Resolving Equity's *Erie* Problem

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States are modernizing the use of equitable remedies for state law. Their authority to do so is widely accepted. But one thing stands in the way—the federal courts. Bound by "traditional equitable principles," federal courts dismiss state law claims seeking equitable remedies, even when state law makes the litigant's desired remedy available. Problematically, it is not clear where those traditional equitable principles come from, nor why or how they supplant state law—the very inquiries that the renowned Erie *case requires. This Article examines what happens when traditional equitable principles face off against contemporary state law remedies.*

The resolution offered here preserves state law's remedial design while also accounting for traditional understandings of the federal judicial role in awarding equitable remedies. This Article argues that the traditional principles of equity should be understood as limitations on federal court subject matter jurisdiction. In fact, these principles historically served a jurisdictional function and continue to operate precisely like jurisdictional limits in operation and purpose but lack the formal classification. While federal courts frequently reference their "equitable jurisdiction," there has been no attempt to doctrinally justify traditional equitable principles as jurisdictional and entitled to the treatment that comes with the label. This Article provides that justification. To the extent that state remedial law exceeds the bounds of federal court jurisdiction, therefore, such cases should be adjudicated by state courts with the authority to act beyond equity's traditional limitations.

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INTRODUCTION....291

I. THE EQUITY-*ERIE* PROBLEM....298
A. Federal Principles of Traditional Equity....299
B. Contemporary Approaches to Equity....307
C. Erie's Demands and York's Approach....311
1. *Erie Railroad Company v. Tompkins*....312
2. *Guaranty Trust Company of New York v. York*....315
D. The Equity-Erie Problem in Action: A Case Study....318

II. UNSUCCESSFUL RESPONSES TO THE EQUITY-*ERIE* PROBLEM....324
A. An Erie Analysis for Traditional Equity....325
B. A Source for Traditional Equity....329
C. A Rejection of Traditional Equity....334

III. THE EQUITABLE JURISDICTION THEORY....337
A. Traditional Equity as a Subject Matter Jurisdiction Limitation....337
1. Traditional Principles of Equity Establish Equitable Jurisdiction....337
2. Equity Jurisdiction Is a Subject Matter Jurisdiction Limitation....343
B. The Middle Ground....356
C. Resolving the Equity-Erie Problem....359

IV. IMPLICATIONS: BEYOND DIVERSITY AND ADMINISTRABILITY....362

V. CONCLUSION....364

INTRODUCTION

It is an open secret that equity has an *Erie* problem. In 1945, the Supreme Court insisted that federal courts sitting in diversity must apply certain general equitable principles when faced with suits seeking equitable relief, even for state law claims and even in the face of contradictory state law.[1] At first glance, this proposition appears to run headfirst against *Erie*'s notorious instruction that "[t]here is no federal general common law."[2] Although distinct from the forbidden general commercial law that *Erie* declared unconstitutional as federal common law, in many ways these equitable principles—like the rule that equitable remedies are unavailable when legal remedies are adequate—seem to exist only "by common practice and consent among a number of sovereigns."[3]

This Equity-*Erie* problem exists and persists in large part because of the way that federal law treats equity—as distinct from law and limited by certain historical principles. That conception of equity's exceptionalism is not an aberration or the result of judicatory error.[4] To the contrary, the idea that equity may operate only in certain circumstances has been the common consensus of the federal courts since the founding. This theory of equity, which is associated with the English Court of Chancery but traces its origins as far back as Aristotle,[5] infiltrated the American legal psyche at the founding and, despite challenges to its legitimacy,[6] has survived in a complex federalist system even after the supposed merger of law and equity.

But this understanding of equity's exceptionality is neither inherent nor fixed. For years, scholars have argued against the historical "remedial

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1. Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945).
2. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
3. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984) (describing the concept of general law in the early nineteenth century); *see also Erie*, 304 U.S. at 75–76 (listing examples of the "so-called 'general law' as to which federal courts exercised an independent judgment"). Compare these descriptions of the nature of the general common law, with a description of the Supreme Court's new equity practice and supposed reliance on history and tradition as "allow[ing] the Court to proclaim what was done 'in equity'—without reference to any particular court, nation, or century." Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1018–19 (2015).
4. *See* Bray, *supra* note 3, at 1000–01.
5. *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1067 (2021) (describing Aristotle's *Nicomachean Ethics* as providing that "equity is distinct from law and corrects the law").
6. *See generally* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991); Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53 (1993) (arguing that equity's principles "now pervade the legal system").

hierarchy" that disfavors equity by treating its remedies as rare and exceptional.[7] Critics have demonstrated that the selection of remedies could be based on more relevant functional distinctions like practicality or administrability.[8] Indeed, it has been said that courts have actually been relying on just such functional determinations and that, in reality, the adequate remedy at law rule is "dead."[9] Moreover, some states have begun to reconsider the rare and exceptional treatment of equity, exploring new applications for equitable remedies.

Consider California's remedial innovation. For its state consumer protection laws, California has decided that courts can award an equitable remedy—like an injunction or equitable restitution—even if the plaintiff could also bring a claim for damages.[10] The objective is simple: provide enhanced protection for California consumers through efficient methods for securing relief.[11] In so doing, California has put equitable remedies on a level playing field with legal remedies, while also giving consumer-plaintiffs greater say in the remediation of their injuries. In short, the state has rejected the traditional adequate remedy at law rule.[12]

That California may designate specific remedies to achieve state policy objectives is uncontroversial for adjudicating state law claims in state courts. But when the same claims find their way into federal court due to diversity jurisdiction, they face a roadblock. In *Guaranty Trust Co. v. York*,[13] a case better known for its "outcome determinative" test, the Supreme Court set forth a special approach for claims seeking equitable remedies. It said that federal courts are bound by traditional equitable principles, even when adjudicating state law claims, and even in the face of contrary state rules. And traditional equitable principles prohibit a case "in equity" if money damages would provide an adequate remedy or if the claims are outside the scope for which equitable remedies were historically used.[14] *York* recognized that "a

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7. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 38–39 (1978).

8. Laycock, *supra* note 6, at 60–61.

9. LAYCOCK, *supra* note 6, at 11.

10. *See* CAL. CIV. CODE §§ 1750–1785. (West 2023); CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2023).

11. *See* Brief of the State of California as Amicus Curiae in Support of Appellant and in Support of Reversal at *5–8, Sonner v. Premier Nutrition Corp., 971 F.3d 834 (9th Cir. 2020) (No. 18-15890), 2018 WL 5283701 [hereinafter *Sonner I* Amicus Brief].

12. *See* LAYCOCK, *supra* note 6, at 4 (describing the traditional rule that "equitable remedies are unavailable if legal remedies will adequately repair the harm"). Laycock also refers to the "irreparable injury rule," stating that "[t]he two formulations are equivalent; what makes an injury irreparable is that no other remedy can repair it." *Id.* at 8.

13. Guar. Tr. Co. v. York, 326 U.S. 99 (1945).

14. *See infra* Section I.A.

State may authorize its courts to give equitable relief unhampered by any or all such restrictions," but averred that states "cannot remove these fetters from the federal courts."[15] In other words, for cases involving equitable remedies, traditional equitable principles override state law in federal courts.

What is curious is that *Erie* seems to require something different. Famously, *Erie* declared that "[t]here is no federal general common law," holding that federal courts sitting in diversity may apply federal constitutional or statutory law, but otherwise "the law to be applied in any case is the law of the state."[16] Neither the adequate remedy at law rule nor the other traditional equitable principles find their source in the Constitution or the United States Code, but instead linger as guardrails of "the traditional scope of equity as historically evolved in the English Court of Chancery."[17] Nonetheless, at each opportunity the Supreme Court has affirmed the traditional equitable principles, the consequence of which, in most circumstances, is a narrowing of the availability of federal equitable relief.[18]

Although *York* announced its approach for traditional equitable principles in the face of *Erie*,[19] the case left several critical questions unanswered. First, it failed to explain how traditional equity's common law rules satisfy *Erie*'s positive law demand without an obvious constitutional or statutory source. Second, it failed to articulate how traditional equity's rules should operate—whether they represent rules of decision, rules of procedure, or something

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15. *York*, 326 U.S. at 105–06.

16. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). Of course, *Erie*'s firm pronouncement was immediately proven elastic, when the Court the same day announced in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), that the question should be decided based on the federal common law. *See* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 (1964); *see also* Alfred Hill, *The Law-Making Power of Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026 (1967). The new *permissible* federal common law is discussed *infra* at Section II.B.

17. *York*, 326 U.S. at 105.

18. *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2173 (2019) (endorsing, as recently as 2019, the adequate remedy at law rule); *see also* James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 725–27 (2020) (suggesting that the Supreme Court's reliance on history to define the scope of the equitable power "risks a serious distortion of the law," and acknowledging its contracting effect).

19. At issue in *York* was whether New York's statute of limitations controlled in an equitable breach of trust case, or if, instead, there existed "an exception to Erie R. Co. v. Tompkins on the equity side of a federal court." 326 U.S. at 111. *York*'s statements, prioritizing traditional equitable principles over contemporary state practices, are dicta—the Court offered the *Erie* carveout for traditional equity's "fetters" though none were at issue in the case. *See id.* at 105–06; *see also infra* notes 150–151. Even so, the Court has never disavowed *York*'s dicta, and lower courts consider themselves bound by its instructions. *See, e.g.*, Sonner v. Premier Nutrition Corp. (*Sonner I*), 971 F.3d 834, 841 n.4 (9th Cir. 2020); *see also* Vital Pharms., Inc. v. Alfieri, 23 F.4th 1282, 1297 (11th Cir. 2022) (Pryor, C.J., concurring).

different entirely.[20] The distinction matters a great deal, at least when state law is in conflict. Yet, to this day the Supreme Court has carefully avoided calls to return to these questions, all the while continuing to rely on *York*'s unyielding traditional principles.[21]

These gaps have resulted in no shortage of confusion for federal courts, which find themselves bound by rules of unclear source and uncertain application. Recently, a consumer wishing to take advantage of California's contemporary equitable remedies sought equitable restitution of funds obtained by the defendant through unlawful false advertising.[22] The Ninth Circuit concluded, under *York*, that it was bound to adhere to traditional equity's adequate remedy at law rule.[23] Because the plaintiff did not and could not allege that a remedy at law was unavailable or inadequate, her claims were dismissed notwithstanding California's express authorization of equitable remedies.[24] More problematic, however, was that without a clear source for the traditional equity rules, the Ninth Circuit declined to answer even the most fundamental question as to the preclusive effect of the dismissal.[25] And since then, district courts have been puzzled by still other operational questions, such as the proper form of motion for dismissal under traditional equity rules, or whether plaintiffs can seek remand to state court for state law claims that fail to satisfy these federal courts requirements.[26]

In short, although the Court purported to consider *Erie*, *York*'s approach for traditional equitable principles perpetuates a deep tension with *Erie*'s demands resulting from the incomplete answer the case provided. The time is right for the Supreme Court to step in to provide the missing explanation.

It might be tempting to think that the puzzle is easily solved. On the one hand, one might argue that after *Erie* federal courts are required to follow

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20. *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 662–71 (2019) (distinguishing rules of procedure, rules of decision, rules of jurisdiction, and rules of redress for purposes of evaluating a rule's justification under the Rules Enabling Act).

21. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19, 318 n.3 (1999) (relying on traditional principles of equity jurisdiction, and declining to consider the argument that, under *Erie*, the availability of injunctive relief "should be determined by the law of the forum State").

22. *Sonner I*, 971 F.3d at 837–39. This case is discussed in detail *infra* Section I.D.

23. *Sonner I*, 971 F.3d at 841.

24. *Id.* at 844; *see also id.* at 845 ("Regardless of whether California authorizes its courts to award equitable restitution under [state consumer laws] when a plain, adequate, and complete remedy exists at law, we hold that federal courts rely on federal equitable principles before allowing equitable restitution in such circumstances.").

25. *See* Sonner v. Premier Nutrition Corp. (*Sonner II*), 49 F.4th 1300, 1306 (9th Cir. 2022).

26. *See infra* notes 368–371.

state law's assigned equitable remedies because of those remedies' outcome-determinative effect.[27] So, *York* was wrong that federal courts should override state law with federal equitable principles. On the other hand, one might argue that there must be an exception to *Erie* for equitable remedies because awarding equitable relief is bound up in the federal courts' judicial function.[28] So, *York* was correct that states cannot redefine the power of a federal court to remediate injuries. Both suggestions have some intuitive appeal. Indeed, the debate is reflective of a deeper and more fundamental disagreement as to the role and status of remedial law in our constitutional system and in private law more broadly.[29] Even so, neither suggestion is fully satisfactory—both stances over or under value state interests in defining state law remedies, over or under appreciate limits on federal courts' role in private law remediation, and over or under account for *Erie*'s demands.[30]

This Article offers a different resolution: an equitable jurisdiction theory. The equitable jurisdiction theory says that traditional principles of equity should be understood as limitations on federal court subject matter jurisdiction. It reconciles *York*'s approach for traditional equitable principles with *Erie* and addresses the questions *York* left unanswered. *Erie*'s positive law demand is satisfied because the rules stem from Congress's statutory grant of diversity jurisdiction. *York*'s approach finds support because Congress, and not states, are responsible for defining the boundaries of federal court jurisdiction. And procedurally, federal courts should treat traditional equitable limitations consistent with other rules that limit the cases and claims the federal courts may adjudicate. This theory protects state authority over the design of state law while accounting for traditional understandings of the federal judicial role in awarding equitable remedies.

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27. *See* Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 264–67 (2018) (arguing that federal courts must follow state law for equitable remedies as "substantive" law under an *Erie* analysis).

28. *See* John T. Cross, *The* Erie *Doctrine in Equity*, 60 LA. L. REV. 173, 175 (1999) (arguing that Article III of the Constitution confers an inherent authority for federal courts to "craft a separate body of federal equity law").

29. Those who disagree with *York*'s approach tend to do so because they view the availability of remedies as a matter of policymaking subject to legislative control. By contrast, those who embrace *York*'s approach generally consider the act of remediation to be a uniquely judicial function that implicates the machinery of the operative legal system. *See, e.g.*, Henry T. Terry, *The Arrangement of Law I*, 17 COLUM. L. REV. 291, 294 (1917). Although contemplated in the private law space, the two viewpoints also have a connection to debates about remedial and judicial authority in the public law space. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–96 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2, 46–50 (1979).

30. *See infra* Sections II.B, II.C.

The equitable jurisdiction theory involves two analytical steps. First, the traditional principles of equity are guardrails of federal courts' "equitable jurisdiction." That much is supported by a rational textual explanation and historical narrative, with longstanding acceptance from the Supreme Court.[31] The Court has repeatedly recognized that a limited equitable jurisdiction was implied when the First Congress authorized federal court jurisdiction over diverse party suits "in equity."[32] That grant reasonably contained limitations as to when a federal court could act in its equitable capacity consistent with the understanding of equity practice at the time—that equitable remedies were available only when legal remedies were not, for certain types of claims, always subject to a judge's discretion. And although operation of the equitable jurisdiction theory works for those who would identify the Constitution as the source of federal courts' equitable limits, this Article endorses a statutory source, reserving Congress's authority to broaden federal courts' equitable jurisdiction if it sees fit.[33]

Second, equitable jurisdiction is properly treated as establishing limits on federal courts' subject matter jurisdiction. The traditional principles of equitable jurisdiction share key characteristics with other jurisdictional rules—they limit the exercise of adjudicatory power, circumscribe the boundaries of a certain form of suit, and affect only federal and not state courts. Although federal courts may have subject matter jurisdiction over a state law claim in diversity based on the citizenship of the parties, the limitations on the court's equitable jurisdiction preclude it from acting on the claim for relief as a court of equity. Lacking equitable jurisdiction, the federal court must dismiss the claim without prejudice to its adjudication by a court that has both party diversity and equitable jurisdiction. Like the amount-in-controversy, which limits federal court jurisdiction over cases involving diverse parties that fail to meet an anticipated monetary value, equitable

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31. For cases before and after *Erie* that acknowledge a limited federal court equitable jurisdiction, see Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868); Mississippi Mills v. Cohn, 150 U.S. 202, 204–05 (1893); Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568–69 (1939); Guar. Tr. Co. v. York, 326 U.S. 99, 105–06 (1945); Schlesinger v. Councilman, 420 U.S. 738, 755 (1975); Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

32. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789) (extending the original cognizance of the federal circuit courts to "all suits of a civil nature at common law or in equity"); *see also Atlas Life*, 306 U.S. at 568 (identifying Section 11 of the Judiciary Act of 1789 as conferring upon federal courts "'jurisdiction' . . . to entertain suits in equity"); *Grupo Mexicano*, 527 U.S. at 318 (suggesting that the limits of federal equitable jurisdiction granted by the Judiciary Act of 1789 are represented by the "jurisdiction in equity exercised by the High Court of Chancery in England" at the time of the founding).

33. *See infra* Section III.A.1.

jurisdiction limits federal courts' power to hear claims between diverse parties for equitable relief outside traditional guardrails.[34]

The objective of this Article is not to identify the original understanding of federal courts' equitable jurisdiction. The practice and structure of equity has evolved—most notably the procedural merger of law and equity—but so too have understandings of jurisdiction itself.[35] Instead, this Article proposes a theory to resolve federalism tensions arising from federal interests in traditional equitable principles, state interests in state law remedial schemes, and *Erie*'s demands. In so doing, this approach is also attentive to *Erie*'s separation of powers concerns,[36] reserving for Congress the authority to control the expansiveness of federal courts' authority to act in equity.

Practically, the equitable jurisdiction theory provides much needed guidance for how the principles of traditional equity should operate in diversity cases. If a plaintiff seeks to afford herself of contemporary equitable remedies for her state law claim—remedies beyond the scope of traditional equity—then the claim is outside federal courts' statutory equitable jurisdiction. Lacking equitable jurisdiction, the federal court must dismiss the claim without prejudice to subsequent review by a court authorized to act beyond traditional equity's scope. Or, for a case removed from state court, a federal court should remand. In either event, the federal court's dismissal should not preclude state court adjudication.

Accordingly, this Article urges recognition of traditional equity's limitations as jurisdictional.[37] And the Court has some cleaning up to do,

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34. This Article focuses on the function of traditional equitable principles in cases adjudicating state law claims, and therefore attends to the limitations associated with federal court diversity and supplemental jurisdiction. *See infra* Part III. The Article does not explore the traditional equity limitations associated with federal question claims and whether those also function as jurisdictional limitations. It may be reasonable to assume that they should, but as a matter of statutory interpretation the consequences may differ. *See infra* notes 410–411 and accompanying text.

35. *See* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1831 (2007) ("[A]s a historical matter, certain of the qualities commonly associated with the federal courts' concededly limited subject matter jurisdiction remained less than fully settled throughout much of the nation's history.").

36. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 718–38 (1974); *see also* Paul J. Mishkin, *Some Further Last Words on* Erie*—the Thread*, 87 HARV. L. REV. 1682, 1683–88 (1974) (providing a scholarly understanding of *Erie* not just as a federalism case, but as a separation of powers case).

37. Carlos Vazquez has suggested that "[t]o the extent the applicable state law authorizes an equitable remedy that the federal courts may not award because it is not 'judicial' in character, the case should be dismissed by the federal court for lack of jurisdiction rather than on the merits, leaving it open to the plaintiff to pursue the claim in state court." Carlos Vazquez, *The Constitution as a Source of Remedial Law*, 132 YALE L.J.F. 1062, 1077 (2023). What Vazquez

having previously suggested distinctions between equitable jurisdiction and subject matter jurisdiction.[38] Providing clarity that equitable jurisdiction acts as a limit on subject matter jurisdiction will ensure that federal court determinations made on the basis of traditional equitable limitations receive the proper treatment—namely, they will not prevent state courts with a broader equitable jurisdiction from adjudicating the dispute and awarding the state's desired remedies. Some procedural obstacles will surface, like whether or how a plaintiff may plead for alternative forms of relief. But it would aid federal courts, state courts, and litigants to have traditional equitable limitations formally and expressly acknowledged as jurisdictional with the attached consequences. Perhaps most importantly, states like California could continue to achieve their policy objectives for state law claims with innovative, contemporary remedial design.

The Article is organized as follows: Part I details the "Equity-*Erie* problem," explaining federal court adherence to the principles of traditional equity, state deployment of contemporary equity, the challenge posed by *Erie*, and the Supreme Court's unexplained approach in *York*. It then examines the Equity-*Erie* problem with a case study resulting from California's contemporary equitable remedies for its consumer protection laws. Part II considers three ultimately unsatisfactory responses to the Equity-*Erie* problem, and Part III offers what this Article contends is the only successful resolution—that the rules of traditional equity must be understood as limits on federal court subject matter jurisdiction. Part IV identifies several further implications. At bottom, the Article concludes that treating traditional equitable principles as jurisdictional limitations satisfies *Erie* and makes progress toward an administrable equilibrium between traditional and contemporary approaches to equitable remedies.

I. THE EQUITY-*ERIE* PROBLEM

Equity presents a unique and particularly challenging *Erie* problem. Although the subject of equity is often assigned to the field of remedies, its content is in fact much broader, incorporating defenses, procedure, and some

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calls an insufficiently "judicial" remedy this Article characterizes as an example of a state's adoption of a contemporary, non-traditional equitable remedy. *See id.* (suggesting that federal courts should be required to provide a remedy that state law establishes for state law claims, "with the possible exception of a state-created remedy that is so innovative as not to be thought of as 'judicial' in nature"). This Article tackles the broader Equity–*Erie* problem head-on, providing a theoretical and practical justification for an equitable jurisdiction theory.

38. *See infra* notes 346–354 and accompanying text.

whole substantive areas of law.[39] To the extent that equity can be associated with remedies, that field is itself recognized as neither substantive nor procedural, defying the classic dividing line of the *Erie* test.[40] Moreover, equity is difficult to classify, and therefore difficult to analyze under *Erie*, because it represents a unique mode of administering justice, distinct from its counterpart of "law."[41] As such, it is aptly spoken of as a "meta-system" with triggers and principles that unite to "solve problems of high uncertainty and complexity."[42] Equity captures the idea that judging might involve the exercise of discretion to fit the law to the facts, rather than the other way around. An *Erie* problem is at its apex when it must reconcile not just two divergent rules of law, but conceptions of adjudication.[43] The Equity-*Erie* problem, then, is an example of one of the most challenging puzzles of American federalism, testing the limits of just how independent state and federal systems of law can be.

This Part outlines the Equity-*Erie* problem: detailing the principles that federal courts have maintained in a commitment to traditional equity, highlighting novel and contemporary deployments of equitable remedies by states which depart from traditional rules, identifying the *Erie* challenge posed by those conflicting approaches, and addressing the Court's incomplete approach to the problem in *York*. It ends with a case study that showcases the complexity of the Equity-*Erie* problem.

A. Federal Principles of Traditional Equity

The principles of traditional equity operate to reserve equity's remedies only for rare, narrow, and extraordinary circumstances.[44] The principles themselves are representative of a theory of equity that has achieved and

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39. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2016); *cf.* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1777 (2022) ("[I]n equity it is remedies that are the focus of complexity and the object of judicial attention."); *see also* Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945).

40. Caprice L. Roberts, *Remedies, Equity &* Erie, 52 AKRON L. REV. 493, 494 (2018).

41. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 426, 436 (describing the principal distinction between law and equity as "the different modes of administering justice in each," including "the mode of proof, the mode of trial, and the mode of relief").

42. Smith, *supra* note 5, at 1059.

43. *See, e.g.*, Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1980–85 (2011) (evaluating *Erie*'s application to principles of statutory interpretation).

44. Safe to say, this perhaps aspirational objective may not be descriptively accurate. *See* LAYCOCK, *supra* note 6, at 5.

maintained primacy in the American legal system and one that serves objectives consistent with constitutional structure.

Traditional equity's theory starts by distinguishing two distinct adjudicatory practices: applying law and acting in equity. Applying law takes a rigid and rule-bound approach to resolving conflicts, whereas acting in equity takes a fact and fairness-centered approach to ameliorating a dissatisfactory result.[45] When operating together, adjudicators act in equity in order to round out the imperfections of the law.[46] A legal system might incorporate equity, therefore recognizing that law, as generally applicable principles, may not fit all circumstances.[47] The system adjusts for that reality by providing an avenue for relief that can sand down the rough edges of the law.[48] By virtue of its auxiliary relationship to law, this theory of equity requires it to be secondary to law and exercised in limited circumstances.[49]

Implicit in this theory are two policy considerations. One concerns the potential power of an adjudicator acting in equity. Equity must take a backseat to law and should be reserved for discrete circumstances as a means of restricting its discretionary use. Unconstrained, the equitable power could quickly overtake the democratically designed rules that it was meant merely to support, and the judge's role extends to lawmaker. Another policy consideration concerns equity's potential for external misuse, causing inefficiency and tension in the judicial system more broadly. Litigants cannot be permitted to use equity to circumvent the law, interrupt its proceeding, or rehash its outcomes. Equity is the exception to law and steps in only in

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45. *See* Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2063 (2022) (providing an illuminating analogy that describes legal adjudication as a "chain," with mandatory and indispensable links, and equitable adjudication as a "rope," braided from various narrative strands some of which might break without dooming the whole).

46. Smith, *supra* note 5, at 1067 (describing Aristotle's *Nicomachean Ethics* as providing that "equity is distinct from law and corrects the law").

47. *Id.* at 1056. Smith offers a complex functional account of equity as meta-law. *Id.* at 1054. It is based on a premise that "regular law seeks generality and ex ante certainty," and therefore "cannot handle situations in which intense interactions can lead to unforeseen and undesired results." *Id.* at 1056. Accordingly, equity serves as "a second system that corrects these problems from without and thereby allows law to be more general and certain than it otherwise could be." *Id.*

48. *Id.* at 1138 ("[T]here is a version of equity that undergirds the entire legal system, and these large uses of equity raise a question that is in a sense beyond the Constitution itself."); *see also* Funk, *supra* note 45, at 2061 (explaining the historical equity jurisdiction as one appropriately extended to judges rather than lay jurors as "equity developed a tolerance for balancing competing claims of merit rather than handing victory to one side or another in an adjudication").

49. This theory of equity has been described in various ways—as "adjectival," a supplement to law, or "meta-law." Bray & Miller, *supra* note 39, at 1764; Smith, *supra* note 5, at 1054.

specific circumstances in order to respect the work of other adjudicative bodies. In sum, by viewing equity as a tool that is rare, limited, and secondary to law, the traditional theory of equity protects a limited judicial role in a multi-body judicial system.

In the American legal system, these policy concerns have played a role in adherence to the traditional theory of equity, at least for the federal courts. As a matter of judicial role, a policy consideration ringing of separation of powers, federal courts have adhered to equity's rarity and exceptionality.[50] And as a matter of judicial cooperation, a policy consideration ringing of federalism, federal courts have monitored the reach of equity to avoid improperly interfering with the exercise of a state court's authority to address a legal claim.[51]

In addition to policy, the federal system's endorsement of the traditional theory of equity—and its limits in particular—was no doubt also influenced by the English experience. To be sure, at the founding, the United States did not adopt the English system whole cloth. Nonetheless, England's messy history with a less-restricted, more boundless equity was known to the founding generation.[52] Thus, although some states did away with the idea of law and equity courts, the federal courts maintained at least a fiction of "courts of law" and "courts of equity" by requiring litigants to file with one "side" of the court or the other until the Federal Rules of Civil Procedure accomplished the procedural merger of law and equity in 1938.[53]

The merger of law and equity purported to make no changes to any "substantive rights,"[54] and therefore has not been treated as a rejection of the traditional theory of equity.[55] But the creation of "one form of action—the civil action,"[56] analytically requires a new antecedent determination before

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50. *See, e.g.*, Gordon v. Washington, 295 U.S. 30, 36 (1935) (urging consideration of whether "the accepted principles of equity" permitted "the exercise of its extraordinary powers as a court of equity").

51. *See, e.g.*, Matthews v. Rogers, 284 U.S. 521, 525–26 (1932) (emphasizing "scrupulous regard for the rightful independence of state governments").

52. Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1250–56 (2023) (describing the evolution from a "conscience-based equity" to a "precedent-based equity" in English law); *see also id.* at 1258–60 (suggesting that members of the founding generation were aware of equity's operation and history in England).

53. Smith, *supra* note 5, at 1061–62.

54. *See* Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072).

55. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 106 (1945); Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939); Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999); *see also infra* note 220.

56. FED. R. CIV. P. 2.

invoking traditional equity principles: a classification of what is and what is not "equity." Consistent with the traditional theory of equity,[57] as it stands today, equity's classification largely resorts to an examination of the requested remedy.[58] A subset of remedies—generally those that order the subject to take a specific action—are claimed by equity.[59] They are contrasted most frequently with the primary form of remedies claimed by law: damages. This classification of equity based on remedy then also requires determining what remedy is at issue in a case, a decision that now generally rests on the remedy sought by the plaintiff in the complaint.[60] In short, federal courts

57. Identifying equity by its remedies is at least superficially consistent with the traditional approach to equity, in that it was meant to be exercised only when the litigant had a right or legal entitlement but no tool to effectuate it. *See* Funk, *supra* note 45, at 2061 (explaining Justice Story's view of equity as a tool that "did not offer causes of action independent of common-law rights," but instead "could act only on entitlements established at law").

58. *See* FED. R. CIV. P. 9 advisory committee's note to 1966 amendment ("[I]t is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought."); *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993) (observing that, although petitioners said their suit was for "appropriate *equitable* relief," they did not seek "a remedy traditionally viewed as 'equitable,' such as injunction or restitution," but rather "nothing other than compensatory *damages*"); *cf.* Smith, *supra* note 5, at 1142 ("Equity was indeed associated with particular remedies because equity had different powers (contempt) and because intervening in law without 'disturbing it' called for that set of powers (and vice versa). Yet, as we have seen, equity is not simply a set of remedies but a whole structure and style, a system of law itself."). In the Seventh Amendment context, the Court has explained that "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries." Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

59. *See* Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 145 (2016) ("Equitable remedies 'are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets.'" (quoting 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1234, at 694 (Spencer W. Symonds ed., Bancroft-Whitney Co. 5th ed. 1941))). The following remedies, at least, are claimed by equity: "the injunction, accounting for profits, constructive trust, equitable lien, subrogation, equitable rescission, specific performance, and reformation." Bray, *supra* note 39, at 553. And yet, "[a]ccurate law-equity characterization is often elusive." Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1047 (2011). Caprice Roberts highlights the inherent difficulty with remedy-by-remedy classification focusing on disgorgement, a remedy to which courts all too often "attach the equity label in a conclusory fashion," but one which she argues frequently functions as "a legal money judgment that ought to trigger the parties' jury-trial right." *Id.* at 1051–52.

60. Prior to the procedural merger of law and equity, a plaintiff would address the complaint to either the "law side" or the "equity side" of a federal court and, if directed to the equity side, the court would evaluate equitable jurisdiction based on equitable principles. *See, e.g.*, Van Norden v. Morton, 99 U.S. 378, 380 (1878). Since federal courts' law and equity "sides" were merged, courts generally look to the remedy sought in the complaint. *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738, 741–43 (1975) (raising, sua sponte, jurisdictional and equity issues

determine when to invoke the limitations of traditional equity by looking to the remedy sought by the plaintiff.

The product of this theory, policy, history, and doctrine is a set of principles that circumscribe the use of equitable remedies. Three principles, in particular, play the most significant role in categorizing federal equity's boundaries and maintaining its traditionally rare and exceptional use—the adequate remedy at law rule, the rule precluding equitable remedies of right, and the rule limiting equitable remedies to their traditional usages.[61] These principles have been present in recent Supreme Court case law and help to illustrate the ways in which states' contemporary approaches to equitable remedies have the potential to present the Equity-*Erie* problem.[62] As such, they are used here to illustrate the framework by which the federal principles of traditional equity can be reconciled with *Erie*'s demands, even if they do not necessarily capture the entire scope of traditional equity.

The primary manifestation of traditional equity is the rule that a court may not act in equity if there is an adequate remedy at law.[63] This is the most important limitation because it does two things: directly separates "law" from

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where federal complaint sought injunctive relief); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (evaluating equitable principles for suit seeking to enjoin defendants' operations, noting that "[i]t goes without saying that an injunction is an equitable remedy"). *But see* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477–78 (1962) (refusing to allow plaintiff's "choice of words used in the pleadings" to characterize its own case as equitable, and therefore not subject to a jury trial); Stern v. S. Chester Tube Co., 390 U.S. 606, 610 (1968) ("[T]he label used under state practice of course has no bearing on the question whether the federal courts have power to grant the kind of [r]elief actually sought."). This step in the categorization of equity is driven by plaintiff's choice, perhaps, because "the plaintiff is the master of the complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 398–99 (1987).

61. There are doubtless other principles of traditional equity that serve this function. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488, 499 (1974) ("[C]ourts of equity should not act . . . to restrain a criminal prosecution."); Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. 699, 703, 714–15 (2022) (addressing equity's requirement that a plaintiff have a proprietary interest). Conversely, there are rules of equity, developed by the federal courts, that do not define federal equity's rarity or exceptionality but simply serve to guide its execution. Consider, for example, the Supreme Court's four-part test for a plaintiff's entitlement to a preliminary injunction. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). As Justice Ginsburg recognized, some courts have treated that test on a "sliding scale," "awarding relief based on a lower likelihood of harm when the likelihood of success is very high." *Id.* at 51 (Ginsburg, J., dissenting).

62. *See infra* Section I.B.

63. Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868) (calling the adequate remedy at law rule "the only test of equity jurisdiction"); Bray, *supra* note 3, at 999 (describing "the requirement that a plaintiff seeking equitable relief must first show there is no adequate remedy at law" as "the last redoubt of equitable exceptionalism").

"equity" and establishes an order of priority.[64] Law is the default, and equity, justified by law's inadequacy, should never act before it. To this day, the Supreme Court appears committed to this requirement.[65]

Van Norden v. Morton provides a helpful illustration of the adequate remedy at law rule's dual function.[66] There, the plaintiff filed a bill before the equity side of the federal court.[67] He claimed to be the owner of a dredge-boat that had been seized to satisfy a judgment owed to the defendant by a separate company. The plaintiff asked that any interference with his possession of the boat be enjoined, that title to the boat be quieted, and that defendants be decreed to pay damages. The Supreme Court rejected an argument that the remedy under state law would have been "of an equitable character,"[68] suggesting that plaintiff could instead have applied for a remedy against erroneous levy of execution.[69] The latter remedy, the Court observed, "does not depend on any inadequacy of an action for damages or by sequestration" and thus itself presented a remedy at law available to preclude the federal court's exercise of equity.[70] In other words, that an alternative potential remedy did not require consideration of alternative remedies' availability or adequacy was sufficient to classify it as a remedy at law, which then precluded the court from acting in equity to grant the plaintiff's requested relief.

A second principle of traditional equity that protects its exceptionality is the rule that equitable remedies are not available as of right, but instead demand judicial discretion.[71] This principle is tied to equity's historical mode

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64. Samuel Bray argues that the primary principle of traditional equity—the adequate remedy at law rule—is itself a tool that "forces courts to classify remedies as legal or equitable." Bray, *supra* note 39, at 535–36. He contends that the classification of remedies "sustains the system of equitable remedies." *Id.* at 536. Stated differently, a conception of equity as exceptional and secondary to law necessarily requires a categorization of remedies as either legal or equitable.

65. *See, e.g.*, Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945); eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391–92 (2006); Monsanto Co. v. Geerston Seed Farms, 561 U.S. 139, 161 (2010).

66. Van Norden v. Morton, 99 U.S. 378 (1878).

67. *Id.* at 378.

68. *Id.* at 379.

69. *Id.* at 381.

70. *Id.*

71. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). ("A preliminary injunction is an extraordinary remedy never awarded as of right."); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–12 (1982) (expressing that an injunction, as an equitable remedy, "is not a remedy which issues as of course," and even an interlocutory injunction "has never been regarded as strictly a matter of right"); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (declining to infer that a statute mandated the issuance of an injunction, noting that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the

of adjudication, specifically its willingness to consider all circumstances of the case.[72] Indeed, like the adequate remedy at law rule, equity has at times been defined by its discretion, seeing as an equitable remedy cannot be compelled "if under all the circumstances it would be inequitable to do so."[73] In *Pope Manufacturing Company v. Gormully*, the Court found questionable the validity of a contract granting the defendant license to use certain of the plaintiff's patents in exchange for an agreement that the defendant could never import, manufacture, or sell devices covered by other (potentially "wholly void") patents.[74] Ultimately, however, the Court declined to consider the contract's validity and instead determined that the plaintiff could not call upon the court of equity to order specific performance under the contract, as specific performance is a remedy "not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, and always with reference to the facts of the particular case."[75] Here too, then, the rule that equitable remedies are not available as of right is a categorization limit to equity which serves to define what is and is not the exercise of equitable authority, thereby distinguishing equity from its legal counterpart.

The third relevant principle of traditional equity is the rule that equitable remedies are available only in circumstances consistent with historical practice. This principle stems from the idea that equitable remedies must be limited to rare, exceptional circumstances, and it understands historical practice as having identified those proper circumstances.[76] It also relies on

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necessities of the particular case"). Although these cases deal with federal statutory causes of action, the Court's description of the inherent discretion of equitable remedies suggests that it would infer the same discretion be preserved for equitable remedies sought in state law claims. *See* Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943) (addressing a claim under Florida law and insisting that "an appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity").

72. *See* W.S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 13–14 (1929) ("Equity . . . always took all the circumstances of the case and the conduct of the parties into consideration; and its remedies were, for that reason, always discretionary."); Payne v. Hook, 74 U.S. (7 Wall.) 425, 432 (1868) ("A court of equity adapts its decrees to the necessities of each case . . . .").

73. Wesley v. Eells, 177 U.S. 370, 376 (1900).

74. Pope Mfg. Co. v. Gormully, 144 U.S. 224, 231 (1892).

75. *Id.* at 237 (citing Hennessey v. Woolworth, 128 U.S. 438, 442 (1888)).

76. The view that historical practice had identified the proper circumstances for and applications of equitable remedies is perhaps a relic of the pre-merger prescribed forms of proceeding requiring "declarations" and "bills" for common law and equitable actions respectively. *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 804 (2004); *id.* at 784 (explaining that, at the time of the founding, "a plaintiff had a cause of action at law or in equity only if judicial relief was available through a particular form of

the understanding that there are certain remedies that belong to equity and conversely that there are certain remedies unavailable through equity. For example, in *Pusey & Jones Co. v. Hanssen*, the Court dismissed a case in equity in which the plaintiff, a contract creditor, sought the appointment of a receiver for the insolvent corporate debtor.[77] The Court acknowledged that the state statute "makes possible a new remedy, because it confers upon the Chancellor a new power," but, under historical traditions of equity, such a remedy "theretofore would not have been open to an unsecured simple contract creditor."[78] While this principle may previously have served as a guidepost, under modern doctrine the rule has become more rigid and requires, it seems, a precise historical analogue.[79] Recently, the Court has indicated that the lines identifying the permissible applications of equitable remedies are drawn according to divisions "administered by the English Court of Chancery at the time of the separation of the two countries"[80] or at least "the days of 'the divided bench' before law and equity merged."[81]

Historically, all three of these principles were part of a framework that worked to identify cases that were or were not proper for resolution by the courts of equity. Prior to the merger of law and equity, in federal courts the principles were applied to determine whether the plaintiff had filed in correct form, and indeed whether the case had been brought before the right "side" of the court.[82] When those principles were not satisfied—when, for example, the court concluded that an adequate legal remedy was available—the court

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proceeding" which required "unique procedural incidents, a particular form of relief, and specific forms of judgment and execution"). This, despite equity's more "flexible" approach. *See id.* at 791 (citing Justice Story's Commentaries on Equity Jurisprudence).

77. Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 495 (1923).

78. *Id.* at 499; *see also* Kelleam v. Maryland Cas. Co., 312 U.S. 377, 381 (1941) (reversing the district court's appointment of a receiver based on traditional equitable rules despite availability of equitable relief under Oklahoma statutes).

79. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999); *see also* Stephen Burbank, *Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1301–06 (2000) (summarizing *Grupo Mexicano*'s evaluation of traditional equity practice). This principle may not seamlessly fit as one that defines traditional equity, in part because historical practice permitted new equitable remedies if authorized by a state legislature, at least when the remedy "merged" with the underlying state right. *See* Cross, *supra* note 28, at 179–81. Nonetheless, the Court situates this requirement as one that encompasses the federal court equitable jurisdiction, *see Grupo Mexicano*, 527 U.S. at 318–19, and it is also a principle poised to present an Equity–*Erie* problem, *see* Section I.B. For comments on the propriety of this principle and its place in the equitable jurisdiction theory, see *infra* notes 394–395.

80. *Grupo Mexicano*, 527 U.S. at 318 (citing Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939)).

81. U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 94–95 (2013).

82. *See, e.g.*, Van Norden v. Morton, 99 U.S. 378, 381 (1878).

would dismiss the claim without prejudice, allowing the plaintiff to refile an action at law before the court's other side.[83] In this way, the rare and exceptional nature of equity was preserved by federal courts.

To this day, the Court is committed to these principles of traditional equity and insists on looking to historical practice to limit federal equity's reach. In its "new equity cases,"[84] the Court has reinforced that, at least in the federal courts, equitable remedies must be subordinate to legal remedies, they may not be granted as a matter of course, and they may only be available consistent with historical practice.[85]

B. Contemporary Approaches to Equity

There were many moments in American legal history when these principles of traditional equity might have disappeared altogether. At the nation's founding, American legal structures and concepts of law departed from English practices in many ways.[86] Equity might have been one of those. In fact, many states declined to establish courts of equity. But federal courts maintained the law-equity divide, desirable or not.[87] Traditional equitable principles might also have disappeared after *Erie*, when the Court declared that federal courts lacked the authority to craft "substantive rules of common law applicable in a state."[88] Or, after the "merger" of law and equity when the

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83. *See, e.g.*, Scott v. Neely, 140 U.S. 106, 117 (1891).

84. Bray, *supra* note 3, at 999–1000 (identifying that, over the last decade and a half, in eleven different cases, "the Court has deeply entrenched the 'no adequate remedy at law' requirement for equitable relief, and it has repeatedly underscored the distinction between legal and equitable remedies. . . . [T]he court has insisted with vigor on the historic division between law and equity.").

85. *See* eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391–92 (2006); Monsanto v. Geerston Seed Farms, 561 U.S. 139, 165 (2010); Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1942–43 (2020).

86. *See* Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 257, 265 (Donald Fleming & Bernard Bailyn eds., 1971) (asserting that, although it was thought that equity was unpopular, Americans objected more to courts of chancery than equity in the colonial period); *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 279 (Max Farrand ed., Yale Univ. Press rev. ed. 1966) (1911) (documenting the Founders arguing against "blind adherence to the British model").

87. *See* FISS, *supra* note 7, at 44–45 (challenging the remedial hierarchy as lacking a desirable justification).

88. *See infra* Section I.C.

two systems united procedurally, the traditional circumscription of equity might have also evaporated.[89]

Pressure from the academy to abandon traditional rules that made equity rare or exceptional mounted in the latter half of the twentieth century, particularly as courts made wider use of equity's injunction remedy. Use of the injunction for structural reorganization of social institutions led Professor Owen Fiss to challenge the notion of a hierarchy of remedies.[90] Professor Douglas Laycock made a related challenge when he proclaimed the "death of the irreparable injury rule."[91] Examining thousands of cases, Laycock argued that courts have repeatedly found ways to "escape[]" the adequate remedy at law rule, while still paying it lip service.[92] Specifically, Laycock averred that the distinctions made between law and equity, those presumably prioritizing legal over equitable remedies, were but a "crude proxy for a set of more functional distinctions."[93] He urged that the inadequate remedy at law rule for equity should be discarded and policymakers freed to "unbundle" the functional choices within.[94] As has been observed, however, the Supreme Court's "new equity" cases of the last twenty-five years have not opted for the road offered by these scholars, and have instead doubled down on the law-equity distinctions.[95]

There are a number of potential explanations for why traditional equity's rare and exceptional treatment persisted. For one, the combination of traditional equity's lengthy history and principles of stare decisis may have made it difficult to alter. For another, the principles of traditional equity may capture the Court's—or individual justices'—normative beliefs about the proper exercise of judicial power. In other words, the Court might be maintaining limitations on equity as its own proxy to protect against the potential abuse of coercive remedies.[96] A more cynical take might be that the Court, particularly of late, has a political aversion to equity, especially its growth in the direction of structural and nationwide injunctions, and has

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89. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 679 (2014) ("True, there has been, since 1938, only 'one form of action—the civil action.' But 'the substantive and remedial principles applicable prior to the advent of the federal rules have not changed.'" (first quoting FED. R. CIV. P. 2; and then quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1043 (3d ed. 2002))).

90. FISS, *supra* note 7, at 7.

91. *See generally* Laycock, *supra* note 6.

92. *Id.* at 4.

93. *Id.* at 12.

94. *Id.*

95. Bray, *supra* note 3, at 1008.

96. Bray, *supra* note 39, at 534 (explaining that equity's remedies and managerial devices, like contempt, can be costly and are vulnerable to abuse, necessitating equity's constraints).

actively sought ways to shrink equity's influence.[97] Or perhaps because, at the trial court level, traditional equitable remedies come with higher administrative burdens, judges who themselves are interpreters of equity's exceptional principles may be hesitant to loosen those restrictions and expand equity's reach.[98]

Crucially, however, not all states feel the same way. Since Fiss's and Laycock's repudiation of the hierarchy in favor of legal remedies, states have begun to explore challenges to the principles of traditional equity. For example, states have explored uses for equitable remedies that do not grow out of equity's historical practice, taking instead a contemporary approach to its remedies.[99] States have also moved away from traditional equity's demand for discretion, by instructing courts to apply presumptions in favor of equitable relief when certain circumstances are met.[100] Most importantly, a handful of states have turned traditional equity on its head by abrogating the inadequate remedy at law rule, putting equitable remedies on an equal playing field with legal remedies.[101]

The policies cited for these novel approaches reflect a desire by states to use the flexibility of equitable remedies to protect and vindicate the rights of potential plaintiffs. In furtherance of these policy goals, states are elevating and expanding the use of equitable remedies to provide more comprehensive protection for beneficiaries or to prevent injury in the first place. This is particularly true in the rejection of the rule that damages must be the default

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97. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J., concurring to express skepticism that district courts have authority to enter universal or nationwide injunctions).

98. *See* Bamzai & Bray, *supra* note 61, at 729 ("Equity insistently needs limiting principles at least in part (1) because it does not have 'causes of action' as a constraint on suits, (2) because its remedies are more demanding for courts and more vulnerable to abuse by opportunistic litigants, and (3) because the political legitimacy concerns for the federal courts are at their height in equity.").

99. For example, New York law, N.Y. C.P.L.R. § 7601, affords confirmation of an appraiser's award. Cendant Corp. v. Forbes, 70 F. Supp. 2d 339, 345 (S.D.N.Y. 1999).

100. See FLA. STAT. § 542.335(1)(j), under which a party is entitled to a presumption of irreparable injury if it can prove the violation of an enforceable covenant. Vital Pharms., Inc. v. Alfieri, 23 F.4th 1282, 1292 (11th Cir. 2022).

101. According to the state, California has abandoned the adequate remedy at law rule by permitting equitable relief under the Unfair Competition Law and California Legal Remedies Act, despite the latter also allowing for legal damages. *See Sonner I* Amicus Brief, *supra* note 11, at *5–8 (citing CAL. BUS. & PROF. CODE §§ 17203, 17205; CAL. CIV. CODE. §§ 1780(a), 1782(d), 1752); *see also infra* Section I.D. Virginia's Uniform Trade Secrets Act likewise instructs that "a complainant need not allege or prove irreparable harm when it involves a statute that authorizes injunctive relief. All that need be proved is a violation of the statute." E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 894 F. Supp. 2d 691, 704 (E.D. Va. 2012) (citing Cap. Tool & Mfg. Co. v. Maschinenfabrik Herkules, 837 F.2d 171, 172 (4th Cir. 1988)), *vacated on other grounds*, 564 F. App'x. 710 (2014). For several other examples, see *infra* note 198.

remedy, where states note that an equitable remedy is "often an appropriate 'remedy of enforcement' which furthers the preventive goal" of a state's statute.[102] But similar policy objectives can be seen in the adoption of rules that establish defaults in favor of equitable remedies or provide for equitable relief in contemporary contexts.

For example, Florida's § 542.335 provides "a comprehensive framework for analyzing, evaluating and enforcing restrictive covenants contained in employment contracts."[103] In an amendment to the statute, the legislature established a presumption of irreparable injury if the plaintiff demonstrates a violation of an enforceable restrictive covenant, upon which a court shall enforce with an appropriate remedy including temporary or permanent injunction.[104] The presumption stemmed from a Florida Supreme Court case which explained the policy as based on practicality of proof, risks of delays to meritorious claims, and the need for equity's tools to preserve the status quo.[105] "To require that a plaintiff prove irreparable injury as a prerequisite to injunctive relief," the court explained, "would, in most instances, defeat the purpose of the plaintiff's action."[106]

Also seeking to deploy equity's responsive remedies, New York law provides that a private agreement to submit to a valuation, appraisal, or similar process may be "specifically enforce[d]" as if it were an arbitration agreement.[107] The New York Law Revision Commission's report suggests

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102. Greenfield Country Ests. Tenants Ass'n. v. Deep, 666 N.E.2d 988, 993–96 (Mass. 1996) (explaining that with Massachusetts's adoption of General Law chapter 93A, which "allows a consumer to bring an action for damages 'and' such equitable relief the court deems necessary and proper . . . the Legislature sought to ensure latitude in the manner, be it legal or equitable, in which the statute is enforced to protect consumers"); *see also infra* note 261.

103. Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1230–31 (11th Cir. 2009) (quoting Env't. Servs., Inc. v. Carter, 9 So. 3d 1258, 1262 (Fla. Dist. Ct. App. 2009)).

104. FLA. STAT. § 542.335(1)(j).

105. *See* John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*, 70 FLA. BAR J. 53, 55 (1996).

106. Capraro v. Lanier Bus. Prod., Inc., 466 So. 2d 212, 213 (Fla. 1985). The court went on to state: "Immediate injunctive relief is the essence of such suits and oftentimes the only effectual relief. It truly can be said in this type of litigation that relief delayed is relief denied. For these reasons we agree with the district court that irreparable injury should be presumed." *Id.*

107. N.Y. C.P.L.R. § 7601 (Westlaw through 2023, Legislative Studies and Reports). There is some debate as to whether equitable relief was historically unavailable in this posture. *Compare* Cendant Corp. v. Forbes, 70 F. Supp. 2d 339, 343 (S.D.N.Y. 1999) (acknowledging that "traditional courts of equity would not specifically enforce *executory* arbitration or appraisal agreements," but concluding that "no such bar applied once an agreement was no longer executory"), *with* Neil S. Hecht, *Variable Rental Provisions in Long Term Ground Leases*, 72 COLUM. L. REV. 625, 683 (1972) ("Although a court of equity may intervene in an appropriate case and render a judicial valuation, it will not specifically enforce an agreement to appraise by

that the law stemmed from concern over "hostile or dilatory conduct" by a party facing an appraisal, but also a desire to maintain the flexibility of an appraisal system rather than subjecting it to the rigidity of arbitration.[108] In light of these competing objectives, the statute uses arbitration's equitable remedy as "a procedure of last resort, so to speak."[109]

As these examples show, states are consciously choosing to deploy contemporary, non-traditional equitable remedies for state law. And there is little reason to think that they are not permitted to do so.[110] But because federal courts have continued to adhere to traditional general principles that limit equity's reach, these new state practices will result in tricky choice of law questions. Indeed, they already have.[111]

C. Erie*'s Demands and* York*'s Approach*

Exploring federal courts' commitment to traditional equitable principles and states' contrary deployment of contemporary equitable remedies begins to elucidate a conflict between federal and state law. Such a conflict generally invokes the choice-of-law analysis defined by *Erie Railroad v. Tompkins* and its progeny. And *Erie*'s choice-of-law rules certainly comprise a big part of the Equity-*Erie* problem. But *Erie* did more than instruct courts which law to apply when state and federal law conflict. The case also represented a change in the conception of law and a related demand for the identification of positive law to guide judicial intervention. All of these components of *Erie* are implicated in the tug-of-war between traditional and contemporary equity. And in fact, *York* addressed the choice-of-law issue, but failed to account for *Erie*'s other demands. Understanding these two cases sets up the full Equity-*Erie* problem.

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requiring unwilling appraisers to conduct a valuation or by appointing an appraiser in the event that a party fails to do so.").

108. YOUNG B. SMITH ET AL., N.Y. LAW REVISION COMM'N REP., LEG. DOC. NO. 65, at 387 (1958).

109. *See* § 7601.

110. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 105–06 (1945) ("That a State may authorize its courts to give equitable relief unhampered by any or all such [exceptional equity] restrictions cannot remove these fetters from the federal courts."); *see also* Burbank, *supra* note 79, at 1344 (arguing that "it would require both a blinkered view of the history of provisional remedies in the United States and an expansive view of preemption" to prevent states from awarding remedies deemed beyond federal court equitable jurisdiction in *Grupo Mexicano*).

111. *See, e.g.*, Vital Pharms., Inc. v. Alfieri, 23 F.4th 1282, 1293 (11th Cir. 2022) (Pryor, J., concurring); *Sonner I*, 971 F.3d 834, 839 (9th Cir. 2020); Cendant Corp. v. Forbes, 70 F. Supp. 2d 339, 343 (S.D.N.Y. 1999).

1. *Erie Railroad Company v. Tompkins*

Justice Brandeis's famous opinion has a rich and closely examined political and jurisprudential history.[112] When it comes to the Equity-*Erie* problem, two trends leading up to the 1938 decision help to illuminate its key moves. And those trends, interestingly, may have some parallel to the story of contemporary equity's departure from traditional equity.

The first trend was a move by states to assert control over the rules affecting state law claims. At the time that *Swift v. Tyson*[113] was decided, states largely followed the general law merchant in commercial cases—this involved state courts, like federal courts, applying their "independent judgment" about the principles that would guide the case.[114] Over time, however, state courts began to treat the commercial law as local rather than general, and all the while state legislatures took the opportunity to enact statutes on various aspects of commercial law.[115] A second trend was a reach by federal courts further into state law. What started as a relatively narrow set of commercial-law-adjacent bodies of general law eventually expanded as federal courts began to apply their independent judgment to areas of traditionally local law such as tort.[116]

These two trends collided, the consequence being that federal courts "appeared to be freely disregarding state law with no clear warrant in the Constitution for doing so."[117] A once reasonable approach to adjudication began to lose its legitimacy, particularly as litigants manipulated diversity jurisdiction to obtain outcomes that would differ from one court to the next.[118]

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112. *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION (2000); *see also* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 922 (2013).

113. Swift v. Tyson, 41 U.S. 1 (1842).

114. Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1292–93, 1312 n.22 (2007); *see also* Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 5 (2015) (explaining that "because [the general law] was not the creation of any particular government, no court could claim to be authoritative in its interpretation").

115. Clark, *supra* note 114, at 1292–93 (citing *Stalker v. M'Donald*, 6 Hill 93 (N.Y. 1843), in which the state of New York declined to follow the rule of the Supreme Court in *Swift*); *see also* Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938) ("Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.").

116. Clark, *supra* note 114, at 1294; *see also Erie*, 304 U.S. at 75–76 (describing cases in which the general law was applied).

117. Clark, *supra* note 114, at 1294.

118. The classic example of this mischief, cited by *Erie*, is Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 523 (1928), in which

It was this context that led the Court in *Erie* to disclaim common lawmaking by the federal courts, to demand instead a certain type of positive law source, and to direct federal courts in resolving conflicts between state and federal law.

Erie's first step was the rejection of "federal general common law."[119] After characterizing it as a case permitting federal courts to rely upon their "independent judgment" to determine "what the common law of the state is—or should be," the Court expressly overruled *Swift*.[120] The Court criticized *Swift* as resting on a fallacy:

> The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law."[121]

Next, *Erie* demanded a rooting in one of three positive law sources.[122] The requirement is tied to the Court's identification of the legitimacy of law, as it notes that "Congress has no power to declare substantive rules of common law applicable in a state . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts."[123] Accordingly, permissible sources of "law" include only "matters governed by the Federal Constitution or by acts of Congress," or state law, which is "the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court)."[124] *Erie* was deeply attuned to lawmaking authority, and the allocation of that authority between state and federal actors.

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the plaintiff company reincorporated in a different state to take advantage of diversity jurisdiction and a more favorable federal common law rule.

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

120. *Id.* at 71, 77–78. As Caleb Nelson put it, "[w]hatever else it did, *Erie* abandoned what it repeatedly called 'the doctrine of *Swift v. Tyson*.'" Nelson, *supra* note 112, at 924.

121. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. at 532–33 (Holmes, J., dissenting)).

122. While a central tenet of this discussion is *Erie*'s demand for a positive law source for the application of federal law, this Article in no way seeks to suggest that *Erie*'s holding was a necessary byproduct of a legal positivism philosophy. *Cf.* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

123. *Erie*, 304 U.S. at 78. As John Cross described *Erie*'s "new way of looking at law," "no legal rule is valid unless it can be traced to a sovereign with legislative jurisdiction over the subject of the rule." Cross, *supra* note 28, at 192 (citing Guar. Tr. Co. v. York, 326 U.S. 99, 101 (1945)).

124. *Erie*, 304 U.S. at 78–79.

Last, *Erie* detailed a choice-of-law rule[125]—effectively a default with exceptions. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."[126] The *Erie* choice-of-law analysis has evolved and now involves a series of steps to distinguish law that is "substantive," "outcome-determinative," or incentivizing of forum shopping (when federal courts must follow state law) from law that is "procedural," "nonsubstantial, or trivial" (when federal courts are authorized to apply federal rules).[127]

The Court in *Erie* did not address whether its new positive law and choice of law requirements applied in equity or to equitable remedies at all. But a few points suggest that the decision cannot be limited only to primary law or "rights." One is that the Court expressly invoked federal court application of general law to questions of exemplary or punitive damages as it catalogued the ways in which the general law's reach had spread.[128] Another is the Court's rejection of the notion of "supervision"—that federal courts would make better choices about the law of the state than the state legislature or judiciary.[129] Arguably, where a state legislature or court has chosen a preferred remedy for a state law claim, the federal court's refusal of that remedy is a form of this impermissible supervision. Also noteworthy is the Court's emphasis that the permissible common law—that which is enforced in a state—cared not about the historical principles that may have come before it:

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125. Roosevelt III, *supra* note 114, at 10 ("Erie is actually a choice-of-law case.").

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

127. *See infra* Section II.A. Because this Article seeks to resolve the question of whether the principles of traditional equity can be reconciled with all of *Erie*'s demands, it takes both of those two doctrines as they are found. Accordingly, it does not engage with the first order and extensively debated question of whether *Erie* was correctly decided. *See generally* Friendly, *supra* note 16; Nelson, *supra* note 112; Clark, *supra* note 114. The Article nonetheless acknowledges that a conclusion that *Erie*'s demands are prudential rather than constitutional would affect the analysis of the Equity–*Erie* problem. For, if the Constitution permits a "federal general common law," or if it contemplates federal judges and judicial decisions as generally permissible sources of law, then custom-rooted or judiciary-imposed federal rules of equity no longer pose the same problem.

128. *Erie*, 304 U.S. at 76; *see also* Burbank, *supra* note 79, at 1321 ("[T]here is nothing about remedial law that preserves it from . . . the positivist mandates of *Erie* and the Rules of Decision Act.").

129. *Erie*, 304 U.S. at 79 ("Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence."); *see also id.* at 78 (citing Justice Field's admission that "learned judges," including himself, had in the past brushed aside the law of the state that conflicts with their views).

> [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[130]

2. *Guaranty Trust Company of New York v. York*

After *Erie*, one might have expected a retreat from federal courts' commitment to traditional equitable principles. For starters, because they are neither constitutional nor statutory, federal equitable principles appear to lack the required grounding in a source of positive law. While scholars have plausibly argued that equity derives from a constitutional source, the Court has yet to adopt that view.[131] There is no federal statute detailing and imposing equity's traditional principles.[132] Insofar as it might seek to control state law remedies, it is at least questionable whether Congress could pass such legislation.[133] What is more, like the federal general common law

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130. *Id.* at 79.

131. For an argument that Article III confers on federal courts "an inherent power to administer a system of equitable remedies that is coextensive with the remedial authority of the English Court of Chancery in 1789," see Gallogly, *supra* note 52, at 1221. Owen Gallogly contends that "Article III is both the primary source of and limitation on federal equity power." *Id.* at 1310. The scope of that inherent power, he contends, includes the authority to gradually develop the system of equitable remedies but prohibits alteration or abandonment of settled rules of founding-era equity. *Id.* at 1313. Thus, Gallogly would likely conclude that traditional equity's adequate remedy at law rule and rule precluding equitable relief as of right are required by Article III, but he would reject the rule strictly limiting equitable remedies to contexts in which they have a perfect historical analogue. *See id.* at 1312. But, as Vazquez has offered in response, the scope of the federal equity power as understood by Gallogly "would be equally compelling whether the historical standard came from Article III or the statute passed by Congress granting jurisdiction in equity to the court." Vazquez, *supra* note 37, at 1071. The latter is explored *infra* at Part III.

132. The Judiciary Act of 1789 contained a provision that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy at law may be had." Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82; *see also* Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) (citing the same). However, this provision, discussed in further detail *infra* at Section III.A, expressly acted as a jurisdictional limitation of the federal courts and did not apply to state court adjudication of state law remedies. *See, e.g.*, Scott v. Neely, 140 U.S. 106, 111–12 (1891) (declining to "express any opinion of the wisdom" of a Mississippi law that permitted a contract creditor to bring a suit in equity for removal of certain obstacles prior to adjudication of legal claims on the contract, but that it was impermissible under the statute for federal courts).

133. A federal statute that purported to define the remedies that must apply to state law claims could be beyond Congress's limited legislative powers. *See* Cross, *supra* note 28, at 201 ("Congress certainly has no general power to regulate what remedies are available in cases arising

declared unconstitutional by *Erie*, the federal principles of traditional equity seem to exist as a "a transcendental body of law" used by federal courts in the exercise of their own judgment.[134]

However, just seven years after *Erie*, *York* reasserted federal equity's traditional guardrails and indicated that they should apply even in the face of contrary state law principles.[135] The case involved claims against a company trustee for breach of trust and failure to disclose self-interests relevant to a note buyback offer.[136] Although the district court found that prior litigation foreclosed the claims, the court of appeals reversed, holding that the suit was neither foreclosed nor barred by the state statute of limitations.[137] The appellate court reasoned that because the suit had been brought on the "equity side" of the district court, it need not follow a state statute of limitations even when diversity of citizenship formed the basis of the court's jurisdiction.[138]

The Supreme Court reversed, taking as its starting point "the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* embodies."[139] The *York* Court observed that "[i]n overruling *Swift*," it had "overruled a particular way of looking at law"—namely, law "conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations."[140] It then considered the applicability of this shift to cases in federal equity, which had been understood "from the beginning" as "a separate legal system."[141] First recognizing that the principle of *Erie* had already been applied to a suit in equity,[142] the Court narrowed its focus to

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under state law, even when those remedies are heard in federal court."). To be clear, Congress's power over the jurisdiction of the lower federal courts may be broad enough to declare the equitable remedies that will be available in federal court. *See* Sheldon v. Sill, 49 U.S. 441, 448 (1850); *see also infra* Part III. The point here is that Congress has not claimed an Article I power to, for example, declare that a specific remedy shall apply to certain (or all) state law claims, irrespective of the adjudicator.

134. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting); *see also* John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1912, 1922 (2022) ("Unwritten federal equity is thus part of the body of norms, external to the courts, that they apply using judicial power.").

135. Guar. Tr. Co. v. York, 326 U.S. 99, 105–06 (1945).

136. *Id.* at 100.

137. *Id.* at 100–01.

138. *Id.* at 101.

139. *Id.*

140. *Id.* at 101–02.

141. *Id.* at 105.

142. *Id.* at 107 (citing Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 205 (1938)). *Ruhlin* held that *Erie* applied to cases in equity, even where the source of the state law equitable rule came from judicial decisions, but was not focused on equitable remedies. 304 U.S. at 205. The Court's conclusory decision was that *Erie*'s doctrine "applies though the question of construction arises

whether a state statute of limitations was "a matter of 'substantive rights' to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact that there is a State-created right," or if instead such a statute is "of 'a mere remedial character' which a federal court may disregard."[143] After expounding about some of federal equity's immutable characteristics, the Court concluded that, even for suits in equity, a federal court "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."[144] And so, the state statute of limitations barring recovery had to be applied in federal court.

Importantly, the *York* Court makes three pronouncements about the limits of *Erie*'s application to equity, with the apparent aim of protecting equity's traditional rare and exceptional character:

> (1) "Equitable relief in a federal court is of course subject to restrictions," including (a) a fit within a traditional scope evolved from the English Court of Chancery, (b) satisfaction of the adequate remedy at law rule, (c) any congressional rules of equity's curtailment, and (d) the constitutional right to a jury trial.[145]
>
> (2) States "may authorize [their own] courts to give equitable remedies unhampered by any or all such restrictions."[146]
>
> (3) But "[s]tate law cannot define the remedies which a federal court must give" and "a federal court may afford an equitable remedy for a substantive right . . . even though a State court cannot give it."[147]

The *York* Court draws out these protections of traditional equity as it highlights the unique system of equity, one which "derived its doctrines, as well as its powers, from its mode of giving relief."[148] Specifically, the Court first notes that Congress's grant of "cognizance" of diverse equity suits to federal courts did not include "the power to deny substantive rights created

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not in an action at law, but in a suit in equity." *Id.* The case did not address the different standards permitted for common law and equity cases under the Rules of Decision Act, an issue left for the Court to grapple with in *York*.

143. *York*, 326 U.S. at 107–08 (citing Henrietta Mills v. Rutherford Co., 281 U.S. 121, 128 (1930)).

144. *Id.* at 108–09.

145. *Id.* at 105.

146. *Id.* at 105–06.

147. *Id.* at 106.

148. *Id.* at 105 (quoting CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF EQUITY PLEADING, at xxvii (Cambridge 1877)).

by State law or to create substantive rights denied by State law."[149] But it was not limitless. It was subject to equity's traditional principles.

These statements from *York* are plainly dicta, as the Court held that *Erie does* apply to suits brought in equity, and that federal district courts are bound by a state statute of limitations.[150] None of the traditional equity restrictions identified were at issue in the case. But *York*'s dicta have not been questioned in the eight decades since and recent cases reinforce the Court's commitment to the traditional limits of equity.[151]

By "characterizing equity as an independent body of law," *York* circumvented the key questions about how *Erie* affects equity.[152] And those questions remain unanswered. The first asks, as a matter of theory, whether traditional equitable principles can be reconciled with *Erie*'s positive law demands. Second asks, as a matter of practice, what should happen when a state seeks to deploy non-traditional equity and the claims inevitably find their way into federal court. State efforts to modernize equity suggest that this Equity-*Erie* problem cannot lie dormant much longer.

*D. The Equity-*Erie *Problem in Action: A Case Study*

The following case, *Sonner v. Premier Nutrition Corporation*, shows why. California has adopted contemporary, non-traditional equity by abrogating the adequate remedy at law rule for consumer protection claims. When those state law claims end up in federal court based on diversity jurisdiction, the lower courts know that *York* requires them to apply traditional equitable principles, despite California's chosen remedial policy. But after applying *York*, without a true reconciliation of *Erie*'s demands, things get tricky.

Sonner I:[153] The issue in *Sonner I* was a test of *York*'s approach—was it somehow true that a federal court would apply the federal traditional equity

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149. *Id.*

150. Cross, *supra* note 28, at 174; David Crump, *The Twilight Zone of the* Erie *Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court a Block Away,"* 1991 WIS. L. REV. 1233, 1241 (1991).

151. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19. Nonetheless, *York*'s dicta are not safe simply by virtue of longevity or repetition. *See* Oklahoma v. Castro-Huerta, 597 U.S. 629, 645 (2022) (stating that "the Court's dicta, even if repeated, does not constitute precedent and does not alter the plain text" of the statute).

152. *York*, 326 U.S. at 112.

153. Mullins v. Premier Nutrition Corp., No. 13-cv-01271, 2018 WL 510139 (N.D. Cal. Jan. 23, 2018) (district court's order granting defendant's motion to dismiss); *Sonner I*, 971 F.3d 834 (9th Cir. 2020) (Ninth Circuit's opinion affirming the dismissal of equitable claims).

rules to a state law claim even when those rules were rejected by the state itself?[154]

The case was a putative class action filed in the district court for the Northern District of California, alleging that the defendant, Premier Nutrition Corporation, had falsely marketed its product "Joint Juice" by claiming that the dietary supplement beverage nourished cartilage, lubricated joints, and improved joint comfort.[155] The plaintiff, Kathleen Sonner, originally alleged claims seeking damages under the California Legal Remedies Act ("CLRA") as well as equitable relief under California's Unfair Competition Law ("UCL").[156]

After years of litigation and "on the brink of trial," Sonner voluntarily dismissed her damages claim and elected to proceed only with her claim seeking equitable relief: equitable restitution and an injunction.[157] Her claim for equitable restitution was $32 million—the same amount that had been prayed for in her now-abandoned damages claim.[158]

The district court granted the defendant's Rule 12(b)(6) motion to dismiss the restitution claim.[159] The court disagreed with Sonner, concluding that California had not abrogated the adequate remedy at law rule.[160] Because Sonner did not—and perhaps could not—allege that she lacked an adequate remedy at law, the court dismissed the claim.[161] Sonner appealed.[162]

The Ninth Circuit affirmed, but on different grounds.[163] It determined that it was required to "first resolve a threshold jurisdictional question."[164] Relying on *York*, the court held that, even assuming California had done away with the adequate remedy at law rule for these state law claims, a federal court could not award the requested relief because it is bound by "traditional

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154. *Sonner I*, 971 F.3d at 839.

155. *Id.* at 837.

156. *Id.* at 838.

157. *Id.* at 837.

158. *Id.* at 838.

159. *Id.*

160. *Id.*

161. *Id.* The district court dismissed with prejudice because, at the time that Sonner moved to amend her complaint and drop her damages claim, Premier previewed that it would move to dismiss for lack of equitable jurisdiction. *Id.* The district court warned that it would not allow Sonner to re-allege her claim for damages if the potential motion to dismiss succeeded. *Id.* As promised, after granting the motion to dismiss, the district court denied Sonner's motion to amend the complaint and reallege the damages claim. *Id.*

162. *Id.* at 838–39.

163. *Id.* at 845.

164. *Id.* at 839.

equitable principles."[165] Beyond its heavy reliance on *York*, to which the Ninth Circuit found itself bound despite acknowledging its instructions as dicta,[166] the court also noted that a balance of polices favored following federal rules in order to protect the constitutional right to trial by jury.[167] Agreeing with the district court that Sonner had not alleged an inadequate remedy at law, the Ninth Circuit affirmed.[168]

The amusing procedural posture and arguably manipulative litigation strategy—"gamesmanship" as the Ninth Circuit later called it[169]—by the plaintiff should not alone explain the outcome of this case. Nor can it be said that this was not a true Equity-*Erie* conflict. After all, the State of California filed an amicus brief in support of Sonner's appeal arguing that "under California law, statutory injunctions and restitution are available without a need to show an adequate remedy at law."[170] The state's brief explained why the California legislature had chosen to make both legal and equitable damages available for these consumer claims, emphasizing the desire to "protect consumers—and the public as a whole—from the harms caused by unfair, unlawful, and deceptive business practices."[171] And the State's argument opened by reminding the court that "a federal court sitting in diversity must, under the *Erie* doctrine, follow California law regarding the availability of remedies under the UCL and the CLRA."[172] California's argument did not prevail.

Sonner II: The court in *Sonner II* addressed the source and effect of the federal traditional equity rules.[173] Ultimately, the court parted ways with the

165. *Id.* at 841.

166. *Id.* at 841 n.4.

167. *Id.* at 842 (citing Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–38 (1958)). Although it pointed to *Byrd*'s federal policy considerations, the court did not conduct a detailed *Erie* analysis. *Id.* at 841–42. To the contrary, the court recognized that the outcome of the suit would be different if the case were heard by California courts not bound by the adequate remedy at law rule. *Id.* But the Ninth Circuit assumed that *York* foresaw this possibility, and still concluded that federal equitable principles prevailed, noting that "[s]ince *York*, the Court has never held or suggested that state law can expand a federal court's equitable powers, even if allowing such expansion would ensure a similar outcome between state and federal tribunals." *Id.*

168. *Id.* at 845.

169. *See* Guzman v. Polaris Indus., Inc., 49 F.4th 1308, 1313 (9th Cir. 2022).

170. *Sonner I* Amicus Brief, *supra* note 11, at *4. California and the Attorney General suggested, in the alternative, that if the court believed California law unclear, it should "certify the question to the California Supreme Court under California Rule of Court 8.548." *Id.* at *22–23.

171. *Id.* at *1.

172. *Id.*

173. *Sonner II*, 49 F.4th 1300 (9th Cir. 2022).

proposed jurisdictional theory offered here and left open several important questions for ultimate resolution of the issues.

"One day after the mandate in *Sonner I* issued," Sonner filed a complaint against Premier in California state court alleging the same claims from her earlier federal complaint.[174] Premier responded by filing a motion in the federal district court seeking to permanently enjoin the state proceedings pursuant to the All Writs Act and the relitigation exception to the Anti-Injunction Act.[175]

The parties disputed whether the state court suit was claim-precluded—specifically whether *Sonner I* had resulted in a final judgment on the merits.[176] The district court identified two "thorny" questions: whether the district court's original (later affirmed) decision or the Ninth Circuit's decision was the relevant one for claim preclusion, and, if the latter, whether the Ninth Circuit's decision was "on the merits."[177] The district court assumed that the Ninth Circuit decision in *Sonner I* was operative, but was unable to reach a conclusion on the second question.[178] Instead, it heeded guidance that "analysis of preclusive effect 'is usually the bailiwick of the *second* court'" and declined to intervene, noting that "any doubts regarding the appropriateness of an injunction should be resolved in favor of permitting the state courts to proceed."[179]

In *Sonner II*, the Ninth Circuit again affirmed.[180] It first made clear "to dispel any confusion, there is no doubt that [*Sonner I*'s] dismissal was *not* for lack of subject matter jurisdiction."[181] The court's "characterization of the choice-of-law analysis between California and federal law as a 'threshold jurisdictional question,'" in the context of the whole opinion, related to "which forum's laws applied, *not* whether jurisdiction was lacking."[182] The Ninth Circuit put emphasis on the Federal Rules of Civil Procedure's vehicles for dismissal.[183] The court emphasized that Rule 12(b)(1), for dismissal based on lack of subject matter, and 12(b)(2), for lack of personal jurisdiction, are

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174. *Id.* at 1303.
175. *Id.*
176. *Id.* at 1304.
177. Mullins v. Premier Nutrition Corp., No. 13-cv-01271-RS, 2021 WL 1134386, at *3 (N.D. Cal. Feb. 24, 2021).
178. *Id.*
179. *Id.* at *3–4 (quoting Amwest Mortg. Corp. v. Grady, 925 F.2d 1162, 1164 (9th Cir. 1991)).
180. *Sonner II*, 49 F.4th at 1302.
181. *Id.* at 1304.
182. *Id.* at 1305 (quoting *Sonner I*, 971 F.3d 834, 839 (9th Cir. 2020)).
183. *Id.* at 1304–05.

the only two avenues to dismiss for lack of jurisdiction, and that it had affirmed the district court's dismissal under Rule 12(b)(6).[184]

But the issue remained of whether the court's dismissal with prejudice was "on the merits" such that it would preclude relitigating in another forum.[185] Had a source been apparent for the traditional equitable principles preserved by *York*, including the federal adequate remedy at law rule by which the Ninth Circuit was bound, the effects may have been more easily discerned. Instead, the court chose not to answer the preclusion question, instead finding that the district court had not abused its discretion under the Anti-Injunction Act in declining to issue the injunction.[186] Therefore, the Ninth Circuit left it "for the state court to decide whether res judicata applies."[187]

The preclusion question that the Ninth Circuit faced is quite complex as a matter of doctrine, made more so by the case's gnarly procedural posture. But such complexity will likely arise anytime a court dismisses claims based on traditional equitable principles, if a second court, authorized to operate beyond those principles, exists as an alternative forum.[188] Although the failure to satisfy traditional equitable principles may prevent the trial court from reaching the "ultimate substantive issues," the Supreme Court has warned that res judicata may still apply as "[t]he 'merits' of a claim are disposed of when they are refused enforcement."[189] Indeed, dismissal under Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits."[190]

However, following *Sonner II*, California's Alameda County Superior Court concluded that *Sonner I* was "a jurisdictional decision, not a merits decision."[191] "For the purpose of claim preclusion generally and the judicial competency exception specifically," the state court saw "little distinction between the limitation of a federal court's competency to adjudicate a claim based on Article III limitations on a federal court's subject matter jurisdiction and limitations on a federal court's equity jurisdiction, to hear the same claim."[192] Accordingly, the state court denied Premier's motion for judgment

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184. *Id.* at 1304 n.1.

185. *Id.* at 1306.

186. *Id.*

187. *Id.* at 1308. The court also declined to resolve whether federal or state preclusion rules would apply. *Id.* at 1306.

188. *See, e.g.*, Howard v. Green, 555 F.2d 178, 181–82 (8th Cir. 1977).

189. Angel v. Bullington, 330 U.S. 183, 190–91 (1947).

190. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981).

191. Sonner v. Premier Nutrition Co., No. RG20072126, at 4 (Cal. Super. Ct. Alameda Mar. 22, 2023) (order granting in part motion for judgment on the pleadings).

192. *Id.* (internal citations omitted).

on the pleadings as to plaintiff's UCL claim seeking equitable relief.[193] That claim proceeds to class certification and trial in 2024.

* * *

The Ninth Circuit did what it could with the Supreme Court's unexplained approach to traditional equitable principles in *York*. Even so, two problems persist. First, it is doctrinally problematic that federal courts are unable to identify the source of law for the rules that are being used to displace contrary state law. Even absent *Erie*'s positive law demands, a groundless subversion of state law challenges well-held federalism principles.[194] Second, it is procedurally problematic that federal courts cannot give guidance to lower courts—and state courts—about the operation of federal law. Indeed, in the wake of *Sonner*, federal district courts have issued dozens of decisions dismissing California UCL and CLRA claims for equitable relief due to plaintiffs' failure or inability to plead an inadequate remedy at law.[195] These orders show significant variations in understandings of the interactions between California law, *Sonner*'s demands, and federal equity's traditional requirements.[196] And there is reason to believe, at least according to the

193. *Id.* at 5.

194. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954) (identifying the devices employed by the Constitution's makers in service of federalism, including the preservation of states as "separate sources of authority and organs of administration").

195. *See, e.g.*, Barrett v. Nutrition, No. CV 21-4398-DMG, 2022 WL 3452791, at *1 (C.D. Cal. July 18, 2022) (granting a second motion to dismiss, explaining that it was insufficient that plaintiff had abandoned her claim for damages and that she "still must affirmatively plead facts that demonstrate an inadequate remedy at law"); Lou v. Am. Honda Motor Co., No. 16-CV-04384-JST, 2022 WL 18539358, at *2 (N.D. Cal. Aug. 26, 2022) (granting motion for judgment as a matter of law on plaintiff's CLRA and UCL claims where he failed to plead an inadequate remedy at law).

196. *See, e.g.*, Boone v. Amazon.com Servs., LLC, 562 F. Supp. 3d 1103, 1127 (E.D. Cal. 2022) (dismissing UCL claim for failure to allege an inadequate remedy at law or distinguish request for restitution from request for damages); Gibson v. Jaguar Land Rover N. Am., LLC, No. CV 20-00769-CJC, 2020 WL 5492990, at *3–4 (C.D. Cal. Sept. 9, 2020) (finding that nothing in the complaint suggested that money damages would not make plaintiff or the putative class whole, and therefore dismissing with prejudice claims under the UCL because remedies under that statute do not include damages); Adams v. Cole Haan, LLC, No. Sacv20-913 JVS, 2020 WL 5648605, at *2 (C.D. Cal. Sept. 3, 2020) (concluding that *Sonner*'s "broad analysis of the distinction between law and equity" did not create "an exception for injunctions as opposed to other forms of equitable relief," but dismissing without prejudice to allow plaintiff to demonstrate why legal damages would be inadequate); Ketayi v. Health Enrollment Grp., 516 F. Supp. 3d 1092, 1128 n.16 (S.D. Cal. 2021) (finding that plaintiffs alleged an inadequate remedy at law because their request for injunctive relief was for a "qualitatively different" remedy than their damages claim, but dismissing for lack of standing to seek injunctive relief).

California Attorney General, this was not the legislature's intent for the operation of these state law claims.[197]

California's deployment of a contemporary equitable remedial scheme provides the most comprehensive example of the theoretical and practical issues that arise from the Equity-*Erie* problem. But California is not alone in remedial experimentation, and other circuits are likely to face litigation like *Sonner* based on uses of non-traditional equitable remedies by other states.[198] Further, remedial experimentation is likely to continue, as states attempt to combat the latest public policy challenges that arise out of everything from new technologies to climate change. What is clear now is that *York*'s approach did not solve the Equity-*Erie* problem.

II. UNSUCCESSFUL RESPONSES TO THE EQUITY-*ERIE* PROBLEM

This Part examines three possible responses to the Equity-*Erie* problem. It first considers whether the federal principles of traditional equity fit within and satisfy the tests of *Erie* and its progeny. Finding that they do not, it then considers whether the federal principles of traditional equity survive *Erie* based on another source—either as part of the "new" and permissible federal common law, or as an inherent power of federal courts. Once again finding they do not, it lastly considers whether that federal principles of traditional equity can and should be displaced by state law in diversity cases.

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197. *See supra* notes 170–172; *infra* note 261.

198. The adequate remedy at law rule has been abrogated or loosened in states including Oregon, Virginia, and Massachusetts. *See* Evergreen W. Bus. Ctr., LLC v. Emmert, 323 P.3d 250, 252 (Or. 2014) (explaining that "the choice between legal and equitable remedies in civil actions has been informed by the shibboleth that equitable relief ordinarily is not available when the claimant has an adequate legal remedy" and taking the "opportunity to reexamine the foundations of that principle"); E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 894 F. Supp. 2d 691, 706 (E.D. Va. 2012); MASS. GEN. LAWS ch. 214, § 1A (2023); MASS. GEN. LAWS ch. 93A, § 9 (2023); *see also* Weinstein v. Aisenberg, 758 So. 2d 705, 712–13 (Fla. Dist. Ct. App. 2000) (Gross, J., concurring specially) (urging "[a] 'deliberate reconsideration' of the irreparable injury rule" and suggesting that "Florida's preference for legal remedies over equitable ones no longer serves any useful purpose"). Further, states like New York have explored uses for equity that may not grow out of equity's historical tradition. *See* Cendant Corp. v. Forbes, 70 F. Supp. 2d 339, 343 (S.D.N.Y. 1999). This list is not exhaustive but demonstrates that states have and will likely continue to explore opportunities to deploy non-traditional equity. In future work, I intend to catalogue state deployments of contemporary equitable remedies to solve public policy problems.

A. An Erie *Analysis for Traditional Equity*

Although *York*'s reservation of the federal principles of traditional equity might feel like an exception to *Erie*, it is worth considering first whether the principles are in fact a permissible application of federal law under *Erie* and the Supreme Court's subsequent cases—collectively the *Erie* analysis. The *Erie* analysis is reasonably criticized as being "very, very complicated."[199] But, if the analysis dictates that federal courts may follow the federal traditional equitable principles even in the face of conflicting state rules, that might solve the Equity-*Erie* problem.

The first step for a federal court deciding whether to apply conflicting federal or state law is to identify whether there is a Federal Rule of Civil Procedure that governs the issue, which will be permissible unless the rule exceeds statutory authorization or Congress's power.[200] The traditional equitable principles, however, do not find their source in the FRCP.

There are two sets of plausibly relevant Federal Rules. The first are rules addressing the merger of law and equity (Rules 1, 2, 18, and 81). Rule 1 defines the scope of the Federal Rules as governing procedure "in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."[201] Per the Notes of the Advisory Committee on Rules for the 1946 Amendment, Rules 1 and 81 "provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted."[202] Likewise, Rule 2 clarifies that "[t]here is one form of action—the civil action."[203] As the 1937 Advisory Committee's notes explain, Rule 2 "modifie[d]" the former stand-alone provision restricting suits in equity to cases which lacked an adequate remedy at law, allowing a court to try legal and equitable causes in the same action.[204] And Rule 18 addresses joinder of claims, stating that "[a] party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive

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199. Michael S. Green, *The* Erie *Doctrine: A Flowchart*, 52 AKRON L. REV. 215, 215 (2018).

200. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010). This step comes from the Rules Enabling Act, which authorized the adoption of the Federal Rules of Civil Procedure. *See* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965).

201. FED. R. CIV. P. 1.

202. FED. R. CIV. P. 81 advisory committee's note to 1946 amendment; *see also* FED. R. CIV. P. 8 advisory committee's note to 2007 amendment (noting the deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" to reflect "the parallel deletions in Rule 1 and elsewhere").

203. FED. R. CIV. P. 2.

204. FED. R. CIV. P. 2 advisory committee's note to 1937 amendment; *see also* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508–09 (1959).

rights."[205] The original advisory committee notes explain that the rule sought "to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both."[206] Although these rules extend the Federal Rules of Civil Procedure's application to cases in equity and those seeking equitable relief, none comes close to limiting federal courts' equitable authority.[207]

A second set of plausibly relevant rules are those that expressly address equitable remedies (Rules 65, 66, and 70). Rule 65 addresses preliminary injunctions and temporary restraining orders;[208] Rule 66 addresses the appointment of receivers;[209] and Rule 70 provides for enforcing a judgment by ordering specific performance.[210] By contrast to the general merger rules, these establish express procedural requirements for certain remedies. Rule 65 is exceedingly procedural, detailing required notice and hearings that must precede the temporary injunctive remedy's issuance.[211] Notably, the Supreme Court's cases that limit injunctive relief by its traditional principles cite to precedent and not Rule 65.[212] Rule 70 also outlines procedures specific to a judgment requiring transfer of land.[213]

With one possible exception, these rules do not contain traditional equitable limitations. Rule 66 extends the Federal Rules to "an action in which the appointment of a receiver is sought or a receiver sues or is sued."[214] As the Committee explained, "Rule 66 is applicable to what is commonly known as a federal 'chancery' or 'equity' receiver, or similar type of court officer."[215] By contrast to every other Federal Rule, Rule 66 expressly incorporates historical practice, stating that "the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the

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205. FED. R. CIV. P. 18(b). The rule provides as an example that "a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money." *Id.*

206. FED. R. CIV. P. 18(b) advisory committee's note to 1937 amendment.

207. *See* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.").

208. FED. R. CIV. P. 65.

209. FED. R. CIV. P. 66.

210. FED. R. CIV. P. 70.

211. FED. R. CIV. P. 65; *see also* David E. Shipley, *The Preliminary Injunction Standard in Diversity: A Typical Unguided* Erie *Choice*, 50 GA. L. REV. 1169, 1230 (2016) (concluding that the federal standard for preliminary injunctions should apply in *Erie* cases not only because Rule 65 controls, but also based on the other *Erie* factors).

212. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20–22 (2008); *see also* eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006).

213. FED. R. CIV. P. 70.

214. FED. R. CIV. P. 66.

215. FED. R. CIV. P. 66 advisory committee's note to 1946 amendment.

historical practice in federal courts or with a local rule."[216] The Committee notes suggest an intent to streamline the procedure for the appointment of a receiver by bringing the practice into "accord with the more modern state practice, and with more expeditious and less expensive judicial administration."[217] Circuit courts appear in agreement that "the appointment of a receiver in a diversity action is governed by federal law."[218] As those courts observe, in addition to Rule 66's assertion of "the primacy of federal law in the practice of federal receiverships," the appointment of a receiver is "an ancillary remedy which does not affect the ultimate outcome of the action."[219] For that reason, even if Rule 66 incorporates some traditional practice for the appointment of receivers, that cannot account for all of the principles of traditional equity and their application to other equitable remedies.[220]

If a Federal Rule of Civil Procedure is not implicated in the *Erie* question, the next step requires "wad[ing] into *Erie*'s murky waters" to discern whether

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216. FED. R. CIV. P. 66.

217. FED. R. CIV. P. 66 advisory committee's note to 1946 amendment.

218. Nat'l P'ship Inv. Corp. v. Nat'l Hous. Dev. Corp., 153 F.3d 1289, 1291 (11th Cir. 1998) (citing Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316 (8th Cir. 1993)); *see also* Chase Manhattan Bank, N.A. v. Turabo Shopping Ctr., Inc., 683 F.2d 25, 26 (1st Cir. 1982); Can. Life Assurance Co. v. LaPeter, 563 F.3d 837, 843 (9th Cir. 2009); Myles v. Sapta, Nos. 96-6374, 97-6023, 1998 WL 45494, at *3 (10th Cir. Feb. 5, 1998).

219. *Nat'l P'ship*, 153 F.3d at 1291. The Advisory Committee for the 1946 amendments invokes equitable jurisdiction. FED. R. CIV. P. 66 advisory committee's note to 1946 amendment. When discussing authorizations to sue a receiver, the Committee explains the requirements but notes that "such suit is subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as justice necessitates." *Id.*

220. Hypothetically, if the Supreme Court amended the Federal Rules to incorporate all traditional equity's principles as applied to any equitable remedy, the rule could be challenged as impermissibly modifying substantive rights. *See* Rules Enabling Act of 1934, 28 U.S.C. § 2072 (permitting the Supreme Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts" so long as the rules do "not abridge, enlarge or modify any substantive right"); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406 (2010) (citing *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), to observe that "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure"); Cross, *supra* note 28, at 194 ("[T]he Rules Enabling Act cannot support a system of federal equity law as wide-ranging as that suggested in *York* and *Holmberg*."). *But see Shady Grove*, 559 U.S. at 407 (explaining that the Supreme Court has "rejected every statutory challenge to a Federal Rule that has come before [it]"). To the extent that traditional equity's principles are jurisdictional rules, *see infra* Part III, the Supreme Court may not prescribe them pursuant to the Rules Enabling Act. *See* Spencer, *supra* note 20, at 668. Separately, however, it may be possible that Congress could adopt a non-jurisdictional statute restricting federal courts from awarding equitable remedies outside the bounds of exceptional equity principles, relying on its authority over the administration of the courts. U.S. CONST. art. I, § 8, cl. 9.

to apply state substantive law or federal procedural law.[221] The guidance for this analysis comes from *Erie*'s progeny, which deem a law substantive if it "significantly affect[s] the result of a litigation,"[222] is "intended to be bound up with the definition of the rights and obligations of the parties,"[223] or as otherwise guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[224] An examination of traditional equitable principles shows that they would be unlikely to survive *Erie* on these bases.

York itself is the primary indication that the traditional equity does not pass *Erie*'s test. In the midst of rejecting an "exception to *Erie R. Co. v. Tompkins* on the equity side of a federal court," the Court carved out an exception for equity's traditional principles.[225] It did so, perhaps, in recognition that the outcome of litigation in federal court, if bound by equity's traditional limitations, would not be "substantially the same" as if the same case were to be heard by a state court not bound by those limitations.[226] For that reason, even defenders of *York*'s exception to *Erie* recognize that the differences between traditional equity and contemporary equity would likely lead to forum shopping due to potential discrepancies in what a party might recover.[227]

Indeed, the Supreme Court has recognized that a different remedy—such as a "significantly larger . . . recovery"—is a substantial variation.[228] If a state has chosen to entitle a successful plaintiff to a non-traditional equitable remedy, it has likely done so to ensure that the underlying rights can be enforced in a way that the state finds meaningful, intending that the remedy be "bound up with the definition of the rights and obligations of the parties."[229] Such a choice by a state, to devise and deploy a contemporary

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221. *Shady Grove*, 559 U.S. at 398.

222. Guar. Tr. Co. v. York, 326 U.S. 99, 109 (1945).

223. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958). When the state rule is not "bound up" with substantive state law rights, the courts may ask whether "countervailing considerations" based on federal policy outweigh a reliance on state law. *Id.* at 537–38.

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

225. *York*, 326 U.S. at 105–06, 111.

226. *See id.* at 109; *see also* Vazquez, *supra* note 37, at 1076.

227. *See* Cross, *supra* note 28, at 194 ("Differences in the remedies available in state and federal courts would unquestionably lead to forum shopping, as the desire for certain relief is the main reason people go to court.").

228. Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 430–31 (1996).

229. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958). Of note, federal courts apply state law to legal damages claims in *Erie* analyses. *See, e.g.*, *Gasperini*, 518 U.S. at 428 (recognizing party acknowledgement that "a statutory cap on damages would supply

non-traditional application of equity, is more than a practical consideration, and, to the contrary, reflects other policy choices otherwise hampered by the traditional rules of federal equity themselves.[230]

It bears noting that even if the traditional equitable principles could be shoe-horned through the *Erie* analysis, that would only aid in solving the practical choice-of-law aspect of the Equity-*Erie* problem—whether federal courts should apply federal traditional equitable principles if states would apply contemporary rules. It would leave unanswered the theoretical question that asks for traditional equity's positive source of law.

B. A Source for Traditional Equity

The federal traditional equity rules do not survive the *Erie* analysis. But they could still survive *Erie* on its own terms, as "matters governed by the Federal Constitution or by acts of Congress."[231] Two possible lines of reasoning have been offered to justify other federal common law rules post-*Erie*: the first preserves the "new" federal common law as that which is authorized by Congress or the Constitution through an express or implied delegation of lawmaking authority to the federal courts; the second preserves the "inherent" powers of federal courts as authorized by the Constitution.[232] Addressing each in turn, neither is a plausible source for traditional equity.

After *Erie*, a new federal common law developed in two distinct forms.[233] In one, the federal courts find authority to fashion judge-made common law

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substantive law for *Erie* purposes"); *see also id.* at 430 n.12 ("For rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy.").

230. *See* Laycock, *supra* note 6, at 54–60; *see also supra* notes 99–109 and accompanying text. Interestingly, pre-*Erie* case law often speaks of federal equity's traditional limitations as protective of state interests—an assurance that federal courts would not use their equitable powers to interfere with state proceedings. *See, e.g.*, Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U.S. 276, 282 (1909) (explaining that the adequate remedy at law rule evidenced "a proper reluctance to interfere by prevention with the fiscal operations of the state governments" even where a party alleged impairment to federal rights). *But see* Funk, *supra* note 45, at 2068–72 (highlighting the resistance to fusionist reforms, noting that "[f]ederal equity had to follow federal law, not to protect state processes from federal disruption, but to protect federal equity from the corrosive practices of the states").

231. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

232. Amy C. Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 816 (2008).

233. Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (identifying "two categories" of permissible "federal common law" after *Erie*). While *Erie* boldly declared that "[t]here is no federal general common law," 304 U.S. at 78, it did not end federal court development of common law and may have had something of the opposite effect. *See* Friendly, *supra* note 16, at 421.

rules based on implied "delegations" by Congress—when a federal statute leaves gaps, the federal courts may assume that Congress wished them to fill those gaps through standard common lawmaking practice.[234] In the other, federal courts find authority in the Constitution or federal statutes not by virtue of their gaps but because the area of law—the "enclave"—involves such "uniquely federal interests" that federal law must preempt state law and, where necessary, the federal courts may proscribe its contents.[235] Recognized enclaves are limited to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[236] For both forms of permissible federal common law, *Erie*'s positive law demand is satisfied because, although judge-made, this federal common law is tethered to a permissible source. And because it is rooted in a permissible federal source, it is binding on state courts and preempts state law.[237]

Seeking to classify traditional equity as a form of new federal common law has some intuitive appeal because traditional equitable principles are "judge made" and do not "pretend[] to interpret any provision of the enacted law."[238] But that observation simply recognizes these principles' "common law" likeness. Beyond that, the classification falters. First, while it may be plausible for federal courts to assume a delegation that permits use of traditional equitable principles to fill gaps in identifying appropriate remedies for federal statutes,[239] the same logic does not extend to state law claims. For

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234. Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 878–79 (2007); *see also* Cross, *supra* note 28, at 196 (describing this authority as primarily "implied delegation").

235. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964); *Tex. Indus.*, 451 U.S. at 640; Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

236. *Tex. Indus.*, 451 U.S. at 641 (footnotes omitted).

237. Friendly, *supra* note 16, at 405 ("[B]y leaving to the states what ought be left to them, *Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful as its predecessor, more general in subject matter but limited to the federal courts, was not."); Bradley et al., *supra* note 234, at 878–79 (describing the "basic animating principle of post-*Erie* federal common law"—that because *Erie* requires federal courts to derive law from a domestic sovereign source, when that source is the Constitution or federal statute, the common law developed has "the status of truly federal law").

238. *See* Barrett, *supra* note 232, at 823.

239. Although it has not said so explicitly, it is possible that the Supreme Court believes itself to be applying gap-filling common law rules in its new equity cases dealing with federal statutes. *See, e.g.*, Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1940 (2020) (concluding that the statute's authorization of suits by the Securities and Exchange Commission for "equitable relief" allowed disgorgement awards only insofar as they do not exceed a wrongdoer's net profits). *Liu* suggests

Equity-*Erie* cases, the source being state law, federal courts cannot imply a delegation to create new common law rules, particularly one that would override state law.[240] For largely the same reason, traditional equitable principles do not wholesale involve such peculiarly federal concerns to warrant displacement of state law.[241] Although it is imaginable that a state law claim permitting a contemporary, nontraditional equitable remedy could touch upon an issue requiring federal law preemption, contemporary equitable remedies as a class do not.[242] Perhaps most relevant, the federal traditional equitable principles are not given the same effect as the new federal common law—they are not understood to be "supreme" federal law that binds states.[243] To the contrary, the Supreme Court has never suggested that federal equitable principles bind the states and has expressly assumed the opposite.[244] For these reasons, it makes little sense to think of federal equitable limits as subsumed in the "new" federal common law.

A second line of reasoning might be that the exercise of traditional equity (and the associated power to develop or adopt its governing limitations) is an inherent power vested in the federal court "simply because Article III denominates them 'courts' in possession of 'the judicial power.'"[245] The typical example of one such inherent power is the sanctioning power of

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that the issue is one of statutory interpretation, *see id.* at 1942, but where a judge-made rule supplements a statutory cause of action, rather than just divining the meaning of a particular word or phrase, the court arguably exercises a common lawmaking authority. *See* Cross, *supra* note 28, at 199, 199 n.176.

240. Erie R.R. v. Tompkins, 304 U.S. 64, 78–79 (1938) (extolling that the Constitution "recognizes and preserves the autonomy and independence of the states," such that "[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States").

241. *Cf.* Boyle v. United Techs. Corp., 487 U.S. 500, 505 (1988).

242. The Court has identified *Clearfield Trust* as an example of a uniquely federal interest requiring "the entire body of state law applicable to the area . . . [to be] replaced by federal rules." *Boyle*, 487 U.S. at 508 (citing Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943)). There, federal law as to the rights and duties of the parties—specifically, rights and duties of the United States on commercial paper—displaced state law because the federal government's payment of debts is made pursuant to its constitutional functions and powers. *Clearfield Tr.*, 318 U.S. at 366. In contrast, the state law claims in which equitable relief is sought can lack any connection to the rights or obligations of the federal government.

243. Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 290 (2010).

244. Guar. Tr. Co. v. York, 326 U.S. 99, 105–06 (1945) ("That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts.").

245. Barrett, *supra* note 232, at 842 (citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)).

contempt.[246] But, it has also been suggested that federal courts' inherent power might extend to some matters of "procedural common law" like the doctrines of abstention, remittitur, or forum non conveniens.[247] It is therefore worth considering whether equity's traditional doctrines might be justified under a similar analysis.

At least two important characteristics appear to define the federal courts' procedural common lawmaking authority. One is the target of the lawmaking authority—procedural common law regulates "internal court processes."[248] To be sure, as is true of the slippery distinction between procedural law and substantive law, internal court process rules will, at times, undoubtedly affect the outcome of some cases. But critically, the procedural common law does not regulate rights and obligations but rather provides rules to guide litigation. Another characteristic is the type of authority exercised—procedural common lawmaking authority is implicitly granted by the Constitution as "incidental authority [the federal court] needs to get its job done."[249] The "inherent" quality suggests that it belongs to any federal court exercising the judicial power and is therefore "local" by nature.[250] Both of these characteristics of the procedural common law are thought to support its authorization by an inherent judicial power. A consequence of a federal court procedural common lawmaking power is that some of the common law rules may therefore be beyond Congress's control, as a matter of separation of powers and institutional competence.[251]

The Equity-*Erie* problem is not easily solved by resorting to an inherent judicial power. First, the idea of an inherent judicial power is itself not easily reconcilable with *Erie*, even if that power might theoretically find an implied source in Article III.[252] An expansive view of federal court inherent authority

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246. *See id.* at 845.

247. *Id.* at 819–20. Then-Professor Amy Coney Barrett argues that procedural common law rules have resulted from a combination of an inherent Article III power *and* federal enclaves of constitutional preemption. *Id.* at 888.

248. *Id.* at 814.

249. *Id.* at 847–48.

250. *Id.* at 882–83 (explaining that the inherent authority, by which a federal court can adopt procedures in the course of adjudication, permits that court only to regulate its own proceedings, which in turn means that a reviewing court may only upset a decision that is an abuse of discretion, not an improper rule).

251. *Id.* at 841.

252. Charles M. Yablon, *Inherent Judicial Authority: A Study in Creative Ambiguity*, 43 CARDOZO L. REV. 1035, 1088 (2022) (questioning whether *Erie* concerns and the introduction of the Federal Rules of Civil Procedure would "limit, or perhaps even eliminate, the ability of federal courts to innovate procedurally, to develop new practices and procedures not expressly authorized

would defeat *Erie*'s demand for law based on a positive source from an authorized sovereign. But, if there is an inherent judicial power to craft a limited procedural common law, traditional equitable principles should not be within it. The principle that a court may not act in equity when legal remedies are available is not a doctrine "concerned with the regulation of court processes and in-courtroom conduct,"[253] or "necessary to the exercise of all other[]" judicial powers.[254] Rather, it is a rule bearing on what relief a litigant can receive when she walks out of the courtroom doors. Indeed, the availability of remedies guides conduct outside of the courtroom as parties look to legal consequences in governing their affairs.[255] An authority to decide the enforcement of substantive rights has the potential to grow, shrink, or erase the right itself, making questions of remedy akin to substantive law policy decisions. Nor do traditional equitable principles represent an "entirely local" authority by which a federal court regulates its own proceedings and for which superior court supervision is absent.[256] By contrast, the principles of traditional equity are not treated as inherent powers free from review—indeed, federal appellate courts review (albeit under an abuse of discretion standard) whether the lower court correctly concluded that the plaintiff lacked an inadequate remedy at law.[257]

In a slight variation, one commentor has suggested that federal equity may be an inherent power of the federal courts because Article III's grant of judicial power includes "the special power of a court of equity to exercise

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by the Federal Rules," although ultimately concluding that federal court practices over the subsequent eighty years suggest they did not).

253. Barrett, *supra* note 232, at 823; *see also* Cross, *supra* note 28, at 206 ("The simplest explanation is that a federal court's power to regulate judicial procedure comes from the simple fact that it is a court.").

254. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812))).

255. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 859 (1999) (crediting Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), for "showing how decisions about rights or entitlements are bound up with decisions about remedies").

256. Barrett, *supra* note 232, at 817. A key justification—and limit—of the inherent procedural authority is that its basis in Article III's grant of the "judicial power" empowers a federal court "to regulate its own proceedings, but it does not empower a reviewing court to supervise the proceedings of a lower court by prescribing procedures that the lower court must follow." *Id.*

257. *See, e.g.*, Combs v. Shelter Mut. Ins. Co., 551 F.3d 991, 1002 (10th Cir. 2008); United States v. Kane, 677 F. App'x 400, 400–01 (9th Cir. 2017).

discretion when adjudicating substantive legal rights."[258] This is so, it is suggested, because "[t]he exercise of discretion in determining how a right should be enforced in a given context is an inherently *judicial* function, not a legislative one."[259] But that is hardly self-evident, particularly after *Erie*. While a legislative body *can* provide that remediation be within the discretionary authority of the adjudicator, it need not necessarily be so.[260] Indeed, the determinations that equitable remedies should be subservient to legal remedies, awarded in the exercise of discretion, and limited to their historical uses are themselves policy judgments.[261] After *Erie*, the fact that federal courts once exercised discretion in identifying the best means to enforce substantive rights does little to substantiate a positive law source.

C. A Rejection of Traditional Equity

A final alternative response to the Equity-*Erie* problem might conclude that, after *Erie*, federal courts' traditional equitable remedial rules should fall. If traditional equitable principles fail the *Erie* analysis and rest on no other permissible federal source, then it is possible they too were rejected by *Erie* as "federal general common law."[262] Perhaps federal courts should simply follow state law all the way down, including when it comes to equitable remedies, even if that means rejecting traditional equitable principles altogether. Doing so would mean that federal courts could issue equitable remedies even when legal remedies are adequate, even if the equitable remedies were not historically available, and even in the absence of judicial

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258. Cross, *supra* note 28, at 216. Cross contends that, although both stem from the Article III's judicial power, "[e]quity is a separate exception to *Erie*, not a subset of the procedural exception." *Id.* at 220.

259. *Id.* at 213.

260. *See* Spencer, *supra* note 20, at 671 (suggesting that crafting rules about remediation, as opposed to remediation within adjudication, "would seem to be a quintessentially legislative, rather than judicial, act").

261. Consider the State of California's amicus brief in *Sonner I*, which described the state's interest in deploying a contemporary non-traditional equitable remedy for state law violations. *See Sonner I* Amicus Brief, *supra* note 11, at *1 ("The California Legislature enacted these two [consumer protection] laws because it determined that existing legal remedies did not adequately protect consumers - and the public as a whole - from the harms caused by unfair, unlawful, and deceptive business practices."); *id.* at *8 ("These two statutes were created to provide efficient, streamlined, and economical procedures for obtaining relief, in contrast to the more complex procedures for obtaining legal remedies. Thus, the Legislature could not have intended for courts to subject such streamlined claims under these statutes to the inadequate-remedy-at-law doctrine.").

262. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

discretion, if state law so requires. This would be a repudiation of *York*'s approach.[263] Part III presents a resolution obviating this scenario, but before doing so it is important to consider the implications of allowing state law to displace traditional equitable principles.

First, the rejection option quickly runs into a Seventh Amendment issue. Like federal equity's traditional principles, the Seventh Amendment necessitates a distinction between "[s]uits at common law" and suits in equity in order to determine those claims entitled to a trial by jury.[264] The Federal Rules of Civil Procedure's authorization of the joinder of legal and equitable claims into one action did not alter the jury trial right for claims at law.[265] As the *Sonner* court feared,[266] if federal courts must apply state equity rules,[267] and those rules permit federal judges to hear equitable claims not consistent with historical practice, the defendant's jury trial right might be evaded.[268]

Equally important is the consequence that a wholesale displacement of traditional equitable principles by state law could have on the federal judicial role. At least three characteristics of equitable remedies have direct effects on judicial role. First, equitable remedies tend to be more coercive than legal remedies, both in their function, compelling action or inaction, and their consequence, being directly enforced with the tool of contempt.[269] Second, equitable remedies often require a variety of subsidiary decisions as to their operation based on their inherent variability.[270] And third, equitable remedies typically involve more ongoing administration, management, and oversight

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263. *See supra* Section I.C.

264. U.S. CONST. amend. VII.

265. Dairy Queen v. Wood, 369 U.S. 469, 471–72 (1962).

266. *See supra* note 167 and accompanying text.

267. The Seventh Amendment's jury trial requirements do not apply in state courts. Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916).

268. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945). In arguing that federal courts should apply state law for equitable remedies, Michael Morley brushes aside the Seventh Amendment issue. He suggests that "in cases where a state has authorized equitable relief under circumstances that would implicate the Seventh Amendment right to a jury in federal court, however, a federal court could apply state standards while allowing a jury to make any constitutionally required findings or judgments." Morley, *supra* note 27, at 262. It is not clear from what source a federal court would obtain the authority to order a jury trial for an equitable claim. If believed to derive from the Seventh Amendment itself, which requires a trial by jury for suits "at common law," it begs the question of the classification of the claim. *Cf.* Cates v. Allen, 149 U.S. 451, 459 (1893) ("[T]he fact that the chancery court has the power to summon a jury on occasion cannot be regarded as the equivalent of the right of trial by jury secured by the seventh amendment.").

269. Bray, *supra* note 39, at 565–66. As a general rule, contempt is not available for legal remedies. *Id.* at 567.

270. *Id.* at 568–71.

than legal remedies.[271] Put together, and in contrast to what is required for a court to order damages, the power to order equitable remedies introduces significant coercive authority, invites intensive involvement in directing litigants' private affairs, and requires extensive judicial resources.[272] In these ways, the choices about how to deploy equitable remedies have a direct impact on the judicial role.

Because equitable remedies have an effect not just on the policies of the underlying primary law but also on the role of the court awarding them, there is good reason to think their availability is and should be subject to some federal guardrails and not left wholly to state law's discretion. The federal system has both normative and financial interests in when and how federal judges are permitted to dictate, coerce, and oversee behavior, rather than act as mere adjudicators. It would put a substantial amount of control over federal court machinery in state hands if state law could obligate federal courts to act in equity without restriction—requiring, for example, that courts issue injunctions for a wide set of state law claims and thereby strapping federal courts with the associated complex, resource-intensive requirements.[273] It is here where traditional equitable principles serve important federal interests.[274] Without traditional equity's limits, states would have the power to significantly expand the federal judicial role.

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271. *Id.* at 563–65, 573–74; *id.* at 564 n.175 (citing Avitia v. Metro. Club of Chi., Inc., 49 F.3d 1219, 1231 (7th Cir. 1995)); *see also* Chayes, *supra* note 29, at 1292 (highlighting similar distinctions between injunctive relief and the damage remedy).

272. Kellen Funk highlights early arguments made in favor of the law-equity distinction, including that of Attorney General Edmund Randolph to whom Funk attributes a concern that "federal courts were not equitable adjuncts of the state tribunals" and for that reason states' litigants should not be entitled to "dragoon a federal chancellor into litigations" where the state had eschewed courts of equity. Funk, *supra* note 45, at 2067.

273. This presents what might be called a "reverse-*Printz*" effect: state law conscripting federal courts to service state policy objectives. *See* Printz v. United States, 521 U.S. 898, 898–99 (1997) (holding that Congress's legislative design requiring state executive law enforcement officers to participate in administration of federal handgun regulation was impermissible commandeering of state officials in violation of constitutional principles of state sovereignty). Of course, these federalism concerns are not nearly as tidy in the context of adjudication where federal and states courts share concurrent jurisdiction. *See id.* at 907–08 (drawing a distinction between early federal statutes imposing naturalization obligations on state courts because, "unlike legislatures and executives," courts "appl[y] the law of other sovereigns all the time"). But even so, the possibility that a state could dictate the use of federal court resources in a significant way puts some pressure on the "constitutional system of dual sovereignty," *id.* at 935, not to mention Congress's power of the purse. *See* U.S. CONST. art. I, § 9, cl. 7.

274. Bray argues that the characteristics of equitable remedies—their coercive nature, potential for abuse, variability, and administrative costs—are themselves justifications for traditional equity's limits like the adequate remedy at law rule. *See* Bray, *supra* note 39, at 534.

In short, a solution to the Equity-*Erie* problem that rejects traditional equitable principles altogether faces a similar problem as the solution suggesting an equity exception to *Erie*: both underappreciate the implications necessarily bound up in both traditional and contemporary approaches to equity. While it is true that remedies implicate public policy, and therefore the lawmaking role, it is also the case that equitable remedies implicate the judicial role and are therefore of federal concern.

III. THE EQUITABLE JURISDICTION THEORY

A viable resolution to the Equity-*Erie* problem is still available: the equitable jurisdiction theory. This theory identifies a positive law source for traditional equitable principles, shows why those principles may not be subject to state law manipulation, and ensures that state law cases involving contemporary equitable remedies may still be adjudicated. In so doing, it offers a faithful middle-ground approach, one that accounts for the ways that equitable remedies can affect the federal judicial role without diminishing the substantive effect that equitable remedies can have on state-created rights. This Part explains how traditional equity operates as a subject matter jurisdiction limitation, how that resolution surpasses other compromise tactics, and how this approach resolves the Equity-*Erie* problem.

A. Traditional Equity as a Subject Matter Jurisdiction Limitation

Congress has permitted federal courts to exercise jurisdiction over cases involving diverse parties, including cases in equity, but that grant of subject matter jurisdiction is limited to the boundaries of equity's traditional principles. Two premises must be established to reach this conclusion: first, that traditional equity principles establish the boundaries of federal courts' equitable jurisdiction; and second, that equitable jurisdiction acts as a limitation of federal court subject matter jurisdiction.

1. Traditional Principles of Equity Establish Equitable Jurisdiction

The first premise explains that the traditional principles of equity mark the boundaries of federal courts' equitable jurisdiction. The premise is supported by an account that identifies Congress as the source of equitable jurisdiction.

This Article's analysis reaches one step further to explain why the same characteristics make the adoption of traditional equitable limits issues of *federal* concern.

The account has long been adhered to by the Supreme Court, and Congress, too, has acted consistently with it.

The account is this: The Constitution gave Congress the authority to create inferior federal courts and to grant those courts jurisdiction over controversies between citizens of different states whether in law or in equity.[275] The First Congress did so in Section 11 of the Judiciary Act of 1789, extending federal court jurisdiction, concurrent with the courts of the states, over suits "between a citizen of the State where the suit is brought, and a citizen of another State."[276] But Congress also put limits on that otherwise-broad grant. Notably, it set an amount-in-controversy limit, authorizing diversity jurisdiction if the dispute "exceed[ed], exclusive of costs, the sum or value of five hundred dollars."[277] And, relevant here, it authorized diversity jurisdiction for "suits of a civil nature at common law or in equity."[278]

The extant systems of law and equity likely shaped by the lawmakers' understanding of "equity" in Section 11.[279] Congress permitted federal courts to exercise "equity jurisdiction" for diverse party claims.[280] That "equity jurisdiction" is circumscribed by equity's traditional limits, whatever their ultimate scope.[281] At a minimum, in light of the statute's language and early

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275. U.S. CONST. art. III, § 2.

276. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789). Although the original grant of diversity jurisdiction was to the federal trial circuit courts, it is now vested in federal district courts. *See* 28 U.S.C. § 1332.

277. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78.

278. *Id.*

279. As legal historians are eager to tell, it was not a foregone conclusion, in either the drafting of the Constitution or the Judiciary Act, that federal courts would be permitted to adjudicate cases in equity. *See, e.g.*, Charles Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 96–97 (1923). That debate naturally centered around equitable jurisdiction as it was known at the time. Thus, the compromise to permit federal court jurisdiction over cases "in equity" contained assumptions of how equity acted at the time.

280. Following the Judiciary Act, most equity cases arose under diversity jurisdiction as the Act did not authorize general federal question jurisdiction. John Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 126 n.63 (1998). Federal question jurisdiction was authorized for a brief period in 1801, repealed in 1802, and not reintroduced until 1875. *See* Martha Field, *Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation*, 88 IND. L.J. 611, 616, 616 n.12 (2013).

281. This section maintains that the principles that protect traditional equity in the federal courts are contained in Congress's extension of diversity cases to suits in equity. To accept this proposition, it is not necessary to define the full spectrum of exceptional equity principles, *see supra* note 61, nor the scope of any individual principle. For example, one could endorse either Justice Scalia's "static conception" or Justice Ginsburg's "expansive view" of the rule limiting equitable remedies to circumstances consistent with historical practice—both of which recognize Section 11 of the Judiciary Action of 1789 as conferring a limited equitable jurisdiction. *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318, 321 (1999); *id.* at 335–36 (Ginsburg, J., concurring in part and dissenting in part). Whatever those limits, they

judicial interpretations, federal court equity jurisdiction is likely limited by the adequate remedy at law rule.[282] Indeed, the First Congress further added Section 16 to limit the federal courts' equity jurisdiction, providing that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy be had at law."[283] Therefore, it is reasonable to interpret Congress's original grant of diversity jurisdiction, inclusive of an equitable jurisdiction, to be limited to suits in equity based on its traditional principles.

Although Congress tinkers with federal court jurisdiction from time to time, changes to diversity jurisdiction's limitations have been relatively minimal. Since 1789, Congress has seven times changed the amount-in-controversy threshold.[284] It has also amended the statute to clarify citizenship requirements.[285] Most relevantly, after the merger of law and equity, Congress changed the diversity statute's language to provide for federal court jurisdiction over "all civil actions" that satisfied citizenship and amount-in-controversy requirements, omitting any reference to equity.[286] Despite this

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can be rooted in Congress's grant of diversity jurisdiction and should be treated as limitations on the subject matter jurisdiction of the federal courts. *See infra* Section III.A.2.

282. Payne v. Hook, 74 U.S. 425, 430 (1868) ("The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings." (citing Watson v. Southerland, 72 U.S. 74, 78 (1866))). This is likely a minimum, as the Court has directed that equity's other traditional principles also define the boundaries of the federal court equity jurisdiction. *See* Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."); Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 500 (1923) ("But where a state statute relating to clouds upon title is held merely to enlarge the equitable remedy, it will not support a bill in equity in the federal court.").

283. Judiciary Act of 1789, ch. 20, § 16, 1 Stat. at 82; *see also* Matthews v. Rodgers, 284 U.S. 521, 525 (1932) (stating that, even at the time of its adoption, Section 16 "was but declaratory of the rule in equity, established long before its adoption"); Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U.S. 276, 281 (1909) (explaining that the "guiding rule in equity" was "crystalized into statute form by the 16th section of the judiciary act" and merely "emphasizes the rule and presses it upon the attention of courts"). Congress's 1948 restructuring of Title 28, governing the judiciary and judicial procedure, removed what was the Judiciary Act's Section 16. *See* Morley, *supra* note 27, at 261. The implication of this change is discussed *infra* at notes 287–288.

284. Steven Gensler & Roger Michalski, *Altered Stakes: Reimagining the Amount in Controversy Requirement*, 109 CORNELL L. REV. (forthcoming 2024) (manuscript at 9).

285. Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 286 (2019) (explaining that the 1958 amendment, in response to the Court's *Black & White Taxicab* decision, "expressly provide[s] that a corporation was a citizen of both its state of incorporation and the state of its principal place of business" (citing Act of July 25, 1958, § 2, 72 Stat. 415, 415 (codified at 28 U.S.C. § 1332(c)))).

286. Act of June 25, 1948, ch. 646, § 1331, 62 Stat. 930.

change, it is widely understood that the change intended to leave the diversity jurisdiction as it was found—"all civil actions" as the equivalent of "all suits of a civil nature at common law or in equity"—thereby incorporating the traditional equity limitations.[287] This presumption rests on an atextual understanding that the change was linguistic and not substantive, that because law and equity had been procedurally merged, there was no need for the statute to refer to both because both were incorporated within "all civil actions."[288] In short, the federal courts' equity jurisdiction, as part of its authority to adjudicate diversity cases, has not been statutorily changed since the initial grant in 1789 and continues to contain traditional equity limitations.

That serves as a plausible, if slightly cramped, reading of the diversity statute, although notably one endorsed by several on the modern Court.[289] More problematic is the issue of supplemental jurisdiction—whether and how equity's traditional principles apply to state law claims heard by a federal court exercising supplemental jurisdiction. The statute authorizing federal court supplemental jurisdiction, 28 U.S.C. § 1367, was adopted in 1990, decades after the modern diversity statute and centuries after the original grant of diversity jurisdiction in the Judiciary Act.[290] Section 1367 "enables federal district courts to entertain claims not otherwise within their adjudicatory authority when those claims 'are so related to claims . . . within [federal-court competence] that they form part of the same case or controversy.'"[291] It says nothing about the federal courts' equity jurisdiction

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287. Duffy, *supra* note 280, at 147 n.173 ("There is no indication that the change was anything other than a stylistic change, so the modem term 'civil action' is best understood as encompassing traditional equity jurisdiction."); *accord* Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222, 227 (1957); Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992). Notably, Congress's willingness to omit Section 16's express adequate remedy at law rule may also suggest that it believed the rule incorporated elsewhere. *See, e.g.*, Morley, *supra* note 27, at 261 ("Due to the merger of law and equity, however, section 16 was omitted as obsolete from the modern Judiciary Code when it was recodified three years after *Guaranty Trust* was decided.").

288. Of course, one could come to the opposite conclusion—that Congress's removal of the reference to equity, and the omission of Section 16's adequate remedy at law rule, expressly terminated any previous equitable jurisdiction rules. That which came in as equity, left as an entirely new being: the civil action. The Court, of course, has rejected such a notion. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected." (quoting Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949))).

289. *See Grupo Mexicano*, 527 U.S. at 321 (Scalia, J., writing for the majority); *id.* at 335 (Ginsburg, J., concurring in part and dissenting in part); *see also* Bray, *supra* note 3, at 1015–16 (identifying cases endorsing versions of a historically-rooted equity written by "four different Justices").

290. Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089.

291. Artis v. District of Columbia, 583 U.S. 71, 74 (2018) (quoting 28 U.S.C. § 1367(a)).

for supplemental claims. Nor was there a prior version of the supplemental jurisdiction statute from which to source intended limits on equitable jurisdiction.[292]

Under the jurisdictional theory of this Article, it could be argued, then, that federal courts hearing supplemental state law claims are not limited by principles of traditional equity, even if federal courts hearing the same claims under diversity jurisdiction are so limited—a strange and dissatisfying possibility. There are two reasons to think that need not be the case. First, if the federal court's original jurisdiction over the suit contains equitable jurisdiction limits, a state law claim contradictory to those limits could not expand the federal court's jurisdiction and the district court should decline to exercise supplemental jurisdiction.[293] Alternatively, it is possible that the same linguistic logic that supports the continued incorporation of traditional equity limits into diversity jurisdiction applies to supplemental jurisdiction. Congress provided that supplemental jurisdiction would attach to "all other claims" sufficiently related to "*any civil action* of which the district courts have original jurisdiction."[294] The same reference to any "civil action" took the place of "all suits of a civil nature at common law or in equity" in the diversity statute, and carried with it the limits of equitable jurisdiction.[295] It is possible that Congress intended federal courts to be subject to the same limits for adjudication of supplemental claims.

As an alternative to this Article's statutory theory, one could take the position that the federal equitable jurisdiction limitations are contained in Article III's extension of the judicial power to "all Cases, in Law and Equity" rather than—or in addition to—Congress's jurisdictional grant in the diversity statute.[296] The references to "equity" in the two provisions are

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292. Before the enactment of § 1367, the doctrines of pendent and ancillary jurisdiction were judge-made common law rules, although perhaps justified as interpretations of diversity and federal question jurisdictional grants over "civil actions." *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552–57 (2005).

293. Matthews v. Rodgers, 284 U.S. 521, 529 (1932) (state law "cannot affect the jurisdiction of federal courts of equity"); *see also* 28 U.S.C. § 1367(c)(4) (district courts may decline to exercise supplemental jurisdiction over a claim in exceptional circumstances). Somewhat akin to a "contamination theory," *see Exxon Mobil*, 545 U.S. at 560, this explanation could also help guide the application of equitable jurisdiction for other non-diversity state law claims in federal courts. *See, e.g.*, 28 U.S.C. § 1251(b)(1) (granting the Supreme Court original jurisdiction over actions in which ambassadors and public minsters are parties).

294. 28 U.S.C. § 1367(a) (emphasis added).

295. *Compare id.*, *with* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

296. *See* U.S. CONST. art. III, § 2. Justice Thomas appears to locate a version of traditional equitable principles in Article III's extension of the judicial power over cases in equity. Trump v. Hawaii, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring). The Court as a whole has not

textually similar,[297] a fact given all the more weight because the Judiciary Act became law within months of the Constitution.[298] This position would also negate any uncertainty about federal courts' supplemental jurisdiction. But, while a constitutional source for traditional equity's rules is conceptually coherent, several considerations point in favor of a statutory source.

First, sourcing traditional equity in statute is doctrinally sound while also maximally flexible. This approach assumes that the constitutional authorizing language is broad, and the congressional granting language narrower but also, importantly, adjustable. It is a scheme that the Court has endorsed in the context of federal court "arising under" jurisdiction.[299] Here, it would mean that Article III's reference to equity authorizes federal courts to hear any case or controversy whether considered law or equity. But the Judiciary Act's reference to equity grants federal court jurisdiction over cases in equity subject to its traditional limits: reserved for certain types of claims, only when legal remedies are inadequate, and accompanied with judicial discretion.

This also means that Congress retains authority to remove or adjust the jurisdictional bounds when needed. And it is possible that Congress has acted consistent with the understanding that it *can* modify the court's jurisdiction to adjudicate claims beyond traditional equitable principles. For example, some scenarios under the Declaratory Judgment Act[300] might implicate the traditional adequate remedy at law rule.[301] Likewise, certain Federal Rules of Civil Procedure might be interpreted to authorize equitable remedies

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addressed this issue. *See* Gallogly, *supra* note 52, at 1219 (arguing that the Constitution vests federal courts with inherent power to grant equitable relief, but acknowledging that the Supreme Court has yet to address the significance of Article III's reference to equity, even in its "new equity" cases).

297. *Id.* at 1307 ("The relevant language of the two provisions is virtually identical: Article III refers to 'all cases . . . in Equity,' while section 11 refers to 'all suits . . . in equity.'").

298. *See id.* at 1307–08 (suggesting that federal judges understanding of "equity" in section 11 of the Judiciary Act likely mirrored their understanding of "Equity" in Article III).

299. *Compare* Osborn v. Bank of the U.S., 22 U.S. 738, 823–25 (1824) (concluding that "arising under" in Article III permits Congress to grant jurisdiction whenever federal law is an "ingredient" of the cause of action), *with* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 153–54 (1908) (explaining that "arising under" in the statute granted jurisdiction only for those cases where the federal question is properly pleaded by the plaintiff in her complaint).

300. Declaratory Judgment Act, ch. 646, 62 Stat. 964 (codified as amended at 28 U.S.C. § 2201).

301. *See* Note, *Developments in the Law*, 62 HARV. L. REV. 787, 800–01 (1949); *see also* Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 45 (1934) ("The clause 'whether or not further relief is or could be prayed' is designed to make it clear that the declaratory judgment is an alternative remedy, and not an exceptional or exclusive or extraordinary remedy, to be employed only when no other remedy is available."). *But see* Bray, *supra* note 39, at 561–62 (arguing that the declaratory judgment is not an equitable remedy).

inconsistent with historical tradition, but they have nonetheless received Congress's acquiescence.[302] If correct, this suggests Congress believes itself to have the power to modify even the traditional limits of equity jurisdiction.[303]

Equally important is the Supreme Court's take, which is most consistent with the view that traditional equitable principles have a statutory rather than constitutional source. Before *Erie*,[304] after *Erie*,[305] and to this day,[306] the Court has cited the Judiciary Act as its source in recognition that equity's traditional principles constrain the authority of federal courts to adjudicate disputes in equity.[307] But while the Supreme Court has pressed its view that the grant of diversity jurisdiction contains a limited equitable jurisdiction, it has not explained how that "jurisdiction" operates. The next section fills that gap.

2. Equity Jurisdiction Is a Subject Matter Jurisdiction Limitation

A judicial determination should not be hastily categorized as "jurisdictional." For one, jurisdictional decisions have unique practical effects—they are, at least in theory, the first issues to be adjudicated in a case, and their resolution might prevent the court from reaching the merits;[308] they are to be raised by the court sua sponte and may not be subject to waiver by the parties.[309] For another, classifying an issue as jurisdictional has important

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302. *See, e.g.*, FED. R. CIV. P. 64 (permitting federal courts to apply provisional remedies of the state in which the court is located); *see also supra* notes 214–220 and accompanying text (discussing FED. R. CIV. P. 66). Note, however, that Rule 82 states that the Federal Rules "do not extend or limit the jurisdiction of the district courts." FED. R. CIV. P. 82.

303. *Cf.* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 329 (2015) (acknowledging that "Congress may displace the equitable relief that is traditionally available to enforce federal law").

304. Gordon v. Washington, 295 U.S. 30, 36 (1935); Matthews v. Rodgers, 284 U.S. 521, 529 (1932).

305. Guar. Tr. Co. v. York, 326 U.S. 99, 105–07 (1945).

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

307. A final note on the source of law. Although this Article argues, consistent with current Supreme Court doctrine, that equitable jurisdiction limits are statutory and therefore adjustable by Congress, the treatment of equitable jurisdiction as a subject matter jurisdiction limitation, *see infra* Section III.A.2, works conceptually even for adherents to a constitutionally limited equity.

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

309. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93, 95 (1998). The non-waivability and sua sponte obligations are specific to issues of subject matter jurisdiction and do not apply when the court's jurisdiction over the parties—personal jurisdiction—is at issue. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–04 (1982). The Court has explained this distinction as based on the function and source of the two rules, noting that "[s]ubject-matter jurisdiction . . . is an Art. III as well as a statutory requirement," which

structural implications—namely, the potential to shift adjudicatory power from federal to state courts,[310] or the possible elimination of an adjudicatory forum altogether.[311] In that vein, the Supreme Court has urged against referring to a rule as jurisdictional "unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction."[312]

A court's subject matter jurisdiction over a dispute is about the "character of the controversies over which federal judicial authority may extend,"[313] and it looks to the heads of jurisdiction, or the subjects which Article III permits federal court adjudication over,[314] subject, of course, to a statutory grant of authority by Congress.[315] The heads provide a basis for bringing a case or controversy before a federal court—a litigant must identify one as a key to entry. But even after identifying a head of jurisdiction, federal court jurisdiction is subject to additional limitations.

Jurisdictional limitations, which are restraints on a federal court's subject matter jurisdiction,[316] may be either constitutional or statutory. Constitutional limits on federal court jurisdiction include, for example, Article III's case or controversy requirement, doctrinally captured in the justiciability doctrines of standing, mootness, ripeness, and (perhaps) the political question

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"functions as a restriction on federal power, and contributes to the characterization of the sovereign." *Id.* at 702. By contrast, "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause," and restricts judicial power "not as a matter of sovereignty, but as a matter of individual liberty." *Id.*

310. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989); *see also* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2103 (2019) (describing the relationship between state and federal courts as one that "determines litigants' access to federal court, the vertical distribution of judicial power, the coherence of federal and state substantive law, and the shape of procedural law"). Congress may also use its control of federal court jurisdiction to assign adjudicatory authority to other specialized courts of its making. *See* Lockerty v. Phillips, 319 U.S. 182, 187–88 (1943) (holding that Congress had permissibly given exclusive jurisdiction to the Emergency Court of Appeals for the issuance of injunctive relief as to objections to regulations issued under the Emergency Price Control Act).

311. *See* Patchak v. Zinke, 583 U.S. 244, 278 (2018) (Roberts, J., dissenting) (observing that the majority's determination—that the statute permissively stripped federal courts of jurisdiction—"ends Patchak's suit for good," because a different statute also precluded state courts to exercise jurisdiction).

312. Henderson v. Shinseki, 562 U.S. 428, 435 (2011). As equity's traditional limitations are not tied to the persons that come before it, the analysis herein focuses solely on subject matter jurisdiction and related limitations.

313. *Ins. Corp. of Ir.*, 456 U.S. at 701.

314. U.S. CONST. art. III, § 2.

315. Sheldon v. Sill, 49 U.S. 441, 449 (1850).

316. Alternatively, jurisdictional limitations, like justiciability rules, are referred to more generically as "constitutional and prudential limits on federal judicial power." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 42 (8th ed. 2021).

doctrine.[317] These constitutional limits on federal court jurisdiction apply across-the-board irrespective of the head of jurisdiction.

Statutory limits on federal court jurisdiction differ by head of jurisdiction. For example, Congress has established limits on diversity jurisdiction based on citizenship and the amount in controversy, which apply to any case in which access to federal court is based on the diverse citizenship of the parties.[318] Limitations on federal question jurisdiction, by contrast, are now largely specific to the federal cause of action in question.[319] They might carve out subjects, persons, or procedures that remove a matter from federal judicial review. In this context, determining whether a limit is jurisdictional frequently arises as a question of statutory interpretation.

"Equity" is not a head of subject matter jurisdiction[320] and Congress has never purported to grant federal courts jurisdiction over all suits in equity.[321]

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317. *See id.* at 42, 170. Sovereign immunity is another constitutional jurisdictional limit. Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar."). However, sovereign immunity's classification as a subject matter limitation or a personal jurisdiction limitation is less than clear. *See* Wisconsin Dep't of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (explaining that its waiver rules make sovereign immunity appear to be a personal jurisdiction requirement, but its presentment rules are more consistent with subject matter jurisdiction); *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565–66 (2002) (suggesting that the Constitution's background rule of sovereign immunity is a waivable, personal jurisdiction limitation, while the Eleventh Amendment is an additional nonwaivable subject matter limitation).

318. *See* 28 U.S.C. § 1332(a); Gensler & Michalski, *supra* note 284 (manuscript at 3). The Class Action Fairness Act of 2005 ("CAFA") is an example of a jurisdictional limitation, although it was an expansion of federal court diversity jurisdiction at the time. Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4. Through CAFA, Congress granted federal court jurisdiction over class action cases involving diverse, but not completely diverse, parties so long as the controversy satisfied a minimum value. 28 U.S.C. § 1332(d)(2). Although this legislation expanded the jurisdiction of the federal courts, it is better understood as a refinement of a jurisdictional limitation than requiring complete diversity. *See* Strawbridge v. Curtiss, 7 U.S. 267, 267 (1806).

319. *See, e.g.*, 8 U.S.C. § 1252(a)(1)–(2) (providing for judicial review of final orders of removal of noncitizens, but expressly excluding certain subjects from review). Although federal question jurisdictional statutes at one time also contained an amount-in-controversy threshold, in 1948 Congress eliminated it for any claims brought under § 1331. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 783 (7th ed. 2015).

320. *See* U.S. CONST. art. III, § 2. Equity falls neither under the "character of the cause" nor "character of the parties" to which the judicial power of the United States extends. *See* Cohens v. Virginia, 19 U.S. 264, 393 (1821).

321. Nor could it. As a doctrinal matter, Congress may only authorize federal court jurisdiction in such categories and up to the maximum limitations of Article III. Louise Weinberg, *The Article III Box: The Power of "Congress" To Attack the "Jurisdiction" of "Federal Courts*,*"* 78 TEX. L. REV. 1405, 1426 n.97 (2000); *see also* Muskrat v. United States, 219 U.S. 346, 362

Instead, the equitable jurisdiction theory to the Equity-*Erie* problem understands exceptional equity's principles as jurisdictional *limitations*—contained in Congress's grant of diversity jurisdiction to the federal courts. Without addressing its jurisdictional nature, the Court has adopted the view that the Judiciary Act of 1789 incorporates "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."[322] But this still invites the question of how those principles operate—whether as substantive rules (elements of what equity can or must be), jurisdictional rules (limitations as to which courts may exercise equitable power), or something else entirely.

The Supreme Court's approach to distinguishing between elements of a claim and limitations on federal court jurisdiction is not a model of clarity. This could be attributed, at least in part, to the Court's imprecise use of the jurisdiction label in its own decisions.[323] It is therefore not appropriate to assume, just because the Court has described equity's traditional principles as the test of a court's "equity jurisdiction,"[324] that these principles affect a court's subject matter jurisdiction.[325] That being said, the relevant considerations evidence that traditional equity's limitations are, in fact, jurisdictional.

As the Court explains, jurisdiction is "the courts' statutory or constitutional *power* to adjudicate the case," and a challenge to the court's jurisdiction is distinct from a challenge to the validity of the cause of action.[326] The Court resolves questions of whether a claim requirement is "jurisdictional" or relating to the merits "mindful of the consequences" of a

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(1911) (holding that Congress could not grant federal courts jurisdiction to adjudicate claims that did not involve a case or controversy).

322. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939)). The Court, likewise, has interpreted the ERISA statute, which permits equitable relief, as limited to "those categories of relief that were *typically* available in equity." Mertens v. Hewitt Assocs., 508 U.S. 248, 256–58 (1993) (addressing ERISA's remedial scheme at 29 U.S.C. § 1132(a)(3)).

323. Arbaugh v. Y & H Corp., 546 U.S. 500, 510 (2006). The blame could be placed on the desire of courts and scholars to attempt to classify legal issues as jurisdictional or non-jurisdictional altogether. *See* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614 (2003).

324. *See, e.g.*, Payne v. Hook, 74 U.S. 425, 430 (1868).

325. To the contrary, the Court has suggested that equity "jurisdiction" is something different from subject matter jurisdiction. *Atlas Life*, 306 U.S. at 568; Schlesinger v. Councilman, 420 U.S. 738, 754 (1975). For a reconciliation of these cases and the equitable jurisdiction theory, see *infra* notes 346–354 and accompanying text.

326. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

jurisdictional determination.[327] Importantly, jurisdiction rules help to identify an appropriate forum vested with authority to adjudicate the matter. For example, Article III's case or controversy justiciability rules are binding on federal but not state courts, such that a plaintiff who lacks standing to sue in federal court may be permitted to proceed in a state court.[328]

As a matter of statutory interpretation, the Supreme Court has adopted a clear statement rule which presumes that a limitation is not jurisdictional unless Congress has made clear indication otherwise.[329] The rule does not require "magic words," and context is relevant.[330] Where the courts have continued to treat an issue as one affecting their jurisdiction, and where Congress does not amend the statute to respond to that treatment, it is assumed that Congress has thereby expressed its intent.[331]

Scholars have criticized the Court's approach to distinguishing jurisdictional from non-jurisdictional issues.[332] They observe that such distinctions, particularly between jurisdictional elements and merits elements, when interrogated quickly blur.[333] To provide more consistency, alternative tests have been suggested. One position advocates looking to the traditional tools of statutory interpretation—the text and legislative and

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327. *Arbaugh*, 546 U.S. at 513–14; *see also* Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

328. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (acknowledging that "state courts are not bound to adhere to federal standing requirements"); Polo v. Innoventions Int'l, LLC, 833 F.3d 1193, 1196 (9th Cir. 2016) ("Remand is the correct remedy [if a plaintiff lacks Article III standing] because a failure of federal subject-matter jurisdiction means only that the federal courts have no power to adjudicate the matter. State courts are not bound by the constraints of Article III.").

329. *Arbaugh*, 546 U.S. at 516.

330. *Henderson*, 562 U.S. at 436.

331. *Id.*; *see also* Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992) ("We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction . . . on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions.").

332. Lee forcefully argues that "the line between jurisdictional issues and merits issues is always at some level arbitrary," and even "dangerous because it has the potential to make judges think that the issue is whether they *can* exercise their ability to do justice rather than whether they *should* exercise their ability to do justice." Lee, *supra* note 323, at 1614. That critique is well taken; this Article lacks the space to engage this issue in significant depth. Nonetheless, a jurisdictional theory is offered here not out of a belief that traditional equity as a jurisdictional determination makes it clearer for courts to decide when they can or should adjudicate a claim, but rather because the functional consequences of the determination under our current legal system better accomplish the purpose of the traditional equity principles themselves.

333. *Id.* at 1620 ("Jurisdiction and the merits are both ultimately concerned with the same thing, which is the legitimacy of the resulting judgment."); Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1721–22 (2022). Notably, non-jurisdictional issues may be "merits" issues but can also be "procedural" issues. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439, 1456 (2011); *see also infra* Section III.B.

statutory history—to determine Congress's intent, on grounds that "[t]he analytical touchstone of the distinction between jurisdiction and merits is a proper conception of congressional power."[334] Another urges resort to "such familiar policy considerations as notice, reliance interests, finality, judicial efficiency, and the equities," and rejection of the metaphysical notion that jurisdictional elements can be identified by their "nature."[335] And yet another position, more closely aligned with current doctrine, offers a framework that looks to whether Congress has expressly designated the issue as jurisdictional, as well as the issue's function and effects, historical treatment, and the treatment of comparable issues.[336]

For the traditional principles of equity, these considerations—the textual expression and context, structure and function, and consequences and effects—point in the same direction. Each support the conclusion that the principles of traditional equity are jurisdictional:

Textual Expression and Historical Context: Section 11 of the Judiciary Act of 1789 grants the courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity" over a specific financial threshold if between diverse citizens.[337] This provision explicitly "speak[s] in jurisdictional terms."[338] Any argument that would quibble with whether the reference to "equity" carries independent jurisdictional connotations challenges the first premise, but there is no question that the provision as a whole is a grant of jurisdiction. And, although the statutory language changed in 1948, if no substantive changes were made

334. Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 646 (2005); *see also id.* at 680–83 (examining this idea through the lens of the issue later addressed in *Arbaugh*—whether Title VII's quantum-of-employees threshold was a jurisdictional or merits element).

335. Lee, *supra* note 323, at 1614.

336. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 60, 66 (2008). Scott Dodson's framework distinguishes jurisdictional rules from rules of procedure. For the reasons detailed above, equity's traditional principles are not properly deemed "procedural," at least under an *Erie* analysis. Even so, the framework captures reasonable considerations for when and how the jurisdictional label might attach.

337. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

338. Henderson v. Shinseki, 562 U.S. 428, 438 (2011) (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004) ("The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature."); Claflin v. Houseman, 93 U.S. 130, 139 (1876) (noting that "the first Congress in drawing up the Judiciary Act of Sept. 24, 1789" was focused on "distributing jurisdiction among the various courts created by that act" with "constant exercise of the authority to include or exclude the State courts therefrom").

to the jurisdiction of the federal courts by that change,[339] then the limitations remained jurisdictional.

Importantly, the historical context shows that equity's traditional principles like the adequate remedy at law rule have long served a jurisdictional function—from the English practice, the division of adjudicatory authority into subject matters appropriate for the English common law courts or for Chancery; and in early American practice, division of authority for the law or equity "sides" of the federal court.[340] Prior to the merger of law and equity, a determination that a claim was outside the equitable jurisdiction of the federal courts would lead to dismissal of the claim in order to allow it to be properly refiled, seeing as it had not been decided on the merits.[341] Likewise, a federal court could remand a case that had been removed from state court if it found it lacked equitable jurisdiction.[342] Although equitable jurisdiction may have acted historically to police the boundaries between courts of law and courts of equity—even when those "courts" were one and the same—the merger of law and equity makes that exact notion of equitable jurisdiction somewhat anachronistic.[343] But after *Erie*, equity jurisdiction serves a new purpose, policing the boundaries between those courts that are bound by traditional equity limits and courts permitted to exercise a contemporary, non-traditional equity. Over time, the Court has continued to refer to the exceptional equity principles as defining the federal courts' equity jurisdiction,[344] and Congress may reasonably have relied on that characterization in declining to significantly alter the diversity statute.[345]

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339. *See supra* note 287 and accompanying text.

340. Cross, *supra* note 28, at 176 (recognizing that, unlike English judicial systems, the federal judicial system at the founding did not separate the courts of law and equity, but was instead "a single system with law and equity sides").

341. Van Norden v. Morton, 99 U.S. 378, 381 (1878) (reversing the lower court's dismissal on the merits as it would "be a bar to any other action which complainant might bring at law"); Scott v. Neely, 140 U.S. 106, 117 (1891) (dismissing claim without prejudice where federal court lacked jurisdiction).

342. Cates v. Allen, 149 U.S. 451, 460–61 (1893).

343. *See* Funk, *supra* note 45, at 2059 (providing an account of federal equity as "a story of anti-fusionist structures and attitudes being exchanged for anti-federalist ones"); *see also* Burbank, *supra* note 79, at 1321 ("Statements about the relationship between federal equity and state law prior to 1938 have as much salience today as *Swift v. Tyson*: they are history." (footnote omitted)).

344. *See* cases cited *supra* note 31. *But see* Bray & Miller, *supra* note 39, at 1775 (observing that the reference to "equitable jurisdiction" was "a loose description of situations in which equity would act," and "did not refer to the power of a court of equity to pronounce a judgment").

345. *See* Bowles v. Russell, 551 U.S. 205, 209–10 (2007) (considering the substantial length of time that the Court had held a rule was mandatory and jurisdictional as indicative of its

And yet, the Supreme Court has also suggested a difference between subject matter jurisdiction and equitable jurisdiction. Most notably, the Court said in *Atlas Life* in 1939 that federal courts' "jurisdiction" to entertain suits in equity is "an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[346] The Court went on to address Section 11 of the Judiciary Act of 1789:

> This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity.[347]

By repudiating the notion that equitable jurisdiction relates to federal court authority to hear and decide a case, *Atlas Life* might seem to reject exceptional equity's classification as a limitation on subject matter jurisdiction. But such a reading overlooks the distinction between the jurisdictional grants and jurisdictional limitations. That distinction is all the more important when it comes to equity. Indeed, *Atlas Life* underlines this point by explaining that "although the adequacy of the legal remedy precludes resort to a federal court of equity, it does not follow that the

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jurisdictional nature); *see also* Cross, *supra* note 28, at 211 ("The fact that equity jurisdiction has continued for so long a period is a clear indication that Congress is comfortable with the current system, in which federal courts perform the same functions as the English equity system."). *But see* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 168 (2010) ("[T]he relevant question here is not . . . whether [the rule] itself has long been labeled jurisdictional, but whether the type of limitation that [the rule] imposes is one that is properly ranked as jurisdictional absent an express designation."). The Court has urged that "unrefined dispositions" which haphazardly state that dismissal is for lack of jurisdiction without a full jurisdictional analysis are "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998)). Although it seems odd to call centuries worth of references to the court's equitable jurisdiction "drive-by," it is true that the use of the phrase is almost always without an analysis of the court's authority to adjudicate the claim. This underscores the need for equitable jurisdiction's justification as a true jurisdictional limitation.

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

347. *Id.*

converse is true—that the want of a legal remedy in the federal courts gives the suitor free entrance to a federal court of equity."[348]

It is useful to draw a comparison to Article III's case or controversy requirement. Standing rules, recognized as limitations on the jurisdiction of the federal court, do not represent a "subject matter" comprised of Article III's jurisdictional catalogue or a unique grant of jurisdiction by Congress. Put differently, satisfying Article III standing by showing injury-in-fact, causation, and redressability does not guarantee a plaintiff a federal court forum. But those requirements nonetheless circumscribe the authority of the federal court to act on a case.[349] These rules are understood to be rooted in Article III, and therefore bind federal courts, but do not impact state courts, and states may have their own standing rules or reject standing requirements altogether.[350] The same is true for advisory opinions, which state courts might be permitted to author even if federal courts may not.[351] In this way, justiciability doctrines "define the role of the federal courts in our constitutional structure,"[352] and, critically, leave states free to define the role of their own courts as well.

Traditional equitable principles are comparable. The Court has indicated that they are rooted in the Judiciary Act of 1789 and create independent limits on the federal court's equitable jurisdiction.[353] The grant of equitable jurisdiction in the Judiciary Act is not understood to provide a unique basis for federal court jurisdiction, but it does circumscribe federal court authority to act in equity where the claim is beyond the historical exercises of equity or where an alternative remedy at law exists. In other words, federal courts' equitable jurisdiction ensures that federal courts continue to operate within equity's traditional bounds. Thus, an alternative reading of *Atlas Life* would suggest that the Court's seeming rejection of the equitable jurisdiction theory

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348. *Id.* at 569–70; *see also* Schlesinger v. Councilman, 420 U.S. 738, 754 (1975) ("[Federal court] equitable jurisdiction [is] a question concerned, not with whether the claim falls within the limited jurisdiction conferred on the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers.").

349. *See* CHEMERINSKY, *supra* note 316, § 2.1.

350. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

351. FALLON ET AL., *supra* note 319, at 58; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845 n.68 (2001).

352. FALLON ET AL., *supra* note 319, at 49.

353. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999); Guar. Tr. Co. v. York, 326 U.S. 99, 105–06 (1945); Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939).

was in fact distinguishing equitable jurisdiction as a jurisdictional limit rather than a head of jurisdiction.[354]

Structure and Function: The extent of federal court jurisdiction necessarily implicates the balance of power between the federal and state governments. So too in the context of traditional equity. Federal equity's exceptional principles are jurisdictional because they identify limits on certain courts' power to act on a case and they act by precluding the court from adjudicating the case. They separate a class of equity cases that may be heard from those that may not. Unlike merits elements, the traditional equity rules do not attach to a claim or cause of action, nor address the rights, obligations, or convenience of parties, but are instead directed only to circumscribe the authority of certain adjudicators.

When a court dismisses a case in equity for failing the adequate remedy at law rule, it has not said that there exists no remedy for the alleged violation or that the limitation hinges upon one construction of a right rather than another.[355] Rather, the court's conclusion is that the circumstances in which equitable relief is sought are not those that the court is permitted to act in equity.[356] The court does not evaluate the plaintiff's right to recover because it finds itself precluded from acting in equity.[357] Likewise, when a court dismisses a case seeking an equitable remedy not tethered to historical uses of equity, it does not determine whether the plaintiff's claim is valid or even remediable. The federal court must dismiss, regardless of whether the underlying cause of action might permit such relief, because the creative, contemporary application of equitable remedies does not allow a court to proceed in equity.[358] The same is true for the traditional equitable principle that disallows defaults in favor of equitable relief. This principle can also be categorized as jurisdictional. If state law insists that a plaintiff is entitled to a

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354. *See* Baker v. Carr, 369 U.S. 186, 198 (1962) (distinguishing "nonjusticiability"—whether judicial relief exists—from subject matter jurisdiction). Cross appears to read *Atlas Life*'s language defining equity jurisdiction, which he calls dictum, as encompassing both a limitation on authority and a body of substantive instructions. *See* Cross, *supra* note 28, at 183 ("That language suggests that national equitable rules determine not only whether a federal court can sit in equity, but also how it disposes of a given case.").

355. *Cf.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89–90 (1998).

356. *See* Van Norden v. Morton, 99 U.S. 378, 381–82 (1878).

357. *See* Gordon v. Washington, 295 U.S. 30, 39–40 (1935).

358. Samuel Bray and Paul Miller describe the plea in equity as "not simply aiming to show satisfaction of conditions requisite to liability," but instead "that the subject matter of a complaint (a) falls within the wide parameters of a kind of grievance that equity has recognized or has jurisdiction to recognize and (b) is sufficiently compelling in its particulars as to justify intervention that is exceptional and hence inherently discretionary." Bray & Miller, *supra* note 39, at 1778.

remedy as of right or based on a presumption in his favor, a court would be precluded from weighing the equities. In a sense, the contemporary presumption converts equitable remedies into a non-traditional use—an attempt to remove the equity from the equitable remedy.[359] The court's dismissal on this basis, therefore, is a statement that it cannot act in equity under the circumstances. Again, this neither determines the validity nor remediability of the claim.

Consequences and Effects: Nearly all of the effects of traditional equity's limitations also reflect their jurisdictional function. First, the Court has acknowledged that federal equity's limits do not apply to state courts.[360] It has also instructed that federal courts should take objection to the invocation of their equitable jurisdiction in contradiction of traditional principles sua sponte.[361] And, perhaps most importantly, the limits on federal courts' equitable jurisdiction prevent the court's adjudication of the merits of non-traditional equity.[362]

And yet, equitable jurisdiction has at least one effect that does not align with the rules of subject matter jurisdiction—the possibility that it might be waived by parties.[363] This aspect of equitable jurisdiction could stem from its association with the Seventh Amendment's jury trial right for suits in common law (and not equity), which is itself subject to waiver.[364] Regardless, it is true that a core principle of federal court subject matter jurisdiction is that it cannot be established by party consent because the power of the federal

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359. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–14 (1982).

360. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 105–06.

361. Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 n.1 (1939) (citing Lewis v. Cocks, 90 U.S. 466, 470 (1874); Singer Sewing Mach. Co. v. Benedict, 229 U.S. 481, 484 (1913)).

362. *See Gordon*, 295 U.S at 39–40.

363. *Atlas Life*, 306 U.S. at 568 n.1 (citing Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 380 (1893); In re Metro. Ry. Receivership, 208 U.S. 90 (1908); Marin v. Augedahl, 247 U.S. 142 (1918)). The cases cited by the *Atlas* Court discuss the waivability of equity jurisdiction, but in so doing they illuminate a concern regarding the timing of objections. *See Hollins*, 150 U.S. at 380–81; *In re Metro.*, 208 U.S. at 107–10. Specifically, the Court emphasizes the remedial authority that a court might begin to exercise if parties fail to raise challenges to its equitable jurisdiction. *See In re Metro.*, 208 U.S. at 96–110. In *Hollins*, the Court gives the example of a receiver who has been appointed and distributed assets. 150 U.S. at 380. *In re Metropolitan Railway* presents just this scenario: a receiver was appointed, took possession of property, and enjoined company employees. 208 U.S. at 96–97. These details suggest that the Court's willingness to accept party waiver of equitable jurisdiction may have more to do with the difficulty of undoing equitable remedies once remediation has begun—a recognition that, at some point, courts awarding equitable relief may lack the ability to put the toothpaste back in the tube.

364. *See* Rogers v. United States, 141 U.S. 548, 554 (1891) (citing Henderson's Distilled Spirits, 81 U.S. 44, 53 (1871)); *see also* Scott v. Neely, 140 U.S. 106, 109–10 (1891).

courts implicates the constitutional system of checks and balances.[365] Accordingly, equitable jurisdiction's waivability could cast doubt on its classification as an issue of subject matter jurisdiction.

But, as tidy and appealing as the principle prohibiting waiver of subject matter jurisdiction may be, the rule is not nearly as simple in practice. Doctrines associated with federal court jurisdiction, like state sovereign immunity or delegation of judicial power to non-Article III courts, have escaped the waiver prohibition based on the extent to which they are deemed to primarily protect litigant rights or where institutional interests are *de minimis*.[366] These considerations may apply to traditional equity's subject matter limitations. The rules preventing a federal court from awarding equitable remedies lacking a historical analogue or in lieu of available legal remedies have served to ensure that a defendant's rights under the law would not be usurped by a court of equity's exercise of discretion. Likewise, although permitting waiver of equitable jurisdiction appears to contravene Congress's jurisdictional limitation, Congress's apparent acceptance of this longstanding practice might lessen any institutional concerns.[367] If the Court recognizes the principles of exceptional equity as limitations on federal court subject matter jurisdiction, it will likely also need to address the question of waivability.

Of late, there have been several other contradictory "effects" of a federal court lacking equitable jurisdiction. One effect is confusion by lower courts

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365. Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." (quoting United States v. Cotton, 535 U.S. 625, 630 (2002))).

366. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855–56 (1986); *see also* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 679–80 (2015); Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 397–98 (1998) (Kennedy, J., concurring). In his exploration of "jurisdiction as power," Ryan Williams suggests that "waivability and forfeitability" are "particularly susceptible to decoupling from jurisdiction's identity because they do not actually characterize multiple existing doctrines that are widely recognized as 'jurisdictional' in nature." Williams, *supra* note 333, at 1763–64 (referring to personal jurisdiction and sovereign immunity). He argues that it is not apparent why private party decisions should be "categorically incapable of affecting structural judicial powers," seeing as "the scope of federal judicial authority over private claims routinely depends on a variety of purely private litigation decisions regarding, among other things, which claims to assert, which parties to name, which court to file in, and whether to remove a case to federal court." *Id.* at 1765; *see also* Dodson, *supra* note 333, at 1472–74 (suggesting that "jurisdictional hybridization" could allow sovereign immunity to retain its jurisdictional character despite having nonjurisdictional features like waivability).

367. Of course, it would not be unreasonable to resolve this concern in the opposite direction and conclude that the structural implications (both vertical and horizontal) outweigh any aspect of the equitable jurisdiction that is aimed to protect litigants. If so, a recognition of equitable jurisdiction as a subject matter jurisdiction limit would counsel in favor of abandoning its waivability rule.

in how to address motions to dismiss and motions to remand. Motions to dismiss for lack of jurisdiction are brought under Federal Rule of Civil Procedure 12(b)(1)—which allows a party to assert a defense for "lack of subject-matter jurisdiction."[368] Federal courts have instead dismissed claims for lack of equitable jurisdiction under Rule 12(b)(6).[369] Likewise, the remand statute will only allow a plaintiff to seek remand after thirty days if the defect is "lack of subject matter jurisdiction."[370] Federal courts have hesitated to grant motions to remand for lack of equity jurisdiction as not permitted by the remand statute.[371] The Court's acknowledgement of equitable jurisdiction as a limitation on federal court subject matter jurisdiction, as suggested here, would clarify the proper treatment of these issues.

* * *

All these considerations suggest that equitable jurisdiction must be treated as a limitation on federal court subject matter jurisdiction. But one other point also counsels in favor of this resolution, and that is the fact that the alternative cannot be correct. It cannot be the case that a federal court's dismissal for lack of equitable jurisdiction is a "merits" determination.[372]

Equitable jurisdiction is a pleading requirement that does not look to the substantive elements of the claim. The issues raised by traditional equity's limitations do not require the court to decide a plaintiff's *right to recover* under the complaint, which might be sustained under one construction of the law or defeated under another.[373] The federal court does not need to determine

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368. FED. R. CIV. P. 12(b)(1).

369. *See* Lopez v. Cequel Commc'ns, LLC, No. 2:20-cv-02242-TLN-JDP, 2021 WL 4476831, at *2 (E.D. Cal. Sept. 30, 2021) (listing cases of district court dismissals of claims for equitable relief under Rule 12(b)(6)).

370. 28 U.S.C. § 1447(c).

371. *See, e.g.*, Treinish v. iFit Inc., No. CV 22-4687-DMG, 2022 WL 5027083, at *4 (C.D. Cal. Oct. 3, 2022) (denying a motion to remand because "[e]quitable jurisdiction is distinct from subject matter jurisdiction," and therefore any equitable jurisdiction argument "be made on the motion to dismiss"). *But see* Guthrie v. Transamerica Life Ins. Co., 561 F. Supp. 3d 869, 878 (N.D. Cal. 2021) (remanding based on district court's lack of equitable jurisdiction, despite concluding that equitable jurisdiction was distinct from subject matter jurisdiction).

372. *See* Schlesinger v. Councilman, 420 U.S. 738, 754 (1975) (pointing out that the question of equitable jurisdiction must be addressed *before* a district court "properly could reach the merits" of the claim). In *Sonner II*, the Ninth Circuit took pains to avoid this issue. *See Sonner II*, 49 F.4th 1300, 1306 (9th Cir. 2022). Only after insisting that a dismissal of equitable claims for failure to show an inadequate remedy at law based on federal equitable principles was not a dismissal for want of jurisdiction, the court handed off the merits-or-not determination to the second (state) court. *Id.* at 1306–08.

373. *Cf.* Bell v. Hood, 327 U.S. 678, 681 (1946).

duties, liabilities, or potential defenses.[374] The challenge to equitable jurisdiction does not contest whether the substantive law may have been violated if the facts alleged are proven true. Indeed, for the three principles of traditional equity identified here, the facts alleged in the complaint may be irrelevant.[375]

The most merits-like argument that a defendant can make based on equitable jurisdiction is that a plaintiff has failed to prove entitlement to a remedy she sought.[376] But that argument is not consistent with the work that the principles of traditional equity are doing, which only limit certain courts from awarding certain relief in certain contexts. Indeed, this is the heart of the Equity-*Erie* problem because, if liability can be shown, then a plaintiff *is* entitled to an equitable remedy—just not from the federal court.

B. The Middle Ground

In contrast to the state equity option (federal courts must abandon traditional principles of equity and apply state law) and the federal equity option (federal courts may apply traditional principles of equity as an inherent power, displacing state law), the equitable jurisdiction theory strikes a happy medium. It acknowledges that the traditional principles of equity serve to proscribe a limited judicial role vis-à-vis the substantial power that necessarily accompanies equitable remedies. But it also recognizes that the designation of remedies can be a key component of lawmaking, entitled to be directed according to the policy choices of the lawmaker.

One might agree, therefore, with the need for a middle ground solution. And yet, one could still carry some reservations about subject matter jurisdiction as the tool, either because of its traditional application or

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374. *See, e.g.*, *Sonner I*, 971 F.3d 834, 845 (9th Cir. 2020) (affirming dismissal on the case on the sole basis that plaintiff lacked an adequate remedy at law).

375. *Id.* at 844 (finding that plaintiff did not make showing of inadequate remedy at law because she did not so plead in the complaint and because she sought the same monetary value in restitution as she had previously sought in damages without providing an explanation for "how the same amount of money for the exact same harm is inadequate or incomplete"). *But see* Williams, *supra* note 333, at 1786 (distinguishing jurisdictional determinations from other "non-merits" grounds that can be resolved without case-specific substantive analysis but may still be entitled to claim-preclusive effect).

376. Brief for Defendant-Appellant at 20, Sonner v. Premier Nutrition Corp, 49 F.4th 1300 (9th Cir. 2022) (No. 21-15526), 2021 WL 3556630 at *20 (arguing that dismissal for failing to plead an inadequate remedy at law requires the district court to "analyze the complaint to determine if [the plaintiff] had satisfied her burden of pleading her entitlement to equitable relief, a question of law and fact that constitutes a decision on the merits of the pleadings" (quoting Stewart v. U.S. Bancorp, 297 F.3d 953, 957 (9th Cir. 2002) (internal quotation marks omitted))).

consequences. Subject matter jurisdiction is traditionally about claims (federal question) or parties (diversity),[377] rather than remedies. Moreover, the consequences that attach to a jurisdictional label can be "drastic," particularly their potential to upset litigation if they can be raised at any time.[378] Although this Article argues that subject matter jurisdiction is the most appropriate tool to represent the operation of traditional equitable principles in a post-merger world,[379] it is not without challenges.

Accordingly, it is reasonable to consider whether other middle ground options, short of subject matter jurisdiction, might work. Three, in particular, warrant a closer look: (1) whether the traditional principles of equity are "claim-processing" rules, (2) whether the traditional principles of equity are restrictions on remedial authority, or (3) whether the traditional principles of equity are appropriate for a new form of abstention. Although each of these options carry the benefits of a middle ground solution, they fall short in solving the Equity-*Erie* problem.

First, claim-processing rules are "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[380] Whereas jurisdictional rules govern a court's adjudicatory authority, claim-processing rules do not.[381] Typical examples include filing deadlines or exhaustion requirements.[382] The Court generally identifies claim-processing rules only as a foil to jurisdictional rules—the category exists to capture the mandatory rules that do not receive "jurisdictional" treatment like nonwaivability.[383] As a stand-alone category, therefore, it is somewhat opaque. Notably, however, the Supreme Court has

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377. *See* Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1846 (2019) (holding that a rule was "not jurisdictional, a term generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction)").

378. Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

379. *See supra* Section III.Aaa.2.

380. *Henderson*, 562 U.S. at 435.

381. Gonzalez v. Thaler, 565 U.S. 134, 141 (2012).

382. *See Henderson*, 562 U.S. at 435 (observing that filing deadlines "are quintessential claim-processing rules"); Santos-Zacaria v. Garland, 598 U.S. 411, 417 (2023) (explaining that an exhaustion requirement "is a quintessential claim-processing rule"); *see also Davis*, 139 S. Ct. at 1849–50 (cataloging an "array of mandatory claim-processing rules and other preconditions to relief" characterized as nonjurisdictional).

383. Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 5 (2008) (arguing that "automatic characterization of nonjurisdictional rules as the inverse of jurisdictional rules . . . is erroneous").

only ever identified as claim-processing rules certain requirements found in federal statute or federal procedural rules.[384]

Because the traditional rules of equity are not tied to a specific federal statute or rule, they are inapt for classification as claim-processing rules. Moreover, traditional rules of equity do not fit the general definition because they do not direct the parties to take specific steps in litigation, but rather control the court's authority. If the category were somehow expanded to encompass rules imposing traditional equity principles on state law claims, it would certainly invite questions of Congress's authority to so affect state law.[385] And beyond the doctrinal concerns, the category itself would do little to solve the practical problems of whether states must follow these federal rules or how to evaluate the preclusive effects of federal court dismissals if not.

For some of the same reasons, the explanation that traditional equity rules merely limit federal courts' remedial authority also falls short.[386] While it is certainly an apt description to say that the court cannot act in Equity-*Erie* cases as state law allows because of limits on remedial power, as a category the description lacks doctrinal meaning. It could be true that limits on federal court remedial authority are subject to waiver—or not. Likewise, a dismissal for want of remedial authority could result in a preclusive determination—or not. Perhaps a new category of "remedial authority rules" is warranted, with consideration given to the appropriate consequences and effects,[387] but for the time being it would do little to provide the guidance needed by the lower federal courts.

A third and slightly different option could be to suggest that, instead of the "harsh consequences" of the jurisdictional brand,[388] the Court should instead construct a new form of abstention to apply when faced with an Equity-*Erie*

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384. Of the twenty cases in which the Supreme Court references the category of "claim-processing rules" to distinguish from jurisdictional rules, each involves a rule found in a federal statute, Federal Rule of Appellate Procedure, Federal Rule of Criminal Procedure, Federal Rule of Bankruptcy Procedure, or Federal Rule of Civil Procedure. The Court has noted that requirements found in procedural rules rather than statute are properly classified as nonjurisdictional. Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 714 (2019).

385. *See supra* note 133.

386. *See, e.g.*, John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 (1998) (identifying as a separate structural power of Congress the "authority over federal judicial remedies" including "the congressional power to determine what kind of decrees the federal courts can issue in lawsuits that are within their jurisdiction but that do not involve causes of action themselves created by Congress").

387. *See supra* note 323.

388. *Davis*, 139 S. Ct. at 1849 (quoting United States v. Kwai Fun Wong, 575 U.S. 402, 409 (2015)).

problem. Under this middle ground option, federal courts would recognize when they are bound by traditional rules of equity that conflict with state rules. Rather than dismiss the case, federal courts might "decline to exercise their jurisdiction," a tool used "in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest."[389] To be sure, this option might provide a short-term fix to the practical issue, maintaining federal courts' cabined equitable authority by deferring to state courts to adjudicate nontraditional state law equity cases.[390] But it still leaves the unresolved the important theoretical question at the heart of *Erie*—where traditional equity's principles come from and how they bind the federal courts.

*C. Resolving the Equity-*Erie *Problem*

The theory offered here—that traditional equitable principles are jurisdictional—satisfies each of *Erie*'s demands. It abandons a reliance on general law, identifies a positive law source, and adheres to its choice-of-law instruction. The theory helps to explain *York*'s approach to traditional equitable principles. And, for the reasons above, it is likely the only resolution that reconciles *Erie* and federal equity, allowing federal courts to maintain equity's traditional exceptionalism while still empowering states to deploy contemporary equitable remedies.

First, the equitable jurisdiction theory answers *Erie*'s source of law demand. The source of equity's traditional limitations is the First Congress's original grant of federal court jurisdiction over "all suits of a civil nature at common law or in equity" for diverse parties, as advanced by the Supreme Court in *Grupo Mexicano*.[391] Although the jurisdictional statute's language has changed to accommodate the procedural merger of law and equity, Congress retained the implied jurisdictional limitations for cases in equity.[392] It is worth noting here that one need not agree with the Court's expressed scope of traditional equity to recognize this source.[393] In particular, the rule that a federal court may only grant equitable remedies if there exists a

389. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)).

390. *See, e.g.*, Guthrie v. Transamerica Life Ins. Co., 561 F. Supp. 3d 869, 878–79 (N.D. Cal. 2021) (relying on the principles of abstention doctrines to remand state law contemporary equity case).

391. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78; Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

392. *See supra* note 287 and accompanying text.

393. *See supra* note 281.

sufficiently similar historical analogue is likely wrong as a matter of original meaning and post-*Erie* practice,[394] perhaps dangerously so.[395] But while it lives, treating it and traditional equity's other limits as jurisdictional thereby allows states to authorize contemporary, non-traditional equity. And it invites Congress to change those limits if it believes the Court has them wrong.[396]

The equitable jurisdiction theory also ensures that federal court adherence to equity's traditional principles nonetheless abides by *Erie*'s choice-of-law instruction. *Erie* expressly permits, consistent with the Supremacy Clause, that federal courts may rely on federal law for matters "governed by the Federal Constitution or by acts of Congress," even in the face of contrary state law.[397] Though substantively significant, the rules regulating federal court jurisdiction do not fall into *Erie*'s bucket of "substantive" state law, which federal courts must apply when sitting in diversity.[398] Rather, jurisdictional rules provide the boundaries of a court's authorized powers; federal courts' boundaries can be affected only by the Constitution or Congress and not by state law.[399] Accordingly, *York*'s insistence and federal courts' adherence to traditional equitable limits as defining the boundaries of federal court jurisdiction is consistent with *Erie*'s choice-of-law instruction.

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394. *See* Gallogly, *supra* note 52, at 1312 ("By stringently applying its historically inflected approach to federal statutes, the Court has raised ahistorical barriers to reasoned judicial elaboration of equity."); *see also* Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 879, 894–96 (2023) (arguing that *Grupo Mexicano*, relying on inapt precedent, was the first case to reject a federal equitable remedy for inconsistency with founding-era practice).

395. Pfander & Formo, *supra* note 18, at 724 (exploring "the risk that a static conception of equity poses to the remedial powers of lower federal courts").

396. As discussed *supra*, Section III.A.1, an alternative source is that equity's exceptional limits come directly from Article III's authorization of federal judicial power. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). This view is also consistent with the equitable jurisdiction theory, insofar as traditional equity's principles limit federal court jurisdiction but not state court jurisdiction, much like the federal "case or controversy" requirement. The mechanics of this view would operate much the same way, but Congress may be limited in its ability to reimagine federal courts' equitable authority.

397. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* U.S. CONST. art. VI. Bradford Clark argues that "*Erie* rests on recognition of the Supremacy Clause as the exclusive basis for displacing state law, and on the procedural and 'political safeguards of federalism' built into the Clause." Clark, *supra* note 114, at 2–3 (footnote omitted).

398. *See* Spencer, *supra* note 20, at 667–68; Bernard C. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386, 386 (1932) ("It must be observed that the law of jurisdiction of the courts is neither procedural law nor substantive law. It has nothing to do with either the creation or recognition of substantive rights; it is simply a limitation on the power of a court to act *as a court*.").

399. "'Only Congress may determine a lower federal court's subject-matter jurisdiction,' pursuant to its constitutional authority to 'ordain and establish' inferior federal courts." Spencer, *supra* note 20, at 668 (first quoting Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 17 (2017); and then quoting Lockerty v. Phillips, 319 U.S. 182, 187 (1943)).

Still unexplained is *York*'s suggestion that federal courts' equitable authority permits them to issue equitable remedies beyond those permitted by state law.[400] An equitable jurisdiction theory cannot account for this aspect of *York*'s dicta, especially as the Supreme Court has repeatedly emphasized that a grant of jurisdiction is not a grant of affirmative lawmaking authority.[401] Lower courts have differed in their adherence to this statement from *York*.[402] It may be wrong that federal courts can expand the remedies available for state law claims. At the very least, the possibility presents additional tension with *Erie* and likely warrants further inquiry.

Nonetheless, it is not insignificant that the equitable jurisdiction theory solves for the bulk of *York*'s dicta, is consistent with the way that the Court has discussed the adequate remedy at law rule,[403] and can account for the rules advanced in the Court's recent equity cases.[404] Indeed, the jurisdictional theory appears to be the only option that reconciles the federal traditional principles of equity and *Erie*.

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400. Prior to the merger of law and equity, the Court occasionally referenced the Federal Equity Rules as providing authority from Congress for federal courts' power to afford equitable remedies irrespective of state law and practice. *See, e.g.*, Guffey v. Smith, 237 U.S. 101, 114 (1915).

401. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts." (citation omitted)); Sosa v. Alvarez-Machain, 542 U.S. 692, 741–42 (2004) (Scalia, J., concurring) (explaining that the rule against implied common lawmaking authority from jurisdictional statutes "applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute"). *But see* Duffy, *supra* note 280, at 121–22 (arguing that federal courts historically treated the grants of federal question jurisdiction in equity as conferring an authority to create substantive common law in equity, though recognizing that authority "may seem incorrect today").

402. *Compare* Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54, 57 (5th Cir. 1970) ("Neither the Federal Rules of Civil Procedure nor the *Erie* doctrine deprive Federal courts in diversity cases of the power to enforce State-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in the courts of the State." (emphasis added)), *and* Perfect Fit Indus., Inc. v. Acme Quilting Co., 646 F.2d 800, 806 (2d Cir. 1981) ("[I]t would not matter if New York did bar its courts from granting that remedy. State law does not govern the scope of the equity powers of the federal court; and this is so even when state law supplies the rule of decision."), *with* Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 647 (9th Cir. 1988) ("[W]e hold that the California anti-injunction statute should be followed in this diversity case. The general equitable powers of federal courts should not enable a party suing in diversity to obtain an injunction if state law clearly rejects the availability of that remedy.").

403. *See* Van Norden v. Morton, 99 U.S. 378, 380–81 (1878).

404. *See* Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999).

IV. IMPLICATIONS: BEYOND DIVERSITY AND ADMINISTRABILITY

This Article aims to address whether the federal courts' adherence to traditional equitable principles can be reconciled with *Erie*'s demands. Understanding the principles of traditional equity as jurisdictional limitations, entitled to the same effects, provides that reconciliation. But this theory has other potential implications too.

Optimistically, identifying traditional equitable principles, like the adequate remedy at law rule, as jurisdictional boundaries might provide an impetus for the Court to provide stricter governance on the "adequacy" requirement itself—a main complaint of remedial hierarchy skeptics.[405] If forced to consider the boundaries of their own power, lower federal courts would look for clearer rules to aid the inquiry. Of course, a jurisdiction label is not a panacea; one need only look to the law of standing to see how muddled the inquiry for a jurisdictional determination can become.

Likewise, adoption of the equitable jurisdiction theory might also lead to a more careful identification of traditional equity principles themselves.[406] Various commentors have criticized, for example, the Supreme Court's unexpected announcement of a "traditional" test for permanent injunctions in federal court.[407] One might hope that the Court would exercise caution before repackaging other new "traditional" jurisdictional limitations. Moreover, the equitable jurisdiction theory clarifies the choice-of-law issue and insists upon precision in its framing. The Equity-*Erie* question in a diversity case seeking a permanent injunction will not be whether a federal court should apply the state law test or federal law test but, instead, whether the federal rule falls within the guardrails of traditional equitable jurisdiction such that it should be treated as a restriction on federal court subject matter jurisdiction. At least one prong of the Supreme Court's four-part injunction standard would likely fall within the equitable jurisdiction framework—the test incorporates the adequate remedy at law rule.[408] But whether the federal standard could displace a different balancing test for state law injunctions—like the adoption of a "sliding scale"—is less likely to fall within an equitable jurisdiction

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405. *See* LAYCOCK, *supra* note 6, at 4; *see also* Bamzai & Bray, *supra* note 61, at 710 (discussing a "full answer" for determining adequacy).

406. *Cf.* Gluck, *supra* note 43, at 1991 n.322 (suggesting that an *Erie*-based rule for choice of statutory interpretation methodology might provide "an incentive [for courts] to clarify their own methodological rules for proper application by the outside world").

407. *See* Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012) (noting that remedies scholars have reported being "unfamiliar with any traditional four-factor test for permanent injunctions" prior to the Court's announcement of it in *eBay Inc. v. MercExchange*, *LLC*, 547 U.S. 388 (2006)).

408. *eBay, Inc.*, 547 U.S. at 391.

framework.[409] The equitable jurisdiction theory, therefore, changes both the inquiry and the analysis.

There are also administrative questions implicated by the equitable jurisdiction theory, such as those involving the severability of state law non-traditional equity claims from claims over which the federal court retains jurisdiction. To be sure, the structural federalism and separation of powers issues are deeply affected by the mechanics and procedure.

It is also worth considering how the equitable jurisdiction theory may affect federal statutory or constitutional claims. Under the analysis offered here, jurisdictional for one statute does not mean jurisdictional for all. In other words, the conclusion that Congress's grant of federal diversity jurisdiction contains traditional equity's limitations like the adequate remedy at law rule or a restriction of equitable remedies to their historical context should not necessarily imply that Congress's extension of jurisdiction over other claims in equity always contains similar limitations. Indeed, the Supreme Court's new equity cases treat the question of equitable authority as a statute-by-statute inquiry.[410] Moreover, even if the equitable jurisdiction theory were extended to federal question cases—looking, perhaps, to Congress's broad grant in 28 U.S.C. § 1331—this analysis acknowledges that Congress holds the keys to unlocking a contemporary, non-traditional equity.[411]

Of course, the same would not be true if the Court were to endorse a constitutional source of equitable jurisdiction by concluding that Article III itself maintains equity's traditional limits for claims in federal court.[412] Such a conclusion would tie Congress's hands, freezing federal equity in its historically rare, narrow, and exceptional character for claims brought

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409. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) ("Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a 'sliding scale,' sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high." (citing 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.3 (3d ed. 2023))); *see also supra* note 61.

410. *See, e.g.*, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210–12 (2002) (examining permissible equitable remedies under ERISA's § 502(a)(3)); Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1942–44 (2020) (examining permissible equitable remedies under the Securities Exchange Act's § 78u(d)(5)).

411. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("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. . . . 'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946))).

412. *See supra* notes 307, 396.

pursuant to any head of jurisdiction. It would require a constitutional amendment to erase equity's distinction from law by eliminating its traditional boundaries altogether. This should weigh against a determination that federal courts' equitable jurisdiction is constitutionally rooted. Although it seems plausible that the Constitution's extension of the federal judicial power to cases "in . . . equity" was intended to ensure that federal courts could act in equity when legal remedies were inadequate, it is harder to imagine that the Constitution intended to preclude Congress from authorizing equitable relief in new contexts or as a matter of right in certain contexts.[413]

V. CONCLUSION

This Article has demonstrated that there is a way to reconcile the traditional principles of equity that make it rare and exceptional with the positive law demands of *Erie*. In light of movement by states toward contemporary, non-traditional equity, the Supreme Court should take up the issue and make clear that any limitations on federal courts to act in equity should have the effects associated with jurisdictional questions so that non-traditional equity cases may be adjudicated in state courts. Treating exceptional equity's limitations as jurisdictional not only roots them in a positive law source, but also helps achieve an equilibrium between federal and state courts and the policies that inform traditional and non-traditional equity.

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413. *See* Pfander & Formo, *supra* note 18, at 724; Gallogly, *supra* note 52, at 1312; Keenan, *supra* note 394, at 910.