Erie and Equity

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Michael T. Morley, *The Federal Equity Power* (March 1, 2017), available at SSRN.

Michael Morley has many skills we admire in a scholar: he is doggedly productive; he has an easy command of the established authorities; and he typically identifies sources that shed new light on the problem he has chosen to tackle. Perhaps best of all, Morley has a canny eye for the kind of project that has become ripe for careful exploration. His new article on the federal equity power confirms this.

We have enjoyed something of an equity renaissance in recent years. The Supreme Court has been busy, fashioning a body of federal equity law for application to a diverse array of problems. To be sure, the Court's handiwork has drawn its share of criticisms, perhaps most pointedly from John Langbein. But it also has its share of defenders. In an elegant piece of writing (reviewed in JOTWELL), Sam Bray celebrated the Court's new equity jurisprudence as a flexible body of principles drawn from the days of the divided bench. While Bray recognized that the Court's equity might not pass muster as good history, he argued that it might nonetheless provide the foundation for a supple body of law.

Understanding the nature of federal equity power has become more pressing in the wake of the Court's decision in Armstrong v. Exceptional Child Center. There, the Court refused to treat an action to compel state compliance with a cooperative state-federal spending program as an entailment of the Supremacy Clause; instead, the Court explained that the right to seek an injunction to compel state official compliance with federal norms was a creature of federal equity. While such remedies were ordinarily available to enforce certain federal rights (as in *Ex parte Young* and its progeny), they were displaced in the particular case by a federal Spending Clause statute that appeared to place remedial control in the state's overseers at the federal agency level. Private enforcement had been displaced.

Along comes Morley to make sense of the federal equity power. While he does not set out to solve the *Armstrong* problem, his paper possesses an admirable clarity. He would extend Erie to issues of remedial power that some federal courts continue to view as governed by the equity power of the federal forum. His approach would significantly curtail the availability of a freestanding body of federal equity in cases otherwise governed by state law. By contrast, when the substantive right traces to a foundation in federal law, Morley would recognize broader federal equity power.

In doing so, Morley marshals a good deal of common sense, pointing out that equitable remedies create the outcome disparities that ordinarily bring the *Erie* Doctrine into play. He also shows that one cannot fairly link the federal equity power to any positive source in the federal rules of civil procedure or in applicable federal jurisdictional statutes, thus leaving it exposed as a body of judge-made law to which the *Erie* doctrine (the "relatively unguided *Erie* choice") applies with full force. Morley echoes conclusions that Steve Burbank also reached in a different context, arguing against the Court's reliance on federal (rather than state) equitable principles in assessing the availability of *Mareva* injunctions in Grupo Mexicano.

One might fairly ask how much difference it will make if a federal court were to evaluate the propriety of preliminary injunctive relief under a federal or state standard; after all, most standards consider such matters as irreparable harm and likelihood of success on the merits. And a federal judge, sitting in

diversity, will evaluate likelihood of success by looking at the merits of the claim under applicable state law. To the extent that equity calls for the exercise of judicial discretion in weighing matters of more or less, the way one frames the standard may matter less than the proverbial size of the chancellor's foot. But where state law speaks in more absolute terms, either requiring or forbidding injunctions in specific settings, the choice of state or federal remedial law can make all the difference. In those settings, remedial choices have a more dramatic impact on outcomes and on forum preferences, thus triggering the concerns that continue to underpin *Erie*. When a state says no to an equitable remedy on matters governed by state law, federal courts should pay attention; after all, we would expect a state court to refrain from equitable enforcement of the federal norms that the *Armstrong* Court said were a matter for federal agency enforcement.

Morley teaches another important and subtle lesson. By describing the world of pre-*Erie*, free-wheeling federal equity and contrasting it with the more circumscribed perception of federal common law authority today, Morley helps us understand nineteenth-century perceptions of federal equity as a system of remedies. He also shows that it can be quite difficult to account for the particular content of much of the old doctrine. Sometimes equity took its cues from English practice, sometimes from perceptions of remedial adequacy at common law, sometimes from more localized considerations. In the welter of doctrines, one has difficulty distilling an essence of equity that readily translates to our very different world of litigation today, after the merger of law and equity. This offers a cautionary tale for a Court apparently devoted to dusting off the old books and plucking equity doctrines of old for use as the measure of federal equity today.

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