurred well after Ratification that militate against a dynamic approaches to equity law, resulting in an increasing reluctance on the part of courts to make law or to expand remedies beyond those expressly created by Congress.

I. HISTORICAL DEVELOPMENT OF EQUITY

The Supreme Court has repeatedly emphasized that the hallmark of equity is its flexibility[3] and it is certainly true that equity arose precisely because of the inflexible nature of the British law courts. But a review of the history of English equity demonstrates that this aspect of flexibility—the freedom to resolve disputes by unbridled concepts of fairness or ethics—had, for the most part, ended by the time of the separation of the two countries. By then, equity courts had also eliminated the open-ended nature of its jurisdiction by imposing rigid requirements upon entrance to the halls of equity.

Indeed, shortly after ratification of the Constitution, during the first half of the 19th Century, English Parliament implemented sweeping reforms of its civil procedure code ended equity separate existence. First, English law courts were given full injunctive and other equitable

[2] The Judiciary Act of 1789, 1 Stat. 73.

[3] *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Grupo Mexicano*, 527 U.S. at 321 ("We do not question the proposition that equity is flexible"); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules; it depends on flexibility"); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("Flexibility rather than rigidity has distinguished [federal equity jurisdiction]."); *Seymour v. Freer*, 8 Wall. 202, 218, 19 L. Ed. 306 (1869) ("[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties.").

powers.[4] Then, equity courts were formally merged into law courts to form a unitary judicial system.[5]

A. The Development of English Chancery Practice

At the time equity arose in the 13th Century, English courts of law were rigidly attached to the writ system.[6] In order to proceed in a court of law, the plaintiff had to assert a claim for which there existed a specific writ, such as a writ of trespass, covenant or nuisance.[7] "The lawyer's primary job was to find an appropriate writ of course which fit the facts of the particular case and the lawyer's skill lay in drafting pleadings which satisfied, or attacked, the formal requirements of the most appropriate writ."[8] Common law justice thus depended on whether the plaintiff could legitimately plead a case meeting the rigid requirements of a particular writ.[9]

When a party sought to press claims that could not legitimately be plead under an existing writ, he petitioned the King's chancellor for special relief.[10] As the number of these petitions for the King's justice grew over the course of the 16th and 17th Centuries, the chancery came to function much like a court. Chancellors were trained lawyers and not simply religious figures as in the past,[11] and they employed formidable legal staffs to assist them in managing proceedings and ruling upon petitions.[12] They gradually developed regular procedures for presentation and determination of petitions and a substantive law of equity based on notions of ethics and fairness.[13]

At first, law courts co-existed comfortably with chancery courts, recognizing that chancery courts performed a unique and valuable judicial function.[14] In the 17th Century, the

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[4] The Common Law Procedure Act of 1854, 17 & 18 Vict., c. 125., §§ 74-86; *see* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 739 (1973); *see also* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 210-11 (5th ed. 1956).

[5] The Judicature Act of 1873, 36 & 37 Vict., c. 66, § 24; *see* Wolfram, *supra* note 9, at 739; Robert S. Thompson & John A. Sebert, Jr., REMEDIES: DAMAGES, EQUITY AND RESTITUTION, § 3.01, at 223 (2d ed. 1989).

[6] Owen Fiss, INJUNCTIONS 10 (1972).

[7] Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Standard*, 22-3 THE REVIEW OF LITIGATION 495, 501 (2003), available at http://www.ilnd.uscourts.gov/Judge/DENLOW/md_pim2.pdf.

[8] Thompson & Sebert, *supra* note 5, § 3.01, at 221. From time to time, the entire system would become calcified because the chancellor was prohibited from issuing new writs. Denlow, *supra* note 7, at 501. The chancellor was essentially a "prime minister or secretary of state for all departments" and, prior to the mid-17th Century, invariably a high ranking clergyman. Thompson & Sebert, *supra* note 5, § 3.01, at 220.

[9] Susan H. Black, A New Look at Preliminary Injunctions: Can Principles From the Past Offer Any Guidelines to Decisionmakers in the Future? 36 ALA. L. REV. 1, 3-4 (1984).

[10] Denlow, *supra* note 7, at 501. The King would be petitioned to "do good and dispense justice" and was expected to rule on petitions based solely on his own conscience. *Id*.

[11] *Id*.

[12] Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990).

[13] Fiss, *supra* note 6, at 11-12. Among the equitable doctrines that were included in that fledgling jurisprudence were the doctrines of unclean hands, estoppel and laches. Thompson & Sebert, *supra* note 5, at 222.

[14] Laycock, *supra* note 12, at 699.

peaceful co-existence began to deteriorate. Law courts accused chancery courts of interfering in law matters and jurisdictional jealousies developed.[15]

The monarchy eventually intervened to resolve the friction and equity was forced to respect the boundaries of common law system. From henceforth, equity courts would have to decline jurisdiction where the claimant had an adequate remedy in the law courts.[16] Thus, was born a cardinal principle of equity.[17] Common law courts began dismantling the procedural barriers that restricted access to its adjudicative powers, and thus the jurisdiction of chancery courts grew even narrower.[18]

At the same time, the body of equitable jurisprudence became more developed, and it was increasingly required that a party proceeding in equity cite to pre-existing substantive law in support of a petition for relief, as opposed to simply putting forth unbounded notions of justice and fairness. As one leading treatise of the period described it:

> The mere want of a legal remedy does not create an equitable right or a remedy in equity. A court of equity will, in certain cases, supply a remedy, where, in consequence of the infirmity of legal process, there is neither a right nor a remedy at law, but only what the law in principle acknowledges to be a wrong.[19]

By the time we reach the critical benchmark period of separation, equity was no longer free to disregard the written law, or to provide remedies simply because a law court would not do so. Parties desiring to proceed in equity had to establish at the outset, a basis in substantive law for the exercise of equity.[20] Equity had become "a consistent and definite body of rules" with "no place for a vague and formless discretion" of chancellors.[21] As Blackstone observed, by the middle of the 18th century, English equity had developed into a precise legal system governed by

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[15] *Id*. at 700. Chancery courts frequently issued injunctions restraining proceedings that were pending before common law courts, much to the chagrin of law courts. *Id.*

[16] *Id*.; Black, *supra* note 9, at 4.

[17] Laycock, *supra* note 12, at 699; *Development of the Law—Injunction*, 78 HARV. L. REV. 997, 997 (1965).

[18] Thompson & Sebert, *supra* note 5, at 223.

[19] William W. Kerr, INJUNCTIONS IN EQUITY (1867) ("it does not follow that because in any particular instance there is no legal remedy, therefore there must be an equitable one, unless there be an equitable right").

[20] Black, *supra* note 9, at 5 (the principles of equitable jurisdiction became fixed); 1 W. Holdsworth, HISTORY OF ENGLISH LAW 82 (1956).

[21] Plucknett, *supra* note 4, at 692. None of this history is intended to suggest that flexibility no longer has any role to play in equity jurisprudence. To the contrary, flexibility still has a critical function to perform and that function can be gleaned from the very case the Supreme Court typically cites when it mentions that flexibility is a cardinal principle of equity. *Romero-Barcelo*, 456 U.S. at 312 (*quoting Hecht v. Bowles*, 321 U.S. 321, 329 (1944)); *Grupo Mexicano*, 527 U.S. at 336 (Ginsberg, J., dissenting) (*citing Hecht v. Bowles*, 321 U.S. at 329). In the *Hecht* decision, the Court expressly couples the concept of flexibility with the court's ability to "mould each decree to the necessities of the particular case." 321 U. S. at 329. A federal court has the flexibility to craft a decree to fit the specific needs of the case at hand. It can restrain and compel action and can condition the restraint or compulsion where appropriate.

rules and precedents no less than the courts of law.[22] Indeed, Alexander Hamilton relied upon the precisely-defined nature of that system to answer Anti-Federalist criticisms that newly-created federal equity courts would have unbridled discretion.[23]

B. The Static Approach to the Seventh Amendment

The relevance that English equity law would have on federal equity practice became apparent in early federal court decision construing the Seventh Amendment's Trial by Jury Clause.[24] In his 1812 circuit court decision in *United States v. Wonson,*[25] constitutional scholar and Supreme Court Justice Joseph Story declared that the term "common law" that appears in Seventh Amendment "is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence." [26] That the standard for determining civil jury trial rights would be 18th Century English common law practice, and not English practice as it thereafter evolved, was not expressly mandated by Justice Story's holding in *Wonson*, but was implicit in his selection of English law as the baseline. A dynamic incorporation of English jury trial practice would force upon the American people decisions made by members of a Parliament that they had no role in electing.[27]

In any event, that the Trial by Jury Clause would not dynamically conform to changes in English equity practice over time was confirmed in an 1832 circuit court decision by Justice Baldwin. In *Bains*, he stated that "the jurisprudence of England" that would be the "standard of reference" for Seventh Amendment questions would be "the rules and principles established in England before the revolution" or, at the latest, "at the adoption of the constitution."[28] Thus, the English law that would be examined in Seventh Amendment cases would be that which existed prior to 1789, the year of ratification.

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[22] 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 436 (1768); *see also id.* at 440 ("[I]f a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible.").

[23] The Federalist No. 78, p. 529 (J. Cooke ed. 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."); The Federalist No 83, at 569 & n. ("the principles by which [equitable] relief is governed are now reduced to a regular system."); *see also Missouri v. Jenkins*, 515 U.S. 70, 130 (1995) (Thomas, J., concurring) (Hamilton sought to narrow the expansive Anti-Federalist reading of inherent judicial equity power by demonstrating that the defined nature of the English and colonial equity system-with its specified claims and remedies-would continue to exist under the federal judiciary.")

[24] The Clause provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…" U.S. CONST., amend. 7. The clause was adopted to address concerns expressed by anti-federalists to the provision of Article III of the Constitution providing that "the trial of all Crimes … shall be by Jury." U.S. CONST., art III, § 2, cl. 3. Anti-federalists feared that the federal government would not be obliged to provide for trial by jury in civil proceedings and so the Trial by Jury Clause was adopted to dispel those concerns by ensuring jury trial rights in civil cases. Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 233 (2006) [hereafter "Amar, CONSTITUTION"].

[25] 28 F. Cas. 745 (C.C.D. Mass. 1812).

[26] *Id*. at 750.

[27] Wolfram, *supra* note 4, at 733, 734 n.284.

[28] *Bains v. The James and Catherine*, 2 F. Cas. 410, 418 (C.C.D. Pa 1832).

The Supreme Court in *Parsons*, in an opinion authored by Justice Story, adopted the English law approach to the Seventh Amendment and held that the right to jury trial should turn on whether the case is predicated on a legal right, as distinct from rights in equity or admiralty, as determined by English law.[29] Early federal courts also held that civil jury trial rights would also depend on the nature of the remedy being sought, so that even if the particular right asserted was legal, where the requested remedy was considered equitable and adjudicated in an English chancery court, then the suit could be decided without a jury.[30]

A historical approach, using British 18th Century jurisprudence as a baseline, is not mandated by the textual language of the Seventh Amendment or its legislative history.[31] The word "preserve" can certainly be read to suggest a frozen baseline as opposed to an evolving one, and the phrase "the common law" can naturally be read to connote a single reservoir of content.[32] However, the Amendment's text could also be interpreted as calling for a dynamic states' rights approach—*i.e.*, where the jury trial right to be "preserved" is the one existing under the law of the state in which the federal court sits.[33]

Scholars have noted that a state's rights reading of the Seventh Amendment is "best supported by the historical materials."[34] This reading finds support in the only Federalist Paper to address the issue of civil jury trial rights. In that writing, Alexander Hamilton described the proposed Trial by Jury Clause as providing that cases "in the federal courts should be tried by jury, if, in the State where the courts sat, that mode of trial would obtain in a similar case in the State courts."[35]

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[29] *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830) ("By common law, they meant … not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered").

[30] *Baker v. Biddle*, 2 F. Cas. 439, 445 (C.C.E.D. Pa. 1831) (Baldwin, J).

[31] Wolfram, *supra* note 4, at 734 ("Although it is obvious that the language of the amendment is compatible with the historical test, it hardly compels it."); *id*. at 721 ("The historical materials furnish very little justification for the historical test's reference to the English common law."); *see also id*. at 722 ("allusions to the common law of England can be found scattered in speeches or writings dealing with civil jury trial, but there is no solid reason to believe that the reference in any of them is other than casual").

[32] Stanton Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 450-51 (1999) (the inclusion of the definite article "the" before the term "common law" in the Seventh Amendment's Re-examination Clause necessarily references the common law of England—for "[w]hat other (singular) set of common-law reexamination rules was there?").

[33] Akhil Reed Amar, THE BILL OF RIGHTS 89 (1998) [hereafter "Amar, BILL"] (the word "preserved" can be construed similarly to its etymological cousin, the word "reserved" as used in the Tenth Amendment); Wolfram, *supra* note 4, at 732 n.275 ("The reference to "common law" in the text of the seventh amendment would be read to refer in an undifferentiated and general way to the "law" of the state in which the federal court sat. While the amendment's language would bear this reading, it certainly is forced.")

[34] See Amar, BILL, *supra* note 33, at 90; Wolfram, *supra* note 4, at 732 ("the test most frequently suggested during the ratification process for determining the application of a constitutional guarantee of civil jury trial would have required the federal courts to look to the jury trial practices of the state in which the court sat").

[35] THE FEDERALIST No. 83 (Alexander Hamilton); *see also* Amar, BILL, supra note 33, at 90 n.*. Other approaches to interpreting the Trial by Jury Clause have been proposed, but none of them square with the

In much the same way that designating English law as the baseline for determining civil jury trial rights virtually mandated the adoption of a static approach, a state law view of jury trial rights necessarily required a dynamic approach, where the right being "preserved" would change over time as the underlying state's jury trial laws evolved.[36] A static approach freezing each state's law as of the time of ratification was certainly feasible, but it would be unworkable for states admitted thereafter.[37] It would be both awkward and unfair to have federal courts in newly-admitted states following up-to-date state jury trial practices, while federal courts in the original states adhered to out-dated and superseded jury trial rules.[38]

Although a dynamic states' rights reading of the Trial by Jury Clause had merit, early federal courts were drawn to a static English law approach by the Judiciary Act of 1789, which was enacted contemporaneously by the same Congress that proposed the Seventh Amendment.[39] The Act has "always been considered, in relation to [the Constitution], as a contemporaneous exposition of the highest authority."[40] In a case considering the scope of admiralty jurisdiction conferred in the Judiciary Act, Justice Baldwin stated that the phrases "suits in admiralty", "suits in equity", and "suits at law", should be construed similarly for purposes of both the Seventh

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fundamental purpose of the Clause. For instance, it has been argued that the Clause was intended to give Congress the discretion to determine by statute which civil causes of action had to be tried by a jury. Krauss, *supra* note 32 at 479-83. Others have contended that the Clause should be construed in a functional matter, letting federal courts decide which civil claims are most suitable to resolution by lay juries. Wolfram, *supra* note 4, 746-47. Still others assert that the Clause should be interpreted as guaranteeing jury trial rights only for non-statutory claims, thus permitting Congress to eradicate the right by enacting a statutory claim that supersedes a common law one. *See* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1034 (1992) (advocating that the term "common law" as used in the Seventh Amendment be understood as referencing judge-made law, as opposed to a statutory enactment).

These proposed constructions all suffer from the same flaw. If anti-federalists demanded the Seventh Amendment to allay their concerns that the new federal government would eviscerate jury trial rights, why would they be satisfied with an amendment that leaves those rights completely to the discretion of one or more of the branches of that government, such as Congress or the federal judiciary?

[36] Wolfram, *supra* note 4, at 732.

[37] *Id*. (problems with a static state law approach to the Trial by Jury Clause become "insuperable").

[38] The federal Process Acts of 1789 and 1792 provided for a static conformity with certain state procedural laws. Under these acts, federal courts were required to follow procedures "now used or allowed" in the states wherein the federal courts sat. Act of Sept. 29, 1789,, c. 21 § 2, 1 Stat. 93; Act of May 8, 1792, c. 36, § 2, 1 Stat.275, 276. As a leading federal practice commentator has noted, the static conformity of these acts proved to be unworkable, forcing Congress repeatedly to intervene to incorporate newly enacted procedures of existing states and the procedures of newly admitted states. Charles A. Wright, LAW OF FEDERAL COURTS, § 61 at 424 (5th ed. 1994).

[39] The Judiciary Act of 1789, 1 Stat. 73, which created federal courts and regulated their jurisdiction, was among the first, and most significant, achievements of the first Congress and has enjoyed "quasi-constitutional status." Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); *see Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 594 (1875) ("the venerable Judiciary Act of 1789 was in some sort regarded as only less sacred than the Constitution").

[40] *Patton v. United States*, 281 U.S. 276, 301 (1930). The Supreme Court has touted the value of the Judiciary Act as an interpretative guide as to the meaning of the Constitution, ranking it as having equal authority to The Federalist Papers. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821); *Wisconsin v. Pelican Ins. Co*., 127 U.S. 265, 297 (1888) (the Judiciary Act "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning").

Amendment and the Judiciary Act, and specifically by reference to 18th Century English practice.[41]

Justice Story also viewed the two provisions as closely inter-related enactments establishing a single unitary framework. In construing the Trial by Jury Clause, he gave considerable weight to the provisions of the Judiciary Act consistently providing for trials in the federal courts (district, circuit and Supreme) for issues of fact in all cases, except cases in equity or admiralty.[42] Because the Judiciary Act took such pains to distinguish, for purposes of providing rights to jury trials, between actions at law, on the one hand, and actions in equity or admiralty, on the other, it made all the more sense that the Seventh Amendment's baseline would be the law of a jurisdiction that drew a similar distinction--the law of England.[43]

Accordingly, when it came time for early federal courts to determine the substantive standards for granting equitable relief, they were already looking to pre-separation English equity law as a source guide for ascertaining jury trial rights. It is not, therefore, surprising that they turned to English equity law to provide the standard for determining whether injunctive relief should be granted.

II. PRELIMINARY INJUNCTION JURISPRUDENCE

Once the Judiciary Act, like the Seventh Amendment, was deemed to incorporate English law on jury trial rights, it was only logical that English law would supply meaning to all other provisions of the Judiciary Act that pertained to equity. Thus, Section 16 of the Act, which provided actions in equity could not proceed if there were a "plain, adequate and complete" remedy at law, was held to preserve a standard that had been developed in pre-revolutionary England. As Justice Bushrod Washington, riding circuit, declared:

> The expressions …'plain, adequate and complete' … go no farther than to recognise and adopt the long and well established principles of the English court of chancery, upon the subject of the ordinary jurisdiction of a court of equity. Any other construction would unsettle those great land marks which

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[41] *Bains*, 2 F. Cas. at 419.

[42] *Parsons*, 28 U.S. at 447.

[43] Some states Pennsylvania, Delaware, and North Carolina did not distinguish between law, equity or admiralty for jury trial purposes, and others, New Hampshire, Connecticut and Massachusetts, had no separate chancery courts and thus had their common law courts conduct jury trials for admiralty and equity claims. THE FEDERALIST No. 83, at 565-67 (J. Cooke ed. 1961); *see Robinson v. Campbell*, 3 Wheat. 212, 221-223, 4 L. Ed. 372 (1818) ("In some states in the union, no court of chancery exists to administer equitable relief….A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction."). By contrast, incorporating English equity law into the Seventh Amendment was not an outright rejection of a states' rights approach. As Hamilton noted in his Federalist No. 83, the civil jury trial practices of four key states, New York, Virginia, South Carolina and Maryland, were predicated on the English law system. THE FEDERALIST No. 83, at 565-67 (J. Cooke ed. 1961); *see also* Wolfram, *supra* note 4, at 737 n.290 ("several state constitutional guarantees of jury trial referenced English common law or taking a static approach to jury trial rights).

> have hitherto separated the two jurisdictions of the common law and equity courts; and would introduce all that uncertainty which is usually attendant upon every new system.[44]

Perhaps the most authoritative commentator on equity jurisprudence in the early days of the Republic was Supreme Court Justice Joseph Story. His treatise on Equity Jurisprudence unequivocally states that the federal law of equity "is founded upon, coextensive with, and in most respects, conformable to, that of England."[45] Thus, 18th Century English law was viewed as not only the determinative guide to federal civil jury trial rights, but as the source of federal substantive equity law as well.

A. English Chancery Preliminary Injunction Standards

Although by the end of the 18th Century, English chancery courts had developed an extensive body of substantive principles to be applied in cases in equity, a few scholars have contended that, right up until shortly before England merged its chancery courts and common law courts into a single system, there were no established standards for preliminary injunctive relief in English chancery courts.[46] That is, these scholars dispute the Supreme Court's oft-repeated assertion that the substantive requirements for injunctive relief have a "background of several hundred years of history."[47]

In support of their view, these scholars cite William Kerr's influential 1867 treatise on injunctions, published precisely when the preliminary injunction was evolving from being primarily a tool for staying litigation in law courts to a device that could be used to restrain conduct *pendente lite* so that its legality could be adjudicated before its harmful effects were felt.[48] As one scholar explains, once the "injunction staying proceedings at law" began to "fad[e] from the scene,…generalization about preliminary injunctions became more plausible."[49]

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[44] *Harrison v. Rowan*, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819); *see also Mayer v. Foulkrod*, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) ("The only inquiry here must be, what are the principles, usages, and rules of courts of equity, as distinguished from courts of common law, and 'defined in that country, from which we derive our knowledge of those principles.'") (*quoting Robinson v. Campbell*, 3 Wheat. [16 U. S.] 212).

[45] Joseph Story, EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 57 at 50 (11th ed. 1873). This view is not surprising, given Story's views of both the Seventh Amendment and the Judiciary Act of 1789. *See supra* text accompanying notes 25-29 and 42-43.

[46] John Leubsdorf, *The Standard For Preliminary Injunctions*, 91 HARV. L. REV. 525, 532 (1978); Black, *supra* note 9, at 5; Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 126 (2001); Denlow, *supra* note 7, at 501.

[47] *Romero-Barcelo*, 456 U.S. at 312-13; *Hecht*, 321 U.S. at 32. Professor Leubsdorf, for instance, has opined that, as of the 18th Century, the "concept of a general rule applicable to all preliminary injunctions was still unborn." Leubsdorf, *supra* note 46, at 531.

[48] Lee, *supra* note 46, at 128 ("These early articulations of the [preliminary injunction's] goal of preserving the status quo were soon synthesized in William Kerr's influential treatise on the *Law and Practice of Injunctions in Equity*."); Leubsdorf, *supra* note 46, at 536.

[49] Leubsdorf, *supra* note 46, at 537.

Scholars have pointed to the following passage in the introductory section of Kerr's influential treatise as reflecting the first preliminary injunction standard:

> In interfering by interlocutory injunction, the Court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the mean time in statu quo.[50]

Scholars have suggested that this summary indicates that a showing of irreparable injury was not an essential element of a preliminary injunction.[51] The language can also be read to suggest that while the moving party must make some showing that her claim is potentially meritorious (i.e., "a substantial question to be tried"), she need not demonstrate that she is more likely than not to succeed on the merits.

A thorough review of the entire contents of Kerr's treatise, however, indicates that the above quotations are not an accurate and complete statement of the preliminary injunction standard that is referenced elsewhere in the treatise. Later sections of the treatise discuss the provisional remedy as it was applied by chancery courts in connection with specific claims. For example, a chapter dealing with common law rights states:

> The Court must, before disturbing any man's legal rights, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit.[52]

The chapter further provides that "a man who seeks the aid of the Court must be able to satisfy the Court that its interference is necessary to protect him from that species of injury which the Court calls irreparable, before the legal right can be established upon trial."[53]

Similarly, a section of the treatise dealing with trespass states:

> If the right at law is clear, and the breach of that right is clear, and serious damage is likely to arise to the plaintiff if the defendant is allowed to proceed

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[50] Kerr, *supra* note 19, at 12.

[51] Leubsdorf, *supra* note 46, at 537. Another passage in the introductory section of Kerr's treatise reads similarly:

> A man who comes to the Court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such questions can be disposed of.

Kerr, *supra* note 19, at 12.

[52] Kerr, *supra* note 19, at 197.

[53] *Id*. at 199.

> with what he is doing,…an injunction will be granted pending the trial of the right."[54]

The treatise has similar passages indicating that showings of both a likelihood of success on the merits and irreparable injury are required to obtain interlocutory injunctions in actions for waste,[55] nuisance[56] and breach of covenant.[57]

To be fair, there are also passages in these sections that can be read to suggest that neither a likelihood of success nor irreparable injury is required for temporary injunctive relief.[58] Thus, the best that can be said of the Kerr treatise is that, rather than setting forth a clear and definitive standard for obtaining a preliminary injunction in English chancery courts, the Kerr treatise describes some cases where chancery courts insisted upon proof of irreparable injury and likelihood of success and some where those elements were either not mentioned or deemed unnecessary. The treatise does not, therefore, conclusively demonstrate that the first preliminary injunction standard under English law did not require proof of either a likelihood of success or irreparable injury.

B. Early Federal Preliminary Injunction Standards

Whatever ambiguities may have existed regarding the actual preliminary injunction standard under 18th Century English law was not perceived by early federal jurists. The irreparable injury/inadequate remedy rule was applied in one of the Supreme Court's most noteworthy decisions of the Marshall Court Era: *Osborn v. Bank of the United States*.[59] The Supreme Court upheld an injunction that restrained a state official from taxing, in a repeated and confiscatory manner, a federal bank with the "avowed purpose of expelling the Bank from the State."[60] Chief Justice Marshall rejected the argument that the federal bank had an adequate remedy at law in the form of a trespass action for damages, reasoning that the bank sought

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[54] *Id.* at 295.

[55] *Id*. at 235 ("restraining waste by injunction is founded upon the equity of protecting property from irreparable injury"); *id*. at 237 (plaintiff is required to show a particular title).

[56] *Id*. at 337("The interference of the Court by interlocutory injunction being founded on the existence of the legal right, and having for its object the protection of property from irreparable injury pending the trial of the right, a man who comes to the Court for an injunction to restrain nuisance must be able to satisfy the Court that he has a good *prima facie* title to the right which he asserts and that there is danger of irreparable, or at least material, injury being done in the meantime….").

[57] *Id.* at 493 ("If the right at law under the covenant is clear or fairly made out, and the breach of it is clear or fairly made out, and serious injury is likely to arise from the breach, it is the duty of the Court to interfere before the hearing to restrain the breach.").

[58] *Id.* at 493 ("But if the right at law under the covenant is not clear, or is not fairly made out, or the breach of it is doubtful and no irreparable injury can arise to the plaintiff, pending the trial of the right, the case resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the plaintiff by its being withheld"); *see also id*. at 294.

[59] 22 U.S. 738 (1824).

[60] *Id*. at 840.

protection, "not from the casual trespass of an individual …, but from the total destruction of its franchis e, [and] of its chartered privileges".[61]

In Justice Story's eyes, the law as developed in England and transported to the United States via the Judiciary Act was quite definitive on the issue of interlocutory injunctions and the essential need to establish a likelihood of success (if not a greater showing) and irreparable injury. Citing English cases, Story's treatise declares that equity courts exercise "extreme caution" when considering temporary injunctions, given their "summary nature" and "liability for abuse",[62] and that they should be issued "only in very limited clear cases."[63] The treatise cites with approval the following language from an 1830 circuit court opinion by Supreme Court Justice Henry Baldwin:

> There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity that ought never to be extended, unless to cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction. But that will not be awarded in doubtful cases, or new ones, not coming within well-established principles….[64]

Justice Baldwin had applied this standard in a case involving an alien property owner's effort to enjoin a railroad from trespassing on his property to construct a road. Finding "thus far his case is made out and his right clear" and that "[n]o damages can restore him to his former condition", and citing numerous English chancery cases, Justice Baldwin preliminarily enjoined the construction on the grounds that the relief was "within the well established rules of courts of equity."[65]

Justice Baldwin's standard was adopted by the Supreme Court in its 1847 decision in *Truly v. Wanzer*.[66] The complainant had purchased two black slaves ten years prior to suit and had defaulted on the payment of one of the notes he had given to the slaveowner. He sought to enjoin enforcement of a judgment that had been obtained on the note and to rescind the purchase on the grounds that the seller lacked good title to the slaves and had violated Mississippi law by

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[61] *Id*. at 841-46.
[62] Story, *supra* note 45, § 959b at 172.
[63] *Id*.
[64] *Id*., n.1 (*citing Bonaparte v. Camden & Amboy Railroad Co.*, 3 F. Cas. (Baldw. 205) 821, 827 (C.C.D.N.J. 1830)).
[65] 3 F. Cas. at 833.
[66] 46 U.S. 141 (1847).

transporting the slaves into the state for purposes of sale.[67] The Court denied the petition, concluding that his case failed to meet the "free from doubt" standard.[68]

Another leading treatise on injunctions of this era is one by Harvard Law Professor James High, and covers the standards for injunctions in the early days of American jurisprudence.[69] The treatise reflects that most state courts insisted upon a showing of a probability of success on the merits and irreparable injury before issuing a preliminary injunctive relief. For instance, Professor High comments that courts will not issue temporary injunctions "without a probability that plaintiff may finally maintain his right"[70] and that where the case presents "a novel question of law or grave importance and serious difficulty, the injunction should be denied."[71]

In a section headed "Irreparable Injury Must Be Clearly Shown," he states:

> An injunction, being the "strong arm of equity," should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity….[H]e must also show some emergency or danger of loss requiring immediate action; and the danger must be clear and the right of plaintiff free from reasonable doubt to warrant the interposition of the court."[72]

Thus, whatever obscurity existed under actual 18th Century English equity law regarding the status of the likelihood of success or irreparable injury elements, 19th Century federal courts perceived that the law of equity that the Republic had inherited from her mother Country plainly required a showing of both a likelihood of success on the merits and irreparable injury for the granting of preliminary injunctive relief.

C. Twentieth Century Federal Standards

The substantive requirements for obtaining a preliminary injunction in federal court have never been codified. The only modern prescriptive guide to injunctive relief is Federal Rule of Civil Procedure 65, which authorizes federal courts to grant temporary injunctions in federal cases.[73] Rule 65 merely sets forth certain procedural requirements for obtaining interlocutory

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[67] *Id*. at 141.
[68] *Id*. at 142.
[69] James L. High, A TREATISE ON THE LAW OF INJUNCTIONS (4th ed. 1905).
[70] *Id*. § 4, at 9.
[71] *Id*. § 4 at 8. In a section entitled "Relief Not Granted When Legal Right is in Doubt", he further states:
The writ of injunction, being largely a preventative remedy, will not ordinarily be granted where the parties are in dispute concerning their legal rights, until the right is established at law. And if the right for which protection is sought is dependent upon disputed questions of law which have never been settled by the courts of the state, and concerning which there is an actual and existing dispute, equity will withhold relief until the questions of law have been determined by the proper courts.
Id. § 8, at 12-13.
[72] *Id.* § 22 at 20.
[73] Fed. R. Civ. P. 65.

injunctive relief and does not purport to specify the substantive prerequisites for obtaining the provisional remedy.[74] As the Supreme Court has noted, the substantive elements for attaining a preliminary injunction are simply those that were applied by the English chancery courts at the time of the adoption of the Constitution and the enactment of the Judiciary Act.[75]

1. Likelihood of Success

During the early 20th Century, federal courts continued to impose a likelihood of success requirement for preliminary injunctions, though they referred to it as a "clear right" or "free from doubt" standard. While these formulations arguably suggest that a plaintiff has to show more than a mere fifty-one percent chance of prevailing, they certainly establish that a plaintiff has to show it will more likely than not prevail.[76] The Supreme Court emphasized the rigorous nature of the standard in *Ex Parte Young*, seeking to deflect concerns that permitting private litigants to obtain injunctions against state officials based on an allegedly unconstitutional statute would bring forth a "great flood of litigation." The Court expressed confidence that lower federal courts would follow the rule that no injunction "ought to be granted unless in a case reasonably free from doubt".[77] Lower federal courts justified that confidence.[78]

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[74] 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2941, p. 31 (2d ed.1995) ("[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction."). The Rules Enabling Act, 28 U.S.C. § 2072, under which the Federal Rules were promulgated, specifically provides that the rules "shall not abridge, enlarge or modify any substantive right." *Id*. § 2072 (b). The Federal Rules have similarly been held to not have enlarged or diminished the class of cases for which there is right to trial by jury. *See* Wright, Miller & Kane, *supra*, § 2301; *see also Indiana Lumbermen's Mut. Ins. Co. v. Timberland Pallet & Lumber Co*., 195 F.3d 368 (8th Cir. 1999).

[75] *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U. S. 308, 318-19 (1999).

[76] The Supreme Court has never expressly held that a slightly more than fifty percent chance of success is not sufficient to obtain preliminary injunctive relief.

[77] 209 U.S. 123, 166-67 (1908); *Massachusetts State Grange v. Benton*, 272 U. S. 525, 528 (1926) ("no injunction ought to issue … unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury"); *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919).

[78] *Barker Painting Co. v. Brotherhood of Painters, Decorators and Paperhangers*, 15 F.2d 16, 18 (3d Cir. 1926) ("It is a principle long recognized that the power to grant the extraordinary remedy of injunction should be exercised by courts with great caution and applied only in very clear cases."); *Goldammer v. Fay*, 326 F.2d 268 (10th Cir. 1964) (injunction will not be awarded in doubtful cases, or new ones not coming within well established principles); *Sharp v. Lucky*, 266 F.2d 342, 343 (5th Cir. 1959) (*per curiam*) (injunction should be used "where both the right and the wrong claimed are clear"); *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941), *cert. denied*, 316 U.S. 691; *Coleman v. Aycock*, 304 F. Supp. 132, 140–141 (D. Miss.1969) (power to issue injunctions "should be exercised with great caution and only where the reason and necessity therefor are clearly established"); *Penn Central Co. v. Buckley & Co*., 293 F. Supp. 653, 658 (D.N.J.1968) (injunction should not be granted "unless the evidence satisfies the Court that the criteria for the granting of injunctive relief have been clearly disclosed by the proofs"), *aff'd*, 415 F.2d 762 (3d Cir. 1969); *Times Film Corp. v. City of Chicago* , 180 F. Supp. 843 (N. D. Ill.), *aff'd*, 272 F.2d 90 (7th Cir. 1959), *aff'd*, 365 U.S. 43 (1961); *Paramount Pictures Corp. v. Holden*, 166 F. Supp. 684 (S.D. Cal.1958).

The term "likelihood of success on the merits" has not always been free of ambiguity.[79] The Supreme Court may have engendered some confusion by using the term "possibilities of success" in one case.[80] But, in *Doran v. Salem Inc.*, the Court made it quite clear that "likelihood of success" was the appropriate phrasing for the standard and that it meant that the movant had to show that is more likely than not to succeed.[81] Describing the element in percentage terms tends to be unrealistic, since federal judges are typically unable to differentiate between fifty-percent and fifty-one percent chances of success. Nevertheless, the formulation is useful because courts can usually distinguish between cases where the plaintiff is likely to win at trial and those where it is a toss-up or where she is likely to lose.

2. Irreparable Injury

Federal courts in the early 20th Century continued to insist upon a showing of an imminent threat of substantial and irreparable injury.[82] The requirement of imminence had been developed in English cases to preclude interlocutory injunctions in cases that could be tried before the harm was expected to occur or where the court preferred to wait and see if an injury would be likely to occur.[83] The substantiality requirement was developed to insure that the plaintiff could prove an actionable injury-in-fact and was not seeking relief simply because of a psychic dissatisfaction that the defendant was not complying with a legal obligation.[84]

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[79] *Roland Machinery Corp. v. Dresser Indus., Inc*., 749 F.2d 380, 384 (7th Cir. 1984) (discussing the various iterations of the element and noting that many formulations imply that a less than fifty percent chance of success can be sufficient). Some courts have added to the confusion by adding modifiers, such as describing the element as a "substantial likelihood of success" or calling for a "strong" showing of likelihood. *See Walgreen Co. v. Hood*, 275 F.3d 475, 477(5th Cir. 2001) ("substantial likelihood"); *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001) ("substantial likelihood"); *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 n.3 (1st Cir. 2002) ("strong showing"). *See generally* Denlow, *supra* note 7, at 525 (discussing the various iterations).

[80] *Brown v. Chote*, 411 U.S. 452 (1973).

[81] 422 U.S. 922, 932 (1975); *see also Granny Good Foods Inc. v. Brotherhood of Teamsters & Auto Truck* Drivers, 415 U.S. 423, 441 (1974) (describing the element as "likelihood of success on the merits"). Most circuit courts recognize that "likelihood of success" means a greater than fifty percent chance of prevailing. *See* Denlow, *supra* note 7, at 525. The Second Circuit has recently intimated that the phrase "likelihood of success on the merits" does not necessarily entail a showing that the movant is more likely to prevail than not. *Citibank Global Mkts Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30, at 34-35, 37 (2d Cir. 2010). The court's reasoning, however, was disjointed. If "likelihood of success" does not require a plaintiff to show more than that the evidence is in equipoise, then there would be no reason for the court to defend its use of the concededly lower "serious questions going to the merits to make then fair grounds for litigation" standard. *Id*. at 35-38.

[82] *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919) (injunction must be shown to be necessary to prevent "great and irreparable injury"); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500 (1924) (injury must be "actual and immanent"); *Fenner v. Boykin*, 271 U.S. 240, 244 (1926) (requiring showing of "extraordinary circumstances, where the danger of irreparable loss is both great and immediate").

[83] Gene Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 391-92 (1983).

[84] *Id*. at 392; see *Consolidated Canal Co. v. Mesa Canal Co*., 177 U.S. 296, 302 (1900) ("it is familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling"); *State of Pennsylvania v. Wheeling & Belmont Bridge Co*., 13 How. 518, 561, 14 L. Ed 249; *Parker v. Winnipiseogee Lake Cotton & Woollen Co*., 2 Black 545, 551, 17 L. Ed. 333; *Enelow v. New York Life Ins. Co*., 293 U.S. 379 (1935).

Courts frequently associated the irreparability requirement with the immeasurability of damages.[85] The absence of available or reliable valuation data, thereby preventing the plaintiff from establishing projected losses with reasonable certainty, was frequently seen as a basis for deeming an injury to be irreparable.[86] Nevertheless, despite the general difficulty of monetizing losses in situations involving constitutional or statutory violations, the Supreme Court still insisted that irreparable injury be shown in each case.[87]

Whether irreparable injury and inadequacy of legal remedies are two separate elements or just two different ways of expressing the same concept has been debated.[88] Some commentators assert that they are distinct elements and that irreparable injury is broader since it considers non-remedial legal proceedings that can obviate or repair the alleged harm.[89] For example, where a plaintiff can assert the unconstitutionality of a state statute as a defense to a state criminal action, he will not suffer irreparable injury though defending a criminal proceeding is not a "remedy".[90] Irreparable injury also requires consideration of non-legal remedies. Indeed, in the preliminary injunction context, courts are required to consider whether a permanent injunction entered after trial would suffice to ameliorate the harm, even though that relief is equitable, not legal.[91]

In any event, the Supreme Court has recently confirmed that it considers the two phrases as representing distinct elements of the injunction standard.[92]

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[85] Development, *supra* note 17, at 1002-03.

[86] *Schmaltz v. York Mfg. Co*., 204 Pa. 1, 53 Atl. 522 (1902) (loss of business); *Underhill v. Schenck*, 238 N.Y. 7, 17-20 , 143 N.E. 773, 776-77 (1924) (unfair competition); *Harry R. Defler Corp. v. Kleeman*, 19 A.D.2d 396, 403, 243 N.Y.S.2d 930, 937 (1963) (misappropriation of trade secrets); *Dehydro, Inc. v. Tretolite Co*., 53 F.2d 273 (N.D. Okla. 1931) (infringement of intellectual property rights).

[87] *Doran,* 422 U.S. at 931 (plaintiff must show that it will suffer irreparable injury from constitutional violation); *Sampson v. Murray*, 415 U.S. 61 (1974); *Rondeau v. Mosinee Paper Corp*., 422 U.S. 49, 57 (1975) (even where federal statute provides that injunction "shall" issue for violations, plaintiff must still show irreparable harm and inadequacy of legal remedies); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.").

[88] *Roland*, 749 F.2d at 383.

[89] Shreve, *supra* note 83, at 392-94. *But see* Owen Fiss, THE CIVIL RIGHTS INJUNCTION 38 (1978) (the two phrases represent but one rule) [hereafter, "Fiss, CIVIL RIGHTS"].

[90] *See Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (finding no irreparable injury where plaintiff can raise his unconstitutionality in defense of the pending state criminal proceeding).

[91] Laycock, *supra* note 12, at 729 ("courts at the preliminary relief stage routinely find that damages will be an adequate remedy for injuries that would be considered irreparable after a full trial"). *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989) ("plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial"); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (same).

[92] *eBay Inc. v. MercExchange, Inc*., 547 U.S. 388, 391(2006); *see also Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987) ("In brief, the bases for injunctive relief are irreparable injury and inadequacy of legal remedies.")

3. Other Factors

In the early part of the 20th Century, the Supreme Court divined two additional elements for the standard. In a 1935 decision, the Court vacated an injunction that require a city to abate a nuisance, which consisted of a relatively harmless liquid discharge from a processing plant onto a plot of vacant land.[93] Remediating the discharge would have forced the city to incur significant expenditures at a time when it was virtually insolvent, and the impact on the vacant land from the discharge was negligible. In denying injunctive relief, the Court reasoned:

> [A]n injunction is not a remedy which issues as of course. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied….Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.[94]

A decade later in *Yakus v. United States*, the Court reiterated the need for a court, even where irreparable injury is shown, to balance the hardship to the plaintiff from a denial of relief against the hardship to the defendant from a grant, and to consider the public interest.[95]

4. Injunctive Relief Made Available Under a Federal Statute

In 1982, the Supreme Court determined that even upon a violation of a federal statute that expressly provides for the issuance of an injunction as a means of enforcement, the traditional prerequisites for obtaining injunctive relief still apply.[96] The Court observed that an injunction does not issue as a matter of course from the violation of a federal statute, and that, since the "days of the divided bench," the basis for injunctive relief "has always been irreparable injury and the inadequacy of legal remedies."[97] The Court concluded that imposition of those two elements reflects:

> a "practice with a background of several hundred years of history," a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles.[98]

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[93] *City v. Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co*., 289 U.S. 334, 336-37 (1933).

[94] *Id*. at 338.

[95] 321 U.S. 414, 440 (1944).

[96] *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). Congress is free to depart from established equitable principles but the departure must be explicitly authorized in the statutory text. *Id*. at 314.

[97] 456 U.S. at 312 (*citing Rondeau v. Mosinee Paper Corp*., 422 U.S. 49, 61 (1975); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959*); Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944)).

[98] *Id*. at 313 (*quoting Hecht Co. v. Bowles, supra*, at 329). Justice White wrote the opinion in *Romero-Barcelo* for an eight-Justice majority. Justice Stevens dissented on the ground that the environmental statute mandated the issuance of an injunction. *Id*. at 322 (Stevens, J. dissenting).

Several years later, the Court applied the same approach in the preliminary injunction context.[99] The Court held that a plaintiff seeking a preliminary injunction based on an alleged violation of a federal statute would have to prove the traditional elements for injunctive relief.[100]

III. MODIFICATIONS TO THE SUBSTANTIVE LAW OF INJUNCTIONS

Over the last quarter of the 20th Century, federal circuit courts modified the standards for obtaining preliminary and permanent injunctions. The changes either relaxed one of the elements of the standard or eliminated the element entirely. These changes, though well-intended and consistent with substantial scholarly criticism of traditional approaches to injunctive relief, were unfairly prejudicial to defendants and would frequently produce poor judicial decision-making.[101]

A. Academics Advocate Changes to Injunction Law

Several legal scholars made challenging observations regarding the traditional standards for awarding injunctive relief. Owen Fiss contended that the likelihood of success, irreparable injury and other prerequisites to obtaining an injunction, had improvidently relegated it to an inferior position to other legal remedies.[102] He argued that the subordination of the injunction to a money damages was unjustified and that the courts should simply leave the decision as to which remedy is superior to the plaintiff.[103]

Douglas Laycock went even further. He opined that the irreparable injury requirement served no purpose, particularly where liability is established, and thus should be discarded altogether.[104] He claimed that the element was usually manipulated by courts to mask the true reasons for their rulings on injunction requests—that courts "freely turn to the precedents granting injunctions or the precedents denying injunctions, depending on whether they want to hold the legal remedy adequate or inadequate."[105]

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[99] *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 541-44 (1987). Justice White's opinion on the preliminary injunction issues was on behalf of seven Justices. Justices Stevens and Scalia declined to join in that portion of Justice White's opinion, because they believed it was unnecessary. *Id*. at 556 (Stevens, J., concurring in part and in the judgment).

[100] *Id.* at 546 n.12 (*citing University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981)).

[101] *See supra* text accompanying notes 149-50.

[102] Fiss, CIVIL RIGHTS, *supra* note 89, at 1.

[103] *Id*. at 6. It has also been argued that defendants are unable to "behave efficiently" during the course of a litigation because they will always seek to take advantage of the fact that a plaintiff's claimed right, and a defendant's liability, are both uncertain. Thus, a preliminary injunction should be entered so that the potential "in terrorem" effect of a contempt citation will improve a defendant's behavior. Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 382 (2005). This argument, of course, ignores the fact that a plaintiff will be just as prone to view both his right and the defendant's liability as a certainty.

[104] Laycock, *supra* note 12, at 687.

[105] *Id*. at 692.

When injunctions are granted, Laycock opined, it is usually because courts uniformly perceive that, for certain categories of wrongs, the injury is irreplaceable.[106] Thus, injunctions have become the "routine remedy" for violations of covenants not to compete or misappropriation of trade secrets, or the infringement of patents, copyrights, or trademarks.[107] Injunctions are also the standard remedy in civil rights and environmental litigation because the plaintiff cannot use a damage award to redress a deprivation of voting rights, free speech, or religious liberty, or to replace fresh air, clean water, or lost trees.[108]

When courts deny injunctive relief, Laycock observed, it is frequently because the case falls outside of these settled categories, or if it lies within the categories, the court fears an injunction will be too difficult to craft or to monitor, or would interfere with other types of governmental supervision.[109] He suggested that the elimination of the irreparable injury element would smoke out courts and force them to reveal their actual bases for injunction rulings[110]

Making many of the same observations as Laycock, John Leubsdorf espoused a different approach. He suggested that courts not mechanically trudge through all of the elements for preliminary injunctive relief.[111] Instead, they should assess the likelihood of each party prevailing on the merits at trial and estimate the losses that each party would sustain from an erroneous decision on the preliminary injunction motion. The court would then be guided by the objective of minimizing irreparable loss or aiming to "inflict the smallest probable irreparable loss of rights".[112] In this way, a weaker showing under one element could be offset by a stronger showing under another one. Another thought-provoking commentary advocated in favor of eliminating the likely to succeed on the merits element, claiming that it placed too high of a burden on the movant where there are disputed issues of fact.[113]

Professor Thomas Lee and Judge Susan Black also advocated changes, not to any of the standard elements, but to various burden enhancers that courts had added to the mix whenever a preliminary injunction would alter the status quo, or would require conduct as opposed to prohibiting it.[114] Both authors concluded that the continued use of old maxims regarding

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[106] *Id*. at 702-03 ("it becomes settled that a whole category of wrongs always inflicts irreparable injury").

[107] *Id.* at 713-14.

[108] *Id*. at 708-09. Professor Laycock qualified his proposal by stating that he thought the irreparable injury requirement did serve a useful function and should be maintained as a standard for preliminary injunctions. *Id.* at 728-32 ("If preliminary relief is thought of as a completely separate category, with a completely different meaning for 'irreparable', the phrase 'irreparable injury' can actually be useful here.").

[109] *Id.* at 727-65.

[110] *Id*. at 693 ("Eliminating irreparable injury talk reveals previously hidden relationships among remedial issues, and it reveals what is really at stake in each issue.")

[111] Leubsdorf, *supra* note 46, at 525.

[112] *Id*. at 541; *see also Development*, *supra* note 17, at 1056 ("Clear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury.")

[113] *Probability of Ultimate Success Held Unnecessary for the Grant of Interlocutory Injunction*, 71 COLUM. L. REV. 165, 170-71 (1971).

[114] Lee, *supra* note 46, at 109; Black, *supra* note 9, at 1. Some circuit courts have stated that a plaintiff seeking to alter the status quo is required to make a clear and compelling showing under the preliminary injunction factors.

preservation of the status quo, or the distinction between mandatory and prohibitory injunctions, had outlived their usefulness and should be abandoned.[115]

Not all academics were in favor of abandoning the traditional elements for injunctive relief.[116] Some defended the irreparable injury requirement and the systemic bias in favor of legal, as opposed to equitable, remedies that is a necessary consequence of it.[117] The irreparability and inadequacy elements, they asserted, protects defendants from the "exaggerated harm" that an injunction imposes when the decree's language restrains activity beyond that which is alleged by the plaintiff to be unlawful, or where its imprecision forces a defendant to choose between foregoing potentially permissible conduct and facing a civil contempt motion.[118] Injunctions, moreover, impose significant burdens on courts by requiring them to participate in the crafting of the decree and to entertain applications to enforce or modify it.[119]

B. Circuit Courts Modify Injunction Law

Federal courts of appeal over the course of the past few decades modified the preliminary injunction standard in three respects. First, they have eliminated the need to establish both the likelihood of success and irreparable injury elements by adopting a balancing or sliding scale standard. Second, they have lowered the likelihood of success element by requiring that the movant merely show that "fair grounds for litigation" exist. Third, they have eliminated the irreparable injury requirement by presuming it in certain types of cases.

SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1097-99 (10th Cir. 1991); *Stanley v. University of So. Cal*., 13 F.3d 1313, 1320 (9th Cir. 1994). A few circuit courts have stated that mandatory injunctions should be harder to get than prohibitory ones. *Tate v. American Tugs, Inc.*, 634 F.2d 869-70 (5th Cir. 1981); *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

[115] Lee, *supra* note 46, at 166; Black, *supra* note 9, at 49. Their points are well taken. The term "status quo," is often confusing because there are multiple ways to determine what the status quo is. *See Roland Machinery Corp. v. Dresser Indus., Inc*., 749 F.2d 380, 383 (7th Cir. 1984) (a preliminary injunction in a dealer termination case maintains the status quo in one respect by continuing the dealer, but it alters the status quo in another respect by modifying the contractual provision concerning the supplier's right to terminate the dealer). And, frequently a court can transform a mandatory injunction into a prohibitory one through artful drafting of the decree (*e.g*., "defendant is hereby restrained from refusing to cooperate with the renewal of plaintiff's zoning variance").

[116] A few commentators criticized the lack of uniformity among circuit courts concerning whether all four elements have to be satisfied or whether they can be weighed so that a strong showing on one factor could compensate for a weak showing on another. Denlow, *supra* note 7, at 514-24; Black, *supra* note 9, at 25-42. They urged that a uniform standard be adopted to avoid inconsistent rulings and reduce the temptation for forum shopping. Denlow, *supra* note 7, at 530-33; Black, *supra* note 9, at 49. Not surprisingly, they do not agree on which standard should be adopted. Magistrate Denlow favors an approach where all four elements must be satisfied, Denlow, *supra* note 7, at 536-38, while Judge Black prefers a balancing method. Black, *supra* note 9, at 44-48.

[117] Shreve, *supra* note 83, at 392-97; Edward Yorio, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS §§ 2.1, 2.3, 23.1-23.4. (1989); Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 355-58 (1981).

[118] Shreve, *supra* note at 83; *see* Anthony DiSarro, *Six Decrees of Separation: Consent Orders and Settlement Agreements in Federal Civil Litigation*, 60 AM. L. REV. 276, 284 (2010).

[119] Shreve, *supra* note 83, at 389-90; DiSarro, *supra* note 118, at 317-22.

1. The Sliding Scale Formula

Adopting the suggestions in Professor Leubsdorf's article, the Seventh Circuit, in two decisions authored by Judge Richard Posner, established a reformed preliminary injunction test where a weak showing on one element can be compensated by a strong showing under another.[120] The new standard allows a preliminary injunction to be granted where:

> [T]he harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error.[121]

Henceforth, courts in the Seventh Circuit would apply an algebraic formula to preliminary injunction motions and grant them where: P x Hp is greater than (1 - P) x Hd.[122]

Under this approach, a plaintiff with only a thirty percent chance of prevailing at trial can still obtain a preliminary injunction if she can show that her irreparable harm is much greater than that which would befall the defendant if an injunction were granted.[123] Conversely, "the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side".[124] Other circuit courts have followed the Seventh Circuit's lead and have used a sliding scale or balancing approach where a strong showing on one factor can compensate for a weak showing on another.[125]

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[120] *American Hospital Supply Corp. v. Hospital Prods. Ltd*., 780 F.2d 589 (7th Cir. 1986); *Roland Machinery Corp. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984).

[121] *American Hospital*, 780 F.2d at 593.

[122] *Id.* The Court explained: "The left-hand side of the formula is simply the probability of an erroneous denial weighted by the cost of denial to the plaintiff, and the right-hand side simply the probability of an erroneous grant weighted by the cost of grant to the defendant." *Id.* Judge Posner's imposition of an econometric approach to preliminary injunctions has been the subject of scholarly criticism. *See* Linda S. Mullenix, *Burying (with Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541 (1987); Linda J. Silberman, *Injunctions by the Numbers: Less Than the Sum of its Parts*, 63 CHI.-KENT L. REV. 279 (1987). Other scholars support an econometrics approach to preliminary injunctions and have suggested formulaic modifications to account for the uncertainty in estimating the harms from a grant or denial of injunctive relief. Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197 (2003).

[123] 780 F.2d at 593. Judge Posner did set a minimum showing that would be required but it was quite low. He stated that a plaintiff needed to have "a better than negligible chance" of succeeding at trial in order to obtain a preliminary injunction. *Roland*, 749 F.2d at 387.

[124] *Abbott Laboratories v. Mead Johnson & Co*., 971 F.2d 6, 12 (7th Cir. 1992). As Magistrate Denlow has observed, Denlow, *supra* note 7, at 529-30, there have been a few instances where the Seventh Circuit has ignored the sliding scale approach and treated the preliminary injunction factors as essential elements of a five-part test. *See Rust Envir. & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1213 (7th Cir. 1997); *Jones v. InfoCure Corp.*, 310 F.3d 529, 534 (7th Cir. 2002).

[125] *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) ("If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak."); *United Indus. Corp. v. Clorox Co*., 140 F.3d 1175, 1178-79 (8th Cir. 1998) ("No single factor in itself is dispositive"). In contrast,

2. The Fair Grounds for Litigation Standard

Some circuits have relaxed the likelihood of success element. The Second Circuit, for example, permits a movant to obtain a preliminary injunction if she shows "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly" in her favor.[126] The court explained that its modified approach allows district courts to grant provisional injunctions in complex and fact-intensive cases where courts may not be able to estimate chances of success on the merits.[127] Other circuits have adopted a similar approach and endorsed the issuance of preliminary injunctions in the absence of a likelihood of success showing.[128]

Sometimes, courts have diluted the likelihood of success element by adding qualifying softeners, such as "reasonable likelihood" or "some likelihood," which are intended to relieve the movant from having to show that she is likely to prevail at trial.[129] In a similar vein, some courts lowered the irreparable injury hurdle by requiring only a showing that the injury "may" occur or is a "possibility."[130]

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the Third Circuit has stated that likelihood of success and irreparable injury are indispensible elements to preliminary injunctive relief. *Acierno v. New Castle Co*., 40 F.3d 645, 653 (3d Cir. 1994).

[126] *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc*., 596 F.2d 70, 72 (2d Cir. 1979); *accord Almontaser v. NewYork City Dep't of Educ*., 519 F.3d 505, 508 (2d Cir. 2008); *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir. 1969); *Hamilton Watch Co. v. Benrus Watch Co*., 206 F.2d 738, 740 (2d Cir. 1953).

[127] *See, e.g., F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 815- 19 (2d Cir. 1979) ("fair grounds" standard permits a court to grant a preliminary injunction even where it cannot determine whether the moving party is more likely than not to prevail on the merits of the underlying claims). The court has defended its approach by asserting that "[b]ecause the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 'the balance of hardships tips *decidedly'* in its favor, its overall burden is no lighter than the one it bears under the 'likelihood of success' standard." *CitiGroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30, 35(2d Cir. 2010) (*quoting Jackson Dairy*, 596 F.2d at 72). This reasoning ignores the fact that the "balancing of the hardships" factor is usually the easiest of the elements for a plaintiff to satisfy. The plaintiff can always argue that the hardship to a defendant is ameliorated by the fact that the plaintiff has to post a bond as security for losses sustained by an erroneously granted injunction. *See* FED. R. CIV. PRO. 65 (c) ("The court may issue a preliminary injunction … only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined").

[128] *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002) ("serious questions are raised and the balance of hardships tips in its favor"); *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc) ("The very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test"); *Blackwelder Furniture Co. v. Seilig Mfg. Co*., 550 F.2d 189, 195 (4th Cir. 1977); *Oklahoma Tax Comm'n v. International Regis. Plan, Inc*., 455 F.3d 1107, 1112-13 (10th Cir. 2006); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001); *Davenport v. International Bro. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999).

[129] *See Schwartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002) ("reasonable probability of success"); *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Prods., Inc*., 545 F.2d 1096, 1098 (7th Cir. 1976) ("some likelihood of success"); *Jones v. InfoCure Corp.*, 310 F.3d 529, 534 (7th Cir. 2002) ("reasonable likelihood").

[130] *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson Co*., 274 F.3d 377, 400 (6th Cir. 2001) ("plaintiff may suffer irreparable harm"); *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007) ("possibility" of irreparable harm).

3. Presumptions of Irreparable Harm

Finally, many circuit courts dispensed entirely with the irreparable injury element by conclusively presuming it in large swaths of cases defined by subject matter. Courts, for example, presumed irreparable injury in cases involving an alleged deprivation of a constitutional right.[131] In so doing, they have mostly relied upon the following *dicta* from a three-Justice plurality Supreme Court opinion in *Elrod v. Burns*: "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[132]

In cases of patent infringement, the Federal Circuit applied a general presumption of irreparable harm whenever the movant could establish a likelihood of success on the issues of patent validity and infringement.[133] The court explained that the presumption was required to effectuate the right to exclude that is an inherent part of a patent and was further warranted by the finite term of a patent grant, since that makes the mere passage of time an irremediable harm to the patent holder.[134]

Courts also presumed irreparable injury in cases alleging trademark infringement,[135] reasoning that, in light of the statutory right to exclusive use of a mark, injuries inflicted by trademark infringement are "by their very nature irreparable."[136] Irreparable injury has been

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[131] *Pacific Frontier, Inc. v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) ("We therefore assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of their commercial speech rights."); *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005); *Joelner v. Village of Washington Park*, 378 F.3d 613 (7th Cir. 2004); *Newsom v. Albemarle Co. Sch. Bd*., 354 F.3d 249, 254 (4th Cir. 2003); *Brown v. California Dep't of Trans*., 321 F.3d 1217, 1225 (9th Cir. 2003); *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002); *Siegel v. LePore*, 234 F.3d 1163, 1168 (11th Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999); *Miss. Women's Med. Clinic v. McMillan*, 866 F.2d 788, 795 (5th Cir. 1989); *see also* 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2948, at 440 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Gutierrez v. Municipal Court of Southeast Judicial Dist*., 838 F.2d 1031, 1045 (9th Cir. 1988); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984).

[132] *Elrod*, 427 U.S. 347, 373 (1976) (plurality opinion); *see Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005); *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005); *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004); *Newsom v. Albemarle County Sch. Bd*., 354 F.3d 249, 261 (4th Cir. 2003); *Brown v. California Dep't of Transp*., 321 F.3d 1217, 1226 (9th Cir. 2003); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002).

[133] *H.H. Robertson, Co. v. United Steel Deck, Inc*., 820 F.2d 384, 390-91 (Fed. Cir. 1987); *see also Smith Int'l Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983) (permanent injunction).

[134] *Amazon.com, Inc., v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (preliminary injunction); *Richardson v. Suzuki Motor Co*., 868 F.2d 1226, 1246-47 (Fed. Cir. 1989) (permanent injunction); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1284 (Fed. Cir. 1988) (same).

[135] *Zino Davidoff, S.A. v. CVS Corp*., 571 F.3d 238, 246 (2d Cir. 2009); *Weight Watchers Int'l, Inc. v. Luigino's, Inc*., 423 F.3d 137, 144 (2d Cir. 2005); *Tally-Ho, Inc. v. Coast Community Coll. Dist*., 889 F.2d 1018, 1029 (11th Cir. 1989) .

[136] *Processed Plastic Co. v. Warner Communications, Inc*., 675 F.2d 852, 858 (7th Cir. 1982).

presumed in cases alleging false advertising,[137] based on the notion that a false "comparison to a specific competing product necessarily diminishes that product's value in the minds of the consumer."[138]

Applying reasoning analogous to patent and trademark cases regarding the irreplaceable nature of a statutory right to exclude, courts presumed irreparable injury in cases involving copyright infringement.[139] They presumed irreparable injury for statutory violations where they deemed damages an unsuitable remedy, such as a purported violation of the antitrust laws,[140] or environmental statutes.[141] In so doing, federal circuit courts have "compartmentalized" preliminary injunction law, using subject matter categories to make broad judgments regarding the suitability of injunctive relief, and disregarding the "trans-substantive" nature of equity law.[142]

C. Adverse Consequences of the Modifications

These modifications are unquestionably prejudicial to defendants. First, the presumption of irreparable harm is not simply the type of evidentiary presumption authorized under the Federal Rules of Evidence.[143] Those presumptions merely shift the burden of production (*i.e.*, of going forward with evidence) from the plaintiff to the defendant.[144] They do not affect the ultimate burden of persuasion, which remains with the plaintiff; indeed, if evidence that counters

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[137] *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 161-62 (2d Cir. 2007); *see also North American Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1227(11th Cir. 2008) (proof of falsity is sufficient to sustain a finding of irreparable injury when the false statement is made in the context of comparative advertising).

[138] *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988); *see also Time Warner*, 497 F.3d at 161("it is virtually impossible to prove that so much of one's sales will be lost or that one's goodwill will be damaged as a direct result of a competitor's advertisement") (*quoting Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 316 (2d Cir. 1982)).

[139] *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008) (preliminary injunction); *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1155-56 (9th Cir. 2006); *Richard Feiner & Co. v. Turner Entm't Co.*, 98 F.3d 33, 34 (2d Cir.1996); *see* 4 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 14.06[A] (2004) ("the plaintiff's burden for obtaining a preliminary injunction in copyright cases collapses to showing likelihood of success on the merits, without a detailed showing of danger of irreparable harm").

[140] *Menominee Rubber Co. v. Gould, Inc.*, 657 F.2d 164, 167 (7th Cir.1981); *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 366 (7th Cir.1971); *see* Note, *The Irreparable Harm Requirement for Preliminary Injunction Relief in Antitrust Distributor Termination Cases*, 61 B.U. L. REV., 507, 516-21 (1981).

[141] *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984); *see* Zygmunt Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 575 (1982) ("It does not appear that any lower court, much less the Supreme Court, has ever found in a proceeding on the merits that federal actions violating NEPA could continue in opposition to the statutory mandates").

[142] *Cf.* David S. Schoenbrod, The *Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 631-32 (1988). Equitable doctrines, such as laches or unclean hands, are designed to apply equally and even-handedly to all equitable claimants, regardless of the substantive law that forms the basis of the claims for which equitable relief is sought.

[143] FED. R. EVID. 301.

[144] Of course, an evidentiary presumption can shift a burden of production from a defendant to a plaintiff where the defendant originally bears that burden, such as with regard to an affirmative defense.

the presumption is introduced, the presumption dissipates.[145] By contrast, presumptions of irreparable harm are, for the most part, irrebuttable; they conclusively remove an issue from the case.[146] The presumption, moreover, completely eliminates the element which is often the most difficult one for a plaintiff to satisfy.[147]

Sliding scale formulas or relaxed possibility of success standards reward plaintiffs with weak or dubious cases, and encourage them to move for preliminary injunctive relief. Experienced plaintiffs' lawyers can easily argue that conflicting and complex scientific, marketing or economic evidence indicates that there are fair grounds for litigation. Plaintiffs already have the procedural advantage on preliminary injunction motions in that they control the timing of the motion and can file it after spending months preparing expert affidavits and scientific or marketing studies or surveys. Once his moving papers are filed, the plaintiff typically will press the Court for an expedited hearing on the motion, arguing that it is incurring irreparable injury each day the motion remains pending, and the defendant will usually have an uphill battle simply to get an equal amount of time to prepare its opposition papers. The additional advantages of relaxed standards and presumptions tilt the balance overwhelmingly in the plaintiffs favor.[148]

Although many district courts are sensitive to the rights of defendants in this context, and endeavor to be fair to them, the fact remains that many district judges enjoy handling preliminary injunction motions. They facilitate an early disposition of cases, since preliminary injunction rulings frequently lead to settlements. More importantly, they give judges an opportunity to conduct evidentiary hearings on complex and interesting matters. Trials in complex civil cases are a rarity.

However, where the parties proceed by way of a preliminary injunction motion with expedited discovery and an evidentiary hearing, the public interest is disserved. A contested issue that is important to members of the public is adjudicated on a mere likelihood of success (or even lower) standard. Instead of a definitive holding, the court issues only a tentative ruling.[149] Indeed, determinations on preliminary injunction motions are not even considered "holdings," even where the court uses language suggesting that it is making a definitive and final

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[145] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11(1993).

[146] *Salinger v. Colting*, 607 F.3d 68, 77-78 (2d Cir. 2010).

[147] Scholars have criticized use of presumption in copyright and other intellectual property cases on First Amendment grounds. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L .J. 147, 169 (1998).

[148] Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 573 (2001) (noting that plaintiffs request preliminary injunctions to impose financial stress on rivals, to raise the legal costs of the case, or to adversely affect a defendant's business operations).

[149] *University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981) (emphasizing the tentative nature of a ruling on a preliminary injunction motion). Indeed, far from constituting binding authority in other cases, legal conclusions made by a court in resolving a preliminary injunction motion are not even binding on the parties to the case in question. *Id.* at 395 ("the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits").

determination.[150] Furthermore, appellate review of that decision will be limited to a deferential abuse of discretion standard.[151] Even if the parties are willing to accept that rough and imperfect form of justice, why should constitutional issues of significant public import be determined by an adjudicative technique that is more prone to error and less final than a trial?[152] Even commercial cases outside the constitutional arena can implicate public interests, as patent or copyright cases can influence the level of competition and impact creativity in the marketplace.

Furthermore, a defendant that is preliminarily enjoined faces the prospect of contempt motions as the plaintiff will endeavor to keep maximum pressure on an enjoined defendant. The mere threat of a potential contempt citation is often sufficient to force a defendant to forego arguably permissible conduct. In many instances, the defendant will opt to forego his right to jury trial and settle the case at an inflated price to avoid having to live under a preliminary injunction for the duration of the case.[153] Absent a settlement, the court will be forced to deal with motions to enforce or modify temporary injunctive decrees.

Moreover, all of this prejudice can easily be eliminated by the judge through exercise of the court's prerogative to advance a trial of the merits and consolidate it with the preliminary injunction motion.[154] In most instances a case can be tried in the time period it takes to determine a preliminary injunction motion requiring an evidentiary hearing. Adjudicating the entire case on an expedited basis gives the plaintiff the opportunity for prompt redress of any irreparable harm, while protecting the defendant's rights to prepare a defense and to a jury trial. Under this procedure, there is no need to determine likelihood of success (or any other tentative

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[150] *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 317 (1985) (preliminary injunction ruling, though containing unequivocal conclusions, will still be considered provisional because "any conclusions reached at the preliminary injunction stage are subject to revision.") (*quoting University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981)); *see McLucas v. DeChamplain,* 421 U.S. 21, 30 (1975) ("in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally 'hold' the article unconstitutional").

[151] A grant or denial of a preliminary injunction is one of the few instances where an interlocutory appeal is permitted in federal practice. 28 U.S.C. § 1292 (a) (1). However, the appellate review is narrowly circumscribed. The appellate court can review legal rulings *de novo* but can overturn a district court's ultimate conclusion only if it finds that the district court abused its discretion. *See McCreary Co. v. American Civil Liberties Union*, 545 U.S. 844, 867 (2005); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006).

[152] *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (noting that, with respect to a First Amendment claim, "the preliminary injunction hearing was necessarily hasty and abbreviated" and, not surprisingly, produced an erroneous conclusion); *see, e.g., McCreary Co. v. ACLU*, 545 U.S. 844, 867 (2005) (Establishment Clause claim adjudicated on preliminary injunction motion under likelihood of prevailing standard at district court and abuse of discretion standard on appeal); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (same with respect to free speech claim).

[153] Lanjouw & Lerner, *supra* note 131, at 573 (preliminary injunctions "have substantial effects on the outcome of disputes"). The authors of this article employed econometric regression analyses on data obtained from 250 patent cases and observed that plaintiffs are prone to use preliminary injunctions to obtain greater litigation payoffs from financially weaker opponents. *Id*. at 600-01.

[154] FED. R. CIV. P. 65(a) (2). A court can utilize this procedure without the consent of the parties as long as they are given notice of the court's intention. *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981); *see Branti v. Finkel*, 445 U.S. 507, 508-09 & n.2 (1980) (noting that the district court held a plenary trial of the case on an application for a preliminary injunction).

standard) since the merits will be adjudicated fully and finally at trial.[155] And, there will be complete (not just abuse of discretion) appellate review from any final judgment entered in the case.

IV. THE SUPREME COURT RE-AFFIRMS THE STATIC APPROACH TO SUBSTANTIVE PRELIMINARY INJUNCTION LAW

In a series of decisions over the past five years, the Supreme Court has categorically rejected the circuit court modifications of the traditional preliminary injunction standard and reiterated that preliminary injunctions invariably require proof of a likelihood of success and irreparable injury.

1. eBAY

In *EBay Inc. v. MercExchange, LLC*,[156] the Court criticized the Federal Circuit's practice of presuming irreparable injury for purposes of entering permanent injunctions in patent cases.[157] The Court unanimously reversed the circuit court, concluding that an automatic grant of injunctive relief contravened the "long tradition of equity practice" of assessing the appropriateness of injunctive relief in accordance with the four traditional elements.[158]

Though the case involved a permanent injunction, courts have read *eBay* as precluding presumptions of irreparable harm with regard to preliminary injunctions in patent cases.[159] They have also applied *eBay*'s teaching to other areas of the law. In a trademark and false advertising case, the Eleventh Circuit read *eBay* as strongly suggesting that courts were precluded from using the presumption in Lanham Act cases.[160] The court observed that, much like the Patent Act, the Lanham Act did not intend to displace the traditional principles of equity.[161]

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[155] Denlow, *supra* note 7, at 533-34 ("in most situations it would be more efficient to consolidate the trial on the merits with the motion for a preliminary injunction under Rule 65(a) (2)").

[156] 547 U.S. 388 (2006).

[157] 401 F.3d 1323, 1338-39 (Fed. Cir. 2005), *rev'd*, 547 U.S. 388 (2006). The Court rejected the assertion that the right of exclusion inherent in a patent justifies a statutory right to enjoin future infringements. 547 U.S. at 392.

[158] *Id*. at 391. The Court noted that Congress was free to codify a departure from application of the traditional equitable standards but that one "should not be lightly implied." *Id*. at 391 (*quoting Romero-Barcelo*, 456 U.S. at 320). It found no such implication in the Patent Act, which simply provides that injunctions "may" issue "in accordance with the principles of equity." *Id.* at 391-92 (*quoting* 35 U.S.C. § 283).

[159] *Aurora World, Inc. v. Ty Inc*., 2009 WL 6617192, at *37 (C.D. Cal. Dec. 15, 2009); *Tiber Labors., LLC v. Hawthron Pharm., Inc*., 527 F. Supp. 2d 1373, 1380 (N.D. Ga. 2007); *Sun Optics, Inc. v. FGX Int'l, Inc*., 2007 WL 2228569, at *1 (D. Del. Aug. 2, 2007); *Chamberlain Group Inc., v. Lear Corp.*, 2007 WL 1017751, at *5 (N.D. Ill. Mar. 30, 2007); *Seitz v. Envirotech Sys. Worldwide Inc*., 2007 WL 1795683, at *2 (S.D. Tex. June 19, 2007); *Torspo Hockey Int'l, Inc. v. Kor Hockey Ltd*., 491 F. Supp. 2d 871, 881 (D. Minn. 2007); *Erico Int'l Corp. v. Doc's Marketing, Inc*., 2007 WL 108450, *7 (N.D. Ohio. Jan. 9, 2007).

[160] *North Amer. Med. Corp. v. Axiom Worldwide, Inc*., 522 F.3d 1211, 1228 (11th Cir. 2008); *accord Paulsson v. Geophysical Serv., Inc. v. Sigmar*, 529 F.3d 303, 312 (5th Cir. 2008) (intimating that *eBay* bars the presumption in trademark cases); *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1137-38 (9th Cir. 2006) (applying *eBay* four

Courts have also viewed *eBay* as barring presumptions of irreparable harm in copyright cases,[162] and the Supreme Court itself has extended *eBay*'s reasoning to environmental cases.[163] Indeed, the Second Circuit has gone so far as to suggest that the decision should apply to all types of cases:

> *eBay* strongly indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in any context….Therefore, although today we are not called upon to extend *eBay* beyond the context of copyright cases, we see no reason that *eBay* would not apply with equal force to an injunction in *any* type of case.[164]

Finally, while courts have not explicitly applied *eBay* in constitutional cases, they have begun to question the appropriateness of the presumption or to circumscribe the situations where it should be used.[165]

2. Winter

In *Winter v. National Resources Defense Council*, the Court disapproved of the sliding scale approach or of any other relaxation of the irreparable injury requirement.[166] That case involved an appeal by the Navy from a circuit court ruling enjoining it from conducting training exercises that employed sonar supposedly in violation of federal environmental statutes. Environmental groups sued, claiming that the exercises conducted in the waters off the coast of Southern California was harmful to marine mammals.[167] The court of appeals affirmed a preliminary injunction, finding that plaintiffs were required to show (and did show) "a possibility

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factor test in trademark case); *Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp*., 2010 WL 3418203, at* 2 (D. Del. Aug. 20, 2010) .

[161] *North Amer. Med.*, 522 F.3d at 1228 (*quoting* 15 U.S.C. § 1116 (a) (2006)); *see also Microsoft Corp. v. AGA Solutions, Inc*., 589 F. Supp.2d 195, 204 (E.D.N.Y.2008) (applying *eBay* in a trademark case).

[162] *Salinger v. Colting*, 607 F.3d 68, 77-78 (2d Cir. 2010); *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters*., 533 F.3d 1287, 1323 (11th Cir. 2008); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d. 532, 543 (4th Cir. 2007).

[163] *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (observing that presumed injunctions are improper in environmental cases).

[164] *Salinger*, 607 F.3d at 77-78 & n. 7; *see also* Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 599 (2008) ("Although the Court's holding was directed specifically at patent injunctions, …the Court implicitly acknowledged its universal applicability to *all* grants of injunctive relief.").

[165] *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (where "a plaintiff does not allege injury from a rule or regulation that directly limits speech, irreparable harm is not presumed and must still be shown"); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299-304 (D.C. Cir. 2006) (to presume irreparable harm, the movant must "do more than merely allege a violation of freedom of expression," they must establish "that the allegedly impermissible government action would chill" constitutionally protected behavior").

[166] 555 U.S. 7 (2008).

[167] *Id*. at 370-71.

of irreparable injury".[168] The court of appeals concluded that this lower standard was appropriate under its sliding scale approach because the plaintiffs had established a "strong likelihood" of prevailing on the merits.[169]

The Supreme Court reversed, declaring that the Ninth Circuit's test was contrary to well-established equitable principles.[170] The Court noted that the plaintiffs were required to demonstrate that irreparable injury was likely to occur, not that it was merely possible.[171] "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[172]

Significantly, the Court did not dispute the Ninth Circuit's finding that the movant had made a stronger than required showing on the likelihood of success element.[173] Thus, the Court's reversal in *Winter* must be understood as rejecting the sliding scale approach. The Court necessarily concluded that a deficient showing under one element cannot be excused by a stronger than required showing on another.

In her dissent, Justice Ginsburg remarked that she did not understand the majority to be rejecting a sliding scale approach to preliminary injunctive relief, but provided no explanation of her reasoning.[174] Given that the majority concluded that both lower courts abused their discretion in granting the injunction "even if plaintiffs are correct on the underlying merits," it is hard to read *Winter* as anything other than a repudiation of the sliding scale formulation.[175] Indeed, federal courts have read *Winter* as precluding that approach.[176]

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[168] The Navy unsuccessfully argued that the use of sonar was not harmful to the mammals and they were restrained from, among other things, using the sonar if a mammal was spotted within 2200 yards of a vessel. *Id*. at 372-73.

[169] The Ninth Circuit had applied this flexible standard in prior cases. *E.g*., *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007); *Earth Isl. Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006).

[170] 129 S. Ct. at 370. Chief Justice Roberts delivered the opinion in which Justices Alito, Kennedy, Scalia and Thomas joined. Justice Breyer filed a separate opinion, in which Justice Stevens joined, concurring in the decision to overturn the injunction. He did not disagree with the majority opinion's analysis of the preliminary injunction standards. *Id*. at 382 (Breyer, J., concurring in part and dissenting in part). Justice Ginsburg filed a dissenting opinion in which Justice Souter joined. *Id*. at 392 (Ginsburg, J., dissenting).

[171] *Id*. at 375. The Navy contended that the plaintiffs' claims of injuries were "speculative", given that during the 40-year history of the Navy's training program, there had been no documented case of sonar-related injury to marine mammals. *Id*.

[172] *Id*. at 375-76.

[173] *Id*. at 374 ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits….")

[174] *Id*. at 392 (Ginsburg, J., dissenting). Justice Ginsburg agreed with the majority that a possibility of irreparable harm was insufficient, but, in her view, a "strong threat of irreparable injury" existed. *Id*.

[175] See *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (citing *Winter* for the proposition that "[a]n injunction should issue only if the traditional four-factor test is satisfied.")

[176] *Real Truth About Obama, Inc. v. Federal Election Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009) (*Winter* rejects a sliding scale approach and all four elements must be satisfied); *Stormans, Inc. v. Selecky*, 586 F.3d 1109,

3. Munaf

In *Munaf v. Geren*, the Supreme Court rejected use of the "fair grounds for litigation" alternative to the likelihood of success element.[177] That case involved two American citizens, who voluntarily traveled to Iraq and committed crimes there. While they were being temporarily held in a US-commandeered detainee center, they filed a habeas petition in a United States federal court and sought a preliminary injunction restraining their transfer to Iraqi custody for criminal prosecution.[178] A federal district court concluded that the petitioners' argument that a federal court had habeas jurisdiction presented questions "so serious [and] substantial… as to make them fair ground for litigation."[179] Consequently, it granted a preliminary injunction restraining the transfer, and the court of appeals affirmed.[180]

The Supreme Court reversed, reiterating the rule that a party seeking a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits. The Court stated:

> A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction. It says nothing about the "likelihood of success on the merits," other than making such success more *unlikely* due to potential impediments to even reaching the merits. Indeed, if all a "likelihood of success on the merits" meant was that the district court likely had jurisdiction, then preliminary injunctions would be the rule, not the exception.[181]

Circuit courts have construed *Munaf* as further evidence that a sliding scale approach to injunctive relief is no longer viable and that any relaxation of the likelihood of success factor is impermissible.[182]

4. Nken

In *Nken v. Holder*, the Supreme Court further underscored the impropriety of diluting the likelihood of success or irreparable injury elements.[183] In that case, an alien sought to stay his

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1127 (9th Cir. 2009) (*Winter* now requires that all four factors be established); *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (*Winter* rejected lesser sliding scale standard); *Davis v. Pension Benefit Guaranty Corp*., 571 F.3d 1288, 1292 (D.C. Cir. 2009) (acknowledging that *Winter* could be read as disapproving use of a sliding scale).

[177] 553 U.S. 674 (2008). Chief Justice Roberts delivered the opinion for a unanimous court.

[178] *Id*. at 681-83.

[179] *Omar v. Harvey*, 416 F.Supp.2d 19, 23-24, 27 (D.D.C. 2006), *aff'd*, 479 F.3d 1 (D.C. Cir. 2007), *rev'd*, 553 U.S. 674 (2008).

[180] 479 F.3d 1 (D.C. Cir. 2007), *rev'd*, 553 U.S. 674 (2008).

[181] 553 U.S. at 690.

[182] *Davis v. Pension Benefit Guaranty Corp.*, 571 F.2d 1288, 1295-96 (9th Cir. 2009) (Kavanaugh, J., concurring); *see also American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Judge Kavanaugh's concurring opinion constitutes the opinion of the court because another member of the panel joined it.

deportation to Cameroon pending a federal court of appeals' review of administrative agency order. The Supreme Court first held that it was appropriate to apply the four-factor preliminary injunction standard to the stay pending appeal motion because that there is "substantial overlap" between the two equitable devices.[184] Adopting those elements to the stay pending appeal context, the Court identified them as:

> (1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[185]

Citing preliminary injunction case law, the Supreme Court stated that the first two factors were the most critical, that a "better than negligible" chance of success or a "mere possibility" of success failed to satisfy the first element, and that "a possibility of irreparable injury" failed to satisfy the second factor.[186] Most federal district courts have understood *Nken* as mandating a showing of "likelihood" for both the success on the merits and irreparable injury elements in the analogous stay pending appeal context.[187]

5. O Centro Espirita

Finally, the Court's decision in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* confirms that the likelihood of success element requires a plaintiff to show that she is more likely than not to succeed at trial.[188] In that case, a religious sect sought to preliminarily enjoin the federal government from enforcing a controlled substances ban on the sect's use of a hallucinogenic tea for religious purposes. The claim was brought pursuant to the Religious

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[183] 129 S. Ct. 1749 (2009). Chief Justice Roberts delivered the opinion in which Justices Breyer, Ginsburg, Kennedy, Scalia, Souter and Stevens joined. Justice Alito filed a dissenting opinion, in which Justice Thomas joined. *Id*. at 1764 (Alito, J., dissenting).

[184] *Id*. at 1758, 1761. The court remarked that two motions were analogous. *Id*. at 1761. In dissent, Justice Alito argued that a stay pending appeal is not only analogous to an injunction, it is an injunction and thus is barred by the federal immigration statute. *Id*. at 1765-66 (Alito, J., dissenting) ("it is revealing that the standard that the Court adopts for determining whether a stay should be ordered is the standard that is used in weighing an application for a preliminary injunction").

[185] *Id*. at 1761.

[186] *Id*. (*citing Winter*, 129 S. Ct. at 375).

[187] *Monsanto v. DWW Partners, LLLP*, 2010 WL 1904274, at *1-2 (D. Ariz. May 10, 2010); *Friendship Edison Pub. Sch. Charter v. Nesbitt*, 704 F. Supp. 2d 50, 52 (D.D.C. 2010) ("in order for Friendship Edison to win its motion for a stay, it must show strong likelihood of success on the merits, unrecoverable economic harm, and that the public interest in the ultimate resolution of the controversy favors the stay"); *Solis v. Blue Bird Corp.*, 2009 WL4730323,*2 (M.D. Ga. Dec. 4, 2009); *Henry v. Rizzolo*, 2010 WL1924841, *1 (D. Nev. Apr. 12 , 2010). *But see Barclay Cap. Inc. v.Theflyonthewall.com*, 700 F. Supp. 2d 310, 349 (S.D.N.Y. 2010) (stating that a greater than required showing under one factor can excuse a substandard showing under another).

[188] 546 U.S. 418 (2006). As indicated *infra at text accompanying notes 55-57*, some courts have interpreted likelihood of success as not necessarily requiring a showing that the plaintiff will more likely than not prevail at trial.

Freedom Restoration Act of 1993, which prohibits the federal government from enforcing a rule of general applicability that substantially burdens religion, unless it can show that the burden will further a compelling governmental interest.[189] Before the district court, the government conceded that its enforcement of the Controlled Substances Act against the sect substantially burdened the sect's exercise of its religion, but argued that enforcement of the ban was necessary to protect the health and safety of sect members and to prevent the diversion of the hallucinogenic substance to recreational users. After an evidentiary hearing, the district court granted the injunction, concluding that the evidence of health risks was "in equipoise," and that the evidence on diversion was "virtually balanced."[190]

The government argued that the district court's grant of a preliminary injunction based on a "mere tie in the evidentiary record" contravened the "well-established principle that the party seeking pretrial injunctive relief bears the burden of demonstrating a likelihood of success on the merits."[191] If the likelihood of success element did not require that a showing that the movant is more likely than not to prevail at trial, or if a lesser showing were permitted, then one would expect the Court to have mentioned it. Instead, the unanimous Court affirmed the temporary injunction, [192] explaining that, because the government conceded plaintiff's *prima facie* case and failed to carry its burden of proving a compelling governmental interest, the plaintiff did demonstrate that it was likely to prevail at trial.[193]

In light of these recent decisions, it seems clear that the Supreme Court is unwilling to permit lower federal courts to alter the traditional standards for assessing the appropriateness of preliminary injunctive relief.

V. STATIC APPROACHES TO EQUITY IN OTHER MODERN CONTEXTS

The Court's insistence that equitable principles from 18th Century English law govern injunctions is consistent with its current use of a similar freeze frame approach in other areas of equity. These modern situations include whether (a) jury trial rights exist under, or re-examination practices are precluded by, the Seventh Amendment, (b) types of injunctions that were previously prohibited can now be used, (c) claims can be categorized as "equitable" where a federal statute limits remedies to equitable relief, and (d) structural or prophylactic injunctions are proper.

1. The Trial by Jury Clause

The modern Supreme Court has adhered to the approach espoused by early federal courts for determining civil jury trial rights under the Trial by Jury Clause.[194] English law concerning

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[189] 42 U.S.C. §§ 2000bb-1(a), 2000bb-1(b).
[190] 546 U.S. at 426.
[191] *Id*. at 428.
[192] *Id*. at 429. Chief Justice Roberts delivered the opinion for the Court. Justice Alito took no part in the case.
[193] *Id*. at 428-29 (the "burdens at the preliminary injunction stage track the burdens at trial").
[194] *See infra* text accompanying notes 24-30.

jury trial rights, is frozen as it existed in 1789, and used as a baseline for determining such rights in connection with modern causes of action.[195] The Court looks to the nature of the claim being asserted and attempts to find its closest analog in 18th Century English practice. If the analogous claim was tried in an 18th Century English law court, then the claim is triable before a jury in federal court.[196] If, on the other hand, the analog was adjudicated in an 18th English chancery court, then no jury trial right attaches to that claim.[197]

The modern Supreme Court accords even greater significance to whether the remedy being sought was available at law or in equity in pre-revolutionary England.[198] Thus, the Court has held that a jury should determine both liability and damages in copyright infringement actions because such tasks were performed by juries in 18th English practice.[199] Similarly, the Court has held that liability under an environmental statute should be determined by a jury so long as the civil penalties to be assessed in the event liability is shown are not based on the polluter's profits from the non-compliance, for then it would approximate the equitable remedy of disgorgement.[200]

Likewise, the Seventh Amendment's other clause, the Re-examination Clause,[201] has been interpreted to preserve the practices of 18th Century English courts with respect to the judicial review of jury verdicts. Thus, a federal district court's authority to modify a jury verdict awarding damages depends upon whether the power resided in 18th Century English courts.[202]

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[195] *Curtis v. Loether* , 415 U.S. 189 (1974). The Court has confirmed this freeze frame approach on numerous occasions. *See, e.g., Tull v. United States*, 481 U.S. 412, 417 (1987); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42 (1989); *Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65 (1990).

[196] *Tull*, 481 U.S. at 417. For example, in *Granfinanciera,* the Court concluded that the statutory cause of action by a bankruptcy trustee to recover a fraudulent conveyance was most like an 18th Century English common law actions for trover. 492 U.S. at 41-42.

[197] In *Terry*, the Court compared a labor union's breach of its duty of fair representation to an equitable claim for breach of fiduciary duty against a trustee. 494 U.S. at 567-69. The dissenters disagreed, opining that the cause of action more closely resembled an attorney malpractice action, which was cognizable at law. 494 U.S. at 584 (Kennedy, J., dissenting); *see also Markman v. Westview Instruments, Inc*., 517 U.S. 370, 379-84 (1996) (although a patent infringement claim was a claim at law in 18th Century English practice, the construction of the patent claim was not relegated to the jury).

[198] *Terry*, 494 U.S. at 565. The Court has stated that remedy analysis should have a greater impact on the ultimate conclusion than the claim analysis. *Granfinanciera*, 492 U.S. at 42.

[199] *Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 353-55 (1998); *see Curtis*, 415 U.S. at 197 (punitive damages is a legal remedy and should be determined by a jury); *Ross v. Bernhard*, 396 U.S. 531, 537 (1970) (treble damages is a remedy at law and thus subject to jury determination).

[200] *Tull*, 481 U.S. at 422-25. The Court, in *Tull*, held that the legal nature of the civil penalty remedy entitled the defendant to a jury trial on the question of liability, but that the trial court would determine the amount of the penalty, if liability was established. *Id*. at 425-27.

[201] The Re-examination Clause, provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST., amend. 7. This provision was adopted in response to concerns voiced by anti-federalists that federal courts would overturn the fact-findings of state court juries. Amar, CONSTITUTION, *supra* note 24, at 233-34.

[202] For instance, in *Dimick v. Schiedt*, 293 U.S. 474, (1935), the Court held that while a conditional order granting a new trial unless plaintiff accepts a lower damages award (*i.e.*, remittitur) is permissible under the Re-examination Clause, a similar order conditioned on the defendant agreeing to an enhanced damages award (*i.e.,* additur) is not. The Court explained that "careful examination of the English reports prior [to 1791] fails to disclose

Similarly, the Court will review 18th Century English practice to determine the authority of federal appellate courts to overturn a jury verdict on the ground that the damages awarded are excessive.[203]

2. The Scope of Equitable Jurisdiction

The present Court also uses a freeze frame approach to determine the scope of a federal court's equitable jurisdiction that was conferred under the Judiciary Act of 1789. In its1999 decision in *Grupo Mexicano*, the Court concluded that the authority of a federal court to issue a particular form of injunction should be determined by examining the practices of 18th Century English chancery court.[204] The case involved a request by noteholders for a preliminary injunction restraining the issuer from transferring assets during the pendency of litigation and rendering itself judgment-proof. [205]

The Supreme Court held that a federal court lacked the power to issue such an injunction *pendente lite*. Justice Scalia, writing for the five-justice majority, explained that the equity jurisdiction conferred upon federal courts was limited by the "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[206] The Court noted that the provisional asset freeze sought by the noteholders was not only relief that had "never been available before" in equity, it was "specifically disclaimed by longstanding judicial precedent".[207] The Court stated that, under traditional rules of equity, a litigant had to secure a judgment establishing the debt before a court of equity would interfere with the debtor's use of his property.[208]

The dissenting justices, led by Justice Ginsburg, argued that a modern federal court should not be constrained by 18th Century English chancery court practices.[209] Specifically, Justice Ginsburg stated:

> From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England;

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any authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount fixed by the verdict of a jury in an action at law." *Id.* at 476-77.

[203] *Gasperini v. Center for Humanities, Inc*. 518 U.S. 415, 434-35 (1996); *see id.* at 455-57 (Scalia, J., dissenting); *id*. at 443-45 (Stevens , J., dissenting).

[204] *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U. S. 308 (1999).

[205] *Id*. at 311-12.

[206] *Id*. at 318 (*quoting Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)). Chief Justice Rehnquist, and Justices Kennedy, Thomas and O'Connor, all joined the majority opinion.

[207] *Id*. at 322.

[208] *Id.*

[209] *Id*. at 336 (Ginsburg, J., dissenting).

> we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.[210]

Significantly, though the dissent sharply disagreed with the majority as to whether the types of equitable remedies should be limited to those used by 18th Century English chancery courts, it agreed that the substantive principles of equity, which would include the traditional elements of preliminary injunctions, was governed by that law. From the dissent's perspective, so long as the plaintiffs satisfied the traditional prerequisites for obtaining preliminary injunctive relief--likelihood of success on the merits and irreparable injury--the flexible principles of equity should permit a grant of the provisional relief requested.[211]

3. The Characterization of an Equitable Claim

A freeze frame approach was also used by the Court to decide whether a particular claim qualifies as "equitable" for purposes of a statute. In *Great West Life*, a majority of the Court concluded that 18th Century English chancery practice should govern whether plaintiff's claim for restitution was truly "equitable" and thus could be asserted under a federal statute that permitted only equitable remedies.[212] The Court held that statutes limiting relief to equitable remedies should be construed as barring any relief other than that which "was typically available in equity" in the "the days of the divided bench."[213] To rule otherwise, the majority explained, would be to sanction a "rolling revision of content" that would give no guidance to courts or practitioners.[214] The Court concluded that the plaintiff's claim would not have been viewed as an equitable restitution claim in 18th Century England.[215]

Justice Ginsburg and her co-dissenting justices opined that the "archaic" and "antiquarian" practices of 18th Century chancery courts should not be consulted when construing

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[210] *Id*. at 336 (Ginsburg, J., dissenting) (*citing Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260 (1869); *Gordon v. Washington*, 295 U.S. 30, 36 (1935)). The quoted remark by Justice Ginsburg was not quite correct. In *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), Justice Frankfurter stated : "The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress." *Id*. at 164 (*citing Robinson v. Campbell*, 3 Wheat. 212, 222, 4 L. Ed. 372; *Boyle v. Zacharie*, 6 Pet. 648, 658, 8 L. Ed. 532; *Pennsylvania v. Wheeling Bridge Co*., 13 How. 518, 563, 14 L. Ed. 249; *Payne v. Hook*, 7 Wall. 425430, 19 L. Ed. 260).

[211] *Id*. at 340 (Ginsburg, J., dissenting).

[212] *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Justice Scalia wrote the opinion in which Chief Justice Rehnquist and Justices Kennedy, Thomas and O'Connor joined.

[213] 534 U.S. at 212. England had a divided bench until the 1870's. Thompson & Sebert, *supra* note 5, § 3.01, at 223 (2d ed. 1989).

[214] 534 U.S. at 217. The Court noted that guidance was critical because 77 different provisions of the United States Code contain a reference to the term "equitable relief". *Id*. at n.3.

[215] Justice Scalia noted that true equitable restitution encompasses a claim for specific proceeds held by the defendant as a constructive trustee. By contrast, a plaintiff seeking to hold a defendant personally liable for having received moneys that were wrongfully paid by plaintiffs to another entity would have been considered a claim for restitution at law. 534 U.S. at 213-15.

modern federal statutes.[216] Justice Ginsburg opined that the hallmark of equity is flexibility and thus should be adaptable and malleable, not subject to "rigid application of rules frozen in a bygone era".[217] In her view, so long as the plaintiff's claim could fairly be characterized as restitution, then the claim was equitable because restitution was typically an equitable claim.[218]

The Scalia-Ginsburg debate on static versus dynamic approaches to equity has sparked scholarly commentary on whether the various strands of the interpretative doctrine of originalism should apply to the constantly evolving common law.[219] Even those who support originalism as tool for interpreting constitutional and statutory text question its appropriateness as an interpretive method for common law principles.[220] Equity was not simply a piece of the larger common law pie that could be expected to change over time, it was designed to monitor the common law as it developed and to plug remedial gaps that would arise. In other words, if the common law is dynamic, then equity is hyper-dynamic.

Nevertheless, the thoughtful and probing points put forth by Justice Ginsburg do not undercut the Court's use of a static approach to substantive preliminary injunction law. Although Justice Ginsburg does advocate a dynamic view of equity in her *Great West* dissent, she acknowledges that a static approach is sensible in certain contexts,[221] and agreed in *Grupo Mexicano* that a static approach should be taken with regard to the substantive principles of equity.[222] Moreover, she joined the Court's decisions in *eBay*, *Munaf*, *Nken* and *O Centro Spirito*, all of which re-affirmed that approach and those principles.

4. The Nature of the Injunctive Remedy

Several Supreme Court justices and scholars have also advocated in favor of using a freeze frame approach to determining the propriety of structural and prophylactic injunctions.

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[216] *Id*. at 232-33 (Ginsburg, J., dissenting). Justice Ginsberg forcefully argued that the relevant point in time to determine whether the claim was equitable should be 1974, the year that Congress enacted ERISA. *Id.* at 224-25 (Ginsburg, J., dissenting) ("It is thus fanciful to attribute to Members of the 93d Congress familiarity with those "needless and obsolete distinctions," much less a deliberate "choice" to resurrect and import them wholesale into the modern regulatory scheme laid out in ERISA"). However, she did not attempt to establish that the plaintiff's claim would have been considered "equitable" at that date.

[217] *Id*. at 233 (Ginsburg, J., dissenting).

[218] *Id*. at 228 (Ginsburg, J., dissenting).

[219] Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556-57 (2006) (arguing that the Framers contemplated that the common law terms that were inserted in the Constitution would evolve over time).

[220] Henry Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 37-38 (2004) ("The evolutionary aspects of common law institutions leave Justice Scalia, and his sympathizers like me, with the task of explaining why originalism requires the institutional characteristics at a given point in time to be frozen….Even a strict form of originalism, properly understood, must acknowledge that the original understanding of some clauses could be fairly read to have included a background assumption of further judicial development.")

[221] 534 U.S. at 232-33 (Ginsburg, J., dissenting) (acknowledging that a static historical approach was sensible "in the context of… 'preserving' the meaning of … founding era provisions", such as the Seventh Amendment and Judiciary Act of 1789).

[222] *See supra* text accompanying notes 209-11.

These are injunctions where the federal court essentially oversees the administration of state or local governmental institutions and which impose various obligations on governmental entities that go beyond what is required by law.[223] Justice Thomas, for example, has noted that, prior to the 20th Century, there were no instances of structural injunctions or "continuing judicial supervision and management of governmental institutions."[224] Some scholars have argued that these injunctions offend principles of state sovereignty and of separation of powers," and represent judicial overreaching of the worst sort.[225] Courts have often expressed disapproval of prophylaxis in injunctions and have averred that injunctive obligations should go no farther than necessary to remedy the wrongdoing.[226]

On the other side of this debate, commentators posit that structural and prophylactic injunctions are an essential enforcement mechanism for constitutional rights.[227] This remedy was, after all, essential to enforcing constitutional values in public schools, prisons, and electoral districts.[228] Injunctions, it is contended, are the most appropriate form of remedy in the

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[223] In addition to directing the cessation of unconstitutional conduct (or mandating the performance of constitutionally required conduct), structural injunctions typically compel the undertaking of additional steps that are intended to provide a level of assurance that the proscribed conduct will not be repeated. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 677-80 (1983) (prophylactic decree reduces the risk that the remedy will turn out to be ineffective or that the defendant will evade or misinterpret its remedial duties); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 330 (2004) (prophylactic relief sweeps broadly to include legal conduct and such breadth is the core of its effectiveness).

[224] *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring).

[225] David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 629-30 (1988) ("Without principles to guide the exercise of equitable discretion, the judge acts as a policy maker in framing the remedy, which throws into question the legitimacy of the judicial power to grant [prophylactic remedies]."); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996) (arguing that prophylactic injunctions violate principles of judicial restraint).

[226] *Rizzo v. Goode*, 423 U.S. 362 (1976) (invalidating injunctive relief that included prophylactic measures); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution"); *see also People Who Care v. Rockford Bd. of Educ*., 111 F.3d 528, 534 (7th Cir. 1997) (equitable remediation should "not used to launch federal courts on ambitious schemes of social engineering"); *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) ("I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.").

[227] Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 416-17 (2000) (suggesting that courts should rely more heavily on injunctions because they represent the "the best hope for preventing constitutional violations where a majority is willing to bear the costs of paying compensation or where a powerful interest group benefits from the unconstitutional activity."); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 876 (2001) (structural reform injunctions are a "uniquely appropriate remedial regime" for constitutional wrongs).

[228] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 878-93 (1999); *see Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1, 26 (1971) (ordering busing to desegregate schools); *Hutto v. Finney*, 437 U.S. 678, 683-84 (1978) (ordering limits on the number of prisoners per cell); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (ordering the reapportionment of electoral districts).

constitutional context because damages awards are not a sufficient deterrent since they are too difficult to obtain or too skimpy in amount.[229]

Whatever flexibility is essential for courts to halt constitutional violations and to redress them effectively does not require a modification or abandonment of the substantive equitable principles that have been carried forth from the Founding Era through the present. The Supreme Court has consistently been able to vindicate important constitutional rights through injunctions that were granted only upon a showing of likelihood of success and irreparable injury.[230] It has also resisted any temptation to relax rules of standing or substantive elements of proof simply because constitutional rights were at stake and injunctive relief was being sought.[231]

VI. OTHER PROBLEMS WITH DYNAMIC INCORPORATION

Three other considerations militate in favor of using a freeze frame approach to determine the substantive principles of equity where they are not codified but simply deemed to be incorporated into Federal Rule 65. These considerations include the reluctance to have judges making law in an unrestrained environment, *Erie* restrictions on law-making by federal courts, and the separation of powers preference that remedies be conferred by the legislative branch rather than the judiciary.

These three principles all converged in a 2004 Supreme Court case[232] involving a provision of the Judiciary Act that incorporated an entire body of substantive law--the so-called Alien Tort Statute, which confers jurisdiction to federal courts over civil tort suits brought by an alien based on "the law of nations."[233] The Court concluded that the statute encompassed tort claims other than those few, such as piracy, that the First Congress had in mind when it enacted the provision.[234] The Court, however, limited the scope of modern international law-based tort claims to "a narrow class" of those that would "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable" to the 18th-century torts the

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[229] Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998); Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 42-43 (1997) (injuries from violations of the Fourth Amendment are mostly dignitary and out-of-pocket losses are "small or non-existent").

[230] *See, e.g., Ex Parte Young*, 209 U.S. 123, 143-44 (1908); *Dombroski v. Pfister*, 380 U.S. 479, 485-86 (1965); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Brown v. Board of Educ*., 347 U.S. 483, 493-94 (1954). The remedy of a declaratory judgment is available to plaintiffs who cannot establish the requisite irreparable injury. *Steffel v. Thompson*, 415 U.S. 452, 463 (1974).

[231] In *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), the Court declined to permit a plaintiff to seek to enjoin unconstitutional government conduct unless he could show to a "substantial certainty" that he would likely be injured from that conduct in the future. In *Los Angeles Co. v. Humphries*, 562 U. S. ____, 131 S. Ct.447 (2010), the Court refused to lower the standard of municipal liability under 42 U.S.C. §1983 simply because an injunctive remedy was being sought to prevent unconstitutional conduct.

[232] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

[233] 28 U.S.C. § 1350.

[234] *Sosa*, 542 U.S. at 720.

First Congress had in mind."[235] The Court remarked that this "vigilant gatekeeping" was required by legal developments that took place after the Judiciary Act was passed.[236]

1. Legal Realism

The first development was that courts came to recognize that the process of divining common law is actually more of a legislative function than a judicial one. As Justice Souter explained, when the Judiciary Act became law in 1789, the "accepted conception" of the common law was that it was a pre-existing and "transcendental" body of law, but it has since come to be understood as something that is "made or created" and not "found or discovered."[237] The significance of this transformation, the Court reasoned, it that courts now perceive a certain incongruence in having unelected judges making law (outside the narrow context of filling in statutory interstices) in a democratic society.[238]

This development also supports a conclusion that historic substantive principles of equity should apply, unless Congress has expressly indicated otherwise. Such a framework coincides with the principle emphasized in *Sosa* that only a legislature should legislate.[239]

2. The Erie Doctrine

Second, the second post-Judiciary Act development cited by the *Sosa* Court was the "avulsive change" produced by the Court's 1938 *Erie* decision and its sweeping limitation on the federal courts' common law-making powers to discrete narrow areas of unique federal interest.[240] General common law-making came to be viewed as an improper encroachment upon duties consigned by the Constitution to Congress and, in areas of state concern, on

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[235] *Id*. at 725.

[236] *Id*. at 729. The fourth development mentioned by the Court, which was the potential adverse impact that recognizing a vast array of international torts would have on the foreign relations of this country, has no application outside of the international law context. *Id*. at 729.

[237] *Id*. at 726 (*quoting Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533(1928) (Holmes, J., dissenting)); *see also id*. at 741 (Scalia, J., concurring in part and concurring in the judgment). Justice Souter wrote for a six-member majority in concluding that these three developments counselled in favor of caution in recognizing new torts. Justice Scalia filed a separate concurring opinion, in which Justices Rehnquist and Thomas joined, opining that the three developments precluded courts from recognizing any new international law-based torts.

[238] *Id*. at 726; *see also id*. at 741-42 (Scalia, J., concurring in part and concurring in the judgment) ("the creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century").

[239] It has been argued that the mandatory language of the Legislative Vesting Clause of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress", U.S. CONST., art. I, § 1, is suggestive of an exclusive power and thus that the President and judiciary cannot legislate. *See* Amar, CONSTITUTION, *supra* note 24, at 225.

[240] *Erie Railroad Co. v. Tompkins* 304 U.S. 64 (1938); *see Sosa*, 542 U.S. at 726; *see also id*. at 741-42 (Scalia, J., concurring in part and concurring in the judgment).

responsibilities reserved by that charter to the state legislatures.[241] In the post-*Erie* context, Justice Souter remarked, the general practice of federal courts has been "to look for legislative guidance before exercising innovative authority over substantive law."[242]

Similar considerations apply to the substantive principles governing federal equity. The Supreme Court has adopted the view that the Judiciary Act and the Federal Rules incorporated 18th Century English equitable principles. Federal courts should refrain from implementing changes to those principles absent an invitation to do so from Congress, and even then only where Congress has supplied sufficient guidance as to what modifications should be implemented.

3. Judicial Implication of Remedies

Third, the *Sosa* Court recounted that federal courts came to view the creation or implication of private rights or remedies as an improper judicial arrogation of legislative responsibilities.[243] Courts began to refrain from the practice of implying rights or remedies, reasoning that these matters are more appropriately determined in the political branches of government.[244] This judicial reluctance extends to the expansion of pre-existing remedies, not just the creation of new ones.[245]

A judicial modification of injunction standards so that preliminary injunctions are more liberally granted constitutes an expansion of pre-existing remedies. The Supreme Court has indicated a clear preference that Congress should decide whether to alter the substantive requirements for obtaining preliminary injunctive relief. This course allows the political process, with its public scrutiny and participation, to play the critical role with respect to injunction standards. Advocates pressing for greater pre-trial protection of a plaintiff's interests can make their case and those believing that a more lenient policy with respect to preliminary injunctions would unfairly harm defendants can counter. The result, optimally, would be one that is a fair product of competing political forces, and the public will certainly benefit from having it determined through the open and robust debate of the democratic process.[246]

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[241] *Id*. at 726; *see also id*. at 741-42 (Scalia, J., concurring in part and concurring in the judgment) ("today's federal common law is not our Framers' general common law").

[242] *Id*. at 726.

[243] *Id*. at 727.

[244] *Id*. at 727; *see also id*. at 742-43 (Scalia, J., concurring in part and concurring in the judgment) ("*Bivens* is 'a relic of the heady days in which this Court assumed common-law powers to create causes of action.'") (*quoting Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

[245] *See Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 284-85 (1998); *Davis v. Monroe Co. Bd. of Educ*., 526 U.S. 629, 639-40 (1999); *see generally* Donald Zeigler, *Rights, Rights of Action and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 95-103 (2001).

[246] *Cannon v. University of Chicago*, 441 U.S. 677, 743-44 (Powell, J., dissenting) (1979).

CONCLUSION

A freeze frame approach to the substantive law of preliminary injunctions is consistent with the Court's approach to equity in other areas. It respects the importance that the early federal courts placed on pre-revolutionary English chancery practice, and comports with 20th Century developments emphasizing a federal court's limited lawmaking role in a democratic government. Adhering to the likelihood of success and irreparable injury elements produces a system that is fair to defendants and facilitates more reliable and sound judicial decision-making.

As Justice Kennedy has observed:

> [T]he judgment of our own times is not always preferable to the lessons of history. Our whole constitutional experience teaches that history must inform the judicial inquiry. Our obligation to the Constitution and its Bill of Rights, no less than the compact we have with the generation that wrote them for us, do not permit us to disregard provisions that some may think to be mere matters of historical form.[247]

Allowing history to play a critical role in this context is more palatable than when it is used to supply content to constitutional provisions such as the Establishment or Equal Protection Clauses. Congress cannot change the meaning that history gives to a constitutional provision, but it is free to do so here. If Congress prefers that a more lenient approach to preliminary injunctions be used in certain areas, it is free to prescribe a new standard. In the absence of congressional action, why not assume that it agrees with the use of the traditional preliminary injunction standards. [248]

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[247] *Terry*, 494 U.S. at 594 (Kennedy, J., dissenting).

[248] In concluding this article, it seems fitting to mention perhaps the most celebrated use of the freeze frame technique in American cinema: Director George Roy Hill's freeze frame shot of Paul Newman and Robert Redford as they emerge from the shed in the memorable ending to the classic western, *Butch Cassidy and the Sundance Kid* (1969). http://en.wikipedia.org/wiki/Freeze_frame_shot. I hope that the views expressed in this article will be received more warmly than the reception that greeted the two outlaws.