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ARTICLES**PRELIMINARY INJUNCTION STANDARDS
IN MASSACHUSETTS STATE AND FEDERAL
COURTS**

ARTHUR D. WOLF*

ABSTRACT

Concurrent jurisdiction frequently allows attorneys the choice of filing a complaint in state or federal court. State courts presumptively have jurisdiction over claims rooted in federal law. At times, state courts are required to entertain federal claims. Similarly, federal courts have authority over state claims because of diversity, federal question, and supplemental jurisdiction. Many claims are rooted in both state and federal law, such as antitrust, civil rights, environmental, consumer protection, and civil liberties. Confronted with the choice of state or federal court, the attorney must evaluate a variety of factors before deciding in which court to file.

In a civil action where the plaintiff seeks a preliminary injunction, the selection of a state or federal court may determine the success of the motion for temporary relief. The reason is simple: state and federal courts frequently apply differing standards to such preliminary motions. Massachusetts state and federal courts apply different standards, although some courts have indicated to the contrary. In the

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federal courts, the matter of differing standards is compounded by the complex Erie/Hanna doctrine. State courts may be similarly bound by the much less well known “reverse-Erie” doctrine. Consequently, the Massachusetts federal and state courts may be required to apply state standards to state claims and federal standards to federal claims.

This Article explores the standards for preliminary injunctions in Massachusetts state and federal courts, and the intricacies that attend their application. Part I provides background for the examination of state and federal standards. Part II addresses the criteria for temporary relief in the Massachusetts state courts, while Part III reviews the comparable standards in the Massachusetts federal courts. Part IV inquires into the Erie/Hanna doctrine as it applies to preliminary relief in the federal courts. The Article concludes with the author’s observations about the issues raised.

INTRODUCTION

Attorneys frequently have the choice of filing a complaint in state or federal court because of concurrent jurisdiction. State courts presumptively have jurisdiction over claims rooted in federal law.¹ At times, state courts are required to entertain federal claims.² Similarly, federal courts have authority over state claims because of diversity, federal question, and supplemental jurisdiction.³ Many claims are rooted in both state and federal law, such as antitrust, civil rights, environmental, consumer protection, and civil liberties. Confronted with the choice of state or federal court, the attorney must evaluate a variety of factors before deciding in which court to file.

In a civil action where the plaintiff seeks a preliminary injunction, the selection of a state or federal court may determine the success of the motion for temporary relief. The reason is simple: state and federal courts frequently apply differing standards to such preliminary motions. The Massachusetts state and federal courts apply different standards, although some courts have indicated to the contrary.⁴ In the federal courts, the matter of differing standards is compounded by the complex *Erie/Hanna* doctrine.⁵ The state courts may be similarly bound by the

1. See *Taflin v. Levitt*, 493 U.S. 455 (1990).

2. See *Howlett v. Rose*, 496 U.S. 356 (1990); *Testa v. Katt*, 330 U.S. 386 (1947).

3. See discussion *infra* Part I.

4. See *Ocean Spray Cranberries, Inc. v. PepsiCo, Inc.*, 160 F.3d 58 (1st Cir. 1998); see also discussion *infra* Part II.

5. See *infra* Part IV.

much less well known “reverse-*Erie*” doctrine.⁶ Consequently, the Massachusetts federal and state courts may be required to apply state standards to state claims and federal standards to federal claims.

This article explores the standards for preliminary injunctions in Massachusetts state and federal courts, and the intricacies that attend their application. Part I provides background for the examination of state and federal standards. Part II addresses the criteria for temporary relief in the Massachusetts state courts, while Part III reviews the comparable standards in the Massachusetts federal courts. Part IV inquires into the *Erie/Hanna* doctrine as it applies to preliminary relief in the federal courts. The Article concludes with the author’s observations about the issues raised.

I. BACKGROUND

In 1980, the Massachusetts Supreme Judicial Court (SJC) decided *Packaging Industries Group, Inc. v. Cheney*, which announced new and definitive standards for the issuance of preliminary injunctions.⁷ In its winter 2007 issue, the *Massachusetts Law Review* published Attorney Cameron F. Kerry’s assessment of twenty-five years of state court decisions under the regime of *Packaging Industries*.⁸ He concluded that the SJC’s decision and the cases that followed “establish[ed] the preliminary injunction as one of the most important and useful remedies in the kit of tools available to modern courts.”⁹

In sharp contrast, the United States Supreme Court did not establish clear, firm standards for preliminary injunctions until November, 2008. In *Winter v. Natural Resources Defense Council*,¹⁰ the Court finally announced definitive criteria for the granting or denial of preliminary injunctions.¹¹ Adopting a four-part test, familiar to readers of First Circuit decisions, the Court purported to rest upon prior precedents for this four-criteria approach.¹² In fact, it had never expressly and clearly

6. See, e.g., *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952). The “reverse-*Erie*” doctrine, where a state court may be required to follow federal procedural rules in enforcing federal rights, is not discussed in this Article. See generally Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

7. *Packaging Indus. Grp., Inc. v. Cheney*, 405 N.E.2d 106, 111-12 (Mass. 1980).

8. Cameron F. Kerry, *Unpacking the Massachusetts Preliminary Injunction Standard*, 90 MASS. L. REV. 160 (2007).

9. *Id.* at 178.

10. 555 U.S. 7 (2008).

11. Over the years, the courts have used the words “preliminary,” “temporary,” “interlocutory,” and “provisional” to describe interim injunctive relief. This Article will use these words interchangeably.

12. *Winter*, 555 U.S. at 20; e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12

so ruled in unmistakable language. At least the lower federal courts did not think so.¹³

Finally, the question has arisen whether a federal court must apply state standards for preliminary relief when the moving party's claims are based on state law. Although the Supreme Court has not addressed this issue in the context of preliminary injunctions, it has given some guidance in a series of cases beginning with its landmark ruling in *Erie R.R. Co. v. Tompkins*.¹⁴ Because Massachusetts state and federal standards for interlocutory injunctions differ, the application of the *Erie* doctrine to motions for preliminary relief for state claims in federal court is critical.

This Article will focus on the decisions in the Massachusetts state and federal courts addressing the issue of interlocutory injunctive relief, including the conflict between state and federal law when litigating in federal court. After consideration of certain preliminary matters, the Article will address the standards the state courts have adopted for preliminary relief. The next section will address the federal decisions, focusing on the United States Supreme Court and the First Circuit Court of Appeals. The analysis will then proceed to examine the conflicts that arise between federal and state standards under the *Erie* doctrine,¹⁵ peculiarly a product of litigation in the federal courts involving state law claims. The question is whether state or federal standards should apply to motions for preliminary injunctions when the underlying claim is state-based. A conclusion follows this last section.

Since the early days of the Commonwealth and of the Republic, the preliminary injunction has enjoyed a long and sometimes distinguished career in American law, state and federal. It is one of the most important tools at the disposal of attorneys. The preliminary injunction is used in a wide variety of circumstances: to prevent an imminent merger and acquisition; to enforce covenants not to compete; to restrain the violation of civil rights and civil liberties; to prevent domestic abuse; to resolve property and zoning disputes; to address rights of school children in a variety of settings; and to advance a myriad of other claims.

When seeking a preliminary injunction, the litigant must comply with a variety of procedural and substantive requirements. This Article

(1982).

13. See generally Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173 (1984).

14. 304 U.S. 70 (1938).

15. The *Erie* doctrine is a product of the landmark decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 70 (1938).

will address only the substantive standards that determine whether the court will issue a preliminary injunction. To the extent state and federal law in Massachusetts differ, the Article will note such differences. The SJC has stated: “[w]here the [Massachusetts] Legislature in enacting a statute follows a Federal statute, we follow the adjudged construction of the Federal statute by the Federal courts.”¹⁶ The court has applied this interpretative rule to the Massachusetts Rules of Civil Procedure, which track for the most part the Federal Rules of Civil Procedure.¹⁷

Assuming the litigant has complied with the procedural prerequisites for obtaining a preliminary injunction, the litigant must then persuade the court that it is entitled to the remedy sought. The moving party has a heavy burden to demonstrate, factually and legally, it is entitled to the “extraordinary”¹⁸ remedy of injunction, although a commentator on state court decisions has referred to it as “an ordinary remedy”¹⁹ in this Commonwealth. The Massachusetts state courts have developed two lines of cases in determining whether a preliminary injunction should issue. Similarly, the federal courts have developed multiple standards for the issuance of such relief. Both the federal and the state standards for preliminary injunctive relief will be addressed here.

Before examining the applicable precedents, it is important to recall the purpose for seeking a temporary injunction. Historically, the courts, following the lead of their British counterparts, have identified the preservation of the status quo as the object of interim relief.²⁰ One court has stated that the status quo “is universally defined as the last uncontested status which preceded the pending controversy.”²¹ That premise has two difficulties. First, the courts have struggled with determining what constitutes the status quo, even given the “universal” definition.

Second, in many instances, the party moving for preliminary relief

16. *Packaging Indus. Grp., Inc. v. Cheney*, 405 N.E.2d 106, 108 (Mass. 1980) (and cases therein cited); *accord*, *Scaccia v. State Ethics Commission*, 727 N.E.2d 824, 828 (Mass. 2000); *Mayo v. Key Fin. Servs.*, 678 N.E.2d 1311, 1313 (Mass. 1997).

17. *Farley v. Sprague*, 372 N.E.2d 1298, 1301 (Mass. 1978) (“absent compelling reasons to the contrary”),

18. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 9 (2008); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Yakus v. United States*, 321 U.S. 414, 440 (1944).

19. *Kerry*, *supra* note 8, at 178 (arguing that under state court precedents the preliminary injunction today is an “ordinary remedy”).

20. *See, e.g.*, *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 67 U.S. (2 Black) 545 (1862); *Irwin v. Dixion*, 50 U.S. (9 How.) 10 (1850).

21. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 609 F. Supp. 333, 343 (S.D. Miss. 1984), *aff’d*, 760 F.2d 618 (5th Cir. 1985).

does not want the status quo preserved. On the contrary, the movant wants the court to order the opposing party to take mandatory or affirmative action to alter the status quo, not simply to refrain from engaging in a purported illegality. For example, if the plaintiffs, who wish to protest peacefully without interference from hostile onlookers, are seeking a preliminary injunction to secure police protection, they do not want to preserve the status quo: assaults by hecklers while the police do nothing.²² They want the court to order the police to prevent violence against them by opponents.

In recent years, the courts have recognized the inherent problems in predicating interlocutory relief on maintaining the status quo. Consequently, they have shifted the focus to preserving the subject matter of the lawsuit so that the court will be able to grant effective relief when the suit is resolved on the merits. “On the basis of [an abbreviated] record, the moving party must show that, without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits.”²³ This approach too creates difficulties.

While preservation of the subject matter is the proper concern of interim relief, the American legal system operates on the assumption that individuals (natural and corporate) are free to act as they please until they have been adjudged liable for injury to another. Interim relief is inconsistent with this basic premise because it restricts freedom of action without a final judgment of liability.²⁴ Further, “a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law.”²⁵ In light of that reality, reconciling the need for interim relief with the restriction on freedom that it imposes is the proper focus of the search for appropriate criteria governing interlocutory injunctions. Through the years, the state and federal courts have explored a wide variety of responses to this tension.

22. *See, e.g.*, *Belknap v. Leary*, 427 F.2d 496 (2d Cir. 1970).

23. *Packaging Indus. Grp., Inc. v. Cheney*, 405 N.E.2d 106, 111 (1980).

24. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (the Court refused to allow the injunctive remedy to prevent transfer of assets prior to a judgment on the merits). *See generally* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1320 n.161 (2000) (exploring fully the issues raised in *Grupo*).

25. *Packaging Indus.*, 405 N.E.2d at 111.

II. THE STATE COURTS

A. Overview

The Massachusetts state courts have developed two major lines of cases in addressing motions for preliminary relief: the *Packaging Industries* standards (hereinafter “traditional standards”) and the “abbreviated” standards. The traditional standards require that the trial court evaluate the parties’ likelihood of success on the merits in combination with their irreparable harm, and then balance the irreparable harm and the likelihood of success of both parties, granting the motion if the balance tips in the direction of the moving party.²⁶ In this state, the courts have also, on occasion, required the moving party to demonstrate that the issuance of the preliminary injunction will not adversely affect the “public interest” or will positively advance it.²⁷

The second line of cases requires the moving party to meet “abbreviated standards” to secure a preliminary injunction. In civil actions brought by the State Attorney General (or other governmental unit) or by “private” attorneys general, the state courts require only that the moving party demonstrate a likelihood of success on the merits and that the requested relief would be in the public interest.²⁸

B. Traditional Standards

The leading case for preliminary injunction standards in the state courts is *Packaging Industries Group, Inc. v. Cheney*.²⁹ In *Packaging Industries*, the plaintiffs brought suit to secure injunctive and monetary relief from the defendant Cheney, a former vice-president of the plaintiff companies.³⁰ The claims focused on certain business torts, including unlawful use of trade secrets and breach of fiduciary duties.³¹ The SJC, in affirming the denial of an interlocutory injunction, identified a three-step analysis that a trial judge must undertake to determine whether a preliminary injunction should be granted to the moving party.³²

First, the trial judge must evaluate “in combination the moving

26. *See id.* at 114.

27. *See* John T. Callahan & Sons, Inc. v. City of Malden, 713 N.E.2d 955, 960 (Mass. 1999) (internal citation omitted).

28. *See* Town of Brookline v. Goldstein, 447 N.E.2d 641, 644 (Mass. 1983).

29. *Packaging Indus.*, 405 N.E.2d 106. *See generally* Kerry, *supra* note 8 (exploring 25 years of state court decisions under *Packaging Industries*).

30. *Packaging Indus.*, 405 N.E.2d at 108.

31. *Id.*

32. *Id.* at 111-12.

party's claim of injury [while the case is pending] and chance of success on the merits."³³ Second, if failure to issue the temporary order would subject the movant "to a substantial risk of irreparable harm,"³⁴ the court must then evaluate the injury to the non-moving party if the injunction is granted together with its chance of succeeding on the merits. Third, the court must now balance the risk of irreparable harm to the plaintiff against the injury to the defendant if the injunction is granted or denied with their respective chances of succeeding on the merits. The trial court should issue the preliminary injunction if the balance "cuts in favor of the moving party."³⁵

The trial court's evaluation of the impact of a grant or denial of temporary relief pending a decision on the merits is the critical factor. "It is the combination of likelihood of success and degree of irreparable injury that matters."³⁶ Further, in "an appropriate case," the SJC has directed trial judges to consider an additional factor: the benefits or the "risk of harm to the public interest" if the preliminary injunction is granted or denied.³⁷ In such cases, the trial court must determine whether the public interest is promoted or adversely affected by the grant or denial. Such harm to the public interest should be considered when "the dispute does not involve [only] private parties."³⁸ The SJC has defined "irreparable harm," in the context of a motion for preliminary relief, as the injury that may occur between the request for temporary relief and a judgment on the merits.³⁹ "In the context of a preliminary

33. *Id.* at 112.

34. *Id.*

35. *Id.*

36. *Id.* at 114. *Accord* T & D Video, Inc. v. Revere, 670 N.E.2d 162, 165 (Mass. 1996); Commonwealth v. Mass. CRINC, 466 N.E.2d 792, 797 (Mass. 1984). The SJC's approach in *Packaging Industries* is similar to the sliding scale approach that some federal courts of appeals took prior to the Supreme Court's decision in *Winter*. See text *infra* Part III.B.3.

37. *Town of Brookline v. Goldstein*, 447 N.E.2d 641, 644 (Mass. 1983). Although the SJC applied the three-factor *Packaging Industries* test, the following year it held that a government party's motion for a preliminary injunction need only satisfy a two-pronged test. *Cf. Bettigole v. Assessors of Springfield*, 178 N.E.2d 10 (Mass. 1961) (indicating that "public interest" should be addressed when a governmental unit is the defendant in a suit for injunctive relief).

38. See *John T. Callahan & Sons, Inc. v. City of Malden*, 713 N.E.2d 955, 960 (Mass. 1999). The "public interest" factor in determining preliminary relief should not be confused with the "public interest" as an element of a substantive claim or defense. See *Bank of New England, N.A. v. Mortg. Corp. of New England*, 567 N.E.2d 961, 966 (Mass. 1991); *cf. Planned Parenthood League of Massachusetts v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990). See generally Kerry, *supra* note 8, at 169-73. The "public interest" as an element of a claim or defense may enter the determination of a motion for a temporary injunction when the court evaluates the parties' chance of success under the *Packaging Industries* standards.

39. See *Packaging Indus.*, 405 N.E.2d at 112 n.11.

injunction the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity.”⁴⁰ In short, if no harm is likely to occur before a trial and judgment on the merits, the moving party is not entitled to relief because it has failed to show “irreparable” harm.

On occasion, the irreparable injury asserted involves constitutionally protected rights, such as free speech. For example, in *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, the plaintiffs sued to enjoin the defendants from forcefully interfering, largely through physical obstruction, with access to clinics performing abortions.⁴¹ Because pregnancies are time sensitive, the plaintiffs prevailed on the question of irreparable harm against the defendants’ defense based on the First Amendment (here, freedom of speech and assembly).⁴²

In rejecting the defendants’ assertion, the SJC ruled that the risk of irreparable injury must be assessed at the time of the hearing on the preliminary injunction.⁴³ At that point, the trial court has not yet formulated an injunctive decree, so the alleged irreparable harm is somewhat speculative. “[T]he defendants are not entitled to assume that the judge will issue an injunction which deprives them of their right to free expression.”⁴⁴ Indeed the trial court’s obligation is to craft an injunctive order that carefully separates lawful from unlawful activities, enjoining only the second. Once the preliminary injunction is entered, the defendants may raise again their First Amendment rights, challenging the constitutionality of the order. Indeed in *Planned Parenthood*, the SJC addressed the impact of the decree from a First Amendment point of view.⁴⁵

In sharp contrast, when a party has shown that its First Amendment rights are already in jeopardy because of past actions by the government, irreparable injury is presumed. For example, in *T & D Video, Inc. v. Revere*, an adult video store sued the City of Revere to enjoin it from enforcing zoning ordinances that, in effect, would prevent the video

40. *Id.*; see also OWEN M. FISS & DOUG RENDLEMEN, *INJUNCTIONS* 59 (2nd ed. 1984). In the context of a request for a permanent injunction, “irreparable harm” means that the moving party does not have an adequate remedy at law, ordinarily damages.

41. *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990).

42. *Id.* at 1371.

43. *Id.* at 1369.

44. *Id.*

45. *Id.* at 1369-71.

store from opening for business.⁴⁶ In affirming the issuance of a preliminary injunction against Revere, the SJC first found that the plaintiff had demonstrated a “likelihood of success on the merits”⁴⁷ of its First Amendment claim. Having so ruled, the court held that irreparable injury to the plaintiff followed as a matter of law, citing federal court precedents.⁴⁸

Finally, as noted above, in “appropriate” cases, the SJC has directed trial judges to consider an additional factor: the “risk of harm to the public interest” if the preliminary injunction is granted or denied.⁴⁹ Such harm to the public interest should be considered when “the dispute does not involve [only] private parties.”⁵⁰ Thus the courts will examine the “public interest” criterion where a governmental unit, state or local, is the defendant in a civil action.⁵¹ In such cases, the trial court must first evaluate the traditional standards articulated in the *Packaging Industries* case. Then the court must examine the “public interest” to determine whether the grant or denial of the preliminary injunction will promote or adversely affect such an interest.

In short, the moving party must demonstrate that it has satisfied the traditional standards the SJC identified in the *Packaging Industries* case.⁵² If the defendant is a public body, the movant must show additionally that the issuance of the temporary injunction will promote

46. 670 N.E.2d 162, 164 (Mass. 1996).

47. *Id.* at 166. See *A.M.F., Ltd. v. City of Medford*, 704 N.E.2d 184 (Mass. 1999) (recognizing that in a First Amendment case, the defendant city has the burden to show the constitutionality of the ordinance restricting speech in determining whether the moving party has shown a likelihood of success on the merits).

48. *T & D Video*, 670 N.E.2d at 166. *E.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); see also *Cirelli v. Town of Johnston School District*, 885 F. Supp. 663 (D.R.I. 1995). In *Cirelli*, the plaintiff teacher sued to enjoin her school’s directive that she not videotape unsafe and unhealthy conditions to which her students were exposed. *Id.* at 664. After the plaintiff demonstrated she was likely to succeed on the merits of her First Amendment claim, the federal district court concluded that irreparable injury would be presumed. *Id.* at 668. Although the *Cirelli* holding involved a request for a temporary restraining order, the issue of irreparable injury overlaps with preliminary relief.

49. *Brookline v. Goldstein*, 447 N.E.2d 641, 644 (Mass. 1983); see *Landry v. Attorney Gen.*, 709 N.E.2d 1085, 1090 (Mass. 1999).

50. See *John T. Callahan & Sons, Inc. v. City of Malden*, 713 N.E.2d 955, 960 (Mass. 1999).

51. *Id.*; see *Siemens Bldg. Techs., Inc. v. Div. of Capital Asset Mgmt.*, 791 N.E.2d 340, 345 (Mass. 2003); *Tri-Nel Mgt., Inc. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 40 (Mass. 2001); *Landry*, 709 N.E.2d at 1090.

52. *Packaging Indus. Grp. v. Cheney*, 405 N.E.2d 106, 112 (Mass. 1980).

the public interest, or alternatively, that it will not adversely affect it.⁵³ Since the moving party must demonstrate that all factors favor issuance of the injunction, the state courts usually begin with an examination of whether the moving party is likely to succeed on the merits.⁵⁴ If that party fails to show the likelihood of prevailing on the merits, the appellate court, at least, will end their inquiry.⁵⁵ Trial courts, however, ordinarily address all criteria in the event the appellate court disagrees in its assessment of the standards, thus allowing the appellate court to direct the issuance or denial of the temporary injunction.⁵⁶

C. *Abbreviated Standards*

The state courts have also developed a second line of cases, applying abbreviated standards for the grant of a preliminary injunction. These cases are limited to civil actions commenced by a governmental entity⁵⁷ or a citizen “acting as a private attorney general to enforce a statute or a declared policy of the Legislature.”⁵⁸ In abbreviating the traditional standards, the courts only require that the moving party demonstrate: (1) “a likelihood of success on the merits”;⁵⁹ and (2) that the “requested relief would be in the public interest.”⁶⁰

The state courts have applied these abbreviated standards in two types of cases: where the plaintiff is “the government or a citizen acting as a private attorney general.”⁶¹ In these cases, the plaintiff, in moving for a preliminary injunction, does not have to show irreparable injury or that a balancing of the harms favors the moving party, although the SJC in *LeClair* suggested that any harm to the plaintiff would be subsumed in the evaluation of the public interest factor.⁶²

This line of cases apparently began with *Commonwealth v. Mass.*

53. See *Cote-Whitacre v. Dep’t of Public Health*, 844 N.E.2d 623, 634-35 (Mass. 2006); *Loyal Order of Moose v. Bd. of Health of Yarmouth*, 790 N.E.2d 203, 206-07 (Mass. 2003); *Healey v. Comm’r of Pub. Welfare*, 605 N.E.2d 279, 285 (Mass. 1992).

54. *Fordyce v. Town of Hanover*, 929 N.E.2d 929 (Mass. 2010).

55. *Id.*; *Wilson v. Comm’r of Transitional Assistance*, 809 N.E.2d 524 (Mass. 2004); *Siemens*, 791 N.E.2d 340; *Packaging Indus.*, 405 N.E.2d at 111-12.

56. *Wilson*, 809 N.E.2d at 528-29.

57. *E.g.*, *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548, 550 (Mass. 2008) (state government); *Brookline v. Goldstein*, 447 N.E.2d 641, 644 (Mass. 1983) (local government).

58. *LeClair v. Town of Norwell*, 719 N.E.2d 464, 468 (Mass. 1999); *accord Edwards v. Boston*, 562 N.E.2d 834, 837 (Mass. 1990).

59. *LeClair*, 719 N.E.2d at 468.

60. *Id.*

61. *Id.*; *accord Fremont Inv. & Loan*, 897 N.E.2d at 550.

62. *LeClair*, 719 N.E.2d at 472-73.

CRINC.⁶³ In this case, the Attorney General brought suit to enforce the anti-trust and “bottle bill” laws against defendant beer distributors and a beer container recycling company.⁶⁴ After a hearing, the trial court entered a preliminary injunction restraining the defendants from violating the antitrust law and the bottle bill.⁶⁵ The order contained both prohibitory and affirmative provisions.⁶⁶ On appeal, the defendants contended that the trial court failed to apply the tripartite test of *Packaging Industries*.⁶⁷

After reciting the three-step test articulated in *Packaging Industries*, the SJC agreed that the trial judge failed to apply the irreparable injury and balancing tests of *Packaging Industries*.⁶⁸ The court further held, however, that the *Packaging Industries* standards apply to suits between private parties.⁶⁹ They are inapplicable to suits by the Attorney General because he is acting pursuant to “his broad common law and statutory powers to represent the public interest.”⁷⁰ These powers may rest on general statutory authority, e.g., G. L. c. 12, § 10, specific statutory authority, e.g., G. L. c. 93, §§ 8, 9, 12, and 13, or on “a common law duty.”⁷¹

The SJC has extended the *CRINC* holding to civil actions by private persons who are suing in the capacity of a “private” attorney general. For example, in *LeClair*,⁷² the plaintiffs, ten taxpayers, sued the town alleging it violated state and local law in choosing vendors to conduct a feasibility study for the construction of a new public school, and to design the school if the study gave the green light.⁷³

In *LeClair*, the SJC first noted that the traditional standards for awarding preliminary injunctive relief would not apply since the

63. *Commonwealth v. Mass. CRINC*, 466 N.E.2d 792 (Mass. 1984). Shortly before its decision in *Mass. CRINC*, the SJC applied the three-step test of *Packaging Industries* in a civil action initiated by the Attorney General, *Commonwealth v. County of Suffolk*, 418 N.E. 2d 1234 (Mass. 1981), and by a local government. *Brookline v. Goldstein*, 447 N.E.2d 641, 644 (Mass. 1983). In *dictum*, the court noted that in “appropriate” cases the public interest would be considered.

64. *Mass. CRINC*, 466 N.E.2d at 796.

65. *Id.*

66. *Id.*

67. *Id.* at 797.

68. *Id.*

69. *Id.*

70. *Id.* at 798. In reaching this conclusion, the court relied on *United States v. D’Annolfo*, 474 F. Supp. 220, 222 (D. Mass. 1979).

71. *Id.*

72. *LeClair v. Town of Norwell*, 719 N.E.2d 464 (Mass. 1999).

73. *Id.* at 466.

plaintiffs brought the suit in their capacity as “private attorneys general.”⁷⁴ The plaintiffs acquired this status because they were suing under c. 40, § 53 of the General Laws, the statute authorizing ten taxpayers to enjoin local officials who unlawfully “are about to raise or expend money or incur obligations.”⁷⁵

In such circumstances, the private attorneys general (*i.e.*, the taxpayers), in moving for a temporary injunction, need only show a likelihood of prevailing on the merits and that the public interest supports the injunction. In these suits, the SJC has applied the abbreviated standards in favor of private attorneys general even though the defendant is a governmental unit, which ordinarily would require the moving party to satisfy the traditional standards of *Packaging Industries* plus the public interest factor noted earlier.

To date, the state courts have attached the “private attorney general” label to only a limited number of lawsuits, which allow the party moving for a preliminary injunction to utilize the *CRINC* two-pronged test. The classic cases have involved sections of the General Laws authorizing suits by a certain number of taxpayers.⁷⁶ Presumably the courts would apply the same two-pronged test for preliminary relief to taxpayer suits under still other provisions of the General Laws, such as G.L. c. 35, § 35 (“one or more taxable inhabitants” of a county may sue to enforce laws regulating county accounts and finances); G.L. c. 44, § 59 (“one or more taxable inhabitants” may sue to enforce laws regulating municipal finances and debt); and G.L. c. 164, § 69 (20 taxable inhabitants of a city or town may sue to enforce laws regulating municipal generation of electric or gas).

Recently, the Massachusetts Appeals Court in *dictum* described another category of civil actions where the private attorney general doctrine could apply. In *Carroll v. Marzilli*,⁷⁷ the court rejected the plaintiffs’ argument that their motion for a preliminary injunction should be measured by the abbreviated standards applicable to private attorneys general.⁷⁸ The court held that the statute under which the plaintiffs sued did not authorize them to represent anyone other than themselves.⁷⁹ Their statutory claims were strictly private, not implicating the public

74. *Id.* at 468.

75. MASS. GEN. LAWS. ch. 40, § 53; *see also* *Edwards v. Boston*, 562 N.E.2d 834 (Mass. 1990) (local taxpayers’ suit under MASS. GEN. LAWS ch. 40, § 53).

76. *See* *Natick Auto Sales Inc. v. Dep’t of Procurement & Gen. Servs.*, 715 N.E.2d 84, 85 (Mass. App. Ct. 1999) (twenty-four state taxpayer suit under G.L. c. 29, § 63).

77. *Carroll v. Marzilli*, 915 N.E.2d 268 (Mass. App. Ct. 2009).

78. *Id.* at 271.

79. *Id.* at 272.

interest.

The appeals court suggested, however, that if a statute authorizes the plaintiff to represent other injured persons, as well as itself; the plaintiff could be cast into the role of a private attorney general.⁸⁰ In such instances, the abbreviated standards for preliminary relief would be available. The court offered two examples of such statutory authorization: G.L. c 149, § 105A (employee may represent himself and “other employees similarly situated”), and G.L. c. 151, § 1B (injured party may represent himself and “others similarly situated”).⁸¹ The court did not indicate whether the “private attorney general” doctrine would extend to any class action under Rule 23 of the Rules of Civil Procedure.

Beyond these taxpayer and class action-type suits, the state courts will probably tread very lightly in applying the *CRINC* two-pronged test to private attorney general civil actions. The appeals court, though, has suggested that a single private plaintiff could, in effect, serve as the surrogate for a public agency in an appropriate case.⁸² In this instance, however, the appeals court did not apply to that suggestion the abbreviated standards for securing a preliminary injunction. It did, however, apply the suggestion to the issue whether a judge, in granting a preliminary injunction, could award to the moving party “the ultimate relief” the party seeks after judgment on the merits,⁸³ much as it would if a government agency were the moving party.

Furthermore, the appeals court has indicated that “[t]he public interest” might be a factor in strictly private litigation when a party seeks preliminary relief.⁸⁴ It stated that the “public interest may also be considered in a case between private parties where the applicable substantive law involves issues that concern public interest.”⁸⁵ The “public interest” factor in determining preliminary relief should not be confused, however, with the “public interest” as an element of a substantive claim or defense. Nonetheless, the “public interest” as an element of a claim or defense may enter the determination of a motion for a temporary injunction when the court evaluates the parties’ chances

80. *Id.* at 271-72.

81. *Id.*

82. *See* *Petricca Constr. Co. v. Commonwealth*, 640 N.E. 2d 780 (Mass. App. Ct. 1994).

83. *Id.* at 785.

84. *See* *Bank of New England, N.A. v. Mortgage Corp. of New England*, 567 N.E.2d 961, 966 (Mass. App. Ct. 1991); *cf.* *Planned Parenthood League of Mass., Inc., v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990). *See generally* *Kerry*, *supra* note 8, at 169-173.

85. *See* *Bank of New England*, 567 N.E.2d at 966. *See generally* *Kerry*, *supra* note 8, at 169-70.

of success under the *Packaging Industries* standards.

Under Massachusetts's decisional law, tension exists between the four-step approach (which includes the public interest) for preliminary relief when a governmental unit is the defendant and the decisions allowing a private attorney general to demonstrate only two factors for a temporary injunction in suits against governmental units. When a private party commences a civil action (perhaps even as a class action under Rule 23) against a governmental unit, it must satisfy the standards of *Packaging Industries/CRINC* to obtain a temporary injunction. In sharp contrast, if that private party sues a governmental entity as a "private attorney general," its burden is reduced considerably to the two-factor test of *LeClair*. To date, the SJC does not appear to have addressed specifically this tension between the two lines of cases.

III. THE FEDERAL COURTS

A. Overview

The first case of any substance in the United States Supreme Court involved a preliminary injunction. In *Georgia v. Brailsford*,⁸⁶ Georgia invoked the original jurisdiction of the Supreme Court to enjoin temporarily the execution of a money judgment previously entered by the United States Circuit Court⁸⁷ for the District of Georgia. In that prior suit, Brailsford and others, who were British subjects, recovered the judgment based on a debt owed them by a citizen of Georgia.⁸⁸

In 1782, Georgia enacted a law that confiscated all debts owed to British subjects, making the state the beneficiary of such obligations.⁸⁹ The debt to British subjects was largely a product of the Revolutionary War. During the pendency of the earlier private suit in the Federal Circuit Court between the American debtors and the British creditors, Georgia sought to intervene to assert its rights under the confiscation law.⁹⁰ When the federal judge denied the intervention motion,⁹¹ Georgia

86. 2 U.S. (2 Dall.) 402 (1792) (the caption in the official report misspelled the defendant's name as "Braislford"). The Court decided *Brailsford* six months before the celebrated case of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (involving state sovereign immunity).

87. From 1789 until 1911, two federal courts had trial responsibilities: the district court and the circuit court, which, except for one year between 1801 and 1802, did not have its own judges. RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 21-22, 28-30 (6th ed. 2009).

88. *Brailsford*, 2 U.S. (2 Dall.) at 404.

89. *Id.* at 402-03.

90. *Id.* at 404.

instituted an original suit against Brailsford and other British creditors in the Supreme Court of the United States.⁹²

To protect its asserted right to the money judgment pending a decision on the merits in the Supreme Court, Georgia moved for a temporary injunction to stay the proceedings in the circuit court and to restrain the marshal from paying over to the Brailsford plaintiffs any of the proceeds on the judgment.⁹³ In a 4-2 decision,⁹⁴ including Justice Iredell,⁹⁵ the Court granted the injunction pending disposition of the case on the merits.⁹⁶ Because each of the Justices stated his views in seriatim opinions (a practice that did not last long in the Court), it is difficult to articulate a holding in the case. Justices Cushing and Johnson⁹⁷ dissented on the grounds that Georgia had an adequate remedy at law,⁹⁸ a defense to equity suits mandated by Section 16 of the Judiciary Act of 1789.⁹⁹

At the next term of the Court in 1793, the defendants moved to dissolve the injunction on alternative grounds: (1) the State of Georgia had no remedy at all; and (2) even if it did, Section 16 barred the injunction because of the adequacy of the legal remedy.¹⁰⁰ With Justice Johnson not sitting, the Court denied the motion to dissolve.¹⁰¹ In a three-sentence opinion, Chief Justice Jay held that, even though the

91. *Id.*

92. *Id.*

93. *Id.* at 405.

94. In 1792, the Court had five associate Justices and the Chief Justice.

95. Although Justice Iredell sat in the Circuit Court in the suit between Brailsford and Spaulding, he nonetheless rendered an opinion which he stated was “detached from every previous consideration of the merits of the cause.” *Brailsford*, 2 U.S. (2 Dall.) at 406. Section 47 of Title 28 arguably forbids such a practice today: “No judge shall hear or determine an appeal from the decision of a case or issue tried by him.” 28 U.S.C. § 47 (2006).

96. *Brailsford*, 2 U.S. (2 Dall.) at 406-09.

97. *Id.* at 405, 408 (Cushing, J. & Johnson, J., dissenting). Many years later, lower federal courts, with or without citation, quoted or paraphrased Justice Johnson’s statement in dissent: “In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the court.” *Id.*; e.g., *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (citing *Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969)).

98. *Brailsford*, 2 U.S. (2 Dall.) at 405, 408.

99. Section 16 provided “[t]hat 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 may be had at law.” 1 Stat. 73 (1789). In 1948 when Congress revised the Judicial Code, it eliminated this provision. See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216 (1948).

100. *Brailsford*, 2 U.S. (2 Dall.) at 415.

101. *Id.* at 419. In his separate opinion, Justice Blair identified apprehension that Brailsford, a British subject, would take the money and run (to England) as the factor animating the issuance of the original injunction. *Id.* at 418.

plaintiff had an adequate remedy at law, the injunction would continue because “the money ought to be kept [under the control of the Court] for the party to whom it belongs.”¹⁰² He did not identify any standards to govern the issuance or continuation of preliminary injunctions.

In denying the defendants’ motion to dissolve the temporary injunction, the Court conditioned the continuance of the injunction upon Georgia commencing its action at law before the next term of the Court.¹⁰³ The following year in 1794, the Supreme Court conducted a jury trial in *Georgia v. Brailsford* on the plaintiff’s claim under the Georgia confiscation statute.¹⁰⁴ When the jury returned a verdict for the defendants, the British creditors, the Court dissolved the temporary injunction.¹⁰⁵

Since the 1792 decision in *Georgia v. Brailsford*,¹⁰⁶ the federal courts have struggled with the standards to be applied to requests for temporary injunctive relief. Until its 2008 decision in *Winter v. Natural Resources Defense Council*,¹⁰⁷ the Supreme Court had not definitively stated the criteria for the issuance of preliminary injunctions. For the most part, it had left the matter to the courts of appeals, which developed a variety of standards.¹⁰⁸

English equity practice provided some guideposts in the nineteenth century. At least as early as 1792, the Supreme Court by rule stated that English equity practice would guide its proceedings.¹⁰⁹ Under the Federal Equity Rules in effect from 1822 to 1912, the Supreme Court directed the lower federal courts to employ the “practice of the High Court of Chancery in England” to fill gaps in the law governing federal equity jurisdiction.¹¹⁰ In several nineteenth century decisions, the Court absorbed the principles of the English Chancery into federal law.¹¹¹

The Equity Rules of 1912 did not have a comparable reference to

102. *Id.* at 418-19.

103. *Id.* at 419.

104. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794).

105. *Id.* at 5.

106. *Brailsford*, 2 U.S. (2 Dall.) 402 (1792).

107. *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

108. *See generally* Wolf, *supra* note 13, at 173.

109. *Brailsford*, 2 U.S. (2 Dall.) at 411-14. Fifty years later, Supreme Court Reporter Benjamin C. Howard reported that rule, in slightly different form, as having been promulgated a year earlier on August 8, 1791. 42 U.S. (1 How.) xxiv (1842).

110. *See* Rule 33, 20 U.S. (7 Wheat.) vii, xiii (1822); Rule 90, 42 U.S. (1 How.) xxxix, lxxix (1842).

111. *See, e.g.*, *Penn. v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 563-64 (1856); *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222-23 (1818).

the English law of equity.¹¹² Much more recently, though, the Court, in 2008, restated the proposition that the law of equity, including preliminary injunctions, in the federal courts is guided by the equitable principles extant in England.¹¹³ Sometimes it has referred specifically to the English High Court of Chancery at the time of the ratification of the Constitution in 1788 and the passage of the Judiciary Act in 1789.¹¹⁴ Notwithstanding the references to English equity, the federal courts soon began developing their own criteria to govern motions for interlocutory injunctions.

In their quest for appropriate standards, the Supreme Court and the courts of appeals have not followed consistent paths through the maze of interlocutory relief. The federal appellate courts have not been especially attentive to Supreme Court decisions, and the Court itself has not been especially attentive to the need for uniform criteria.

B. *Supreme Court Decisions*

Prior to the 2008 decision in *Winter v. Natural Resources Defense Council*,¹¹⁵ the opinions of the Supreme Court regarding the standards for issuing preliminary injunctions could be described as inattentive. Although the Court has reviewed many orders granting or denying preliminary injunctions,¹¹⁶ it has not established hard and fast rules regarding their issuance. On the occasions when the court has addressed the criteria, it has done so somewhat casually and largely without regard for the varying standards followed by the lower federal courts and indeed by the Court itself. Furthermore, the Court has not used its prior precedents regularly in developing standards. This casualness perhaps accounts for the reality that the lower federal courts, prior to *Winter*, have barely given nodding recognition to the Supreme Court opinions regarding interlocutory injunctions. At best, the Supreme Court precedents have served as points of departure for federal appellate decisions, which quickly move in other directions.

1. Early Precedents

After the 1792 decision in *Brailsford*, the Supreme Court said very

112. 226 U.S. 629 (1912).

113. *Munaf v. Geren*, 553 U.S. 674, 691 (2008).

114. *Grupo Mexico de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

115. 555 U.S. 7 (2008).

116. In the past 15 years, the Supreme Court has reviewed over 100 civil actions involving preliminary injunctions. It has explored the parameters of the standards for such relief in only seven of them.

little about the standards for preliminary injunctions¹¹⁷ until 1882, when the Court broke its 90-year silence. In *Russell v. Farley*, the Court in *dictum* commented on the criteria for issuing temporary injunctions.¹¹⁸ It noted that a federal court might order interim relief even if the movant's claim is legally in doubt.¹¹⁹ Where the movant's legal right is doubtful, she may still secure a temporary injunction by showing that she will suffer greater harm if the injunction is denied than the opposing party will suffer if it is granted.¹²⁰

In support of this legal proposition, the Court cited *Injunctions in Equity* (1871), a popular treatise by William W. Kerr, a British lawyer.¹²¹ The treatise largely examined English precedents on which the Supreme Court relied in the nineteenth century.¹²² Indeed the Supreme Court still relies on English equity practice,¹²³ including principles extant at the time of the adoption of the Constitution in 1788 and the enactment of the first Judiciary Act in 1789.¹²⁴

Although the statement in *Russell* was *dictum*, it appears to reflect accurately then current standards for preliminary injunctions.¹²⁵ That is,

117. In several cases, the Court, without discussing applicable standards, approved the issuance of temporary injunctions, as in *Brailsford*, to preserve property until an action at law could settle the dispute on the merits, e.g., *King v. Hamilton*, 29 U.S. (4 Pet.) 311 (1830); *Parker v. Judges of the Circuit Court of Md.*, 25 U.S. (12 Wheat.) 561 (1827); or to restrain execution of a judgment at law pending resolution of an equitable defense, e.g., *Horsburg v. Baker*, 26 U.S. (1 Pet.) 232 (1828). In *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 67 U.S. (2 Bl.) 545, 552 (1863), a case involving a permanent or "perpetual" injunction, the Court stated in *dictum* that the party seeking preliminary relief to preserve property pending trial of a civil action at law would have to show "a strong *prima facie* case of right" and irreparable injury.

118. *Russell v. Farley*, 105 U.S. 433, 439 (1881).

119. *Id.* at 438 (nothing that the court is reluctant to take a course which may injure either party when the claim is legally doubtful).

120. *Id.*

121. *Id.* at 438-39.

122. At least as early as 1792, the Supreme Court by rule stated that English equity practice would guide its proceedings. See *Case of Hayburn*, 2 U.S. (2 Dall.) 409 (1792). Under the Federal Equity Rules in effect from 1822 to 1912, the Supreme Court directed the lower federal courts to employ the "practice of the High Court of Chancery in England" to fill gaps in the law governing federal equity jurisdiction. See *Rule 33*, 20 U.S. (7 Wheat.) v, xiii (1822); *Rule 90*, 42 U.S. (1 How.) xxxix, lxix (1842). The equity rules of 1912 did not have a comparable rule. 226 U.S. 629 (1912).

123. See *Munaf v. Geren*, 553 U.S. 674, 691 (2008) (applying England's practice as a reason for its ruling in another case).

124. See *Grupo Mexico de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

125. See J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 13 (Chicago, Callaghan & Co. 1873); CHARLES F. BEACH JR., COMMENTARIES ON THE LAW OF INJUNCTIONS § 20 (n.p. 1894); see generally John Leubsdorf, *The Standards for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV.

if the movant could demonstrate a clear legal right, “plain and free from doubt,”¹²⁶ the injunction would issue. In the alternative, if the legal right were in doubt, then the movant would have to show a balance of hardships in her favor.¹²⁷ The Kerr treatise, however, also reflected a second alternative standard for preliminary relief: (1) a showing of a *prima facie* case; and (2) a showing of irreparable injury, that is, an injury that cannot be remedied with money damages.¹²⁸ Neither *Russell* nor other Supreme Court precedents in the nineteenth century reflected this second alternative test for issuance of preliminary injunctions.

The application of the second alternative test emerged definitively in the early part of the twentieth century in the wake of *Ex parte Young*.¹²⁹ The *Young* decision restated the view that state officials could be sued to enjoin enforcement of state statutes without violating state sovereign immunity from suit in federal court embodied in the Eleventh amendment.¹³⁰ That decision animated a number of suits challenging state regulatory statutes as violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹³¹

In the wake of the *Young* decision, Congress enacted the three-judge court statute, which sought to prevent a single federal judge from enjoining state regulatory statutes.¹³² Because decisions granting or denying preliminary injunctions were appealable directly to the Supreme Court, the high tribunal had numerous opportunities to review the standards for interlocutory relief.

In the *Young* case, as well as in the decisions following it, the Supreme Court held that preliminary injunctions should not issue to restrain the enforcement of state statutes unless the case was “reasonably free from doubt” and only to prevent “great and irreparable injury.”¹³³

994 (1965).

126. WILLIAM W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 220 (Boston, Little, Brown, & Co. 1871); *see also* *Phoenix Ry. Co. v. Geary*, 239 U.S. 277 (1915) (stating that to enjoin preliminarily the operation of a state statute, the plaintiff must show a clear constitutional violation).

127. *See* KERR, *supra* note 126 at 221-22.

128. *Id.* at 208. *See generally* Leubsdorf, *supra* note 125 at 530-31.

129. *Ex Parte Young*, 209 U.S. 123 (1908).

130. *Id.* at 159-60.

131. *See* ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 7.5.1 (Aspen 6th ed. 2012); *see also* WRIGHT AND KANE, LAW OF FEDERAL COURTS § 48 (West 7th ed. 2011).

132. Act of June 18, 1910, Pub. L. No. 218, § 17, 36 Stat. 539, 557 (1910). In 1976 Congress largely repealed the three-judge district court statute.

133. *Young*, 209 U.S. at 166-67; *accord*, *Mass. State Grange v. Benton*, 272 U.S. 525, 527 (1926) (citing *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)); *see* *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 5 (1928); *see also* *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316-19 (1940).

Although it appeared by the early 1920's that the Court had settled on these standards, it still exhibited some variation in its application. In 1923, relying on the Kerr treatise¹³⁴ once again, the Supreme Court, in a challenge to a state rate-making order, upheld a preliminary injunction because a balancing of the hardships favored the plaintiff and because the moving party had posted a sufficient bond.¹³⁵

As the Court moved further into the twentieth century, it appeared to be drawing a distinction between private cases and public cases. That is, the Court would apply a stricter set of criteria for preliminary relief when the plaintiff sought to enjoin governmental (state or federal) action than when the litigation involved only private interests and private parties.¹³⁶ The SJC has adopted this distinction in its decisions as well although not with consistent standards.¹³⁷

In succeeding years, the Supreme Court continued its meandering course through various tests and criteria, which, singularly or in combination, could have formed the basis for a consistent standard for issuing preliminary injunctions. In 1939, for example, the Court emphasized, apparently for the first time, the need to evaluate the impact of a preliminary injunction on the public interest where the plaintiff seeks to enjoin an order of a federal agency.¹³⁸ That same year, in a case challenging the validity of a state statute, the Court identified three prerequisites for injunctive relief: grave doubts as to the constitutionality of the statute; irreparable harm to the movant; and posting of a bond.¹³⁹ It did not discuss the balancing of hardships or the public interest factors noted in earlier cases.

134. KERR, *supra* note 126.

135. *Prendergast v. New York Tel. Co.*, 262 U.S. 43 (1923). In 1934, Congress enacted the Johnson Act to prevent the federal courts from unduly interfering in state rate-making. *See* 28 U.S.C. § 1342 (2006). In 1937, Congress enacted the Tax Injunction Act to prevent the federal courts from unduly interfering in state tax collection. *See* 28 U.S.C. § 1341 (2006); *see also* *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

136. *Compare Young*, 209 U.S. at 123 (suit to enjoin state action) *with* *Rice & Adams Corp. v. Lathrop*, 278 U.S. 509 (1929) (private suit to enjoin patent infringement).

137. *See infra* Part II.C (discussing the "public interest" as a factor in preliminary relief).

138. *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939). Two years earlier, the Court had noted the relevance of the public interest in granting or withholding *permanent* injunctive relief. *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937).

139. *Gibbs v. Buck*, 307 U.S. 66, 76-77, 94 (1939). *See Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 318-19 (1940) (the Court in *Mayo* appeared to adopt two different sets of criteria: one would allow a preliminary injunction if the movant showed irreparable injury and raised "serious questions" regarding the constitutionality of the challenged statute, while the other would require "a clear and persuasive showing of unconstitutionality and irreparable injury").

2. Contemporary Standards

Until its November 2008 decision in *Winter v. Natural Resources Defense Council*,¹⁴⁰ the Supreme Court, in recent years, has not done much better to articulate consistent standards for the issuance of preliminary injunctions. It provided very little guidance to the lower federal courts through the adoption of consistent and uniform standards for the issuance of preliminary injunctions. For example, over a period of fifteen years, the Court had numerous opportunities to clarify the standards for preliminary relief, but it failed to do so.¹⁴¹

Between 1973 and 1975, for example, the Court discussed the criteria for interlocutory relief in at least four different ways. In *Brown v. Chote*,¹⁴² the Court identified a two-factor test: the moving party must show (1) the “possibilities” of success on the merits; and (2) the “possibility” of irreparable injury if the relief is denied.¹⁴³

The following year, the Court repeated the two-factor test, but phrased it as a “likelihood of success on the merits,” and a “likelihood of irreparable injury,”¹⁴⁴ not simply the “possibility.”¹⁴⁵ At its next term, the Court added a third factor to the test for preliminary relief, but did not apply it to the pending case. In addition to showing a likelihood of success on the merits and irreparable injury, the trial court must also “weigh carefully the interests on both sides.”¹⁴⁶ In these three cases, the Court said nothing about the public interest.

In the fourth case in this span of three years, the Supreme Court referred to the public interest factor, which it had earlier mentioned as an element in evaluating the need for preliminary injunctions.¹⁴⁷ In *Sampson v. Murray*, a probationary employee, who had been dismissed from her job with a federal agency, successfully secured preliminary relief from the district court pending a hearing before the Civil Service

140. 555 U.S. 7 (2008).

141. Between 1994 and 2009, the Supreme Court reviewed over 100 civil actions in this span of 15 years, which involved varying standards for preliminary injunctions, discussing the appropriate standards for temporary injunctive relief in only seven of them. *Winter* settled the matter.

142. 411 U.S. 452 (1973); *cf.* *Withrow v. Larkin*, 421 U.S. 35, 45 (1975) (applying the same two factors, although phrasing one as a “high” probability of success on the merits).

143. *Brown*, 411 U.S. at 456.

144. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 441 (1974).

145. In *Winter*, 555 U.S. at 22, the Court expressly rejected the “possibility” standard as “too lenient,” holding that the correct standard is “likelihood” of success on the merits.

146. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

147. *Sampson v. Murray*, 415 U.S. 61 (1974); *see* *Yakus v. United States*, 321 U.S. 414, 441-42 (1944); *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939); *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937).

Commission.¹⁴⁸

In *Sampson*, the Court assumed the vitality of and apparently adopted the four-factor test that the Court of Appeals for the District of Columbia Circuit developed in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*:¹⁴⁹ (1) the moving party must make a strong showing of likely success on the merits; (2) the petitioner must demonstrate that, in the absence of the injunction, she will suffer irreparable injury; (3) the movant must show that other parties interested in the proceeding will not be substantially harmed by the injunction; and (4) the public interest must be evaluated.¹⁵⁰ Because the case involved a government personnel decision, the Court rejected the routine application of these four factors on a motion for a preliminary injunction, holding that such criteria, especially irreparable injury, must be applied more stringently.¹⁵¹ Despite the Supreme Court's reference to the four-factor test in *Sampson*, the courts of appeals continued to go their own ways.¹⁵²

3. The *Winter* Decision

In *Winter v. Natural Resources Defense Council, Inc.*, the Court finally focused on the criteria for the grant or denial of preliminary injunctions.¹⁵³ There, the Natural Resources Defense Council sued to enjoin the United States Navy from using “mid-frequency active sonar” in the waters off Southern California.¹⁵⁴ It alleged that such sonar caused serious harm to some species of marine mammals.¹⁵⁵ Using a “sliding scale” approach it had used for many years, the Ninth Circuit Court of Appeals affirmed the grant of preliminary relief, ruling that the plaintiff had made a strong showing on the likelihood of prevailing on the merits and a “possibility” of irreparable harm.¹⁵⁶

148. *Sampson*, 415 U.S. at 63.

149. 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

150. *Sampson*, 415 U.S. at 84 n.53.

151. *Id.* at 88-92.

152. See generally Wolf, *supra* note 13.

153. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22-23 (2008).

154. *Id.* at 13-14.

155. *Id.*

156. *Id.* at 19-20. The Ninth Circuit Court of Appeals never referred to *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 441 (1974) or other prior Supreme Court precedents that used the word “likelihood” rather than “possibility” to define the level of showing needed to secure the preliminary injunction. This is another example of a lower federal court ignoring precedents because the Court itself, until recently, had not paid detailed and studious attention to the matter.

The Supreme Court reversed the ruling of the Court of Appeals.¹⁵⁷ First, it noted that a temporary injunction is “an extraordinary remedy never awarded as of right.”¹⁵⁸ Second, the Court added that a trial court should grant preliminary relief only upon a “clear showing” that the moving party is entitled to it.¹⁵⁹ Third, the Court identified the four factors the trial court must consider in evaluating requests for temporary injunctions.¹⁶⁰ It ruled that the moving party “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”¹⁶¹ Although the Court cited prior decisions¹⁶² for this four-factor test, in fact it had never expressly and clearly so ruled in unmistakable language prior to its decision in *Winter*. At least the lower federal courts did not think so.¹⁶³

The Court then addressed the question whether it should affirm the issuance of the preliminary injunction. First, it noted that the appellate court had incorrectly required only a showing of “possible” irreparable injury, which the Court noted is “too lenient.”¹⁶⁴ The correct standard is “likelihood” of irreparable injury. It then ruled that the plaintiff had not demonstrated the public interest would not be adversely affected.¹⁶⁵ In fact, the Court observed, the national defense would be seriously impaired, and courts should defer to the military’s assessment of the dangers to the public interest if the injunction is granted.¹⁶⁶

When the non-moving party defendant is a government, the inquiry into the harm to that party and the harm to the public interest is the same inquiry because the government represents the public interest.¹⁶⁷ Finally, the Court declined to rule on the likelihood of success factor as

157. *Winter*, 555 U.S. at 33.

158. *Id.* at 24.

159. *Id.*

160. *Id.* at 22.

161. *Id.* at 20.

162. The Court cited *Munaf v. Geren*, 128 S. Ct. 2207 (2008), *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987), and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982).

163. See generally Wolf, *supra* note 13.

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

165. *Id.* at 26-27.

166. *Id.* at 27.

167. *Id.* at 26-31. Cf. *Nken v. Holder*, 129 S. Ct. 1749, 1761-62 (2009) (ruling on an application for a stay pending appeal, the Court noted that the four “stay” factors are nearly identical to the four criteria for preliminary injunctions, and the harm to the non-movant and the public interest factors “merge when the Government is the opposing party”). This author recommended such a merger 26 years ago. See generally Wolf, *supra* note 13.

unnecessary because the plaintiff had failed to satisfy the other factors. Whether the Court will apply this four-factor analysis, including the public interest criterion, when none of the parties to the litigation is a governmental entity remains to be seen, although the lower federal courts have done so in the wake of *Winter*.¹⁶⁸

The *Winter* decision has already impacted the standards for granting preliminary injunctions applied in the lower federal courts, unlike prior Supreme Court decisions which seemed to have had little effect on the development of the standards for temporary relief. For example, the Ninth Circuit Court of Appeals began applying *Winter* immediately, notwithstanding its prior criteria. “To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.”¹⁶⁹ Prior to *Winter*, the Ninth Circuit allowed the grant of a preliminary injunction if the plaintiff demonstrated either:

(1) [A] likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor. These two alternatives represent extremes of a single continuum, rather than two separate tests. Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown.¹⁷⁰

Winter dramatically altered these previous standards in the Ninth Circuit and elsewhere.¹⁷¹ Its full impact on the standards for granting or denying preliminary injunctions is not yet fully known, but the handwriting is clearly on the wall.

Finally, the Supreme Court in *Winter* suggested that a moving party may have to make a heightened showing if that party is seeking an

168. See, e.g., cases cited *infra* note 171.

169. *Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). *Accord* *South Fork Band Council v. U.S. Dep't of Interior*, 588 F.3d 718, 721 (9th Cir. 2009); *Reed v. Town of Gilbert*, 587 F.3d 966, 973-74 (9th Cir. 2009).

170. *Stormans, Inc. v. Selecky*, 571 F.3d 960, 977 (9th Cir. 2009), *vacated*, 586 F.3d 1109 (9th Cir. 2009)

171. See *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (applying the four *Winter* factors); *Real Truth About Obama v. FEC*, 575 F.3d 342, 346-47 (4th Cir. 2009) (stating *Winter* overrules prior Circuit precedents); *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1375 (Fed. Cir. 2009) (applying *Winter*'s four-factor analysis, observing it is the “longstanding and universal” test); *Attorney Gen. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (applying the four *Winter* factors); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (same). Cf. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (following the four-factor test in *Winter*, but stating the Court did not expressly reject prior circuit precedents applying a “sliding scale” standard).

affirmative (or mandatory) preliminary injunction as compared to a prohibitory injunction.¹⁷² Federal courts of appeals have read the decision in that fashion.¹⁷³ In 2000, the Second Circuit Court of Appeals had ruled that the test is “more vigorous” for an affirmative injunction, requiring the moving party to demonstrate “a clear and substantial” likelihood of succeeding on the merits.¹⁷⁴ Although the First Circuit has not yet, in the wake of *Winter*, addressed the question whether heightened standards apply to affirmative preliminary injunctions, it has ruled that temporary mandatory relief may be necessary to protect the status quo and prevent irreparable injury until a trial on the merits.¹⁷⁵

The affirmative injunction is usually in the form of “thou shalt,” while the prohibitory injunction takes the form of “thou shalt not.” The line is not always clear between the two forms of injunctions. Through the use of the “double negative” order, a court will sometimes enter an injunction that looks like a prohibitory injunction but in fact is an affirmative (or mandatory) injunction: “The defendant is hereby enjoined from failing or refusing to remove the tool shed that trespasses upon plaintiff’s property,” or “the defendant is hereby enjoined from failing or refusing to sell its product to the plaintiff on the same terms and conditions as it sells that product to plaintiff’s competitors.”

C. *First Circuit Court of Appeals*¹⁷⁶

1. Overview

Historically, the United States courts of appeals have differed widely in their approaches to preliminary relief.¹⁷⁷ The First Circuit is not an exception. While there is some cross-pollination between and among the courts of appeals, they essentially have developed their own

172. *Winter*, 555 U.S. at 24.

173. See *Tyson Foods, Inc.*, 565 F.3d 769; *RoDa Drilling Co.*, 552 F.3d 1203; see also *Tunick v. Safir*, 209 F.3d 67 (2d Cir. 2000).

174. *Tunick*, 209 F.3d at 85.

175. *Crowley v. Local No. 82 Furniture and Piano Moving*, 679 F.2d 978 (1st Cir. 1982), *rev’d on other grounds*, 467 U.S. 526 (1984).

176. Congress created this court in 1891 when it established nine circuit courts of appeals. 26 Stat. 826 (1891) (commonly referred to as the Evarts Act or the Circuit Court of Appeals Act of 1891). In 1948, Congress changed the official name of the court from the “Circuit Court of Appeals” to the “Court of Appeals.” 28 U.S.C. § 43(a) (2006). It is not technically correct to refer to a Court of Appeals as the “Circuit Court” (formerly a federal court with original and appellate jurisdiction, which Congress abolished in 1911) or as the “Circuit Court of Appeals,” which Congress abolished in 1948 when it changed the name of the court.

177. See generally Wolf, *supra* note 13.

criteria. Their decisions have largely been characterized by inconsistent articulation and application of standards.

Before the Supreme Court's November 2008 decision in *Winter v. Natural Resources Defense Council*,¹⁷⁸ the federal appellate courts had used at least nine different tests, excluding variations, for interlocutory relief.¹⁷⁹ Other than an *en banc* decision in the Eighth Circuit,¹⁸⁰ no federal appellate court has convened specifically to reconcile these differences.

Furthermore, while the federal courts have developed various criteria based on their inherent judicial powers, they have also recognized special criteria for certain statutory and constitutional claims, creating additional confusion in the search for uniform standards.¹⁸¹ In addition, while the federal appellate courts have not been especially attentive to Supreme Court precedents involving interlocutory injunctions, the First Circuit has, on occasion, cited to and even relied on Supreme Court decisions.¹⁸²

2. Traditional Standards

In one of its early cases over seventy years ago,¹⁸³ the First Circuit, contrary to other courts of appeals, followed the decision of the Supreme Court in *Ohio Oil Co. v. Conway*.¹⁸⁴ In *Munoz v. Porto Rico Ry. Light & Power Co.*, the court, relying on *Conway*, held that the plaintiff could secure preliminary relief if it raised serious questions going to the merits, and if the balance of hardships tipped toward the moving party.¹⁸⁵ In

178. *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

179. See generally Wolf, *supra* note 13.

180. See *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 112 (8th Cir. 1981) (*en banc*).

181. See, e.g., *Sampson v. Murray*, 415 U.S. 61 (1974) (federal employment matters); *V.N.A. of Greater Tift County, Inc. v. Heckler*, 711 F.2d 1020 (11th Cir. 1983) (Medicare reimbursement payments), *cert. denied*, 466 U.S. 936 (1984); *Corbin v. Texaco, Inc.*, 690 F.2d 104 (6th Cir. 1982) (petroleum marketing practices); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) (First Amendment claim); *Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. 1981) (employment discrimination); *Atchison, T. & S.F. Ry. Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981) (*per curiam*) (state taxation of railroads).

182. See, e.g., *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 823-25 (1st Cir. 1979) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)); *Celebrity, Inc. v. Trina, Inc.*, 264 F.2d 956 (1st Cir. 1959) (citing *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929) (*per curiam*)).

183. *Munoz v. Porto Rico Ry. Light & Power Co.*, 83 F.2d 262, 268 (1st Cir. 1936).

184. *Conway*, 279 U.S. 813 (*per curiam*); see also *Celebrity*, 264 F.2d at 958 (relying on *Conway* for the proposition that the moving party must show irreparable injury to secure a preliminary injunction); *Hannan v. City of Haverhill*, 120 F.2d 87, 90 (1st Cir. 1941) (same).

185. *Munoz*, 83 F.2d at 269.

addition the court stated that posting a bond would be a useful device to prevent injury if the harm to the nonmoving party were more than "inconsiderable."¹⁸⁶ By the late 1960s, however, the court had moved to a two-factor analysis for interim relief: likelihood of success on the merits and immediate irreparable injury,¹⁸⁷ ignoring its earlier view expressed in *Munoz*.¹⁸⁸

In the 1970's, the First Circuit expanded its test for preliminary relief by adding two other elements: (1) a balancing of the hardships to the parties,¹⁸⁹ and (2) a public interest factor.¹⁹⁰ Thus by the end of 1978, the First Circuit Court of Appeals had adopted a full-blown four-factor test for interlocutory injunctions.¹⁹¹ But the apparent adoption of the four-factor approach in 1978 did not result in consistent application of it.

In 1979, the First Circuit applied a three-factor analysis, relying on a Supreme Court case decided in 1975.¹⁹² Two years later the court

186. *Id.*

187. *See, e.g., Automatic Radio Mfg. Co., Inc. v. Ford Motor Co.*, 390 F.2d 113, 116 (1st Cir. 1968), *cert. denied*, 391 U.S. 914 (1968); *accord Interco, Inc. v. First Nat'l Bank of Boston*, 560 F.2d 480, 482 (1st Cir. 1977); *Keefe v. Geanakos*, 418 F.2d 359, 360-61 (1st Cir. 1969). In the *Automatic Radio* case, the court also suggested a sliding scale approach: a "strong" showing of probability of success might lessen the burden on the movant to demonstrate irreparable injury. *Automatic Radio*, 390 F.2d at 116. In a footnote, the court also referred offhandedly to the public interest. *Id.* at 116 n.4.

188. 83 F.2d 262 (1st Cir. 1936).

189. *See, e.g., SEC v. World Radio Mission, Inc.*, 544 F.2d 535, 541-42 (1st Cir. 1976); *Int'l Ass'n of Machinist & Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 553-54 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1972). In the *SEC* case, the court also suggested a sliding scale approach indicated in *Automatic Radio* without citing to it. 544 F.2d at 546. With regard to the balancing factor, the court has usually required only that the weighing of hardships favors the moving party. In at least one instance, however, it has declined to allow a preliminary injunction because the movant failed to show that the balance "tips sufficiently" in her direction. *Burgess v. Affleck*, 683 F.2d 596, 601 (1st Cir. 1982). Although the First Circuit had used a balancing test in earlier decisions, it made no reference to them in these cases.

190. *Grimard v. Carlston*, 567 F.2d 1171, 1173 (1st Cir. 1978). Although the First Circuit in recent years has generally adhered to the four criteria approach for interlocutory relief, it has on occasion omitted any reference to the public interest factor. *E.g., Doe v. Brookline Sch. Comm.*, 722 F.2d 910 (1st Cir. 1983); *Rushia v. Town of Ashburnham*, 701 F.2d 7 (1st Cir. 1983); *Mass. Ass'n of Older Ams. v. Sharp*, 700 F.2d 749 (1st Cir. 1983); *see also Nat'l Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819 (1st Cir. 1979).

191. *Levesque v. Maine*, 587 F.2d 78, 80 (1st Cir. 1978).

192. *Nat'l Tank Truck Carriers, Inc.*, 608 F.2d at 823-25 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)); *see also Engine Specialties, Inc. v. Bombardier, Ltd.*, 454 F.2d 527, 530-31 (1st Cir. 1972). Without clearly articulating any standards, the court apparently applied three factors for interim relief: likelihood of success on the merits, irreparable harm, and balance of hardships. *Bombardier*, 454 F.2d at 530-31. While relying on *Doran* in *Burke*, the court of appeals ignored *Doran* the previous year when it announced the four-factor test discussed above, and in 1981, the court read *Doran* as imposing a two-factor analysis. *Maceira v. Pagan*, 649 F.2d 8, 15 (1st Cir. 1981). In 1983, however, it interpreted

restated and applied the four-factor approach in the leading case of *Planned Parenthood League of Massachusetts v. Bellotti*.¹⁹³ Within three months of *Bellotti*, however, the First Circuit reverted momentarily to its earlier two-factor analysis (irreparable injury and probable success on the merits).¹⁹⁴ But within two weeks, it returned to the four-factor analysis of *Bellotti*.¹⁹⁵

Although the Court of Appeals in *Bellotti* did not discuss any of its prior suggestions regarding the “sliding scale” modification of the four-factor test, it did address that question three months later in *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*.¹⁹⁶ After reaffirming the four elements of its newly restated standards for interim relief,¹⁹⁷ the court addressed the assertion that a sliding scale should be applied to that analysis.¹⁹⁸ Relying on the decision of the Fourth Circuit in the *Blackwelder* case,¹⁹⁹ the First

Doran again to require a three criteria approach. *Rushia v. Town of Ashburnham*, 701 F.2d 7, 9-10 (1st Cir. 1983).

193. 641 F.2d 1006 (1st Cir. 1981). In fact, the court quoted from a 1979 district court decision that purported to recite the four elements recognized in the First Circuit. *Id.* at 1009 (quoting *Women’s Cmty. Health Ctr. Inc. v. Cohen*, 477 F. Supp. 542, 544 (D. Me. 1979)). The court did not seek to synthesize or rely on its own prior decisions, nor those of the Supreme Court. In addition, the court made no reference to its prior suggestions regarding the sliding scale approach.

194. *Maceira*, 649 F.2d at 8. Interestingly, in this case, the court cited the *Doran* opinion as supporting the two-factor approach, even though it had cited *Doran* two years earlier for the three-factor test in *Nat’l Tank Truck*, 649 F.2d at 15; *see also Doe*, 722 F.2d 910 (applying a two-factor analysis, although it may be linked to the statutory remedy involved in that case).

195. *Mass. Coalition of Citizens with Disabilities v. Civil Def. Agency*, 649 F.2d 71, 74-76 (1st Cir. 1981). While generally requiring the moving party to satisfy each of the four elements, *id.*, the court has deviated, as the text indicates, from a strict application of that rule. In one case, it even waived proof on two of the four factors when the court ruled on the legal contentions of the parties, notwithstanding many prior statements to the contrary that the merits are not to be addressed on a motion for preliminary relief. *Wald v. Regan*, 708 F.2d 794, 801 (1st Cir. 1983), *rev’d on other grounds*, 468 U.S. 222 (1984). In reversing the judgment of the First Circuit, the Supreme Court did not mention the unorthodox reaching of the merits on motion for an interlocutory injunction, perhaps because the Court itself has done that on occasion, *see Munaf v. Geren*, 553 U.S. 674 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), despite its warnings to the contrary in, for example, *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940). *See also* *University of Texas v. Camenisch*, 451 U.S. 390 (1981). As noted earlier, nineteenth Century English and American practice authorized the issuance of a temporary injunction if the moving party showed a “clear title or right.” *Wald* and *Sawyer* are reminiscent of that earlier doctrine, as is *American Eutectic Welding Alloys Sales Co., Inc. v. Rodriguez*, 480 F.2d 223 (1st Cir. 1973).

196. 649 F.2d at 74 (1st Cir. 1981). Although the court restated the four-factor analysis of *Bellotti*, it failed to cite that case, relying on earlier, less explicit precedents.

197. *Id.*

198. *Id.* at 75.

199. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189

Circuit held that the irreparable injury and probable success factors bear an inverse relationship.²⁰⁰ A greater showing on one reduces the showing necessary on the other. In *Massachusetts Coalition*, the court found that the plaintiff had shown only a “possible” injury, necessitating an examination of “likelihood of success” to determine if the showing was strong enough to compensate for the weaker showing on irreparable injury.²⁰¹

Despite its earlier suggestions regarding the sliding scale approach²⁰² and despite its holding in *Massachusetts Coalition*, the First Circuit has rarely mentioned the concept since 1978.²⁰³ Indeed in numerous cases, the court, in reviewing applications for interim relief, has made no reference at all to the sliding scale variation.²⁰⁴ Furthermore, in other cases, it has implicitly rejected the sliding scale analysis by affirming a denial of interim relief because the movant had failed to show either irreparable injury,²⁰⁵ probable success on the merits,²⁰⁶ or both.²⁰⁷

(4th Cir. 1977). In light of the Supreme Court’s decision in *Winter* the Fourth Circuit has abandoned its “sliding scale” approach. *Real Truth About Obama v. FEC*, 575 F.3d 342 (4th Cir. 2009). *But cf.* *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288 (D.C. Cir. 2009) (following the four-factor test in *Winter*, but stating the Court did not expressly reject prior Circuit precedents applying a “sliding scale” standard).

200. *Mass. Coalition of Citizens with Disabilities*, 649 F.2d at 75.

201. *Id.*

202. *See supra* notes 191-198 and accompanying text.

203. *See* *Mass. Ass’n of Older Ams. v. Sharp*, 700 F.2d 749 (1st Cir. 1983) (mentioning sliding scale, but not applying it); *Auburn News Co., Inc. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982) (passing reference to sliding scale).

204. *E.g.*, *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002); *Martinez v. R.I. Hous. & Mortgage Fin. Corp.*, 738 F.2d 21 (1st Cir. 1984); *Kenworth of Boston, Inc. v. Paccar Fin. Corp.*, 735 F.2d 622 (1st Cir. 1984); *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983); *LeBeau v. Spirito*, 703 F.2d 639 (1st Cir. 1983); *S.F. Real Estate Investors v. Real Estate Inv. Trust of Am.*, 701 F.2d 1000 (1st Cir. 1983); *Rushia v. Town of Ashburnham*, 701 F.2d 7 (1st Cir. 1983); *Crowley v. Local No. 82 Furniture and Piano Moving*, 679 F.2d 978 (1st Cir. 1982), *rev’d on other grounds*, 467 U.S. 526 (1984); *Burgess v. Affleck*, 683 F.2d 596 (1st Cir. 1982); *Mass. Ass’n for Retarded Citizens, Inc. v. King*, 668 F.2d 602 (1st Cir. 1981); *Town of Burlington v. Dep’t of Educ.*, 655 F.2d 428 (1st Cir. 1981); *see also* *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983) (containing no discussion of either the four criteria or the sliding scale variation).

205. *E.g.*, *Rushia*, 701 F.2d at 10 (affirming denial of interlocutory injunction because movant failed to show irreparable injury); *Town of Burlington v. Dep’t of Educ.*, 655 F.2d 428, 432 (1st Cir. 1981) (same); *Levesque v. Maine*, 587 F.2d 78 (1st Cir. 1978) (same); *Interco, Inc. v. First Nat’l Bank of Boston*, 560 F.2d 480, 486 (1st Cir. 1977) (same).

206. *E.g.*, *Spath v. NCAA*, 728 F.2d 25, 27 (1st Cir. 1984) (affirming denial of interlocutory injunction because movant failed to show likelihood of ultimate success on the merits); *McDonough v. Trustees of University Sys. of N.H.*, 704 F.2d 780, 784 (1st Cir. 1983) (same); *LeBeau*, 703 F.2d at 642-43 (same); *Burgess*, 683 F.2d at 602 (same); *Mass. Ass’n for Retarded Citizens, Inc.*, 668 F.2d at 607-08 (same); *S.S. Kresge Co. v. United Factory Outlet*,

While the court of appeals has not delivered a deathblow to the sliding scale concept²⁰⁸ it brought forth in *Massachusetts Coalition*, it has apparently rendered it moribund. In many decisions, the court has noted that the likelihood of success factor is “the sine qua non,”²⁰⁹ “the main bearing wall,”²¹⁰ the “crucial”²¹¹ element, and “the critical question”²¹² among the four criteria.²¹³ The court of appeals has noted that, even if the irreparable injury is “excruciatingly obvious,” the movant must still show probability of success on the merits.²¹⁴ If the moving party fails to establish that essential element, “the remaining factors become matters of idle curiosity.”²¹⁵

Emphasizing the “likelihood” factor means that no matter how strong the showing on irreparable injury, the movant must still prove likelihood of success on the merits. In its 2008 decision in *Winter*, the Supreme Court agreed with the First Circuit on this point.²¹⁶ The recent cases in the First Circuit have routinely recited and applied the four-factor test for preliminary relief,²¹⁷ having now utilized it for almost 30

Inc., 598 F.2d 694, 695, 698 (1st Cir. 1979) (same); *see also* *Tuxworth v. Froehlke*, 449 F.2d 763, 764 (1st Cir. 1971). Indeed the court has stated that failure to demonstrate any one factor precludes the issuance of preliminary relief no matter what the showing on the other criteria. *See* *Mass. Coalition of Citizens with Disabilities v. Civil Def. Agency*, 649 F.2d 71, 74 (1st Cir. 1981).

207. *E.g.*, *Kenworth of Boston, Inc. v. Paccar Fin. Corp.*, 735 F.2d 622 (1st Cir. 1984).

208. “If a great showing of likely success on the merits is made by a plaintiff, a reduced showing of irreparable harm may be appropriate.” *Turner v. City of Boston*, 760 F. Supp. 2d 216, 218 (D.Mass. 2011) (quoting *Cablevision of Boston, Inc. v. Pub. Imp. Com’n*, 38 F. Supp. 2d 46, 53 (D.Mass. 1999)), (citing to *Ross-Simons of Warwick, Inc. v. Baccarat*, 102 F.3d 12, 19 (1st Cir. 1996) and *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 743 (1st Cir. 1996)).

209. *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002).

210. *Ross-Simons*, 102 F.3d at 16.

211. *S.F. Real Estate Investors v. Real Estate Inv. Trust of Am.*, 701 F.2d 1000, 1003 (1st Cir. 1983).

212. *LeBeau v. Spirito*, 703 F.2d 639, 643 (1st Cir. 1983).

213. *See also* *Waldron v. George Weston Bakeries, Inc.*, 570 F.3d 5, 9 (1st Cir. 2009); *Auburn News Co., Inc. v. Providence Journal Co.*, 659 F.2d 273, 277 (1st Cir. 1981) (“[T]he probability-of-success component has loomed large in cases before this court”), *cert. denied*, 455 U.S. 921 (1982); *accord*, *Mass. Ass’n of Older Ams. v. Sharp*, 700 F.2d 749, 751 (1st Cir. 1983).

214. *LeBeau*, 703 F.2d at 642 (quoting *Coalition for Basic Human Needs v. King*, 654 F.2d 838, 841 (1st Cir. 1981) (per curiam)). *But see* *Cintron-Garcia v. Romero-Barcelo*, 671 F.2d 1, 4 n.2 (1st Cir. 1982) (per curiam) (intimating in *dictum* that the probability factor may not be as important if the harm to the moving party is “particularly severe and disproportionate,” an approach that may partially resurrect the sliding scale formulation).

215. *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002).

216. *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008).

217. *See, e.g.*, *ANSYS, Inc. v. Computational Dynamics N. Am., Ltd.*, 595 F.3d 75, 78 (1st Cir. 2010); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003); *S.E.C. v. Fife*, 311 F.3d 1, 8 (1st Cir. 2002); *New Comm.*, 287 F.3d at 8-9; *EF Cultural Travel BV v.*

years, without any reference to a sliding scale approach. This stability of approach in the First Circuit since 1981 mirrors the stability of criteria for preliminary relief in the Massachusetts state courts under the regime of *Packaging Industries*.²¹⁸

Finally, despite the stability of the four-factor analysis over the past 30 years, the court of appeals has injected uncertainties into the disposition of motions for temporary injunctions. For example, it has treated the concept of inadequate remedy at law, which the Supreme Court has called the essence of injunctive relief in the federal courts,²¹⁹ in at least three different ways. First, it has equated inadequacy with irreparable injury.²²⁰ That is, the moving party must show that her remedy at law is inadequate in order to demonstrate irreparable injury. Ordinarily, the legal remedy is adequate if the injury can be compensated through money damages. In this sense, adequate remedy at law and irreparable injury are mutually exclusive concepts: the presence of one means the absence of the other.

Second, the court, on occasion, has treated the adequacy notion as an independent factor in the formula for interim relief.²²¹ In other words, the moving party must establish inadequacy of the legal remedy in addition to the four other criteria. Third, in some cases, the court has simply ignored the question whether the moving party has shown that her legal remedy is not adequate.²²² In contrast, the SJC has defined irreparable injury quite clearly: “In the context of a preliminary injunction the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in

Explorica, Inc., 274 F.3d 577, 581 (1st Cir. 2001); Suarez-Cestero v. Pagan-Rosa, 172 F.3d 102, 104 (1st Cir. 1999); Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996); see *Chevron P.R., LLC v. Rivera Guzman*, 2010 WL 446585, at *2 (D.P.R.). On occasion, the First Circuit has added the adverb “substantially” to the likely to succeed factor. See *Lanier Professional Servs., Inc. v. Ricci*, 192 F.3d 1, 3 (1st Cir. 1999).

218. See generally Kerry, *supra* note 8.

219. *E.g.*, *Sampson v. Murray*, 415 U.S. 61, 88 (1974). The Court has made the same statement regarding motions for permanent injunctions. *E.g.*, *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975).

220. *E.g.*, *Itek Corp. v. First Nat’l Bank of Bos.*, 730 F.2d 19, 22-23 (1st Cir. 1984); *Levesque v. State of Maine*, 587 F.2d 78, 80 (1st Cir. 1978); *Interco, Inc. v. First Nat’l Bank of Bos.*, 560 F.2d 480, 484-86 (1st Cir. 1977); *Keefe v. Geanakos*, 418 F.2d 359, 363 (1st Cir. 1969).

221. *E.g.*, *Auburn News Co., Inc. v. Providence Journal Co.*, 659 F.2d 273, 277 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

222. *E.g.*, *S.F. Real Estate Investors v. Real Estate Inv. Trust of Am.*, 701 F.2d 1000 (1st Cir. 1983); *Rushia v. Town of Ashburnham*, 701 F.2d 7 (1st Cir. 1983); *Town of Burlington v. Dep’t of Educ.*, 655 F.2d 428 (1st Cir. 1981).

equity.”²²³

3. Abbreviated Standards

Like the Massachusetts state courts, the federal courts have also developed an abbreviated set of standards for preliminary relief. The state courts have reduced to two factors the showing needed in civil actions commenced by the Attorney General and other governmental units and private attorneys general.²²⁴ The federal courts have applied abbreviated standards in so-called statutory injunction cases, reducing the showing to one factor. That is, where a federal statute authorizes injunctive relief, some courts have held that the moving party need only show “reasonable cause”²²⁵ to believe the defendant has violated or is about to violate the statute. In such cases, Congress is deemed to have determined that the other three traditional criteria (*i.e.*, irreparable injury, balancing of the harms, and the public interest) favor the moving party.

The First Circuit Court of Appeals, however, has not generally followed the path of other federal appellate courts in applying such truncated standards. Principally, the First Circuit has read Supreme Court precedents to preclude the casual application of abbreviated standards to the request for an interlocutory injunction. Before exploring the analysis of the First Circuit, this Article addresses the approach of the other courts of appeals.

The federal appellate courts adopting these abbreviated standards generally trace this line of cases, if they trace it at all, to the decisions of the Supreme Court in *United States v. San Francisco*²²⁶ and *Tennessee Valley Authority v. Hill*,²²⁷ both of which involved permanent, not temporary, injunctive relief. In contrast, the Court’s decision in *Porter v. Warner Holding Co.*²²⁸ seems to look in a different direction, requiring clear congressional intent to alter traditional criteria for

223. *Packaging Indus. Grp. v. Cheney*, 405 N.E.2d 106, 112 n.11 (Mass. 1980). *See also* FISS AND RENDLEMEN, *supra* note 40. In the context of a request for a permanent injunction, “irreparable harm” means that the moving party does not have an adequate remedy at law (*i.e.*, ordinarily damages).

224. *See supra* notes 57-76 and accompanying text.

225. *Burlington N. R.R. Co. v. Bair*, 957 F.2d 599, 604 (8th Cir. 1992), *cert. denied*, 506 U.S. 821 (1992) (4-R Act forbidding discriminatory state taxation of railroads); *see also* *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981) (*per curiam*) (same).

226. 310 U.S. 16 (1940) (Raker Act granting certain rights in federal lands to local government).

227. 437 U.S. 153 (1978) (Endangered Species Act protecting the habitats of moribund animals).

228. 328 U.S. 395 (1946).

injunctive relief before courts can apply abbreviated standards:

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. 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.²²⁹

Although some courts, like the Eighth and Tenth Circuit Courts of Appeals,²³⁰ have regularly utilized and applied this line of cases, other federal courts, including the federal courts in Massachusetts, have been less active. For example, in *SEC v. J & B Industries, Inc.*,²³¹ a Massachusetts federal district court did not require the SEC to show irreparable harm because the SEC sought preliminary relief under the securities statutes. The SEC was entitled to a preliminary injunction, the court ruled, so long as it made a *prima facie* showing of violation and protecting the public interest outweighed the harm to the defendants.²³² In a recent case arising under the Safe Drinking Water Act,²³³ the First Circuit Court of Appeals recognized the abbreviated standards line of decisions (sometimes referred to as a "statutory" injunction as compared to the judge-made law), including *Bair* and *Lennen*. It declined, however, to apply that line of decisions without taking account of the restrictions in *Porter*.²³⁴

Thus in order for the United States to obtain a permanent injunction in the First Circuit against the Massachusetts Water Resources Authority for violating the Safe Drinking Water Act, it must satisfy the traditional four criteria for injunctive relief.²³⁵ The First Circuit took the same approach by applying the four-factor test for a preliminary injunction sought by a government agency, which argued for the application of abbreviated standards.²³⁶

On the other hand, if the party moving for a preliminary injunction can show that Congress clearly intended to depart from traditional

229. *Id.* at 398; *accord*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982). Compare *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) with *Weinberger*, 456 U.S. at 311-13.

230. *See supra* note 225.

231. *SEC v. J & B Indus., Inc.*, 388 F. Supp. 1082 (D. Mass. 1974). The First Circuit may have overruled this decision *sub silentio* in *SEC v. Fife*, 311 F.3d 1 (1st Cir. 2002).

232. The Massachusetts SJC has taken a similar approach when government entities seek preliminary injunctions. *See supra* notes 42-56 and accompanying text.

233. *United States v. Mass. Water Res. Auth.*, 256 F.3d 36 (1st Cir. 2001).

234. *Id.* at 47-48.

235. *Id.* at 50-51.

236. *SEC v. Fife*, 311 F.3d 1, 8 (1st Cir. 2002).

equitable principles, or if that conclusion is “necessary and inescapable”²³⁷ based on the text, legislative history, structure, and purpose of the statute, the First Circuit Court of Appeals will apply the abbreviated standards.²³⁸ In its two leading cases,²³⁹ the First Circuit held that the government had failed to make the proper showing, so it affirmed the orders denying an injunction based on the traditional four factors.²⁴⁰

IV. THE *ERIE/HANNA* DOCTRINE

A. Overview

Derived from the landmark ruling in *Erie R.R. Co. v. Tompkins*,²⁴¹ the *Erie* doctrine arises when a federal court is asked to apply state law in pending litigation.²⁴² Such requests for the application of state law arise in myriad circumstances. *Erie* itself settled the question as to state “substantive” law. It premised its holding on the Rules of Decision Act,²⁴³ which calls for the application of state law unless federal law otherwise requires or provides.

In 1938, the same year the Supreme Court decided *Erie*, it also adopted the Federal Rules of Civil Procedure for civil actions commenced in a federal court, including where a plaintiff asserted a claim based on state law. Prior to their adoption, the federal trial courts had applied generally state rules of procedure in actions at law.²⁴⁴ Actions in equity and admiralty were excepted from the general rule.²⁴⁵ Thus after 1938, using legal shorthand, the federal courts would apply state “substantive” law in the absence of superseding federal law and federal “procedural” rules even if state law created the plaintiff’s claim. Soon after *Erie* the Supreme Court realized that the line between

237. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

238. *Fife*, 311 F.3d at 8; *Mass. Water Res. Auth.*, 256 F.3d at 48.

239. *Fife*, 311 F.3d at 8; *Mass. Water Res. Auth.*, 256 F.3d at 48.

240. The four-factor test for a permanent injunction is nearly identical to the four-factor test for a preliminary injunction. The only difference is that for a permanent injunction, the moving party must show actual success on the merits rather than simply a likelihood of success. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008); *cf. Mass. Water Res. Auth.*, 256 F.3d at 50 n.15.

241. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

242. The so-called “reverse-*Erie*” doctrine arises when a state court is asked to apply a federal procedural rule to a federal claim. See *supra* note 6.

243. 28 U.S.C. § 1652 (2006), which derived from Section 34 of the Judiciary Act of 1789. 1 Stat. 92 (1789).

244. See generally FALLON, JR. ET AL., *supra* note 87, at 533-43.

245. *Id.*; see *supra* note 122.

“substance” and “procedure” was not so easily drawn.²⁴⁶

The discussion here is limited to the basic *Erie* question: whether a federal judge should apply state law of interlocutory injunctions to a state claim in a civil action pending in the federal court. When confronted with a motion for preliminary relief in these *Erie*-type civil actions, the federal district court must decide whether to apply state or federal standards, traditional or abbreviated, to the request for the injunctive remedy when the claim is rooted in state law.

Perhaps not surprisingly, the courts have not devoted extensive analysis to the issue. For example, in *Grupo Mexico de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,²⁴⁷ one of a handful of cases where the question has surfaced, the Supreme Court refused to entertain the argument that state law should govern motions for preliminary injunctions in federal civil actions asserting state claims. The Court noted that the party seeking to raise the *Erie* issue in the Supreme Court waived the point because it did not present the question to the lower federal courts.²⁴⁸

B. *The First Circuit and Other Authority*

The First Circuit Court of Appeals has taken the same approach as the Supreme Court in *Grupo Mexico*, insisting upon the longstanding rule that the party raising an issue, including the *Erie* doctrine, generally must first bring it to the attention of the trial judge.²⁴⁹ In other decisions, the First Circuit has simply applied federal preliminary injunction standards to state-based claims without discussing the *Erie* doctrine, while applying state law to the substantive issues.²⁵⁰ Thus while the “likely to succeed on the merits” criterion as a standard for temporary relief is rooted in federal law, the determination whether a plaintiff asserting a state law claim is in fact “likely to succeed” is a state law question under *Erie*.²⁵¹

246. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

247. 527 U.S. 308, 318 n. 3 (1999).

248. *Id.*

249. *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004) (party waived the *Erie* objection by not raising it in the district court). In sharp contrast, subject matter jurisdiction is an exception to the general rule, as the federal courts have a “duty” to raise it *sua sponte* even if no party challenges the court’s jurisdiction. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

250. *Waterproofing Sys., Inc. v. Hydro-Stop, Inc.*, 440 F.3d 24, 33 (1st Cir. 2006); *Lanier Prof'l Servs., Inc. v. Ricci*, 192 F.3d 1, 3 (1st Cir. 1999); *Ocean Spray Cranberries, Inc. v. PepsiCo, Inc.*, 160 F.3d 58, 60-61 (1st Cir. 1998).

251. *Hydro-Stop, Inc.*, 440 F.3d at 33; *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192 (5th Cir. 2003).

In *Ocean Spray Cranberries, Inc. v. PepsiCo, Inc.*,²⁵² however, the First Circuit acknowledged that the *Erie* doctrine could apply to motions for preliminary injunctions. Without delving into the intricacies of the question, the court disposed of the matter on the practical ground that the “Massachusetts standards [referring to the three-step approach of *Packaging Industries*] for a preliminary injunction do not seem markedly different”²⁵³ from the federal standards. The court added that the parties in the case had not pointed to any “pertinent state-law difference that would govern a federal court in a diversity matter.”²⁵⁴ The following year, the First Circuit took the same approach: it applied federal standards to a motion for temporary relief based on state claims “where the parties have not suggested that state law supplies meaningfully different criteria.”²⁵⁵

Upon closer inspection, however, the Massachusetts state standards are “markedly” or “meaningfully” different from the federal standards. In cases between private parties, for example, the state courts have applied a sliding scale, three-step approach under *Packaging Industries*,²⁵⁶ while the federal courts in the First Circuit have applied the four-factor test of *Bellotti*,²⁵⁷ which the United States Supreme Court recently confirmed in *Winter*.²⁵⁸

For example, the federal standards include an inquiry into the impact of the preliminary injunction on the “public interest,” while the state standards under *Packaging Industries* do not include that criterion in strictly private party litigation. In the *Winter* decision, the Supreme Court ruled that the impact of a preliminary injunction on the public interest is a critical matter, which the lower federal courts must carefully examine.²⁵⁹ Indeed in *Winter*, the Supreme Court’s inquiry into the public interest made a huge difference in the outcome of the motion for interlocutory relief. In private litigation under *Packaging Industries*, the public interest is not a factor.

In addition, the *Packaging Industries* standards employ a “sliding

252. 160 F.3d 58 (1st Cir. 1998).

253. *Id.* at 61; *accord*, *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797 (3d Cir. 1989) (citing *Hanna*).

254. *Ocean Spray Cranberries, Inc.*, 160 F.3d at 61.

255. *Lanier*, 192 F.3d at 3; *accord*, *Bio-Imaging Techs., Inc. v. Marchant*, 584 F. Supp. 2d 322 (D. Mass. 2008).

256. *Packaging Indus. Grp., Inc. v. Cheney*, 405 N.E.2d 106, 111-12 (Mass. 1980).

257. *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981).

258. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

259. *Id.*

scale” with respect to each party’s assertions of irreparable harm and likelihood of succeeding on the merits, coupled with a balancing test. Federal courts, which previously applied a sliding scale test, have abandoned it after *Winter* for the four-factor test the First Circuit has followed for 30 years.²⁶⁰ Thus these two approaches, *Packaging Industries* and *Winter*, are substantially different in their formulations and results.

Furthermore, under state court precedents, the Attorney General, other governmental units, or “private” attorneys general need only satisfy a two-part test to secure temporary injunctive relief.²⁶¹ In such cases, the plaintiff must demonstrate only that it is likely to succeed on the merits and that the public interest is advanced or not adversely affected.²⁶² The federal courts in the First Circuit apply the same four-factor test of *Bellotti* (and now *Winter*) no matter who the plaintiff is.

Other federal courts, applying federal standards to motions for preliminary injunctions, have reached the same conclusion as the First Circuit in *Erie*-type cases, sometimes traveling a different route. For example, the Sixth Circuit has referred to the temporary injunction standards as “procedural jurisprudence,”²⁶³ while applying state law to the substantive question whether the moving party is likely to prevail on the merits. Without extensive analysis, the Fourth Circuit²⁶⁴ and the Tenth Circuit²⁶⁵ Courts of Appeals have expressly rejected the application of state preliminary injunction standards to state claims pending in federal court.

The Fourth Circuit agreed that state law would apply to the motion for a permanent injunction, but not to a motion for a temporary injunction, which only seeks to preserve the status quo²⁶⁶ and thus arguably procedural, not substantive. The court also observed that the state (Virginia) and federal standards for preliminary relief in that case

260. *E.g.*, *Real Truth About Obama v. FEC*, 575 F.3d 342, 346-47 (4th Cir. 2009), *vacated*, 130 S. Ct. 2371 (2010) (mem.) (noting *Winter* overrules prior Circuit precedents, including “sliding scale” approach). *But cf.* *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288 (D.C. Cir. 2009) (following the four-factor test in *Winter*, but stating the Court did not expressly reject prior Circuit precedents applying a “sliding scale” standard).

261. *See Packaging Indus.*, 405 N.E.2d at 114.

262. *See supra* Part II.

263. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007).

264. *Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988).

265. *Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1361 (10th Cir. 1990).

266. *Capital Tool*, 837 F.2d at 172.

have “no great difference.”²⁶⁷ The Tenth Circuit decision has less analysis than the Fourth Circuit opinion. It simply states that the *Erie* doctrine “does not apply to preliminary injunction standards.”²⁶⁸ Several of these cases relied on the Wright, Miller, and Kane treatise on *Federal Practice and Procedure*, which states categorically that federal standards always apply to motions for preliminary injunctions in federal courts.²⁶⁹

In contrast, Professor Burbank has argued that the Wright, Miller, and Kane treatise is not correct in applying federal standards to movants seeking preliminary injunctions based on state claims, referring to the treatise’s argument as “an example of [federal court] overreaching.”²⁷⁰ Consequently, federal courts, when deciding motions for interlocutory relief, “would be required to yield to the requirements of contrary state law.”²⁷¹ In this sense, Rule 65, which contains procedures for preliminary injunctions and temporary restraining orders, is procedural and does not incorporate the equitable standards for temporary injunctive relief. At least one federal district court allowed that if state law precludes an injunctive remedy, the federal court could not award it. “It would be anomalous to grant preliminary relief on a state law claim that would be unavailable were this case brought in a state court.”²⁷²

Before discussing the general outlines of the *Erie* doctrine as it applies to preliminary injunctions, it is important to note another line of cases in the First Circuit that bears on our analysis. Thirty-six years ago in *Marshall v. Mulrenin*,²⁷³ the First Circuit Court of Appeals confronted the question of whether the more generous relation back law of Massachusetts should govern an amendment to the complaint that added new parties after the expiration of the statute of limitations.

Following the decision in *Hanna v. Plumer*,²⁷⁴ the trial judge applied Rule 15(c) of the Federal Rules of Civil Procedure to deny the

267. *Id.* at 173.

268. *Equifax*, 905 F.2d at 1361. It cites only to Volume 11C of the WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2943, at 390 (1973).

269. WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2943 (1995 with 2011 supplement); *see also* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4513 (1996 with 2011 supplement).

270. Burbank, *supra* note 24, at 1320 n.161.

271. *Id.* at 1320.

272. *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 478 (S.D.N.Y. 2000).

273. 508 F.2d 39, 41 (1st Cir. 1974).

274. 380 U.S. 460 (1965) (discussed *infra*) (in *Hanna*, a diversity case, the Supreme Court unanimously reversed the First Circuit Court of Appeals, requiring the application of Federal Civil Rule 4 rather than a more restrictive state statute on service of process in estate administration).

motion to amend. The court of appeals vacated the judgment, and remanded for further proceedings. It held that the state relation back law should be applied, rather than Federal Rule 15(c), because “although cast in procedural terms, [it] has a direct substantive effect.”²⁷⁵ Recently the First Circuit, while affirming the essence of *Mulrenin*, noted that *Hanna* rejected the application of the substance/procedure line and the “outcome determination” test to conflicts involving the Federal Rules of Civil Procedure.²⁷⁶

C. *Erie* and *Hanna*

1. Background

This section will discuss the *Erie* doctrine as applied to preliminary injunctions. We should recall that *Erie* held, in light of the Rules of Decision Act²⁷⁷ and the powers of the federal courts, “there is no federal general common law.”²⁷⁸ Unless federal law otherwise requires or provides, the federal court must apply the “laws of the several states.”²⁷⁹ Thus the decision has come to mean that when state claims are asserted in a federal court, the law of that state governs the rulings on the substantive claims.

Courts and practitioners sometimes assume that the *Erie* doctrine applies only to civil actions invoking the diversity jurisdiction.²⁸⁰ That assumption is not correct, although post-*Erie* decisions have occasionally intimated it.²⁸¹ Over 50 years ago, the Second Circuit Court of Appeals stated that

[I]t is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the

275. *Mulrenin*, 508 F.2d at 44; *accord*, *Covel v. Savetech, Inc.*, 90 F.R.D. 427, 430 (D. Mass. 1981) (following the *Mulrenin* holding, rejecting apparently contrary law in other circuits). In 1991, the Supreme Court amended Rule 15 to reflect the holding in *Mulrenin*. See FED. R. CIV. PRO. 15(c)(1)(A).

276. *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009).

277. See 28 U.S.C. § 1652 (2006) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

278. *Erie R.R. Co. v. Tompkins*, 304 U.S. 70, 78 (1938).

279. See 28 U.S.C. § 1652 (2006).

280. See 28 U.S.C. § 1332 (2006).

281. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945). *But see* *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (*Erie* applies to state claims asserted in federal court under the doctrine of pendent jurisdiction (now referred to as supplemental jurisdiction)).

governing law Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.²⁸²

State substantive law claims, governed by the *Erie* doctrine, may arise in a federal court in at least three types of cases or controversies: (1) where a state claim is asserted based on diversity jurisdiction;²⁸³ (2) where a state claim is asserted based on supplemental jurisdiction;²⁸⁴ and (3) where a state claim contains an essential federal element within general federal question jurisdiction.²⁸⁵ In each instance, the federal court may have to confront the *Erie* doctrine. In federal question litigation, where state claims are frequently joined with federal claims under supplemental jurisdiction, the matter may become more complex since the court may need to apply a federal rule to the federal claims and a state rule to the state claims.²⁸⁶

In *Erie* doctrine cases, the court is asked to apply state law even though the civil action is pending in a federal court. The Rules of Decision Act,²⁸⁷ which Congress first enacted in 1789, commanded that result, unless federal law “otherwise require[s] or provide[s].”²⁸⁸ The Supreme Court departed from that statute in *Swift v. Tyson*,²⁸⁹ authorizing the federal courts to apply “federal general common law” in controversies based on diversity jurisdiction if the claim involved a question of “general” or “commercial” law (as compared to “local” law). Ninety-six years later in 1938, the Court overruled *Swift* in the *Erie* decision.²⁹⁰

In 1938, the Supreme Court also approved the newly drafted Federal Rules of Civil Procedure for use in the federal district courts.

282. *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956) (emphasis in the original).

283. *See* 28 U.S.C. § 1332 (2006); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005).

284. *See* 28 U.S.C. § 1367 (2006); *Allapattah*, 545 U.S. 546; *cf.* *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

285. *See* 28 U.S.C. § 1331 (2006); *Gunn v. Minton*, 133 S. Ct. 1039 (2013); *Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005); *see also* *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *cf.* *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986).

286. *See, e.g.*, FED. R. EVID. 302 (presumptions); FED. R. EVID. 501 (privileges); 28 U.S.C. (2006) (the state law of presumptions and privileges applies where it provides the rule of decision for “an element of a claim or defense”).

287. *See* 28 U.S.C. § 1652 (2006).

288. *Id.*

289. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

290. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 85 (1938).

Prior to 1938, the federal courts had applied state procedural rules for actions at law.²⁹¹ Thus by the end of 1938, the federal courts in diversity cases were applying state substantive rules under *Erie* where they might have applied federal substantive rules under *Swift*. At the same time, they were also applying the new federal civil rules where they would have applied state procedural rules prior to 1938. “Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.”²⁹²

In the wake of *Erie*, the difficulty the federal courts now confronted was where to draw the line between substance and procedure for *Erie* purposes, “a challenging endeavor.”²⁹³ The Supreme Court struggled with that line, realizing early that some rules or law could be characterized either as substantive or procedural, such as statutes of limitation.²⁹⁴ Within seven years after the *Erie* decision, it settled on an “outcome determinative” test.²⁹⁵ That is, the federal court would apply the state “procedural” rule if it determined the outcome of the litigation, as would be the case with limitations periods. When that test proved inadequate, the Court formulated a balancing test of state and federal interests.²⁹⁶ In 1965, it sought to settle the matter in *Hanna v. Plumer*.²⁹⁷

In the *Hanna* decision,²⁹⁸ the Supreme Court held that *Erie* problems fall into two broad categories: (1) where the conflicting federal “procedural” law arguably falls within the scope of a civil rule promulgated pursuant to the Rules Enabling Act²⁹⁹ (REA) (hereinafter

291. For actions in equity, the Supreme Court had promulgated special rules for such proceedings in the federal trial courts. See *supra*, notes 99-100.

292. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). This statement would apply to any claim rooted in state law, regardless of its jurisdictional basis in federal court. *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540-41 n.1 (2d Cir. 1956).

293. *Gasperini*, 518 U.S. at 427 (citation omitted).

294. See *Guar. Trust Co. v. York*, 326 U.S. 99 (1945). *But cf.* *McCluny v. Silliman*, 28 U.S. 270, 277 (1830) (stating statutes of limitations are “rules of decision” within the meaning of the Rules of Decision Act, now codified in 28 U.S.C. § 1652 (2006) and requiring the application of state limitation periods to claims in federal courts in the absence of a valid federal limitation period).

295. *Guar. Trust Co.*, 326 U.S. at 109.

296. *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 535 (1958). The balancing of state and federal interests appears to have survived the decision in *Hanna*. See generally *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Gasperini*, 518 U.S. 415.

297. 380 U.S. 460 (1965).

298. *E.g.*, *Hanna*, 380 U.S. 460 (dispute involving Rule 4 of the Civil Rules); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (dispute involving 28 U.S.C. § 1404(a)).

299. 28 U.S.C. § 2072 (2006). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (the definitive article on the REA).

referred to as “rules” conflicts); and (2) where the conflicting federal “procedural” law is outside the scope of the REA or other federal statute (hereinafter referred to as “non-rules” conflicts).³⁰⁰ In *Hanna*, the Court did not discuss a third possibility: a conflict between an act of Congress and state law.³⁰¹ Under *Hanna*, the criteria to determine whether state or federal law should govern the dispute falls into two categories. One set of criteria governs “rules” conflicts, while another set governs “non-rules” conflicts.³⁰²

Federal civil actions involving motions for preliminary injunctions reasonably could fall into either of the two categories of conflicts and on either side of the line drawn in *Hanna*. If such a motion is viewed as governed by Rule 65 of the Federal Rules of Civil Procedure, then it falls on the “rules” side of the *Hanna* line (as was the case in *Hanna* itself, which involved Rule 4, the service of process rule). If, on the other hand, the standards governing a motion for a temporary injunction are seen as part of the judge-made law of equity, it would fall on the “non-rules” side of *Hanna*. In all cases, the courts appear to start with the premise that the conflict between state and federal law is not clearly substantive or procedural, which would be an easy case. Rather the assumption is that the matter at issue falls somewhere between substance and procedure, in short, “rationally capable of classification as either.”³⁰³

2. Rules Conflicts

If the state/federal conflict falls on the “rules” side of the *Hanna* line, the Supreme Court has identified a three-step process to resolve the potential conflict.³⁰⁴ First, the federal court determines if the asserted federal rule covers or addresses the disputed matter, creating a direct or genuine conflict with state law. If not, then the court should apply both

300. See also WRIGHT AND KANE, *supra*, note 131, at § 59. See generally CHEMERINSKY, *supra* note 131, at § 5.3.5.

301. The Court has since addressed the *Erie* doctrine when the conflict is between a federal statute and a state law. *Stewart Org.*, 487 U.S. 22 (dispute involving 28 U.S.C. § 1404(a)). In *Ricoh*, the Court articulated a two-step process that courts should follow: (1) decide whether the federal statute and the state law genuinely conflict; and (2) if so, decide whether the federal statute is constitutional, thus superseding state law under the Supremacy Clause in Art. VI of the United States Constitution. *Id.* at 34-35.

302. In the Supreme Court’s most recent decision in the *Erie/Hanna* line of cases, Justice Ginsburg, dissenting, indicated that the two categories operate sequentially rather than independently. Thus if the Court concludes that the state law and the federal rule of civil procedure do not conflict, it must then apply the twin goals of *Erie* to the state law. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1450 (2010).

303. *Hanna*, 380 U.S. at 472.

304. In *Shady Grove*, Justice Scalia appeared to adopt a two-step approach, although his opinion did not command a majority of the Court. 130 S. Ct. at 1450.

state and federal law since the federal rule does not reach the disputed question.³⁰⁵

For example, in *Palmer v. Hoffman*,³⁰⁶ the parties disagreed whether the plaintiff or the defendant had the burden to plead and prove contributory negligence. The plaintiff relied on Rule 8(c) (contributory negligence is an affirmative defense) to place the burden on the defendant, while the defendant argued for the application of the state rule that the plaintiff must prove the absence of contributory negligence.³⁰⁷ The Court held that the federal and state rules do not conflict: the defendant has the burden to plead contributory negligence under Rule 8(c), while the plaintiff has the burden to prove the absence of contributory negligence under state law once the defendant has raised the issue under Rule 8(c).³⁰⁸

Second, if the federal rule is broad enough to cover or address the dispute, the conflict between state and federal law is genuine. The court must then determine, before applying the federal rule to displace state law, if the federal rule is within the scope of the Rules Enabling Act (REA): whether it is a rule of “practice or procedure” under § 2072(a) and whether it abridges, enlarges, or modifies “any substantive right” under § 2072(b). If the federal rule is “rationally capable of classification,”³⁰⁹ as *Hanna* ruled, either as substantive or procedural, the court will treat it as one of “practice and procedure” under § 2072(a).³¹⁰ Having thus classified it as a “procedural” matter (or at least reasonably or arguably so), the federal rule consequently would not abridge any “substantive” right under § 2072(b).³¹¹

305. *E.g.*, *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (no genuine conflict between the state law of claim preclusion and Rule 41(b) of the Federal Rules of Civil Procedure); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (no direct conflict between state limitations period tolling provision upon service of process and Rule 3 of the Federal Rules of Civil Procedure, where civil action commences upon filing, not upon service of process).

306. *Palmer v. Hoffman*, 318 U.S. 109 (1943). Four well-known scholars have referred to such cases as “strained” interpretations of the rules to avoid addressing their validity under the REA. RICHARD H. FALLON, JR., JOHN MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 548 (6th ed. 2009).

307. *Palmer*, 318 U.S. at 116-19.

308. *Id.* In the Supreme Court’s most recent decision in the *Erie/Hanna* line, Justice Scalia appeared less willing to avoid such conflicts, although his opinion did not garner a majority of the justices. *Shady Grove*, 130 S. Ct. at 1431. In contrast, Justice Ginsburg, dissenting, sought to avoid such conflicts. *Id.* at 1470 (Ginsburg J., dissenting).

309. *Hanna v. Plummer*, 380 U.S. 460, 472 (1965).

310. 28 U.S.C. § 2072(a) (the Rules Enabling Act).

311. 28 U.S.C. § 2072(b) (the Rules Enabling Act).

Third and finally, the federal judge must determine if the federal “procedural” rule is constitutional. Since Congress has the power to establish federal courts and prescribe rules for their governance under Article III of the Constitution and the Necessary and Proper Clause of Article I, as the Court ruled in *Hanna*, any rule deemed to be procedural will pass constitutional muster.³¹² The Court’s approach in *Hanna* lead Justice Harlan, concurring, to criticize the majority’s approach as “arguably procedural, ergo constitutional.”³¹³ The concurrence stated that such an approach passes over the critical limitation in the REA: “Such rules shall not abridge, enlarge or modify any substantive right.”³¹⁴

As explored earlier, a state claim in a Massachusetts federal court could be subject to conflicting state and federal standards on a motion for a preliminary injunction.³¹⁵ If the state claim were in a Massachusetts state court, the trial judge would apply a two-factor, a three-step, or a four-stage approach, depending on the criteria noted earlier in this article.³¹⁶ If the state claim were in federal court, the federal trial judge would ordinarily apply the four-factor test under the Supreme Court’s decision in *Winter* and the First Circuit’s decision in *Bellotti* and its progeny.³¹⁷ Applying the state and federal standards to the state claim could very well lead to different results, with the moving party, say, prevailing under the state standards, while the non-moving party would prevail under the federal standards.

At this point in the proceedings, the federal judge would ask if the conflict is in the “rules” category or the “non-rules” category under *Hanna v. Plumer*. Assuming that Rule 65 is the source of the federal standards for preliminary injunctions, then any conflict with state standards for temporary relief would fall into the “rules” category under *Hanna*. If so, then the path to their application is relatively straightforward.

The party supporting the application of federal preliminary injunction standards to a state claim in federal court would argue that these standards are incorporated into Rule 65 and therefore are “procedural,” or at least arguably so. Several courts outside the First

312. *Hanna*, 380 U.S. at 471-74.

313. *Id.* at 476 (Harlan J., concurring).

314. 28 U.S.C. § 2072(b) (2006); *Hanna*, 380 U.S. at 476 (Harlan J., concurring).

315. *See supra* Part I.

316. *See supra* Part II.

317. *See supra* Part III.

Circuit have so held.³¹⁸ If linked to Rule 65 of the Federal Rules, the preliminary injunction standards fall squarely within the holding of *Hanna v. Plumer*.³¹⁹ Thus the federal court may, consistent with the *Erie* doctrine, apply federal standards to the movant's request for a temporary injunction for its state-based claims. The straightforward argument is that all matters arising after the commencement of the civil action relating to the advancement of its resolution are reasonably classifiable as procedural if covered by a federal rule of civil procedure.³²⁰

The Supreme Court has defined "procedural" as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."³²¹ A rule "is a truly procedural rule [if] it governs the in-court dispute resolution processes rather than the dispute that brought the parties into court . . ."³²² Thus the application of Rule 65 to motions for temporary relief would be permissible under the Rules Enabling Act, *Erie*, *Hanna*, and the Constitution.

The Supreme Court has reinforced its "rules conflicts" approach by noting the rigorous review process for rules under the REA. The Advisory Committee on the Civil Rules, the Judicial Conference, the Court itself, and the Congress successively "study and approv[e]"³²³ such rules and their amendments. In doing so, these entities make a "prima facie judgment" that the proposed rule or amendment "in

318. See *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991) (citing *Hanna* and *Wright* and *Miller*); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 799 n.4 (3d Cir. 1989) (citing *Hanna*); *Sys. Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1141 (3d Cir. 1977) (citing *WRIGHT AND MILLER*); *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1243 (N.D. Iowa 1995) (citing *Hanna* and *Ferrero*); see generally *WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D* § 2943 (1995 with 2011 supplement); *WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D* § 4513 (1996 with 2011 supplement). *Contra* *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 646 (9th Cir. 1988) (Rule 65 is strictly procedural and does not incorporate the "traditional equitable power of federal courts" to award preliminary relief). See generally *Burbank*, *supra* note 24, at 1320 n.161.

319. 380 U.S. 460 (1965); *cf.* *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008) (regarding federal preliminary injunction standards, the Supreme Court referred to Rule 65 and federal equity, without specifying their relationship); *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004) (noting that the district court looked to Rule 65 and "federal equitable principles" as the source for preliminary injunction standards).

320. See *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009) and cases therein cited.

321. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

322. *Johansen v. E.I. Du Pont De Nemours & Co.*, 810 F.2d 1377, 1380 (5th Cir. 1987); accord *Morel*, 565 F.3d at 24 (citing *Johansen* and other precedents).

323. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6 (1987).

question transgresses neither the terms of the Enabling Act nor constitutional restrictions.”³²⁴ Furthermore, even if the application of Rule 65 standards for preliminary relief affects substantive rights, such impact, the argument goes, only does so “incidentally.”³²⁵

The stumbling block, however, could be the limitation in § 2072(b) (the Rules Enabling Act): “Such rules shall not abridge, enlarge or modify any substantive right”³²⁶ The non-moving party would argue that its substantive rights will be violated if the court enters the preliminary injunction, which would impact its freedom of action (whether the injunction is simply prohibitory or affirmative in nature).

To some extent, the Supreme Court has danced around this issue, partly because it has recognized that the task of drawing the line between substance and procedure is “a challenging endeavor.”³²⁷ In contrast, the Ninth Circuit has defined “substantive” as “concerned with the legal rights of the parties”³²⁸ at all stages of the litigation, not simply the “final outcome on the merits.”³²⁹ In many cases where a party seeks preliminary relief, the “final outcome” is determined entirely or “in large part” at this early stage in the litigation.³³⁰ In sharp contrast, other courts have ruled that granting or denying a preliminary injunction is not “outcome determinative” under the *Erie* doctrine.³³¹

In this sense, what could be more substantive than a court order limiting freedom of action? Every injunction restricts the freedom of the person enjoined, which could include liberty or property interests or

324. *Hanna*, 380 U.S. at 471 (footnote omitted) (emphasis added); accord *Burlington Northern R.R. Co.*, 480 U.S. at 6 (having passed through or been reported to these bodies, the proposed rule or amendment has “presumptive validity”).

325. *Burlington Northern R.R. Co.*, 480 U.S. at 5. See also *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (plurality opinion).

326. 28 U.S.C. § 2072(b) (2006).

327. *Gasparini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427 (1996). Compare Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281 (1989) with Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012 (1989).

328. *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 645 (9th Cir. 1988) (California anti-injunction statute precludes the grant of preliminary relief in a federal court civil action alleging state law claims). But see *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 978 n.9 (D. Ariz. 2006) (stating federal standards apply to motions for preliminary injunctions for state claims because the standards are not “outcome-determinative” under the *Erie* doctrine); *Sullivan v. Vallejo City Unified School District*, 731 F. Supp. 947, 956 (E.D.Cal. 1990) (stating federal standards apply to Rule 65 motions for preliminary injunctions for state claims because the standards are not part of the substantive right or “outcome determinative” under the *Erie* doctrine).

329. *Sims*, 836 F.2d at 646.

330. *Id.* at 647.

331. *Supra*, note 328 and accompanying text.

both. Similarly, if the court denies the injunction, the liberty or property interests of the moving party will be adversely affected. In either case, the “substantive rights” of the parties will be impacted, contravening the limitation in § 2072(b).

3. Non-rules Conflicts

If the conflict between state and federal standards for a temporary injunction falls on the “non-rules” side of the *Hanna* analytical framework, the federal judge would apply a different test. “Non-rules” conflicts involve disputes where no federal rule promulgated under the Rules Enabling Act even “arguably” governs the resolution.³³² These disputes would include conflicts between state law and federal judge-made law. Under this alternative analysis, articulated in *Hanna*, the federal standards for preliminary injunctions would be viewed as part of the judge-made law of equity, not as incorporated into or authorized by Rule 65.³³³

The Supreme Court has identified a two-step process for determining whether state or federal law applies in these “non-rules” conflicts.³³⁴ The first step is to determine if state and federal law are genuinely in conflict,³³⁵ or, in other words, whether the federal law is broad enough to reach the disputed issue.³³⁶ If not, then the court should apply both state and federal law. If the conflict is genuine or direct or if the federal law is broad enough to control the matter before the court, then the court must determine which law to apply. In making this determination, the court would evaluate the conflict in terms of the “twin aims”³³⁷ of *Erie*: “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”³³⁸

332. CHEMERINSKY, *supra* note 131, at § 5.3.5.

333. *Sims Snowboards*, 863 F.2d at 646 (stating federal equitable authority to grant preliminary relief is separate and apart from Rule 65); *cf.* *Guar. Trust Co. v. York*, 326 U.S. 99, 103-06 (1945) (indicating that federal equity is an independent body of law).

334. *Hanna v. Plumer*, 380 U.S. 460, 466-69 (1965); *cf.* *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Gasperini v. Ct. for Humanities, Inc.*, 518 U.S. 415 (1996).

335. *See Gasperini*, 518 U.S. 415 (finding no genuine conflict between a state law allowing appellate review of damage judgments and the Seventh Amendment.).

336. *See Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010) and cases therein cited.

337. *Hanna*, 380 U.S. at 468.

338. *Id.* The “twin aims” of *Erie*, as the Court ruled in *Hanna*, replaced the former “outcome determinative” test of *Guar. Trust Co.*, 326 U.S. 99. Whether the twin aims also replaced the state/federal interest balancing test of *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958), is an open question. *See Semtek Int’l*, 531 U.S. 497; *Gasperini*, 518 U.S. 415.

The First Circuit Court of Appeals has also applied the “twin goals” approach even when the federal rule is not broad enough to address the issue.³³⁹ It has asked whether a court should decline to apply the state law, even without applying a federal law, because declining would advance the twin goals of *Erie*.³⁴⁰ This ruling seems questionable as the premise underlying *Erie* was to prevent federal courts from applying federal law (thus displacing state law) and thus to discourage forum-shopping and to prevent the undermining of state law through its inequitable administration. It also appears inconsistent with the Rules of Decision Act,³⁴¹ which directs the federal courts to apply state law in the absence of contrary federal law.

The Court has referred to these two criteria as governing the “typical, relatively unguided *Erie* choice.”³⁴² In other words, if federal law were more favorable than state law to one of the parties, that party would choose the federal forum (plaintiffs would commence the action in or defendants would remove to a federal court). Since an action asserting state claims would ordinarily be filed and decided in state court, but for federal jurisdictional statutes that sometimes reach state-based claims, litigating the action in federal court could produce “inequitable administration of the laws.”³⁴³

As examined earlier, the Massachusetts state and federal criteria for preliminary injunctions vary sufficiently so that the state and federal courts, applying their own standards, would reach different results in the same case involving the same claims and defenses. They would truly be “outcome determinative,”³⁴⁴ a test the Supreme Court redefined in *Hanna* into the “twin aims” of *Erie*. If the plaintiff has a choice of state or federal court, the attorney who plans to seek a preliminary injunction would choose the forum more favorable to his client, that is, where the client would have a better chance of securing temporary relief.

As noted earlier, state claims may appear in federal court complaints by three avenues: (1) diversity jurisdiction;³⁴⁵ (2)

339. See *Godin v. Schencks*, 629 F.3d 79, 86 (1st Cir. 2010). In the Supreme Court’s most recent decision in the *Erie/Hanna* line of cases, Justice Ginsburg, dissenting, took a similar approach. Thus even if state law and the federal rule of civil procedure do not conflict (or the federal rule does not cover the disputed question), the court must then apply the twin goals of *Erie* to the state law. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (Ginsburg J., dissenting); see also *Gasperini*, 518 U.S. at 415.

340. See *Godin*, 629 F.3d at 86.

341. 28 U.S.C. § 1652 (2006).

342. *Hanna*, 380 U.S. at 471.

343. *Id.* at 468.

344. See *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

345. See 28 U.S.C. § 1332 (2006); see generally *supra* note 283.

supplemental jurisdiction;³⁴⁶ and (3) general federal question jurisdiction.³⁴⁷ In each of these instances, the plaintiff may choose the state or federal court. If the plaintiff chooses a Massachusetts state court, the defendant may remove the civil action to the federal court over the plaintiff's objection,³⁴⁸ where the standards for preliminary relief are more favorable. In some instances, though, the plaintiff may seek to structure the complaint to make the civil action non-removable.³⁴⁹ After all, the plaintiff is the master of the complaint.

With federal forums frequently available to both plaintiffs and defendants in civil actions alleging state-based claims, the divergent standards for preliminary relief under Massachusetts state and federal law would undermine the *Erie* goal of discouraging forum-shopping. "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."³⁵⁰ Conversely, the federal "equitable powers" should not be used to deny a preliminary injunction when state law would grant it. Indeed the search for the more favorable forum, state or federal, would be rampant, with plaintiffs, wishing to sue in state court and remain there, using pleading devices to prevent removal, while defendants would be seeking to attack such devices so removal could be effected.³⁵¹

The only way to avoid forum-shopping is to apply the state standards to the motion for preliminary relief whether the civil action is pending in state or federal court when the claim is based on state law. The Federal Rules of Evidence have two rules addressing the *Erie/Hanna* doctrine. Both rules require the federal courts to follow the state law of presumptions (Rule 302) and privileges (Rule 501) where state law provides the rule of decision for "an element of a claim or defense."³⁵² That concept should be applied to motions for preliminary relief in federal court when state law claims are alleged.

Regarding the other aim of *Erie*, to prevent the inequitable administration of the law,³⁵³ the varying state and federal standards for

346. See 28 U.S.C. § 1367 (2006); see generally *supra* note 284.

347. See 28 U.S.C. § 1331 (2006); see generally *supra* note 285.

348. See 28 U.S.C. § 1441 (2006).

349. Cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (joining non-diverse defendants to prevent removal of the case from the state court to federal court).

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

351. Cf. *World-Wide Volkswagen Corp.*, 444 U.S. at 286 (using lack of personal jurisdiction of non-diverse defendants to permit removal).

352. FED. R. EVID. 302, 501 (2012)

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

preliminary relief would also offend that goal. Given two identical cases in a state and federal court in Massachusetts involving state-based claims, the plaintiff, for example, in the state court litigation would have a better chance of obtaining a temporary injunction under a two or three-pronged approach of *Packaging Industries* (and its progeny) than a similarly-situated plaintiff in federal court under the four-pronged test the Supreme Court articulated in *Winter*³⁵⁴ and the First Circuit has applied for almost 30 years. The only difference in the two outcomes is the forum in which the litigation is pending. That kind of inequality in the administration of justice is what *Erie* and its progeny,³⁵⁵ including *Hanna*, have sought to prevent.

4. *Erie/Hanna* Avoidance

Federal judges have a variety of tools to avoid this potential violation of the *Erie* doctrine without having to address the difficult *Erie* questions. Historically, as noted earlier, the Supreme Court has sought to reconcile the arguably conflicting state and federal law through interpretation of state and federal law.³⁵⁶ If such harmony occurs, the federal court simply applies the state and federal law without having to resort to the Supremacy Clause of Article VI. But avoidance of the difficult *Erie/Hanna* conflicts can be achieved through other discretionary exercises of federal judicial power.³⁵⁷

First, with regard to state claims in federal court under the supplemental jurisdiction statute,³⁵⁸ the trial court could invoke its discretionary authority under § 1367(c) of that statute to dismiss the state claims.³⁵⁹ Section 1367(c) provides four grounds for discretionary dismissal of supplemental claims.³⁶⁰ Three of the grounds are relatively specific and cabined. The fourth is somewhat indeterminate. The grounds for dismissal of the state claim (the supplemental claim) may fit one of the first three, relatively specific paragraphs of § 1367(c). If not, the trial court could invoke the fourth, more open-ended ground that allows the court to dismiss a supplemental claim when “in exceptional circumstances, there are other compelling reasons for declining

354. *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

355. *E.g.*, *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

356. *E.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

357. *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

358. *See* 28 U.S.C. § 1367 (2006).

359. *See Id.* § 1367(c).

360. *Id.*

jurisdiction.”³⁶¹ Protecting the integrity of *Erie* and *Hanna*, which are central to our federal system of government, might well qualify as “exceptional circumstances” and “compelling reasons.”³⁶²

Second, regarding state claims in federal court under the general federal question jurisdictional statute, the federal judge also has some discretion to dismiss, taking account of the four factors the Supreme Court identified as controlling in the *Grable* decision.³⁶³ In *Grable* the Court affirmed the right of a plaintiff to invoke federal question jurisdiction if its state-based claim has an essential federal element, which is substantial and disputed, so long as the allocation of such cases to the federal courts “is consistent with congressional judgment about the sound division of labor between state and federal courts. . . .”³⁶⁴

Finally, civil actions brought under the diversity statute present more challenging issues for the trial judge to exercise discretion to dismiss the state claims, which ordinarily comprise the entire case. Federal courts have assumed that if a plaintiff properly alleges grounds to assert diversity jurisdiction (complete diversity and amount in controversy), that plaintiff is entitled to be in federal court. Despite that assumption, the Supreme Court has ordered discretionary dismissals of state claims in diversity cases under the “abstention” doctrines.³⁶⁵

CONCLUSION

The standards for the grant or denial of a preliminary injunction overlap in some cases and are considerably different in others when the action is pending in a Massachusetts state or federal court. While the Supreme Judicial Court has developed three sets of criteria, depending on the nature of the case, the First Circuit Court of Appeals, with Supreme Court guidance, has adopted a four-factor test which it has employed in virtually every case since 1981, no matter the nature of the civil action or the parties to it.

In some cases, the state and federal standards for preliminary relief are nearly identical, while in others they differ dramatically. Such differences lead to different results depending whether the case is in

361. *Id.* § 1367(c)(4).

362. *Id.*

363. *Grable & Sons Metal Products, Inc., v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005); accord *Gunn v. Minton*, 133 S. Ct. 1039 (2013).

364. *Id.* at 313.

365. *E.g.*, *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959) (diversity jurisdiction); *see also* *Ala. Pub. Serv. Comm’n v. Southern Ry. Co.*, 341 U.S. 341 (1951) (diversity and federal question jurisdiction); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (same).

state or federal court, or if in a federal court, whether the judge applies state or federal standards to the plaintiff's state-based claims. For attorneys who have a choice of filing in state or federal court when their claims are based on state and federal law, they should consider these differences when seeking preliminary injunctive relief. If their case ends up in federal court because they have filed there or because the defendant has removed the action from state to federal court, they then must seriously consider whether to urge the federal judge to apply state standards to their state-based claims.

Because the federal courts in Massachusetts have generally applied federal standards for interlocutory relief in all cases, no matter the source of the plaintiff's claim, they have not addressed the critical *Erie/Hanna* question whether state standards should apply when the claim in the federal litigation turns on state substantive law. By finessing the issue because the objecting party did not raise the question in the trial court or by stating that the state and federal standards are not "markedly" different, the First Circuit has avoided the difficulties of the *Erie* doctrine. But the state and federal standards for temporary relief are significantly different in some instances, affecting the result of the motion for a preliminary injunction.

This Article advances the point that the grant or denial of preliminary relief impacts the substantive rights of the parties and should be governed by state standards in federal civil actions alleging state claims. Because they impact substantive rights, the application of federal standards to state claims violates the Rules Enabling Act and the twin aims of the *Erie* doctrine: to discourage forum-shopping and to avoid inequitable administration of the laws. The federal courts in Massachusetts need to confront this critical matter. The United States Supreme Court could help, first, by drawing a clearer line between substance and procedure under the Rules Enabling Act, and, second, by defining "rules of decision" more precisely in the Rules of Decision Act.