Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions

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Though described as "'an extraordinary and drastic remedy,'"[1] the preliminary injunction is 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.[2] The plaintiff is essentially seeking her desired outcome in the litigation without having to prove her entitlement to it.[3] The defendant is forced to defend against the merits of the plaintiff's claims at the earliest stages of a lawsuit when she is 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 likely be dictated by the plaintiff as the moving party.[4]

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.[5] Courts are often receptive to requests for prophylactic measures in the injunctive decree so that the defendant will steer far clear of harming the plaintiff.[6] 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.[7] 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.[8]

Courts spend significant resources adjudicating preliminary injunction motions, which frequently require prolonged evidentiary hearings that approximate full trials.[9]

1. Munaf v. Geren, 553 U.S. 674, 689 (2008) (quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948, at 129 (2d ed. 1995)).
2. *See* discussion *infra* Part III.C.
3. *See* discussion *infra* Part III.C.
4. *See infra* notes 176-77 and accompanying text.
5. *See infra* note 144 and accompanying text.
6. *See infra* notes 144, 177-80 and accompanying text.
7. *See infra* note 145 and accompanying text.
8. *See infra* note 187 and accompanying text.
9. *See infra* note 189 and accompanying text.

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 ruling on the merits.[10] The uncertainty of that ruling is compounded on appeal since the order qualifies for only the narrowest form of abuse-of-discretion review.[11]

In a series of decisions over the past five years, the United States Supreme Court has restored the preliminary injunction device to its rightful place as a drastic provisional remedy that should be sparingly granted.[12] The Court has confirmed that temporary injunctions should not be issued unless the moving party demonstrates, at a minimum, that she will likely prevail at trial and suffer irreparable harm.[13] In so ruling, the Court rejected several approaches by federal circuit courts permitting preliminary injunctions in the absence of proof of a likelihood of success or irreparable injury (or both).[14] Many lower federal courts had eliminated any irreparable injury requirement by conclusively presuming it in large swaths of cases; others had watered down the likelihood of success on the merits element by deeming it satisfied upon a showing that the plaintiff has some chance of prevailing.[15]

The Supreme Court's mandate that "likelihood of success" and "irreparable injury" are indispensible elements of a substantive preliminary injunction standard is a reaffirmation of the earliest federal rulings from the Marshall Court era.[16] This approach is the judicial equivalent of a freeze frame technique:[17] the Court encapsulates and applies the principles of equity that prevailed in English chancery courts at the time of separation of the United States from England.[18] Thus, a static, historical conception of equity drives the substantive standards for deciding whether to grant injunctive relief.

The Supreme Court's freeze frame approach 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

10. *See infra* notes 182-83 and accompanying text.
11. *See infra* note 184 and accompanying text.
12. *See* discussion *infra* Part IV.
13. *See* discussion *infra* Part IV.
14. *See* discussion *infra* Part IV.
15. *See* discussion *infra* Part III.B.
16. *See* discussion *infra* Part II.B.
17. A "freeze frame" is a cinematographic technique of using a single camera shot to give the illusion of a still photograph. Gregory J. Golda, *Film Terminology and Other Resources*, PA. ST. U., http://www.psu.edu/dept/inart10_110/inart10/film.html (last visited Oct. 3, 2011, 6:45 PM). The technique is used to enhance a particular scene or an important moment in the movie. An early example is Frank Capra's classic film, IT'S A WONDERFUL LIFE (Liberty Films 1946), in which the first on-screen appearance of the adult George Bailey, played by James Stewart, is shown as a freeze frame.
18. *See infra* notes 46-48 and accompanying text.

federal courts' equitable jurisdiction. Modern equitable remedies are therefore the same as those typically awarded by pre-revolutionary English chancellors.

This article analyzes the Supreme Court's approach to the substantive law of preliminary injunctions and argues that it is well supported by the Court's earliest decisions on the subject and consonant with the Court's approaches in closely-related areas. Part I traces the history of equity in pre-revolutionary England, explaining how the substantive law of equity both developed and influenced the early federal courts' Seventh Amendment jurisprudence. These early federal courts applied a historically-based static inquiry into the practices of eighteenth century English chancery courts to determine civil jury trial rights. Part II explores federal court decisions since the eighteenth century to determine how preliminary injunction law developed into the firm concepts of likelihood of success on the merits 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 misapplying or failing to apply the likelihood of success or irreparable injury standards.

Part IV summarizes recent Supreme Court jurisprudence that categorically rejects the modified approaches of federal circuit courts and reaffirms the indispensability of showing both likelihood of success and irreparable injury. Part V analyzes how the Supreme Court's reinvigorated approach is consistent with its modern Seventh Amendment jurisprudence, its approach to the scope of equity jurisdiction conferred to federal courts under the Judiciary Act of 1789,[19] and the availability of equitable injunctive relief.

I. HISTORICAL DEVELOPMENT OF EQUITY

The Supreme Court has repeatedly emphasized that the hallmark of equity is its flexibility[20] and it is certainly true that equity arose from the inflexible nature of the British court system. A review of the history of English equity, however, 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 the colonists declared themselves independent of England. By then, courts had also eliminated the open-ended nature of equitable jurisdiction by imposing rigid requirements for entrance to the halls of equity.

19. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

20. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999) (stating the court would "not question the proposition that equity is flexible"); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (stating that "'[t]he essence of equity jurisdiction'" is "'[f]lexibility rather than rigidity'" (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)); Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules; it depends on flexibility."); Seymour v. Freer, 75 U.S. (8 Wall.) 202, 218 (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.").

Indeed, during the first half of the nineteenth century, English Parliament implemented sweeping reforms of its civil procedure code, effectively ending equity's separate existence. First, English law courts were given full injunctive and other equitable powers.[21] Then, equity courts were formally merged into law courts to form a unitary judicial system.[22]

A. *The Development of English Chancery Practice*

Equity practice arose during the thirteenth century, a time when English courts were rigidly attached to the writ system.[23] 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.[24] Common law justice thus depended on whether the plaintiff could legitimately plead a case meeting the rigid requirements of a particular writ.[25] If a party's pleadings failed to meet the requirements of any one writ, however, the party was permitted to petition the King's chancellor for special relief.[26]

As the number of these petitions grew over the course of the sixteenth and seventeenth centuries, the chancery came to function much like a court of law.[27] Chancellors were trained lawyers, not simply religious figures as in the past,[28] and they employed formidable legal staffs to assist them in managing proceedings and ruling upon petitions.[29] Accordingly, the chancery gradually developed regular

21. *See* Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, §§ 74-86 (Eng.); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 739 (1973); *see also* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 210, 211 (5th ed. 1956).

22. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 24 (Eng.); ROBERT S. THOMPSON & JOHN A. SEBERT, JR., REMEDIES: DAMAGES, EQUITY AND RESTITUTION § 3.01[B], at 223 (2d ed. 1989); Wolfram, *supra* note 21.

23. *See* OWEN M. FISS, INJUNCTIONS 10 (1972) [hereinafter FISS, INJUNCTIONS].

24. *See* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 501 (2003).

25. *See* THOMPSON & SEBERT, *supra* note 22, § 3.01[A], at 221 ("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."); 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 (1984).

26. *See* Denlow, *supra* note 24, at 500-01. Specifically, parties would petition the King's chancellor to "'do good and dispense justice,'" that is, rule on petitions based on his own conscience. *Id.* (quoting Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 611 (1997)).

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

28. *See generally* Timothy A. O. Endicott, Note, *Conscience of the King: Thomas More and the Development of English Equity*, 47 U. TORONTO FAC. L. REV. 549 (1989).

29. *See* FISS, INJUNCTIONS, *supra* note 23, at 11-12.

procedures for presentation and determination of petitions, as well as a substantive law of equity based on notions of ethics and fairness.[30]

At first, law courts comfortably co-existed with chancery courts, recognizing that each performed a unique and valuable judicial function.[31] In the seventeenth century, the peaceful co-existence began to deteriorate. Law courts accused chancery courts of interfering in matters of law and jurisdictional jealousies developed.[32]

The monarchy eventually intervened to resolve this friction. Equity was forced to respect the boundaries of the common law system and decline jurisdiction where the claimant had an adequate remedy in a court of law.[33] Thus, was born a cardinal principle of equity: A party seeking equity must show that she lacks an adequate remedy at law.[34] As a result, common law courts began dismantling the procedural barriers that once restricted access to its adjudicative powers, and thus, the jurisdiction of chancery courts grew even narrower.[35]

Meanwhile, the body of equitable jurisprudence became more developed. A party proceeding in equity was increasingly required to cite to preexisting 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,

> [t]he 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.[36]

By mid-eighteenth century, equity was no longer free to disregard the written law, or to provide remedies simply because a law court would not do so; instead, parties desiring to proceed in equity had to establish at the outset, a basis in substantive law for the exercise of equity.[37] Equity became "a consistent and definite

30. *See id.* Among the equitable doctrines that were included in that fledgling jurisprudence were the doctrines of unclean hands, estoppel, and laches. *See* THOMPSON & SEBERT, *supra* note 22, § 3.01[A], at 222.

31. *See* Laycock, *supra* note 27.

32. *See id.* Chancery courts frequently issued injunctions that restrained proceedings pending before common law courts, much to the chagrin of those law courts. *See id.* at 700.

33. *See* Black, *supra* note 25, at 4; Laycock, *supra* note 27, at 700.

34. Laycock, *supra* note 27; *Developments in the Law – Injunctions*, 78 HARV. L. REV. 996, 997 (1965).

35. *See* THOMPSON & SEBERT, *supra* note 22.

36. WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 5 (London, William Maxwell & Son 1867) (footnotes omitted). The treatise goes on to state "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." *Id.*

37. *See* 15 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAWS 82 (A.L. Goodhart & H.G. Hanbury eds., 1965); Black, *supra* note 25, at 5 (describing how the "principles of equitable

body of rules" with "no place for a vague and formless discretion" of chancellors.[38] As Blackstone observed, English equity had developed into a precise legal system governed by rules and precedents no less formalistic than the courts of law.[39] Indeed, Alexander Hamilton relied upon the precisely-defined nature of the English equity system to answer Anti-Federalist criticisms that newly-created federal equity courts would have unbridled discretion.[40]

B. *The Static Approach to the Seventh Amendment*

Early federal court decisions construing the Seventh Amendment's Trial by Jury Clause[41] revealed the impact that English equity law would have on federal equity

jurisdiction became fixed.").

38. PLUCKNETT, *supra* note 21, at 692. This historical account is not intended to suggest that flexibility has no further role to play in equity jurisprudence. To the contrary, flexibility still serves a critical function that can be gleaned from the Supreme Court's opinion in Hecht Co. v. Bowles, 321 U.S. 321, 329 (1994). *Hecht* expressly coupled the concept of flexibility with a court's ability "to mould each decree to the necessities of the particular case." *Id.* Under this standard, a federal court has the flexibility to restrain action, compel action, or condition a decree in a way that fits the specific circumstances at hand. *See id.* Perhaps for this reason, the Supreme Court typically cites *Hecht* to describe flexibility as a cardinal principle of equity. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part) ("Since our earliest cases, we have valued the adaptable character of federal equitable power." (citing *Hecht*, 321 U.S. at 329)); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (reiterating that "'[t]he essence of equity jurisdiction'" is "'[f]lexibility rather than rigidity'" (quoting *Hecht*, 321 U.S. at 329)).

39. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 436 (Oxford, Clarendon Press 1768). On this development, Blackstone noted that

> if 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.

Id. at 440.

40. *See* THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. 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 . . . ."); *id.* NO. 83, at 569 n.* ("[T]he 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.").

41. U.S. CONST. amend. VII. The Clause provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." *Id.* By contrast, Article III provides that "the Trial of all Crimes . . . shall be by Jury." U.S. CONST. art. III, § 2, cl. 3. The Seventh Amendment was adopted in part to address anti-federalists' concerns that, absent a constitutional protection like that afforded in criminal cases, the federal government might

jurisprudence. In his 1812 circuit court decision in *United States v. Wonson*, constitutional scholar and Supreme Court Justice Joseph Story declared that the term "common law" that appears in the 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."[42] Although Justice Story's holding in *Wonson* did not require a static eighteenth century English common law approach, it was no doubt implied by his selection of English law as the baseline. A dynamic incorporation of English jury trial practice, on the other hand, would force upon the American people decisions made by members of a Parliament that they had no role in electing.[43]

In *Bains v. The James & Catherine*, Supreme Court Justice Henry Baldwin, sitting as a circuit court judge, confirmed that federal courts would not conform their equitable jurisprudence to dynamically changing English equity practice.[44] Instead, 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."[45] Thus, the English law examined for Seventh Amendment purposes is that which existed prior to 1791, the year the Seventh Amendment was ratified.

The Supreme Court, in *Parsons v. Bedford*, officially adopted a freeze frame approach to the Seventh Amendment, holding that the right to a jury trial should turn on whether the case is predicated on a legal right, distinct from rights in equity or admiralty, as determined by English law.[46] Early federal courts also held that civil jury trial rights should depend on the nature of the remedy being sought.[47] Thus, even if the particular right asserted was legal, where the requested remedy was considered equitable and adjudicated in an English chancery court, the suit could be decided without a jury.[48]

Neither the textual language nor the legislative history of the Seventh Amendment mandate that courts apply eighteenth century jurisprudence as a baseline for interpreting it.[49] One may plausibly read the word "preserve" to suggest a frozen

eliminate jury trials in civil cases. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 233 (2005) [hereinafter AMAR, AMERICA'S CONSTITUTION].

42. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

43. *See* Wolfram, *supra* note 21, at 734 & n.284.

44. *See* Bains v. The James & Catherine, 2 F. Cas. 410, 418 (C.C.D. Pa. 1832) (No. 756).

45. *Id.*

46. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 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 . . . .").

47. *See, e.g.*, *Bains*, 2 F. Cas. at 419; Baker v. Biddle, 2 F. Cas. 439, 445 (C.C.E.D. Pa. 1831) (No. 764).

48. *Baker*, 2 F. Cas. at 445.

49. Wolfram, *supra* note 21, at 734 ("Although it is obvious that the language of the

baseline rather than an evolving one; likewise, one may reasonably interpret "the common law" as meaning a single reservoir of content.[50] However, one might also interpret the Seventh Amendment's text 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.[51]

Scholars have noted that a state's rights reading of the Seventh Amendment is "best supported by the historical materials . . . ."[52] The only Federalist Paper to address the issue of civil jury trial rights supports this interpretation. 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."[53]

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amendment is compatible with the historical test, it hardly compels it."); *see also id*. at 721 ("The historical materials furnish very little justification for the historical test's reference to the English common law."); *id*. at 722 ("[A]llusions 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.").

50. *See* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 450-51 (1999) (arguing that 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?").

51. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89 (1998) [hereinafter AMAR, BILL OF RIGHTS] (explaining that the word "preserved" can be construed similarly to its etymological cousin, the word "reserved," as used in the Tenth Amendment); Wolfram, *supra* note 21, 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." (citation omitted)).

52. *See* Wolfram, *supra* note 21, at 732 ("[T]he 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."); *see also* AMAR, BILL OF RIGHTS, *supra* note 51, at 91.

53. THE FEDERALIST NO. 83, *supra* note 40, at 567; *see also* AMAR, BILL OF RIGHTS, *supra* note 51, at 90 & n.*. Other approaches to interpreting the Trial by Jury Clause have been proposed, but none of them square with the 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. *E.g.*, Krauss, *supra* note 50, at 479-83. Others have contended that the Clause should be construed in a functional manner, letting federal courts decide which civil claims are most suitable to resolution by lay juries. *E.g.*, Wolfram, *supra* note 21, at 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. *E.g.*, 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

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.[54] 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.[55] 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 outdated or superseded jury trial rules.[56]

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.[57] The Act has "always been considered, in relation to . . . [the Constitution], as a contemporaneous exposition of the highest authority."[58] In a case considering the scope of admiralty jurisdiction conferred in the Judiciary Act, Justice Baldwin stated that the phrases "suits in the admiralty," "suits in equity," and

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?

54. *See* Wolfram, *supra* note 21, at 732-33.

55. *See id.* (describing problems with a static state law approach to the Trial by Jury Clause as "insuperable.").

56. The federal Process Acts of 1789 and 1792 provided for a static conformity with certain state procedural laws. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93. Under these acts, federal courts were required to follow procedures "now used or allowed" in the states where the federal courts sat. *See* Act of May 8, 1792 § 2, 1 Stat. at 276; Act of Sept. 29, 1789 § 2, 1 Stat. at 93. As a leading federal practice commentator has noted, the "static conformity" of these acts proved to be unworkable, forcing Congress repeatedly to intervene and incorporate newly enacted procedures of existing states and the procedures of newly admitted states. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 61, at 425 (7th ed. 2011).

57. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, which created federal courts and regulated their jurisdiction, was among the first and most significant achievements of the first Congress, enjoying "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, 259 (1985); *see also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 594 (1875) ("[T]he venerable Judiciary Act of 1789 was in some sort regarded as only less sacred than the Constitution . . . .").

58. 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); *see also* 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."), *abrogated on other grounds by* Milwaukee County v. M.E. White Co., 296 U.S. 268, 278 (1935).

"suits at law" should be construed similarly for purposes of both the Seventh Amendment and the Judiciary Act, and specifically by reference to eighteenth century English practice.[59]

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 by consistently providing federal court trials (district, circuit and Supreme) for issues of fact in all cases, except those in equity or admiralty.[60] Because the Judiciary Act took such pains to distinguish between actions at law and actions in equity or admiralty, it made sense that the Seventh Amendment's baseline would be the law of a jurisdiction that drew a similar distinction—the law of England.[61]

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 these courts 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 with regard to 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 must not proceed if a "plain, adequate and complete" remedy existed at law—was held to preserve a standard that had been developed in pre-revolutionary England.[62] Justice Bushrod Washington, riding circuit, declared:

59. *See* Bains v. The James & Catherine, 2 F. Cas. 410, 417-19 (C.C.D. Pa. 1832) (No. 756).

60. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).

61. Some states—including Pennsylvania, Delaware, and North Carolina—did not distinguish between law, equity, or admiralty for jury trial purposes, and others—New Hampshire, Connecticut and Massachusetts—did not have separate chancery courts, and instead had their common law courts conduct jury trials for admiralty and equity claims. *See* THE FEDERALIST NO. 83, *supra* note 40, at 565-67; *see also* Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 221-23 (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 a [sic] 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 *The Federalist Papers*, the civil jury trial practices of four key states—New York, Virginia, South Carolina and Maryland—were already predicated on the English law system. *See* THE FEDERALIST NO. 83, *supra* note 40, at 565-67; *see also* Wolfram, *supra* note 21, at 737 n.290 (recognizing that several state constitutions referenced English common law and thereby took a static approach to jury trial rights).

62. *See* Harrison v. Rowan, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819) (No. 6,143); *see also* Mayer v. Foulkrod, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (No. 9,341) (discussing other

> 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 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.[63]

Perhaps the most authoritative commentator on equity jurisprudence in the early days of the Republic was Justice Joseph Story. His treatise on equity jurisprudence unequivocally states that the federal law of equity "is founded upon, co-extensive with, and in most respects conformable to, that of England."[64] Thus, eighteenth 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*

By the end of the eighteenth century, English chancery courts had developed an extensive body of substantive principles to be applied in cases of equity. A few scholars have contended, however, that 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.[65] 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."[66]

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provisions of the Judiciary Act and stating, "[t]he 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, 16 U.S. (3 Wheat.) 212, 223 (1818)).

63. *Harrison*, 11 F. Cas. at 667.

64. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 57, at 54 (Boston, Little, Brown & Co. 13th ed. 1886). This view is not surprising, given Story's understanding of both the Seventh Amendment and the Judiciary Act. *See supra* text accompanying notes 41-45, 59-60.

65. *See, e.g.*, Black, *supra* note 25, at 5; Denlow, *supra* note 24, at 501 (stating the proposition that "injunctive relief did not come into being until the latter part of the nineteenth century" is one in which people "widely agree[]"); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 126 (2001) (explaining historical commentators agree "that the modern notion of a special standard for preliminary injunctions did not take hold until well into the nineteenth century"); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 532 (1978).

66. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). Professor Leubsdorf, for instance, has opined that, as of the eighteenth century, the "concept of a general rule applicable to all preliminary injunctions was still unborn."

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 a tool for staying litigation in law courts, to a device used to restrain conduct during the pendency of the case so that its legality could be adjudicated before its harmful effects were felt.[67] As one scholar explains, it was when the injunction ceased being primarily a tool for staying proceedings at law, and became known more for restraining a defendant's actions, that courts began to generalize about an appropriate standard for preliminary injunctions.[68]

Scholars point to the following passage from 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*.[69]

Scholars have suggested that this summary indicates that a showing of irreparable injury was not an essential element of a preliminary injunction.[70] 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 Kerr's treatise, however, indicates that these passages do not provide an accurate or complete statement of the preliminary injunction standard as referenced elsewhere in the work. 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 "[t]he Court must, before disturbing any man's legal right, 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

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Leubsdorf, *supra* note 65, at 531.

67. *See, e.g.*, Lee, *supra* note 65, 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 65, at 536-37.

68. *See* Leubsdorf, *supra* note 65, at 537.

69. KERR, *supra* note 36, at 12.

70. *See* Leubsdorf, *supra* note 65, at 536. 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 36, at 12 (footnote omitted).

case ultimately failing in the final issue of the suit."[71] 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."[72]

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 with what he is doing . . . an injunction will be granted pending the trial of the right.[73]

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,[74] nuisance[75] and breach of covenant.[76]

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.[77] 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, it describes some cases where chancery courts insisted upon proof of irreparable injury and likelihood of success, and some cases where courts did not. The treatise does not, therefore, demonstrate that, under eighteenth century English equity law, neither a showing of likelihood of success nor irreparable injury was required in order to obtain preliminary injunctive relief.

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71. KERR, *supra* note 36, at 197 (footnote omitted).

72. *Id.* at 199 (footnote omitted).

73. *Id.* at 294 (footnote omitted).

74. *Id.* at 235 (explaining that "restraining waste by injunction is founded upon the equity of protecting property from irreparable injury"); *id.* at 237 (noting that plaintiff is required to show evidence of title and injury).

75. KERR, *supra* note 36, 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 . . . ." (footnote omitted)).

76. *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.").

77. *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." (footnote omitted)); *see also id.* at 294 (using similar language).

B. *Early Federal Preliminary Injunction Standards*

Any ambiguities that may have existed under eighteenth century English law regarding the preliminary injunction standard were not perceived by early federal jurists. Rather, federal courts viewed likelihood of success and irreparable injury as essential elements under English equity practice and promptly incorporated them into federal equity jurisprudence. For example, the Supreme Court applied these standards in one of its most noteworthy Marshall-era decisions, *Osborn v. Bank of the United States*.[78]

There, the 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 . . . ."[79] Chief Justice John Marshall rejected an 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 protection "not from the casual trespass of an individual . . . but from the total destruction of its franchise, [and] of its chartered privileges . . . ."[80]

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 to abuse,"[81] and that they should be issued "only in very clear cases . . . ."[82] 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 more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought 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 . . . .[83]

78. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824).

79. *Id.* at 870-71.

80. *Id.* at 840.

81. 2 STORY, *supra* note 64, § 959b, at 264.

82. *Id.*

83. *Id.* at n.1 (citing Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1,617)).

Justice Baldwin had applied this standard in a case involving an alien property owner's effort to enjoin a railroad from trespassing onto his property to construct a road.[84] Finding "thus far his case is made out and his *right clear*" and that "[n]o damages can restore him to his former condition," Justice Baldwin, citing to numerous English chancery cases, preliminarily enjoined the construction on the grounds that the relief was "within the well established rules of courts of equity . . . ."[85]

Justice Baldwin's standard was adopted by the Supreme Court in its 1847 decision in *Truly v. Wanzer*.[86] The complainant had purchased two black slaves ten years prior to suit and had defaulted on the payment of one of the notes given to the slave-owner.[87] 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 transporting the slaves into the state for purposes of sale.[88] The Court denied the petition, concluding that his case failed to meet the *free from doubt* standard.[89]

Another leading treatise on early American injunctive jurisprudence was authored by Harvard law professor James High.[90] His treatise reflects that most state courts insisted upon a showing of a probability of success on the merits and irreparable injury before issuing preliminary injunctive relief. Professor High comments that courts will not issue temporary injunctions "without a probability that plaintiff may finally maintain his right,"[91] and that where the case presents "a novel question of law of grave importance and serious difficulty, the injunction should be denied."[92]

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

84. *Bonaparte*, 3 F. Cas. at 822.
85. *Id.* at 833 (emphasis added).
86. Truly v. Wanzer, 46 U.S. (5 How.) 141, 142-43 (1847).
87. *Id.* at 141-42.
88. *Id.*
89. *Id.* at 142-43.
90. 1 JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS (4th ed. 1905).
91. *Id.* § 5, at 9.
92. *Id.* § 4, at 8. In a section titled "Relief Not Granted When Legal Right is in Doubt," High 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 (footnote omitted).

> 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.[93]

Thus, whatever obscurity existed under actual eighteenth century English equity law regarding the status of the likelihood of success or irreparable injury elements, nineteenth century federal courts perceived the law of equity as plainly requiring 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.[94] Rule 65 merely sets forth certain procedural requirements for obtaining interlocutory injunctive relief and does not specify the substantive prerequisites for obtaining the provisional remedy.[95] 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.[96]

1. Likelihood of Success

During the early twentieth 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.[97] While these formulations

93. HIGH, *supra* note 90, § 22, at 36, 38 (footnote omitted).

94. FED. R. CIV. P. 65(a)(1), (b)(1).

95. WRIGHT, MILLER & KANE, *supra* note 1, § 2941, at 30-31 ("[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, under which the Federal Rules were promulgated, specifically provides that the rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006). The Federal Rules have similarly been held not to enlarge or diminish the class of cases for which there is a right to trial by jury. *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2301, at 11 (3d ed. 2008) (citing Ind. Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co., 195 F.3d 368, 374 (8th Cir. 1999); Rachal v. Ingram Corp., 795 F.2d 1210, 1214 (5th Cir. 1986)).

96. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999).

97. *E.g.*, Mass. State Grange v. Benton, 272 U.S. 525, 527 (1926); Goldammer v. Fay, 326 F.2d 268, 270 (10th Cir. 1964).

arguably approach a *clear and convincing* or *beyond a reasonable doubt* standard, they certainly establish that a plaintiff must show it will more likely than not prevail.[98] The Supreme Court emphasized the rigorous nature of the standard in *Ex parte Young*.[99] There the Court sought 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 . . . ."[100] The Court thus instructed lower federal courts that no injunction should be granted except for those "case[s] reasonably free from doubt."[101] Lower federal courts followed this instruction.[102]

The term "likelihood of success on the merits" has not always been free of ambiguity.[103] But, in *Doran v. Salem Inn, Inc.*, the Court made it quite clear that "likelihood of success" was the appropriate phrasing for the standard and that it

98. The Supreme Court has never expressly held that a slightly more than fifty percent chance of success is insufficient to obtain preliminary injunctive relief.

99. 209 U.S. 123, 166 (1908).

100. *Id.*

101. *Id.* The Court reiterated this instruction in Cavanaugh v. Looney, 248 U.S. 453, 456 (1919) and *Mass. State Grange*, 272 U.S. at 527 ("[N]o injunction ought to issue . . . unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.").

102. *E.g.*, *Goldammer*, 326 F.2d at 270 ("Injunction is a drastic remedy to be exercised with caution, and should be granted only in cases where the necessity therefor is clearly established."); Sharp v. Lucky, 266 F.2d 342, 343 (5th Cir. 1959) (stating that injunctions should be used "where both the right and the wrong claimed are clear"); United States v. Tilley, 124 F.2d 850, 859 (8th Cir. 1941); Barker Painting Co. v. Bhd. of Painters, Decorators, & Paperhangers of Am., 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."); Coleman v. Aycock, 304 F. Supp. 132, 140-41 (N.D. Miss. 1969) ("The power to issue injunctions should be exercised with great caution and only where the reason and necessity therefore are clearly established."); Penn Cent. Co. v. Buckley & Co., 293 F. Supp. 653, 658 (D.N.J. 1968) (stating that injunctions 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, 845 (N.D. Ill. 1959) ("A federal court of equity should only interfere with the enforcement of state laws to prevent irreparable injury which is clear and imminent."), *aff'd*, 365 U.S. 43 (1961); Paramount Pictures Corp. v. Holden, 166 F. Supp. 684, 689 (S.D. Cal. 1958).

103. Roland Mach. 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 that the party will prevail at trial. *See, e.g.*, Acevedo-García v. Vera-Monroig, 296 F.3d 13, 16 n.3 (1st Cir. 2002) (using the terms "strong showing"); Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001) (using the terms "substantial likelihood"); Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001) (using the terms "substantial likelihood"); Denlow, *supra* note 24, at 524-25 (discussing these various iterations). The Supreme Court also may have engendered some confusion by using the terms "possibilities of success" in Brown v. Chote, 411 U.S. 452, 456 (1973).

required the movant to show he is more likely than not to succeed.[104] Describing the element in percentage terms (e.g., a fifty-one percent chance of success) may be convenient for discussion purposes but it is not very realistic. Most federal judges, after all, cannot and would not attempt to assess the relative strength of a plaintiff's case with the precision of a single percentage point (e.g., a fifty-two versus a fifty-one percent probability). Nevertheless, the likelihood element is useful because district courts should be able to 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 twentieth century continued to insist upon a showing of irreparable injury, and in some cases, required additional showings of imminence and substantiality.[105] The requirement of imminence was developed in England 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 whether injury would occur.[106] The substantiality requirement insured 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.[107]

104. Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975); *see also* Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423, 441 (1974) (describing the element as "likelihood of success on the merits"). Most circuits recognize that "likelihood of success" means a greater than fifty percent chance of prevailing. *See* Denlow, *supra* note 24, at 524-25. 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. Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 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 them fair grounds for litigation" standard. *Id.* at 35-38.

105. *E.g.*, Fenner v. Boykin, 271 U.S. 240, 243 (1926) (requiring a showing of "extraordinary circumstances where the danger of irreparable loss is both great and immediate"); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500 (1925) (requiring that injury must be "actual and imminent"); *Cavanaugh*, 248 U.S. at 456 (stating that an injunction must be shown to be necessary to prevent "'great and irreparable injury'" (quoting *Ex parte* Young, 209 U.S. at 166)).

106. *See* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 390-92 (1983).

107. *See id.*; *see also* Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 383 (1935), *overruled by* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S 271, 280 (1988); Consol. Canal Co. v. Mesa Canal Co., 177 U.S. 296, 302 (1900) ("[I]t 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."); Parker v. Winnipiseogee Lake Cotton & Woollen Co., 67 U.S. (2 Black) 545, 551 (1863); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 561-62 (1852).

Courts frequently associated the irreparability requirement with the immeasurability of damages.[108] The absence of available or reliable valuation data, which prevented the plaintiff from establishing projected losses with reasonable certainty, was frequently seen as a basis for deeming an injury to be irreparable.[109] Despite the general difficulty of monetizing losses in situations involving constitutional or statutory violations, the Supreme Court still insisted that movants show irreparable injury in every case.[110]

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.[111] Some commentators assert that these elements are distinct and specifically, that irreparable injury is broader since it considers non-remedial legal proceedings that can obviate or repair the alleged harm.[112] 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."[113]

Irreparable injury also requires consideration of non-legal remedies. Indeed, in the preliminary injunction context, courts must consider whether a permanent injunction entered after trial would suffice to ameliorate the harm, even though that relief is equitable, not legal.[114] In any event, the Supreme Court has recently

108. *See Developments in the Law – Injunctions*, *supra* note 34, at 1002-03.

109. *See, e.g.*, Dehydro, Inc. v. Tretolite Co., 53 F.2d 273, 273-74 (N.D. Okla. 1931) (concerning infringement of intellectual property rights); Underhill v. Schenck, 143 N.E. 773, 776-77 (N.Y. 1924) (addressing unfair competition); Harry R. Defler Corp. v. Kleeman, 243 N.Y.S.2d 930, 937 (N.Y. App. Div. 1963) (involving misappropriation of trade secrets); Schmaltz v. York Mfg. Co., 53 A. 522, 528-29 (Pa. 1902) (concerning loss of business).

110. *E.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (requiring the plaintiff to show it would suffer irreparable injury from the alleged constitutional violation); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57-61 (1975) (stating that, even where a federal statute provides that injunction "shall" issue for violations, plaintiffs must still show irreparable harm and inadequacy of legal remedies); Sampson v. Murray, 415 U.S. 61, 84 (1974); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959) (stating that the basis of injunctive relief in the federal courts has always been "irreparable harm and inadequacy of legal remedies").

111. *See* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 383 (7th Cir. 1984).

112. *See, e.g.*, Shreve, *supra* note 106, at 392-94. *But see* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 38 (1978) [hereinafter FISS, CIVIL RIGHTS] (presenting the two phrases as one rule).

113. *See* Younger v. Harris, 401 U.S. 37, 43-44 (1971) (finding no irreparable injury where the plaintiff could claim unconstitutionality in defense of the pending state criminal proceeding).

114. *See, e.g.*, *Sampson*, 415 U.S. at 90 ("'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.'" (quoting Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)); Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994); Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989) ("In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial."); Laycock, *supra* note 27, at 729 ("[C]ourts at the preliminary relief stage routinely find that damages will be an adequate remedy for

confirmed that it considers the two phrases as representing distinct elements of the injunction standard.[115]

3. Two Additional Elements: A Party's Hardship and the Public's Interest

In the early part of the twentieth century, the Supreme Court added two elements to the preliminary injunction standard. In a 1933 decision, the Court vacated an injunction that required a city to abate a nuisance consisting of sewage effluent discharge into a stream.[116] Remediating the discharge would have forced the city to incur significant expenditures at a time when it was virtually insolvent.[117] Further, the financial loss caused by the discharge was negligible compared to the cost of mitigation.[118] 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 although the nuisance is indisputable. . . . Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.[119]

A decade later in *Yakus v. United States*, the Court reiterated the need, 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.[120]

4. Injunctive Relief Made Available Under a Federal Statute

In 1982, the Supreme Court determined that the traditional prerequisites for obtaining injunctive relief still apply even where federal statute expressly provides for the issuance of an injunction as a means of enforcement.[121] The Court observed that an injunction does not issue as a matter of course from the violation of a federal

injuries that would be considered irreparable after a full trial.").

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

116. Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 336-37, 341 (1933).

117. *Id.* at 336, 339.

118. *Id.* at 339.

119. *Id.* at 337-38 (citation omitted).

120. Yakus v. United States, 321 U.S. 414, 440 (1944).

121. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). While Congress is free to depart from established equitable principles, the departure must be explicitly authorized in the statutory text. *See id.* at 314-20.

statute, and the basis for injunctive relief "has always been irreparable injury and the inadequacy of legal remedies."[122] 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.[123]

Several years later, the Court applied the same approach in the preliminary injunction context.[124] 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.[125]

III. MODIFICATIONS TO THE SUBSTANTIVE LAW OF INJUNCTIONS

Over the last quarter of the twentieth century, federal circuit courts modified the standards for obtaining preliminary and permanent injunctions. The changes either relaxed one of the elements 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 frequently produced poor judicial decision-making.[126]

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

122. *Weinberger*, 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 Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959); Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)).

123. *Id.* at 313 (citation omitted) (quoting *Hecht Co.*, 321 U.S. at 329). Justice White wrote the opinion of the Court for an eight-justice majority in *Weinberger*. *Id.* at 306. As the lone dissenter, Justice Stevens argued that the environmental statute directed the issuance of an injunction. *Id.* at 322 (Stevens, J., dissenting).

124. *See* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 541-44 (1987). In *Amoco*, Justice White delivered an opinion regarding the preliminary injunction issues, with six other justices joining. *Id.* at 533. Justices Stevens and Scalia declined to join in that portion of Justice White's opinion because they believed it was unnecessary. *Id.* at 555-56 (Stevens, J., concurring in part and concurring in the judgment).

125. *Amoco Prod. Co.*, 480 U.S. at 546 n.12 (citing Univ. of Tex. v. Camenisch, 451 U.S. 390, 392 (1981)).

126. *See* discussion *infra* Part III.C.

improvidently relegated it to an inferior position among other legal remedies.[127] He argued that the subordination of the injunction to monetary damages was unjustified and that the courts should simply leave the decision as to which remedy is superior to the plaintiff.[128]

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.[129] Laycock 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."[130]

When injunctions are granted, Laycock argued, it is usually because courts uniformly perceive that, for certain categories of wrongs, the injury is irreplaceable.[131] Thus, injunctions have become the "routine remedy for" violations of covenants not to compete, the "misappropriation of trade secrets," or the "infringement of patents, copyrights," and "trademarks."[132] Injunctions are also "the standard remedy in civil rights and environmental litigation" because the "[p]laintiff cannot use a damage award" to redress a deprivation of "voting rights, . . . free speech, [or] religious liberty. . . . [or to] replace clean air or water, [or] lost forest . . . ."[133]

Contrarily, when courts deny injunctive relief, it is frequently because the case falls outside of these settled categories, and if not, because the court fears the injunction would be too difficult to craft, monitor, or would interfere with other types of governmental supervision.[134] Laycock suggested that the elimination of the

127. *See* FISS, CIVIL RIGHTS, *supra* note 112, at 1-2.

128. *See 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. Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 382 (2005). Thus, a preliminary injunction should be entered so that the potential "in terrorem" effect of a contempt citation will improve a defendant's behavior. *Id.* 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.

129. Laycock, *supra* note 27, at 632, 692, 768.

130. *Id.* at 726-27.

131. *Id.* at 701-03 (stating courts often take the approach that "a whole category of wrongs always inflicts irreparable injury").

132. *Id.* at 713-14.

133. *Id.* at 708-09 (citations omitted). Professor Laycock qualified his proposal by stating that he thought the irreparable injury requirement served 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.").

134. Laycock, *supra* note 27, at 726-27.

irreparable injury element would smoke out courts and force them to reveal their actual bases for injunctive rulings.[135]

Making many of these same observations, John Leubsdorf espoused a different approach. He suggested that courts not mechanically trudge through all of the elements for preliminary injunctive relief.[136] 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.[137] The court would thus be guided by the objective of minimizing irreparable loss or aiming to "inflict the smallest probable irreparable loss of rights."[138] In this way, a weaker showing under one element could be offset by a stronger showing of the other. Another commentary favored reducing the likelihood of success element, claiming that it placed too high of a burden on the movant where there are disputed issues of fact.[139]

Judge Susan Black and Professor Thomas Lee also advocated changes, specifically to the increased burdens added by courts whenever a preliminary injunction would alter the status quo, or would require conduct as opposed to prohibiting it.[140] Both authors concluded that the old maxims regarding preservation of the status quo, or the distinction between mandatory and prohibitory injunctions, had outlived their usefulness and should be abandoned.[141]

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135. *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.").

136. Leubsdorf, *supra* note 65, at 544-45.

137. *Id.* at 541.

138. *Id.*; *see also Developments in the Law – Injunctions*, *supra* note 34, 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." (footnote omitted)).

139. Recent Developments, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 COLUM. L. REV. 165, 170-71 (1971).

140. Black, *supra* note 25, at 1-3; Lee, *supra* note 65, at 157-66. Some circuits 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. *See, e.g.*, Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994); SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098-99 (10th Cir. 1991) (applying a "heavily and compellingly" standard), *overruled by* O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (discarding the "heavily and compellingly" standard but stating courts must "closely scrutinize[]" whether a party is entitled to a "preliminary injunction that alter[s] the status quo" so as to "assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course"). A few circuits have implied that mandatory injunctions should be harder to get than prohibitory injunctions. *See, e.g.*, Tate v. Am. Tugs, Inc., 634 F.2d 869, 870 (5th Cir. Unit A Jan. 1981); *cf.* Newman v. Alabama, 683 F.2d 1312, 1320-21 (11th Cir. 1982) (finding a prohibitory injunction to be preferable and "less intrusive" than a mandatory injunction).

141. Black, *supra* note 25, at 49; Lee, *supra* note 65, at 166. 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 Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 383 (7th Cir. 1984) (noting a

Not all academics were in favor of abandoning the traditional elements for injunctive relief.[142] Some defended the irreparable injury requirement and the systemic bias in favor of legal remedies that accompanies it.[143] The irreparability and inadequacy elements protect defendants from the "exaggerated harm" 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.[144] Moreover, injunctions 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.[145]

B. *Circuit Courts Modify Injunction Law*

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

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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). Frequently a court can transform a mandatory injunction into a prohibitory one through artful drafting of the decree. Take, for example, the following: "Defendant is hereby restrained from refusing to cooperate with the renewal of plaintiff's zoning variance."

142. A few commentators have criticized the lack of uniformity among circuits 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. *E.g.*, Black, *supra* note 25, at 25; Denlow, *supra* note 24, at 514-15. They urged that a uniform standard be adopted to avoid inconsistent rulings and reduce the temptation for forum shopping. Black, *supra* note 25, at 49; Denlow, *supra* note 24, at 530-33. Not surprisingly, they do not agree on which standard should be adopted. Judge Black favors a balancing method. Black, *supra* note 25, at 44-49. Magistrate Denlow, on the other hand, favors an approach where all four elements must be satisfied. Denlow, *supra* note 24, at 536-39.

143. *E.g.*, EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 2.1, at 25-27, § 2.3, at 31, § 23.1, at 518-20 (1989); Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 355-58 (1981); Shreve, *supra* note 106, at 392-97.

144. Shreve, *supra* note 106, at 389; *see also* Anthony DiSarro, *Six Decrees of Separation: Consent Orders and Settlement Agreements in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 284 (2010).

145. DiSarro, *supra* note 144, at 317-22; Shreve, *supra* note 106, at 389-90.

1. The Sliding Scale Formula

Adopting the suggestions of Professor Leubsdorf, the Seventh Circuit, in two decisions authored by Judge Richard Posner, established a reformed preliminary injunction test. Under this test, a strong showing of one element may compensate for a weak showing of another.[146] The new standard allows a preliminary injunction to be granted where

> the 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.[147]

Accordingly, Seventh Circuit courts applied an algebraic formula to preliminary injunction motions, granting them where: $P \times H_p > (1 - P) \times H_d$.[148]

Under this approach, a plaintiff with only a forty 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.[149] 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 . . . ."[150] The

146. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593-94 (7th Cir. 1986); *Roland Mach. Co.*, 749 F.2d 380, 387-88 (7th Cir. 1894).

147. *Am. Hosp. Supply Corp.*, 780 F.2d at 593.

148. *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, 542-43, 580 (1987); Linda J. Silberman, *Injunctions by the Numbers: Less than the Sum of its Parts*, 63 CHI.-KENT L. REV. 279, 280, 282 (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. *See, e.g.*, Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 205 (2003).

149. *Am. Hosp. Supply Corp.*, 780 F.2d at 593. Judge Posner set a minimum threshold showing that would be required, but it was quite low. *See Roland Mach. Co.*, 749 F.2d at 387. Specifically, he stated that a plaintiff needed to have "'better than negligible chance'" of succeeding at trial in order to obtain a preliminary injunction. *Id.* (quoting Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 123 (7th Cir. 1982)).

150. Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992). As Magistrate Denlow has observed, there have been a few instances where the Seventh Circuit "ignored the sliding scale test" and treated the preliminary injunction factors as essential elements of a five-part test. Denlow, *supra* note 24, at 529-30; *see also* Jones v. InfoCure Corp., 310 F.3d 529, 534 (7th Cir. 2002); Rust Env't. & Infrastructure, Inc. v. Teunissen, 131 F.3d 1210, 1213 (7th Cir. 1997).

Third, Eighth, and D.C. Circuits all followed the Seventh Circuit's lead in adopting the sliding scale approach.[151]

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.[152] The Second Circuit 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.[153] Other circuits have adopted a similar approach and issued preliminary injunctions in the absence of a likelihood of success showing.[154]

151. *See* United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1178-79 (8th Cir. 1998) ("No single factor in itself is dispositive . . . ."); 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.'" (quoting CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995)). In contrast, the Third Circuit has stated that likelihood of success and irreparable injury are indispensible elements to preliminary injunctive relief. *See* Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994).

152. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979); *accord* Almontaser v. N.Y.C. Dep't of Educ., 519 F.3d 505, 508 (2d Cir. 2008) ("A party seeking a preliminary injunction 'must show irreparable harm absent injunctive relief, and either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in plaintiff's favor.'" (quoting Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 113-14 (2d Cir. 2006)); 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).

153. *See, e.g.*, F.&M. Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814, 815- 19 (2d Cir. 1979) (explaining that the "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 tip[s] *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) (citation omitted) (quoting *Jackson Dairy, Inc.*, 596 F.2d at 72), *abrogated as recognized in* Salinger v. Colting, 607 F.3d 68, 74-75 (2d Cir. 2010). 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. P. 65(c) (enabling a court to issue a preliminary injunction only if the movant gives security in an amount the court deems sufficient to pay costs and damages sustained by the party the court finds was injured).

154. *E.g.*, Oklahoma *ex rel.* Okla. Tax Comm'n v. Int'l Registration Plan, Inc., 455 F.3d 1107, 1112-13 (10th Cir. 2006); Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 965 (9th Cir.

Similarly, courts also diluted the likelihood of success element by adding qualifying softeners, such as "reasonable likelihood" or "some likelihood," intending to relieve the movant from having to show that she is likely to prevail at trial.[155] Other courts simply lowered the irreparable injury hurdle by requiring only that the injury "may" occur, or is a "possibility."[156]

3. Presumptions of Irreparable Harm

Finally, many circuit courts dispensed entirely with the irreparable injury element by conclusively presuming it in particular categories of cases defined by subject matter. Courts, for example, presumed irreparable injury in cases involving an alleged deprivation of a constitutional right.[157] In applying this presumption, these courts relied upon the following *dicta* from a three-Justice plurality Supreme Court opinion in *Elrod v. Burns*: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[158]

2002) (stating "'serious questions are raised and the balance of hardships tips in its favor'" (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001)); Mich. Bell Tel. Co. v. Engler, 257 F.3d 587, 592 (6th Cir. 2001); Davenport v. Int'l Bhd. of Teamsters, 166 F.3d 356, 360-61, 366-67 (D.C. Cir. 1999); Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) ("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, 195-96 (4th Cir. 1977), *abrogated by* Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346-47 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010) (mem.).

155. *See, e.g.*, *InfoCure Corp.*, 310 F.3d at 534 (adding the terms "reasonable likelihood"); Schwartzwelder v. McNeilly, 297 F.3d 228, 234 (3d Cir. 2002) (adding the terms "reasonable probability of success"); Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Prods., Inc., 545 F.2d 1096, 1098 (7th Cir. 1976) (adding the terms "some likelihood of success").

156. *E.g.*, Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007) (requiring only a "possibility" of irreparable harm); Deja Vu of Nashville, Inc. v. Metro. Gov't, 274 F.3d 377, 400 (6th Cir. 2001) (requiring only that a "plaintiff may suffer irreparable harm").

157. *See, e.g.*, Pac. 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, 620 (7th Cir. 2004); Newsom *ex rel.* Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 254-55, 261 (4th Cir. 2003); Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1225 (9th Cir. 2003); Tenafly Eruv Ass'n 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, 573-74 (2d Cir. 2002); 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* Gutierrez v. Mun. Court, 838 F.2d 1031, 1045 (9th Cir. 1988), *rev'd*, 490 U.S. 1016 (1989) (mem.); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984); WRIGHT, MILLER & KANE, *supra* note 1, § 2948.1, at 161 ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

158. Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Pac. Frontier*, 414 F.3d at 1235; *Tucker*, 398 F.3d at 464; *Joelner*, 378 F.3d at 620; *Newsom*, 354 F.3d at 261; *Brown*,

Likewise, in patent infringement cases, 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."[159] The court explained that such a presumption was necessary to effectuate a patent holder's inherent right to exclude and was further warranted by a patent grant's finite term, since the mere passage of time results in irremediable harm to the patent holder.[160]

Courts also presumed irreparable injury in cases alleging trademark infringement,[161] reasoning that, in light of the statutory right to exclusive use of a mark, infringement inflicts injuries that are "by their very nature irreparable . . . ."[162] Irreparable injury has been presumed in cases alleging false advertising,[163] 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."[164]

Applying analogous reasoning, courts have also presumed irreparable injury in cases involving copyright infringement.[165] These courts presumed irreparable injury for statutory violations where damages were deemed unsuitable, such as a purported

321 F.3d at 1226; *Tenafly*, 309 F.3d at 178. For a more thorough discussion and critique regarding the presumption of irreparable injury in constitutional litigation, see Anthony DiSarro, *A Farewell to Harms: Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y (forthcoming 2012), *available at* http://ssrn.com/abstract=1909876.

159. H.H. Robertson, Co. v. United Steel Deck, Inc., 820 F.2d 384, 390 (Fed. Cir. 1987); *see also* Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1580-81 (Fed. Cir. 1983) (involving a permanent injunction).

160. Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.3d 1343, 1350 (Fed. Cir. 2001) (addressing a preliminary injunction); Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1247 (Fed. Cir. 1989) (involving a permanent injunction); W.L. Gore & Assocs., Inc. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988).

161. *E.g.*, Zino Davidoff SA 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 Cmty. Coll. Dist., 889 F.2d 1018, 1029 (11th Cir. 1990).

162. Processed Plastic Co. v. Warner Commc'ns, Inc., 675 F.2d 852, 858 (7th Cir. 1982).

163. Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 161-62 (2d Cir. 2007); *see also* N. Am. 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 . . . .").

164. McNeilab, Inc. v. Am. Home Prods. Corp., 848 F.2d 34, 38 (2d Cir. 1988); *see also Time Warner*, 497 F.3d at 161 ("'[I]t 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)).

165. *See, e.g.*, Jacobsen v. Katzer, 535 F.3d 1373, 1378 (Fed. Cir. 2008) (preliminary injunction); LGS Architects, Inc. v. Concordia Homes of Nev., 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 also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[A][1][b] (rev. ed. 2011) ("[T]he plaintiff's burden for obtaining a preliminary injunction in copyright cases reduces to showing likelihood of success on the merits, without a detailed showing of danger of irreparable harm." (footnote omitted)).

violation of antitrust laws[166] or environmental statutes.[167] As a result, federal circuits have "compartmentalized" preliminary injunction law, using subject matter categories to make broad judgments regarding the suitability of injunctive relief, and disregarded the "trans-substantive" nature of equity law.[168] This compartmentalized approach leads to unfairness because, contrary to the trans-substantive nature of equity, obtaining injunctive relief for some categories of claims, such as trademark or copyright, is easier than others.

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.[169] Those presumptions merely shift the burden of production (i.e., of going forward with evidence) from the plaintiff to the defendant.[170] They do not affect the ultimate burden of persuasion, which remains with the plaintiff; indeed, if evidence that counters the presumption is introduced, the presumption dissipates.[171] By contrast, presumptions of irreparable harm are, for the most part, irrebuttable; they conclusively remove an issue from the case.[172] The presumption, moreover, completely eliminates the most "important" element a plaintiff must satisfy.[173]

166. *See* Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164, 166-67 (7th Cir. 1981); Milsen Co. v. Southland Corp., 454 F.2d 363, 367 (7th Cir. 1971); Jay Freedman, Case Comment, *The Irreparable Harm Requirement for Preliminary Injunctive Relief in Antitrust Distributor Termination Cases:* Jack Kahn Music Co. v. Baldwin Piano & Organ Co. *and the Wholesaler-Retailer Distinction*, 61 B.U. L. REV. 507, 516 (1981).

167. *See* Save Our Ecosys. v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984); *see also* Zygmunt J.B. 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.").

168. 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. *See* BLACK'S LAW DICTIONARY 286, 619, 953 (9th ed. 2009) (describing the application of equity, laches, and unclean hands).

169. *See* FED. R. EVID. 301.

170. 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. *See id.*

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

172. *See* Salinger v. Colting, 607 F.3d 68, 75 (2d Cir. 2010).

173. Akassy v. William Penn Apartments Ltd. P'ship, 891 A.2d 291, 309 (D.C. 2006). Scholars have criticized the use of this presumption in copyright and other intellectual property cases on First Amendment grounds. *E.g.*, Mark A. Lemley & Eugene Volokh, *Freedom of Speech and*

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.[174] Experienced plaintiffs' lawyers can easily argue that conflicting and complex scientific, marketing, or economic evidence indicates there are fair grounds for litigation.[175] Plaintiffs already have the procedural advantage when pursuing preliminary injunction motions in that they control the timing of the motion and can file it after spending months preparing expert affidavits, studies, and surveys.[176] Once the motion papers are filed, the plaintiff may press the court for an expedited hearing, arguing that he or she is incurring irreparable injuries each day the motion remains pending. The defendant will usually have an uphill battle simply to obtain an equal amount of time to prepare its opposition. The additional advantages of relaxed standards and presumptions tilt the balance overwhelmingly in the plaintiff's favor.[177]

Although many district courts are sensitive to defendants' rights in this context, the fact remains that many district judges enjoy handling preliminary injunction motions.[178] They facilitate an early disposition of cases since preliminary injunction rulings frequently lead to settlements.[179] More importantly, they give judges an opportunity to conduct evidentiary hearings on complex and interesting matters. Trials in complex civil cases are a rarity.[180]

Where the parties proceed by way of a preliminary injunction motion with expedited discovery and an evidentiary hearing, however, the public interest is disserved. A contested issue that is important to members of the public is adjudicated

Injunctions in Intellectual Property Cases, 48 DUKE L.J. 147, 162-63 (1998).

174. Denlow, *supra* note 24, at 532.

175. *See generally* Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 575 (2001) (describing the litigation dynamics involved in preliminary injunctions).

176. *See* Denlow, *supra* note 24, at 534.

177. *See* Lanjouw & Lerner, *supra* note 175, at 574 (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).

178. The author served as a member of the Federal Bar Council Second Circuit Courts Committee, which met frequently with federal district judges in the Southern and Eastern Districts of New York to hear their experiences and concerns. Many of the judges lamented the paucity of civil trials and stated that evidentiary hearings on preliminary injunctions were the closest substitute to what they were missing.

179. Lanjouw & Lerner, *supra* note 175, at 574 (noting that plaintiffs often seek preliminary injunctions to pressure defendants to settle cases).

180. Statistics compiled and published by the federal judiciary reflect that the vast majority of civil cases, in excess of ninety-eight percent, are disposed of prior to trial. *See* STATISTICS DIV., U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010, at 55 (2010), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C04Mar10.pdf.

on a mere likelihood of success (or even lower) standard.[181] Instead of a definitive holding, the court issues only a tentative ruling.[182] Determinations on preliminary injunction motions are not considered "holdings," even where the court uses language suggesting that it is making a definitive and final determination.[183] Furthermore, appellate review of that decision is limited to an abuse of discretion standard.[184] Assuming that the parties are willing to accept that rough and imperfect form of justice, why should constitutional issues of significant public importance be determined by an adjudicative technique that is more prone to error and less final than a trial?[185] Even commercial cases outside the constitutional arena, such as patent or copyright claims, can implicate serious public interests like marketplace creativity and competition.[186]

Furthermore, a defendant that is preliminarily enjoined faces the prospect of contempt motions since the plaintiff may apply maximum pressure to 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 also sacrifice his right to a 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.[187]

181. *See* Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

182. *Id.* (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.* ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits").

183. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 317 (1985) (stating that preliminary injunction rulings, though containing unequivocal conclusions, will still be considered provisional because "any conclusions reached at the preliminary injunction stage are subject to revision"); *see also* McLucas v. DeChamplain, 421 U.S. 21, 30 (1975) ("[I]n 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.").

184. A grant or denial of a preliminary injunction is one of the few instances where an interlocutory appeal is permitted in federal practice. *See* 28 U.S.C. § 1292(a)(1) (2006). 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* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006); McCreary County v. ACLU of Ky., 545 U.S. 844, 867 (2005).

185. *See* Sole v. Wyner, 551 U.S. 74, 84-85 (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 also McCreary County*, 545 U.S. at 867 & n.15 (applying an abuse of discretion standard where the district court adjudicated an Establishment Clause claim on a preliminary injunction motion and under a likelihood of prevailing test); Ashcroft v. ACLU, 542 U.S. 656, 659-60 (2004) (reviewing for an abuse of discretion the district court's injunction in a free speech case).

186. *See* Lanjouw & Lerner, *supra* note 175, at 575.

187. *See id.* at 573 (preliminary injunctions "have substantial effects on the outcome of disputes"). Professors Lanjouw and Lerner employed econometric regression analyses on data

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's discretion to advance a trial on the merits and consolidate it with the preliminary injunction motion.[188] In most instances, a case can be tried in the same time period it takes to determine a preliminary injunction motion requiring an evidentiary hearing.[189] 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 the likelihood of success (or any other tentative standard) because the merits will be adjudicated fully and finally at trial.[190] Additionally, there will be complete (not just abuse of discretion) appellate review from any final judgment entered in the case.

IV. THE SUPREME COURT REAFFIRMS 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 to the traditional preliminary injunction standard and reiterated that preliminary injunctions invariably require both proof of a likelihood of success and irreparable injury.

A. eBay

In *eBay Inc. v. MercExchange, L.L.C.*, the Court criticized the Federal Circuit's practice of presuming irreparable injury for purposes of entering permanent injunctions in patent cases.[191] The Court unanimously vacated the decision of the circuit court, concluding that an automatic grant of injunctive relief contravened equity's long tradition of assessing the appropriateness of injunctive relief in accordance with the four traditional elements.[192]

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.

188. *See* 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. *Camenisch*, 451 U.S. at 395; *see also* Branti v. Finkel, 445 U.S. 507, 508 & n.2 (1980) (noting that the district court held a plenary trial of the case on an application for a preliminary injunction).

189. *See* Denlow, *supra* note 24, at 533-34 ("[I]n 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).").

190. *Id.* at 532.

191. 547 U.S. 388, 392-94 (2006). The Court rejected the assertion that the right of exclusion inherent in a patent justifies a statutory right to enjoin future infringements. *Id.* at 392-94.

192. *eBay*, 547 U.S. at 388, 391, 394. The Court noted Congress was free to prescribe a departure from traditional equitable standards, but that such a departure "'should not be lightly

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.[193] 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.[194] The court observed that, much like the Patent Act, the Lanham Act did not intend to displace the traditional principles of equity.[195]

Courts further viewed *eBay* as barring presumptions of irreparable harm in copyright cases,[196] and the Supreme Court itself has extended *eBay*'s reasoning to environmental cases.[197] Indeed, the Second Circuit has gone so far as to suggest that the decision should apply to all types of cases:

implied.'" *Id.* at 391 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982)). The Court 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 (2006)). Thus, a plaintiff must show the following:

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

Id. at 391.

193. *See, e.g.*, Aurora World, Inc. v. Ty Inc., 719 F. Supp. 2d 1115, 1167 (C.D. Cal. 2009); Tiber Labs., LLC v. Hawthorn Pharm., Inc., 527 F. Supp. 2d 1373, 1380 (N.D. Ga. 2007); Sun Optics, Inc. v. FGX Int'l, Inc., No. 07-137-SLR, 2007 WL 2228569, at *1 (D. Del. Aug. 2, 2007); Seitz v. Envirotech Sys. Worldwide Inc., No. H-02-4782, 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); Chamberlain Grp., Inc., v. Lear Corp., No. 05 C 3449, 2007 WL 1017751, at *5 (N.D. Ill. Mar. 30, 2007), *vacated*, 516 F.3d 1331 (Fed. Cir. 2008); Erico Int'l Corp. v. Doc's Mktg., Inc., No. 1:05-CV-2924, 2007 WL 108450, at *7 (N.D. Ohio Jan. 9, 2007).

194. *See, e.g.*, N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1228 (11th Cir. 2008); *accord* Paulsson Geophysical Servs., Inc. v. Sigmar, 529 F.3d 303, 312-13 (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 & n.11 (9th Cir. 2006) (noting the *eBay* four-factor test in the context of a trademark case); Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp., No. 09-642-SLR, 2010 WL 3418203, at *2 (D. Del. Aug. 20, 2010).

195. *N. Am. Med. Corp.*, 522 F.3d at 1228 ("Similar to the Patent Act, the Lanham Act grants federal courts the 'power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable.'" (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).

196. *See* 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).

197. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010) (observing that presumed injunctions are improper in environmental 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.[198]

Finally, while courts have not explicitly applied *eBay* in constitutional cases, they have questioned the appropriateness of presumptions and circumscribed the situations in which they should be used.[199]

B. Winter

In *Winter v. National Resources Defense Council, Inc.*, the Court rejected the sliding scale approach and affirmed the irreparable injury requirement.[200] That case involved a circuit court injunction prohibiting the Navy from conducting training exercises in alleged violation of federal environmental statutes. Environmentalists claimed that the naval activity, particularly the use of sonar over Southern California waters, was unlawful and harmful to marine mammals.[201] The Ninth Circuit Court of Appeals affirmed a preliminary injunction, finding that plaintiffs were required to show (and did show) "a 'possibility' of irreparable injury."[202] The court of appeals concluded that this lower standard was appropriate under its sliding scale approach

198. *Salinger*, 607 F.3d at 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.").

199. *See* 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, 301 (D.C. Cir. 2006) (stating that, to presume irreparable harm, movants 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). Although the Supreme Court has twice rejected the concept of presumed damages in constitutional tort cases, Carey v. Piphus, 435 U.S. 247 (1978); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986), one circuit court has adopted it for so-called "loss of liberty cases (i.e, false arrest or imprisonment), *see* Kerman v. City of New York, 374 F.3d 93 (2d Cir. 2004). For a thorough discussion and critique of presumed damages in constitutional cases, see Anthony DiSarro, *When a Jury Can't Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1909857.

200. 555 U.S. 7, 20-22 (2008).

201. *Id.* at 14-17.

202. *Id.* at 8, 19. The Ninth Circuit rejected the Navy's argument that the use of sonar was not harmful to the mammals; the court thus restrained the Navy from, among other things, using the sonar within geographic "choke points." *Id.* at 18.

because the plaintiffs had established a "strong likelihood of prevailing on the merits."[203]

The Supreme Court declared, however, that the Ninth Circuit's test was contrary to well-established equitable principles.[204] The Court noted that the plaintiffs were required to demonstrate irreparable injury was likely to occur, not that it was merely possible.[205] It stated, "[i]ssuing 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."[206]

Significantly, the Court did not address the Ninth Circuit's finding that the movant made a stronger than required showing on the likelihood of success element.[207] Thus, the Court's reversal in *Winter* must be understood as rejecting the sliding scale approach. The Court necessarily concluded that a deficient showing of one element cannot be excused by a stronger than required showing of 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.[208] 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,"[209] it is difficult to read *Winter* as anything other than a repudiation of the sliding scale formulation.[210] Indeed, federal courts have read *Winter* as precluding that approach.[211]

203. *Winter*, 555 U.S. at 21. The Ninth Circuit had applied this flexible standard in prior cases. *See, e.g.*, Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007); Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006).

204. *Winter*, 555 U.S. at 22. Chief Justice Roberts delivered an opinion in which Justices Alito, Kennedy, Scalia, and Thomas joined. *Id.* at 10. Justice Breyer filed a separate opinion, in which Justice Stevens joined in part, concurring in the decision to overturn the injunction. *Id.* at 34. He did not disagree with the majority's analysis of the preliminary injunction standards. *Id.* at 34-35 (Breyer, J., concurring in part and dissenting in part). Justice Ginsburg filed a dissenting opinion in which Justice Souter joined. *Id.* at 43 (Ginsburg, J., dissenting).

205. *Winter*, 555 U.S. at 22. The Navy contended that the plaintiffs' claims of injuries were "speculative," given that during the forty-year history of the Navy's training program, "there ha[d] been no documented case of sonar-related injury to marine mammals . . . ." *Id.* at 21.

206. *Winter*, 555 U.S. at 22.

207. *Id.* at 23-24. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . ." *Id.* at 20.

208. *Winter*, 555 U.S. at 51 (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.* at 51-52.

209. *Winter*, 555 U.S. at 31 n.5.

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

211. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (stating that, under

C. Munaf

In *Munaf v. Geren*, the Supreme Court rejected use of the "fair ground[s] for litigation" alternative to the likelihood of success element.[212] *Munaf* consolidated two cases involving American citizens who allegedly committed crimes after traveling to Iraq.[213] While the two were held in a detainee center overseen by the American military, relatives filed habeas petitions on their behalf in United States federal court seeking a preliminary injunction that would restrain their transfer to Iraqi custody for criminal prosecution.[214] 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 . . . .'"[215] Consequently, it granted a preliminary injunction restraining the transfer.[216] The court of appeals affirmed.[217]

The Supreme Court vacated and remanded, reiterating the rule that "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'"[218] The Court stated as follows:

> 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.[219]

Winter, all four factors must be established); Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346-47 (4th Cir. 2009) (explaining that *Winter* rejects a sliding scale approach and that all four elements must be satisfied), *vacated on other grounds*, 130 S. Ct. 2371 (2010) (mem.); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009) (acknowledging that *Winter* could be read as disapproving use of a sliding scale); Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (stating that *Winter* rejected a lesser sliding scale standard).

212. 553 U.S. 674, 690-91 (2008). Chief Justice Roberts delivered a unanimous opinion of the Court. *Id.* at 678.

213. *Munaf*, 553 U.S. at 679.

214. *Id.* at 680-84.

215. Omar v. Harvey, 416 F. Supp. 2d 19, 23-24, 28 (D.D.C. 2006) (quoting Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)), *rev'd*, 553 U.S. 674, 705 (2008).

216. *Id.* at 30.

217. Omar v. Harvey, 479 F.3d 1, 15 (D.C. Cir. 2007), *rev'd*, 553 U.S. 674 (2008).

218. *Munaf*, 553 U.S. at 690 (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425, 428 (2006)).

219. *Id.*

Circuit courts have construed *Munaf* as precluding the sliding scale approach to injunctive relief and prohibiting any relaxation of the likelihood of success element.[220]

D. Nken

In *Nken v. Holder*, the Supreme Court further underscored the impropriety of diluting the likelihood of success or irreparable injury elements.[221] In that case, an alien sought to stay his deportation to Cameroon while a federal appellate court reviewed the administrative order.[222] The Supreme Court first held the four-factor preliminary injunction standard appropriately applied to the stay pending appeal motion due to "functional overlap" between the two equitable devices.[223] The Court then adopted those factors to the stay pending appeal context:

> (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.[224]

The Court stated that the first two factors were the most critical.[225] Further, it added that a "better than negligible" chance of success or a "mere possibility" of success failed to satisfy the first factor, and that "a possibility of irreparable injury fail[ed] to satisfy the second factor."[226] 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 stay pending appeal context.[227]

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220. *See, e.g.*, Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1295-96 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (Judge Kavanaugh's concurring opinion constitutes the opinion of the court because another member of the panel joined it); *see also* Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009).

221. 129 S. Ct. 1749, 1761 (2009). Chief Justice Roberts delivered the opinion of the Court, in which six other justices joined. *Id.* at 1753. Justice Alito filed a dissenting opinion, in which Justice Thomas joined. *Id.* at 1764.

222. *Nken*, 129 S. Ct. at 1754.

223. *Id.* at 1758, 1761. The Court indicated that the 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) ("[I]t 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.").

224. *Nken*, 129 S. Ct. at 1761 (internal quotation marks omitted).

225. *Id.*

226. *Id.* (internal quotation marks omitted).

227. *See* Monsanto v. DWW Partners, LLLP, No. CV-09-01788-PHX-FJM, 2010 WL

E. O Centro Espirita

Finally, the Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao 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.[228] In *O Centro Espirita*, 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.[229] The sect brought its claim under the Religious Freedom Restoration Act of 1993,[230] which bars the federal government from enforcing a rule of general applicability that substantially burdens the exercise of religion, unless it can show the burden will further a compelling governmental interest.[231] 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.[232] After an evidentiary hearing, the district court granted the injunction, concluding that the evidence of both health risks and diversion was evenly balanced.[233]

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."[234] If the likelihood of success element did not require a showing that the movant was more likely than not to prevail at trial, then one would expect the Court to have mentioned it. Instead, the

1904274, at *2 (D. Ariz. May 10, 2010); Henry v. Rizzolo, No. 2:08-cv-00635-PMP-GWF, 2010 WL 1924841, at *1 (D. Nev. Apr. 12, 2010), *vacated pending appeal*, No. 2:08-cv-00635-PMP-GWF, 2010 WL 1924698 (D. Nev. May 12, 2010); Friendship Edison Pub. Sch. Charter Sch. Collegiate Campus v. Nesbitt, 704 F. Supp. 2d 50, 52 (D.D.C. 2010) ("[I]n 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., No. 5:06-CV-341 (CAR), 2009 WL 4730323, at *2 (M.D. Ga. Dec. 4, 2009). *But see* Barclays Capital Inc. v. Theflyonthewall.com, Inc., 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), *rev'd in part*, 650 F.3d 876 (2d Cir. 2011).

228. 546 U.S. 418, 428-29 (2006). As indicated *supra* in the text accompanying notes 74-76, some courts have interpreted likelihood of success as not necessarily requiring a showing that the plaintiff will more likely than not prevail at trial.

229. *O Centro Espirita*, 546 U.S. at 423.

230. *Id.*

231. 42 U.S.C. § 2000bb-1(a), (b) (2006).

232. *O Centro Espirita*, 546 U.S. at 426.

233. *Id.* at 426-27.

234. *Id.* at 428.

unanimous Court affirmed the temporary injunction,[235] 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 demonstrated that it was likely to prevail at trial.[236]

In light of these recent decisions, the Supreme Court is clearly unwilling to permit lower federal courts to alter the traditional standards for assessing whether preliminary injunctive relief is appropriate.

V. STATIC APPROACHES TO EQUITY IN OTHER MODERN CONTEXTS

The Court's eighteenth century English law approach to preliminary injunctions is consistent with, and supported by, its freeze frame approach to other areas of equity. In particular, the Court applies the freeze frame approach to (a) the availability of jury trial rights and re-examination practices under the Seventh Amendment, (b) the scope of equity afforded to federal courts by the Judiciary Act of 1789, (c) the categorization of claims where federal statute provides only equitable relief, and (d) the propriety of structural or prophylactic injunctions.

A. *The Trial by Jury Clause*

The modern Supreme Court adheres to early federal court practice for determining civil jury trial rights under the Trial by Jury Clause.[237] English law concerning jury trial rights is frozen as it existed in 1791 and used as a baseline for determining jury trial rights in connection with modern causes of action.[238] The Court looks first to the nature of the claim asserted to find the nearest eighteenth century English practice equivalent.[239] If this analogous claim was tried in an eighteenth century English law court, then the modern claim is also triable before a jury in federal court.[240] If, on the other hand, the analog was adjudicated in an

235. *Id.* at 439. Chief Justice Roberts delivered the opinion for the Court. *Id.* at 423. Justice Alito took no part in the case. *Id.* at 439.

236. *O Centro Espirita*, 546 U.S. at 428-29 (stating that the "burdens at the preliminary injunction stage track the burdens at trial").

237. *See supra* text accompanying notes 42-48.

238. *See* Curtis v. Loether, 415 U.S. 189, 193 (1974). The Court has confirmed this freeze frame approach on numerous occasions. *See, e.g.*, Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 564-65 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42 (1989); Tull v. United States, 481 U.S. 412, 417 (1987).

239. *Tull*, 481 U.S. at 417.

240. *Id.* at 417-18. 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 eighteenth century English common law action for trover. *Granfinanciera*, 492 U.S. at 43.

eighteenth century English chancery court, then no jury trial right attaches to the modern claim.[241]

The modern Supreme Court, however, accords even greater significance to the nature of the remedy sought, specifically, whether the remedy was traditionally available at law or in equity in pre-revolutionary England.[242] 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 eighteenth century English practice.[243] Similarly, the Court has held that liability under an environmental statute should be determined by a jury so long as any resulting civil penalties are not based on the polluter's profits from the non-compliance.[244] For then, the penalties would resemble the equitable remedy of disgorgement.[245]

Likewise, the Seventh Amendment's Reexamination Clause[246] has been interpreted to preserve the practices of eighteenth century English courts with respect to judicial review of jury verdicts. Thus, a federal district court's authority to modify a jury's damage award depends upon whether this power resided in eighteenth century English courts.[247] Similarly, the Court reviews eighteenth century English

241. *Tull*, 481 U.S. at 417. For example, in *Terry*, the Court analogized 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 with this comparison, opining that the cause of action more closely resembled an attorney malpractice action, which was cognizable at law. *Id.* at 584 (Kennedy, J., dissenting). For a somewhat different example, see Markman v. Westview Instruments, Inc., 517 U.S. 370, 379-84 (1996), in which the Court concluded that, although a patent infringement claim was a claim at law in eighteenth century English practice, patent claim construction was not relegated to the jury.

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

243. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353-55 (1998); *see also Curtis*, 415 U.S. at 197 (stating an award of punitive damages is a legal remedy and should be determined by a jury); Ross v. Bernhard, 396 U.S. 531, 535-36 (1970) (stating an award of treble damages is a remedy at law and, thus, subject to jury determination).

244. *Tull*, 481 U.S. at 422-25. The *Tull* Court 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 427.

245. *Tull*, 481 U.S. at 424.

246. U.S. CONST. amend. VII. The Reexamination 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." *Id.* 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, AMERICA'S CONSTITUTION, *supra* note 41, at 233-34.

247. For instance, in *Dimick v. Schiedt*, 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. 293 U.S. 474, 487 (1935). The Court explained that "careful examination of the English reports prior [to 1791] fails to disclose any authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount

practice to determine the authority of federal appellate courts to overturn a jury verdict on the ground that the damages awarded are excessive.[248]

B. *The Scope of Equitable Jurisdiction*

The present Court also uses a freeze frame approach to determine the scope of federal court equitable jurisdiction conferred under the Judiciary Act of 1789. In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 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 eighteenth century English chancery courts.[249] The case involved a request by noteholders for a preliminary injunction that restrained the issuer from transferring assets during the pendency of litigation and rendering itself judgment proof. [250]

The Supreme Court held that the federal district court lacked the power to issue such a preliminary injunction.[251] 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.'"[252] The Court noted that the provisional asset freeze sought by the noteholders was not simply relief that had "never been available before" in equity, but was "specifically disclaimed by longstanding judicial precedent . . . ."[253] The Court stated that under traditional rules of equity, a litigant must secure a judgment establishing the debt before a court of equity would interfere with the debtor's use of his property.[254]

The dissenting justices, led by Justice Ginsburg, argued that modern federal courts should not be constrained by eighteenth century English chancery court practices.[255] 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; we have never limited federal equity

fixed by the verdict of a jury in an action at law." *Id.* at 476-77.

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

249. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999).

250. *Id.* at 311-12.

251. *Id.* at 333.

252. *Id.* at 318 (quoting Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 568 (1939)). Chief Justice Rehnquist, and Justices Kennedy, Thomas, and O'Connor, all joined the majority opinion. *Id.* at 309.

253. *Grupo Mexicano*, 527 U.S. at 322.

254. *Id.* at 319.

255. *Id.* at 336 (Ginsburg, J., concurring in part and dissenting in part).

jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor."[256]

Although the dissent sharply disagreed whether the scope of equitable remedies should be limited to those used by eighteenth century English chancery courts, it did agree that the substantive principles of equity were governed by that law. From the dissent's perspective, so long as the plaintiffs satisfied the traditional prerequisites for obtaining preliminary injunctive relief—that is, likelihood of success on the merits and irreparable injury—the flexible principles of equity should permit a grant of the provisional relief requested.[257]

C. *The Characterization of an Equitable Claim*

A freeze frame approach was also used by the Court in determining whether a particular claim qualified as "equitable" for purposes of statutory relief. In *Great-West Life & Annuity Insurance Co. v. Knudson*, the Court explained that eighteenth century English chancery practice should govern whether a plaintiff's claim for restitution was truly "equitable" and thus could be asserted under a federal statute permitting only equitable remedies.[258] The Court established 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."[259] To rule otherwise, the majority explained, would be to sanction a "rolling revision of its content" that would give no guidance to courts or practitioners.[260] The Court

256. *Id.* (citations omitted) (citing Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1869)); Gordon v. Washington, 295 U.S. 30, 36 (1935)). The quoted remark by Justice Ginsburg was not quite correct. In *Sprague v. Ticonic National Bank*, Justice Frankfurter stated as follow: "The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress." 307 U.S. 161, 164-65 (1939) (citing Michaelson v. United States *ex rel.* Chi., St. P., M. & O. Ry. Co., 266 U.S. 42, 65-67 (1924); Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1869); Pennsylvania v. Wheeling & Belmont Bridge Co., 31 U.S. (13 How.) 518, 563 (1852); Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 221-22 (1818)).

257. *Grupo Mexicano*, 527 U.S. at 335-36 (Ginsburg, J., concurring in part and dissenting in part).

258. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10, 212-18 (2002). Justice Scalia wrote the opinion in which Chief Justice Rehnquist and Justices Kennedy, Thomas, and O'Connor joined. *Id.* at 206.

259. *Great-West*, 534 U.S. at 211-12. England had a divided bench until the 1870s. *See* THOMPSON & SEBERT, *supra* note 22.

260. *Great-West*, 534 U.S. at 217. The Court noted that guidance was critical because seventy-seven different provisions of the United States Code contain a reference to the term "equitable relief." *Id.* at 217 & n.3.

concluded that the plaintiff's claim would not have been viewed as an equitable restitution claim in eighteenth century England.[261]

Justice Ginsburg dissented, opining that the "archaic" and "antiquarian" practices of eighteenth century chancery courts should not be consulted when construing modern federal statutes.[262] Further, 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 . . . ."[263] 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.[264]

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.[265] Even those who support originalism as a tool for interpreting constitutional and statutory text question its appropriateness as an interpretive method for common law principles.[266] Equity was not simply a piece of the larger common law pie that could

261. Justice Scalia noted that true equitable restitution encompasses a claim for specific proceeds held by the defendant as a constructive trustee. *Great-West*, 534 U.S. at 212-14. 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. *Id.* at 213-15.

262. *See Great-West*, 534 U.S. at 228, 233-34 (Ginsburg, J., dissenting). Justice Ginsburg forcefully argued that the relevant point in time to determine whether the claim was equitable should be 1974, the year that Congress enacted the Employee Retirement Income Security Act (ERISA). *Id.* at 224-25 ("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." (citation omitted)). However, she did not attempt to establish that the plaintiff's claim would have been considered "equitable" at that date. *See id.*

263. *Great-West*, 534 U.S. at 233.

264. *Id.* at 228. The Court adhered to the *Great-West* approach last term in *Cigna Corp. v. Amara*, concluding that a claim for contract reformation or estoppel could be asserted under a statute limiting remedies to equitable ones because, in the days of the divided bench, it could have been brought only in a court of equity. *See* 131 S. Ct. 1866, 1878-80 (2011).

265. 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 included in the Constitution would evolve over time).

266. *See, e.g.*, Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 37-38 (2004). Professor Monaghan argues as follows:

> 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.

Id.

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 points set forth by Justice Ginsburg do not undercut the Court's use of a static approach to substantive preliminary injunction law. Although Justice Ginsburg advocates for a dynamic view of equity in her *Great-West* dissent, she acknowledges that a static approach is sensible in certain contexts,[267] agreeing in *Grupo Mexicano* that a static approach should be taken with regard to the substantive principles of equity.[268] Moreover, she joined the Court's decisions in *Nken*, *Munaf*, *O Centro Espirita*, and *eBay*, all of which reaffirmed the static approach to equitable principles.[269]

D. *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. These are injunctions where the federal court essentially oversees the administration of state or local governmental institutions and imposes various obligations on governmental entities that go beyond what is required by law.[270] Justice Thomas, for example, has noted that prior to the twentieth century, there were no instances of structural injunctions or "continuing judicial supervision and management of governmental institutions."[271] Some scholars have argued that these injunctions offend principles of state sovereignty and of separation of powers,

267. *Great-West*, 534 U.S. at 232 (Ginsburg, J., dissenting) (acknowledging that a static historical approach was sensible "in the context of . . . 'preserving' the meaning of those founding-era provisions").

268. *See supra* text accompanying notes 234-36.

269. Nken v. Holder, 129 S. Ct. 1749, 1753 (2009); Munaf v. Geren, 553 U.S. 674, 678 (2008); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 422 (2006); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 388 (2006).

270. 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, 596-98 (1983) (arguing that a 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) (arguing that prophylactic relief is expansive enough to include legal conduct and, indeed, such breadth is the core of its effectiveness).

271. Missouri v. Jenkins, 515 U.S. 70, 130 (1995) (Thomas, J., concurring). Justice Scalia has voiced similar concerns. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1953 (2011) (Scalia, J., dissenting) ("[S]tructural injunctions are radically different from the injunctions traditionally issued by courts of equity, and presumably part of 'the judicial Power' conferred on federal courts by Article III.").

while also representing judicial overreaching of the worst sort.[272] Courts have often expressed their disapproval of using prophylaxis with injunctions and have warned that injunctive obligations should go no further than necessary to remedy the wrongdoing.[273]

On the other side of this debate, commentators posit that structural and prophylactic injunctions are an essential enforcement mechanism for constitutional rights.[274] The injunction has been, after all, essential to enforcing constitutional values in prisons, public schools, and electoral districts.[275] Injunctions, it is contended, are the most appropriate form of remedy in the constitutional context because pecuniary damages are either too difficult to obtain or too modest in amount.[276]

Whatever flexibility is essential for courts to halt constitutional violations and redress them effectively does not require a modification or abandonment of the

272. *See, e.g.*, Schoenbrod, *supra* note 168, at 629-30 ("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 CALIF. L. REV. 1121, 1126, 1149-50 (1996) (arguing that prophylactic injunctions violate core state functions).

273. *See, e.g.*, 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."); Rizzo v. Goode, 423 U.S. 362, 378, 380 (1976) (invalidating injunctive relief that included prophylactic measures); *see also Jenkins*, 515 U.S. at 133 (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."); People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 534 (7th Cir. 1997) (explaining that equitable remediation should "not [be] used to launch federal courts on ambitious schemes of social engineering").

274. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 876 (2001) (arguing that structural reform injunctions are a "uniquely appropriate remedial regime" for constitutional wrongs); 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").

275. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 683-84 (1978) (ordering limits on the number of prisoners per cell); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26-27, 30 (1971) (ordering busing to desegregate schools); Baker v. Carr, 369 U.S. 186, 209 (1962) (ordering the reapportionment of electoral districts); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 874-83 (1999).

276. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 42-43 (1997) (stating that injuries from violations of the Fourth Amendment are mostly dignitary, causing only "small or non-existent" out-of-pocket losses); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 193 (1998).

substantive equitable principles carried forth from the Founding era. The Supreme Court has consistently been able to vindicate important constitutional rights through injunctions granted only upon a showing of likelihood of success and irreparable injury.[277] 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.[278]

VII. CONCLUSION

A preliminary injunction is an extraordinary remedy because it interferes with a defendant's rights prior to a determination of liability. Simply stated, the defendant is precluded from doing something even though there has been no adjudication that such conduct is unlawful. The likelihood of success and irreparable injury requirements are designed to protect the defendant from erroneous grants of this potent remedy. Eliminating or watering down these two elements is prejudicial to defendants and leads to excessive resort to this remedy. In short, the extraordinary become ordinary. Adhering to the likelihood of success and irreparable injury

277. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); Dombrowski v. Pfister, 380 U.S. 479, 486, 490 (1965); Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954); *Ex parte* Young, 209 U.S. 123, 144-66 (1908). The remedy of a declaratory judgment is available to plaintiffs who cannot establish the requisite irreparable injury. Steffel v. Thompson, 415 U.S. 452, 462-63 (1974).

278. In *City of Los Angeles v. Lyons*, 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. 461 U.S. 95, 111 (1983). In *Los Angeles County v. Humphries*, 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. 131 S. Ct. 447, 449 (2010). Three twentieth century legal developments also favor using a freeze frame approach to equity. First, federal courts have come to acknowledge that applying federal common law is an activity that involves law-making more than law-discovery. There is a certain incongruence in having unelected judges creating law (outside the narrow context of filling in statutory interstices) in a democratic society. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725-26 (2004); *see also id.* at 741 (Scalia, J., concurring in part and concurring in the judgment). Second, the Court's decision in *Erie R.R. Co. v. Tompkins* imposed sweeping limitations upon a federal court's common law-making powers outside of discrete narrow areas of unique federal interest. *See* 304 U.S. 64, 78-79 (1938). As a result of *Erie*, federal courts prefer to await "legislative guidance before exercising innovative authority over substantive law." *Sosa*, 542 U.S. at 726; *see also id.* at 741-42 (Scalia, J., concurring in part and concurring in the judgment) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Third, modern federal courts are wary of unilaterally implying new remedies, or expanding existing ones. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 639, 641-42 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284-85 (1998); *see also* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 101 (2001). This reticence is based on the notion that weighing competing costs and benefits attendant to an expansion of remedies is a task more appropriately performed by the political branches of government. *Sosa*, 542 U.S. at 727; *see also id.* at 741-42 (Scalia, J., concurring in part and concurring in the judgment); Cannon v. Univ. of Chi., 441 U.S. 677, 743-44 (1979) (Powell, J., dissenting).

requirements is, moreover, not only fair to defendants, but facilitates more reliable and sound judicial decision-making. Our legal system is better served by definitive conclusions reached after a full trial, or on summary judgment, than the tentative rulings associated with preliminary injunctions.

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 twentieth century developments emphasizing a federal court's limited lawmaking role in a democratic government.

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.[279]

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, one should assume that it agrees with the use of the traditional preliminary injunction standards.[280]

279. Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 594 (1990) (Kennedy, J., dissenting).

280. 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 (Twentieth Century Fox Film Corp. 1969). I hope that the views expressed in this article will be received more warmly than the reception that greeted those two outlaws.