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Enforcing Equality: Statutory Injunctions, Equitable Balancing under *eBay*, and the Civil Rights Act of 1964

Michael T. Morley[†]

INTRODUCTION

The Civil Rights Act of 1964¹ has played a major role in reshaping many aspects of American society. It has been called a “proven super-statute” that “successfully penetrate[d] public normative and institutional culture in a deep way.”²

One of the Act’s remarkable features that likely has contributed to its impact is that most of its requirements are enforceable through injunctions. For violations of certain provisions, including Title I,³ which prohibits racial discrimination in voter registration,⁴ and Title II,⁵ concerning places of public accommodation,⁶ an injunction is the only

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¹ Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241 (1964).

² William N. Eskridge Jr and John Ferejohn, *Super-Statutes*, 50 Duke L J 1215, 1237 (2001).

³ 42 USC § 1971(c) (pre-existing remedial provision that Title I of the Civil Rights Act relied upon and expanded).

⁴ Civil Rights Act § 101, 78 Stat at 241–42.

⁵ Id §§ 204(a), 206(a), 207(b), 78 Stat at 244–46; see *Newman v Piggie Park Enterprises, Inc*, 390 US 400, 402 (1968) (“When a plaintiff brings an action under . . . Title [II], he cannot recover damages.”).

⁶ Civil Rights Act §§ 201–03, 78 Stat at 243–44.

available remedy.⁷ Along with backpay,⁸ injunctions are the primary remedy for racial discrimination in employment⁹ in violation of Title VII.¹⁰ The Supreme Court has also recognized implied rights of action for both injunctive relief and damages for intentional racial discrimination¹¹ by federally funded programs in violation of Title VI.¹²

For some types of Civil Rights Act violations, only the Attorney General may seek an injunction.¹³ Under certain circumstances, he or she may also intervene in private suits¹⁴ or even sue on behalf of alleged victims of discrimination who are unable to bring suit themselves.¹⁵

The Civil Rights Act does not expressly specify whether courts are required to issue injunctions in response to past or impending violations, or identify particular circumstances under which they should grant injunctions to prevailing plaintiffs. And

⁷ Title II's provisions governing injunctive relief, id § 204(a), 78 Stat at 244, have been incorporated into other civil rights statutes, including the Americans with Disabilities Act (ADA), 42 USC § 12188. See *Dudley v Hannaford Brothers Co*, 333 F3d 299, 304 (1st Cir 2003) ("Title III [of the ADA] . . . allows only injunctive relief (as opposed to money damages).").

⁸ Civil Rights Act § 706(g), 78 Stat at 261. See also *Albemarle Paper Co v Moody*, 422 US 405, 419–21 (1975).

⁹ Civil Rights Act § 706(g), 78 Stat at 261.

¹⁰ Id §§ 703–04, 78 Stat at 255–58.

¹¹ See *Cannon v University of Chicago*, 441 US 677, 696–97 (1979); see also *Alexander v Sandoval*, 532 US 275, 281 (2001). The Court declined to recognize an implied right of action against federally funded programs that have a disparate racial impact in violation of federal regulations. *Alexander*, 532 US at 293.

¹² Civil Rights Act § 601, 78 Stat at 252. Federal agencies also may cut off funding for programs that discriminate. Id § 602, 78 Stat at 252–53.

¹³ See id § 206(a), 78 Stat at 245 (permitting the Attorney General to seek to enjoin a pattern or practice of discrimination in places of public accommodation in violation of Title II); id § 707(a), 78 Stat at 261–62 (same for pattern or practice of employment discrimination in violation of Title VII). The Attorney General also may seek to enjoin violations of voting rights under Title I, see 42 USC § 1971(c). Courts have split over whether private litigants may do so, as well. Compare *Mixon v Ohio*, 193 F3d 389, 407 n 12 (6th Cir 1999), with *Schwieger v Cox*, 340 F3d 1284, 1296 (11th Cir 2003).

¹⁴ Civil Rights Act § 204(a), 78 Stat at 244 (permitting the Attorney General to intervene in suits alleging racial discrimination in places of public accommodation in violation of Title II); Civil Rights Act § 706(e), 78 Stat at 260 (same for suits alleging employment discrimination in violation of Title VII); Civil Rights Act § 902, 78 Stat at 266–67 (same for suits alleging certain Equal Protection violations).

¹⁵ Civil Rights Act § 301(a), 78 Stat at 246 (authorizing the Attorney General to seek "such relief as may be appropriate" if a person alleges that a State or political subdivision has denied him "equal utilization of any public facility"); Civil Rights Act § 407(a), 78 Stat at 248 (same where a public school allegedly is violating the equal protection clause, or a student is barred from attending a public college for racially discriminatory reasons).

Supreme Court doctrine concerning statutory injunctions has caused confusion among the lower courts, including under the Civil Rights Act. A longstanding line of cases reaffirmed over the past few years in *eBay, Inc v MercExchange, LLC*¹⁶ and *Winter v Natural Resources Defense Council*¹⁷ emphasizes that, in general, a court may not automatically, or even presumptively, issue an injunction when a federal statute is violated. Instead, a court must exercise its discretion on a case-by-case basis by applying a four-factor test,¹⁸ a process often called “equitable balancing.”¹⁹ *eBay* and *Winter* raise the issues of: (i) whether a prevailing plaintiff in a Civil Rights Act case must make some additional showing, beyond establishing a statutory violation, in order to obtain injunctive relief, (ii) how the four-factor *eBay* test should be applied in the Civil Rights Act context, and (iii) what the consequences would be of denying injunctive relief to Civil Rights Act plaintiffs based on *eBay*’s “non-merits” factors. In exploring these issues, this Article more broadly seeks to reveal the contradictions and shortcomings of using injunctions as remedies for statutory violations in general, and the deficiencies in the Supreme Court’s current doctrine governing them.

This Article argues that the standard governing the issuance of injunctions for statutory violations, including in the civil rights context, should depend on the nature of the injunction the plaintiff seeks. Part I begins by reviewing current doctrine, explaining that courts generally may not grant injunctions as a matter of course to prevent or remedy violations of most statutes that provide for injunctive relief, but instead must engage in case-by-case balancing of the equitable considerations endorsed by the *eBay* Court.

Part II reviews the wide range of approaches courts have employed in considering whether to grant injunctive relief under the Civil Rights Act. It demonstrates that, under current

¹⁶ 547 US 388 (2006).

¹⁷ 555 US 7 (2008).

¹⁸ *eBay*, 547 US at 394 (explaining that a court should issue a permanent injunction only if: (i) the plaintiff will suffer irreparable harm in the absence of such relief, (ii) he or she lacks an adequate remedy at law, (iii) the balance of hardships favors the plaintiff, and (iv) an injunction would be in the public interest); see Section I.A (discussing the four-factor standard in greater detail). *Winter* establishes a similar test for preliminary injunctions. 555 US at 20.

¹⁹ This phrase may be something of a misnomer, since courts often treat the considerations identified in *eBay* as hard-and-fast requirements for injunctive relief, rather than factors to be balanced against each other. See Section I.A.

doctrine, the *eBay* Court's four-prong balancing test should apply to requests for injunctions under the Act. It then explores the difficulty of attempting to modify that standard to take into account the Act's special purpose.

Part III turns to the normative argument at the heart of this Article, arguing that the manner in which Congress and the courts consider statutory injunctions should depend on the nature of the relief the plaintiff seeks:

- *Remedial (non-monetary) relief*: Remedial relief is intended to ameliorate harm that a plaintiff has suffered due to a past statutory violation. A court should grant, if possible, a prevailing plaintiff's request for a non-monetary remedial order that is tailored or proportionate to the harm he or she has suffered, unless the combined burden or harm that such an order would cause for the defendant and third parties would overwhelmingly outweigh the benefit to the plaintiff.
- *Remedial (monetary) relief*: A plaintiff's request for a remedial order requiring the payment of money should be treated as an action for compensatory damages.
- *Prospective relief*: A court should automatically issue an injunction when a plaintiff establishes that future violations of a statute are likely to occur, and address the propriety of enforcing that injunction during subsequent contempt proceedings. Congress, however, should avoid enacting statutes that provide for such relief, and instead make civil contempt-type remedies directly available for statutory violations.
- *Prophylactic relief*: Courts should avoid issuing injunctions that prohibit conduct that is not otherwise illegal.

Part IV briefly concludes.

The question of whether and when injunctive relief should be available under statutes is but one aspect of the broader debate over the use of liability rules (in other words, damages) and property rules (in other words, injunctions²⁰) to remedy

²⁰ But see Michael T. Morley, *Public Law at the Cathedral: Enjoining the*

violations of legal entitlements.²¹ The relative advantages of liability and property rules tend to be considered primarily in the context of common-law causes of action,²² without addressing the constraints that statutory text and separation-of-powers principles place upon the choice between them. This Article highlights the unique considerations that arise when statutes make injunctive relief available, and offers a new approach to determining the availability of such injunctions by distinguishing among the various types of orders a plaintiff may seek.

I. THE SUPREME COURT AND INJUNCTIVE RELIEF AGAINST STATUTORY VIOLATIONS

Federal laws that provide for injunctive relief generally do not specify the circumstances under which a court should grant an injunction to a prevailing plaintiff. Rather, a statute typically will state only that a court “may” issue an injunction when its substantive provisions are violated,²³ implicitly leaving it to the courts to determine when such relief is appropriate. Particularly where injunctions are the primary or sole mechanism for enforcing a federal statute, this discretion to determine whether to issue an injunction allows courts to effectively nullify a law by failing to either provide a remedy for past violations or attempt to prevent future ones.

Government, 35 Cardozo L Rev 2453, 2488 (2014) (arguing that, at least in the public law realm, the concept of “property rule” should be disaggregated into “potential property rule,” referring to people who have a substantial likelihood of obtaining an injunction if they go to court, and “complete property rule,” referring to people who actually are protected by an injunction).

²¹ See generally Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089 (1972) (arguing that courts should choose between liability rules and property rules to enforce legal entitlements based on transaction costs, distributional concerns, and other justice-related considerations).

²² But see Morley, 35 Cardozo L Rev at 2492–93 (cited in note 20) (explaining how the Cathedral framework of liability and property rules should be applied in public law cases).

²³ See, for example, 15 USC § 53(b) (providing that a “court *may* issue[] a permanent injunction” against false advertisements) (emphasis added); 15 USC § 8131(2) (providing that “a court *may* award injunctive relief” in a suit for cyberpiracy) (emphasis added); 27 USC § 122a(d)(1) (“[U]pon a proper showing by the attorney general of [a] State, the court *may* issue a preliminary or permanent injunction to restrain a violation” of federal liquor laws.) (emphasis added).

Section A begins by discussing the traditional four-factor test that courts generally must apply when exercising their discretion to grant injunctive relief, including statutory injunctions. Section B discusses the rare circumstances under which courts lack such discretion and are required to issue statutory injunctions to successful plaintiffs. Finally, Section C discusses the range of alternate approaches that academic commentators have recommended for determining the availability of injunctions under federal statutes.

A. Equitable Balancing and Statutory Injunctions

Federal courts generally must exercise their equitable powers according to the standards employed by English Chancery courts²⁴ at the time of the nation's founding.²⁵ Purportedly applying those traditional equitable principles,²⁶ the Supreme Court has held that, when a federal statute provides for injunctive relief,²⁷ a court has discretion to decide whether to issue an injunction to prevent an impending violation or recurrences of past violations, or to remedy any such

²⁴ See *Robinson v Campbell*, 16 US 212, 222–23 (1818). Compare with *Hayburn's Case*, 2 US 409, 413–14 (1792) (“THE COURT considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court . . .”).

²⁵ *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund, Inc.*, 527 US 308, 318 (1999). See also *Atlas Life Insurance Co v W. I. Southern, Inc.*, 306 US 563, 568 (1939).

²⁶ Many prominent commentators have questioned the historical provenance of *eBay's* and *Winter's* four-factor tests, or certain elements of them. See Mark P. Gergen, John M. Golden, and Henry P. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 Colum L Rev 203, 207 (2012) (“[T]he Supreme Court's four-factor test differs from traditional equitable practice in at least three, and possibly four, significant ways.”); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv L Rev 525, 527 (1978) (“[T]he attempt to divine a single standard for preliminary relief is scarcely a century old . . .”). See also Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal L Rev 524, 556, 562 (1982) (arguing that, prior to *Hecht Co v Bowles*, 321 US 321 (1944), many cases had held that “injunctions for statutory violations could be issued without traditional threshold showings”). Compare with Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 Geo Wash L Rev 382, 385–86 (1983) (arguing that, historically, a person had to show that an injunction was necessary to prevent “immediate, substantial, and irreparable” harm, there was no adequate remedy at law, and the terms of the injunction were judicially manageable).

²⁷ A statute may provide for injunctive relief either expressly or as part of an implied right of action. See *Fitzgerald v Barnstable School Committee*, 555 US 246, 255 (2009), citing *Franklin v Gwinnett County Public Schools*, 503 US 60, 76 (1992); *Rondeau v Mosinee Paper Corp.*, 422 US 49, 62–63 (1975).

past violations.²⁸ Even when Article III's justiciability requirements are met,²⁹ a court is not required to automatically award injunctive relief unless the statute's text or legislative history³⁰ "unequivocal[ly]" mandates it.³¹ As the Court explained, "The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."³² Indeed, the Court repeatedly has rejected the notion that injunctive relief against statutory violations is even presumptively appropriate or should be denied only in

²⁸ *Monsanto Co v Geertson Seed Farms*, 561 US 139, 156–158 (2010); *Winter*, 555 US at 24, 32 (holding that equitable balancing generally is required for both preliminary and permanent injunctions); *Weinberger v Romero-Barcelo*, 456 US 305, 306–07 (1982) (rejecting the First Circuit's holding that the Federal Water Pollution Control Act "requires a district court to enjoin immediately all discharges of pollutants that do not comply with the Act's permit requirements"); *Rondeau*, 422 US at 58–59 (rejecting the Seventh Circuit's holding that a plaintiff need not show irreparable injury to obtain an injunction under the Williams Act, 15 USC § 78m(d), which requires an investor to disclose when she acquires a large fraction of a company's shares); *Hecht*, 321 US at 326, 328–29 (rejecting the DC Circuit's holding that the Emergency Price Control Act of 1942 "require[d] the issuance of an injunction or other order as a matter of course, once violations were found"). See also *Tennessee Valley Authority v Hill*, 437 US 153, 193 (1978) ("[A] federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law."). Compare with Jason David Fregeau, Comment, *Statutes and Judicial Discretion: Against the Law . . . Sort Of*, 18 BC Envir Affairs L Rev 501, 541 (1991) ("The Supreme Court has taken contradictory positions on whether equitable discretion may be used to permit violations of statutes to continue.").

²⁹ A court lacks jurisdiction to issue an injunction if the plaintiff lacks standing to seek prospective relief, see *City of Los Angeles v Lyons*, 461 US 95, 108 (1983) (holding that the plaintiff lacked standing to seek an injunction against illegal police chokeholds, because he failed to show a sufficient likelihood that he would again "be subjected to a chokehold without any provocation whatsoever"), or the dispute has become moot, *United States v W. T. Grant Co*, 345 US 629, 635 (1953) (affirming district court's refusal to enjoin interlocking corporate directorates after the defendants voluntarily terminated the allegedly illegal conduct and there was no reason to believe they would resume it in the future).

³⁰ See, for example, *Weinberger*, 456 US at 319 (allowing consideration of legislative history in deciding whether a law requires courts to grant injunctions to prevailing plaintiffs); *Hecht*, 321 US at 327–28 (same).

³¹ *Hecht*, 321 US at 329. See also *Amoco Production Co v Village of Gambell*, 480 US 531, 544 (1987) (holding that equitable balancing is required before issuing a statutory injunction unless there exists a "clear indication . . . that Congress intended to deny federal district courts their traditional equitable discretion"); *Weinberger*, 456 US at 320 (holding that "a major departure from the long tradition of equity practice should not be lightly implied").

³² *Weinberger*, 456 US at 313. See also *Amoco*, 480 US at 542; *Winter*, 555 US at 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.").

extraordinary circumstances,³³ explaining that “[n]o such thumb on the scales is warranted.”³⁴

As one commentator characterizes current doctrine:

Both Professor Calabresi and Justice Scalia have said that we live in an age of statutes. That may be true as to “rights,” but it appears to have little weight when it comes to equitable remedies. Here, the Court remains committed to a traditional approach that emphasizes the discretionary nature of the decision to grant or withhold the equitable remedy.³⁵

In *eBay*, the Court recently reiterated that, to obtain a permanent injunction under a federal statute, a plaintiff must not only prevail in its underlying cause of action, but further demonstrate that:

- (1) [he] has suffered an irreparable injury;
- (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
- (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
- (4) the public interest would not be disserved by a permanent injunction.³⁶

³³ *Monsanto*, 561 US at 157 (rejecting the presumption “that an injunction is the proper remedy for a NEPA violation except in unusual circumstances”); *eBay*, 547 US at 393 (rejecting the Federal Circuit’s holding that injunctions against patent infringement should be denied only in “unusual” cases, “exceptional circumstances,” or “rare instances”), quoting *MercExchange, LLC v eBay, Inc.*, 401 F3d 1323, 1338–39 (Fed Cir 2005), revd *eBay*, 547 US at 393; *Amoco*, 480 US at 534, 541 (rejecting the Ninth Circuit’s holding that the Alaska National Interest Lands Conservation Act required a district court to automatically enjoin exploration activities occurring without a statutorily required permit, except in “rare or unusual circumstances”), quoting *Village of Gambell v Hodel*, 774 F2d 1414, 1423 (9th Cir 1985), revd *Amoco*, 480 US at 534.

³⁴ *Monsanto*, 561 US at 158 (“It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue.”).

³⁵ James M. Fischer, *What Hath eBay v. MercExchange Wrought?*, 14 Lewis & Clark L Rev 555, 575 (2010).

³⁶ *eBay*, 547 US at 391, 393–94; accord *Monsanto*, 561 US at 156–157. See also *Amoco*, 480 US at 542; *Weinberger*, 456 US at 312–13; *Rondeau*, 422 US at 63 (holding that a plaintiff suing under the securities laws must “establish[] the traditional

Winter went on to explain that the requirements for obtaining a preliminary injunction are similar, except that the plaintiff must demonstrate “that he is likely to succeed in the merits.”³⁷

Under the *eBay* standard, a plaintiff must establish that, without an injunction, irreparable injury is not only possible, but “likely,”³⁸ and a court generally may not presume that irreparable injury will result from a statutory violation.³⁹ Moreover, the court must give serious consideration to the balance-of-hardships and public-interest elements, rather than treating them “in only a cursory fashion”⁴⁰; it may not assume that enjoining violations of the underlying statute will be categorically in the public interest.⁴¹ In *Winter*, for example, the Court held that the district court erred in issuing a preliminary injunction to prevent the Navy from conducting sonar exercises because, even assuming that such exercises would irreparably harm marine wildlife, and that the Navy was conducting them without having completed the National Environmental Policy Act’s (NEPA) decision-making process,⁴² the balance-of-hardships and public interest considerations both favored their

prerequisites of relief”); *Mills v Electric Auto-Lite Co.*, 396 US 375, 386 (1970), quoting *Hecht*, 321 US at 329–30 (holding that, when deciding whether to enjoin a statutory violation, a court generally must “keep[] in mind the role of equity as ‘the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims’”). Some early commentators had assumed that a plaintiff need not satisfy these requirements when a statute authorizes the issuance of injunctions. See, for example, Comment, *The Statutory Injunction as an Enforcement Weapon of Federal Agencies*, 57 Yale L J 1023, 1024 (1948) (“[L]egislative provision for an injunction liberates the remedy from many of the bonds of equity by satisfying of itself conditions which the Chancellor would otherwise require to be established in each case.”).

³⁷ *Winter*, 555 US at 20, 32. See also *Amoco*, 480 US at 546 n 12 (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”). But see *Brown v Chote*, 411 US 452, 457 (1973) (affirming issuance of preliminary injunction without regard to “the ultimate merits of [plaintiff’s] contentions”).

³⁸ *Winter*, 555 US at 22.

³⁹ *Amoco*, 480 US at 544–45; see also *Robert Bosch, LLC v Pylon Manufacturing Corp.*, 659 F3d 1142, 1149 (Fed Cir 2011) (holding, in a patent case, that “*eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief”).

⁴⁰ *Winter*, 555 US at 26.

⁴¹ *Amoco*, 480 US at 545–46.

⁴² *Winter*, 555 US at 23–24, 31 n 5.

continuation.⁴³ This ruling is even more noteworthy because it went on to emphasize that the Court would apply the same standards in deciding whether to issue a permanent injunction.⁴⁴

Because an injunction is an extraordinary remedy,⁴⁵ a court should deny injunctive relief if it is confident that it can achieve “compliance” with the underlying statute through other means,⁴⁶ such as when a defendant is independently committed to complying with the law.⁴⁷ Perhaps more controversially, the Court has upheld lower courts’ refusals to issue injunctions to prevent ongoing statutory violations,⁴⁸ or as remedies for completed statutory violations,⁴⁹ where the policies or goals underlying the law at issue could be furthered through some means other than strict adherence to the statute itself.⁵⁰

⁴³ Id at 24. See also *Christopher Phelps & Associates, LLC v Galloway*, 492 F3d 532, 543–45 (4th Cir 2007) (upholding denial of permanent injunction based on the balance-of-hardships and public interest factors, despite the fact that the plaintiff had established a copyright violation and faced irreparable harm).

⁴⁴ *Winter*, 555 US at 24.

⁴⁵ Id. But see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L Rev 1281, 1292 (1976) (“[S]urely, the old sense of equitable remedies as ‘extraordinary’ has faded.”); Plater, 70 Cal L Rev at 545 (cited in note 26).

⁴⁶ *Monsanto*, 561 US at 165–166 (“If a less drastic remedy . . . was sufficient to redress respondents’ injury, no recourse to the additional and extraordinary relief of an injunction was warranted.”); *Weinberger*, 456 US at 318, 320 (“We read the FWPCA as permitting the exercise of a court’s equitable discretion . . . to order relief that will achieve compliance with the Act.”). See also *Amoco*, 480 US at 543 n 8.

⁴⁷ See *Hecht*, 321 US at 328 (recognizing that, under certain circumstances, such as when a defendant who previously violated a statute has taken steps to prevent future violations, injunctive relief may be unnecessary).

⁴⁸ See notes 51–53 & accompanying text (discussing *Weinberger*); *Amoco*, 480 US at 544 (affirming “the [d]istrict [c]ourt’s refusal to issue a preliminary injunction against all exploration activities,” even though the Secretary of the Interior had not yet fulfilled statutorily required prerequisites for permitting such exploration, because it “did not undermine [the statutory] policy”). Then Justice Rehnquist wrote approvingly of a court’s discretion to “refuse to order a federal official to take specific action, even though the action might be required by law,” when equitable balancing does not support such relief. *Hill*, 437 US at 213 (Rehnquist dissenting), citing *United States v Dern*, 289 US 352, 360 (1933). Professor Plater contends that *Dern* does not support the proposition for which Justice Rehnquist cited it, however, arguing that “it was never clear whether the defendant [in *Dern*] had violated any statute.” Plater, 70 Cal L Rev at 559 (cited in note 26).

⁴⁹ *Rondeau*, 422 US at 59 (declining to issue a remedial injunction after a shareholder violated the Williams Act, 15 USC § 78m(d), by purchasing more than 5% of a company’s shares without filing the necessary disclosure with the SEC, because “none of the evils to which the Williams Act was directed has occurred or is threatened in this case”).

⁵⁰ See also *Mills*, 396 US at 386 (emphasis added), quoting *J. I. Case Co v Borak*, 377 US 426, 433 (1964) (holding that, “upon finding a violation [of a statute] the courts

*Weinberger v Romero-Barcelo*⁵¹ is perhaps the best example of the Court exercising this discretion. The Court recognized that the Navy was discharging ordnance in the waters around Vieques Island without a permit in violation of the Federal Water Pollution Control Act (FWPCA).⁵² Upholding the district court's equitable balancing, the Court affirmed its refusal to enjoin the Navy from discharging ordnance until the Environmental Protection Agency (EPA) issued a permit, even though the statute clearly prohibited such discharges without one.⁵³

In *United States v Oakland Cannabis Buyers' Cooperative*,⁵⁴ however, the Court cautioned that a district court cannot rely on equitable balancing to "override Congress's policy choice, articulated in a statute, as to what behavior should be prohibited."⁵⁵ The purpose of equitable balancing—particularly the balance-of-hardships and public interest prongs—is to determine whether issuing an injunction "should be chosen over another permissible means" of enforcing a statute, not "whether enforcement is preferable to no enforcement at all."⁵⁶ Thus, while a court cannot use *eBay*'s four-factor balancing test to override or nullify Congress's policy decisions,⁵⁷ it may decide

[a]re 'to be alert to provide such remedies as are necessary to make effective the congressional purpose'). See, for example, *United States v Massachusetts Water Resources Authority*, 256 F3d 36, 50–51 (1st Cir 2001) (upholding district court's refusal to order Massachusetts to comply with EPA rules regarding filtration of public water supplies, after the State had failed to satisfy EPA regulations concerning tolerable water contamination levels, because a court "retains a measure of flexibility" under the Safe Drinking Water Act, 42 USC § 300g-3(b), to determine how best to bring about Congress's goal of clean drinking water).

⁵¹ 456 US 305 (1982).

⁵² Id at 307–08.

⁵³ Id at 314–16; see also id at 328 (Stevens dissenting) (criticizing the majority for holding that an injunction need not be issued to stop "an ongoing deliberate violation of a federal statute").

⁵⁴ 532 US 483 (2001).

⁵⁵ Id at 497. See also *Virginian Railway Co v System Federation No 40*, 300 US 515, 552 (1937) (arguing that Congress's decision to mandate negotiations between railroads and labor unions "is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief").

⁵⁶ *Oakland Cannabis*, 532 US at 497–98. See also id at 498 ("[W]hen a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute," but rather how the public interest and conveniences of the parties "are affected by the selection of an injunction over other enforcement mechanisms."); Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L J 291, 340 (2003).

⁵⁷ *Oakland Cannabis*, 532 US at 497–98.

that the goals Congress intended to further through a statute could best be advanced by allowing statutory violations to continue.⁵⁸

The Court has enforced equitable balancing even in constitutional cases.⁵⁹ Indeed, one of the main reasons, aside from “Our Federalism,”⁶⁰ that the Court established the *Younger* doctrine—which generally prohibits federal courts from enjoining pending state criminal proceedings, even where the state laws that were violated are allegedly unconstitutional⁶¹—is because defendants in such proceedings cannot satisfy the traditional equitable requirements for injunctive relief.⁶² The Court explained, “[T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered ‘irreparable’ in the special legal sense of that term.”⁶³ Moreover, a criminal defendant seeking to raise constitutional challenges to his prosecution has an adequate remedy at law, because he can present those arguments in his criminal case and ultimately seek certiorari from the Supreme Court.⁶⁴ *City of Los Angeles v Lyons*⁶⁵ similarly relied on the traditional equitable requirements for injunctive relief as an alternate basis for rejecting the plaintiff’s challenge to the Los Angeles Police Department’s allegedly unconstitutional policy permitting the unnecessary use of chokeholds.⁶⁶

Prior to the Court’s strident reaffirmation of the four-factor test in *eBay* and *Winter*, several circuits had held that “[t]he standard requirements for equitable relief need not be satisfied

⁵⁸ *Weinberger*, 456 US at 319; *Amoco*, 480 US at 544.

⁵⁹ As one influential article explains, “[T]he interest in immediate protection of constitutional rights may be offset by the disruptive effects of injunctive relief and by judicial reluctance to interfere with coordinate or subordinate political bodies, so that a balancing results which is not wholly different from that in nonconstitutional cases.” *The Changing Limits of Injunctive Relief*, 78 Harv L Rev 997, 1007 (1965).

⁶⁰ *Younger v Harris*, 401 US 37, 44–45 (1971).

⁶¹ *Id.* at 46.

⁶² *Id.* at 43–44 (“[C]ourts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”).

⁶³ *Id.* at 46.

⁶⁴ *Id.* at 50.

⁶⁵ 461 US 95 (1983).

⁶⁶ *Id.* at 111 (holding that an “equitable remedy is unavailable absent a showing of irreparable injury,” and that the plaintiff’s damages suit was “an adequate remedy at law” for the allegedly unconstitutional use of chokeholds by the police).

when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.”⁶⁷ Other courts had held that, rather than the traditional equitable factors, successful plaintiffs need show only that it was possible that future statutory violations would occur,⁶⁸ which is more of a standing requirement than a separate restriction on equitable relief.⁶⁹ Over the past half-decade, however, “the four-factor test from *eBay* has, in many federal courts, become the test for whether a permanent injunction should issue, regardless of whether the dispute in question centers on patent law.”⁷⁰ Lower courts have applied *eBay*’s four-factor test in a wide range of contexts, including intellectual property cases,⁷¹ cases involving

⁶⁷ See, for example, *Burlington Northern Railroad Co v Department of Revenue*, 934 F2d 1064, 1074 (9th Cir 1991). See also *United States v White*, 769 F2d 511, 515 (8th Cir 1985); *United States v Buttorff*, 761 F2d 1056, 1059, 1065 (5th Cir 1985); *CSX Transportation, Inc v Tennessee State Board of Equalization*, 964 F2d 548, 551 (6th Cir 1992) (“[S]ince Congress has expressly authorized the granting of injunctive relief to halt or prevent a violation of [49 USC] § 11503, traditional equitable criteria do not govern the issuance of preliminary injunctions under § 11503.”). Following *eBay* and *Winter*, many courts have questioned or rejected holdings such as these. See, for example, *Galloway*, 492 F3d at 543; *Kane v Chobani, Inc*, 2013 US Dist LEXIS 99359, *20–25 (ND Cal); *E.I. DuPont de Nemours and Co v Kolon Industries, Inc*, 894 F Supp 2d 691, 706 (ED Va 2012).

⁶⁸ See, for example, *Commodity Futures Trading Commission v Hunt*, 591 F2d 1211, 1220 (7th Cir 1979) (“Actions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations.”); *Wisconsin v Stockbridge-Munsee Community*, 67 F Supp 2d 990, 994 (ED Wis 1999) (“[I]n actions for statutory injunctions, once a violation of the act or regulation is shown, the moving party need show only that there is some reasonable likelihood of future violations.”).

⁶⁹ Compare with *Lyons*, 461 US at 108 (holding that the plaintiff lacked standing to seek an injunction against allegedly unconstitutional chokeholds by police, since he could not show it was sufficiently likely that he would be subjected to such chokeholds in the future).

⁷⁰ Gergen, Golden, and Smith, 112 Colum L Rev at 205 (cited in note 26). See also *Voice of the Arab World, Inc v MDTV Medical News Now, Inc*, 645 F3d 26, 33 (1st Cir 2011) (“[T]he text and logic of *eBay* strongly suggest that the traditional principles of equity it discussed should be presumed to apply whenever a court must determine whether to issue an injunction, whether the case is a patent case or any other type of case.”); *Salinger v Colting*, 607 F3d 68, 78 & n 7 (2d Cir 2010) (emphasis added) (“*eBay* strongly indicates that the traditional principles of equity it employed are the presumptive standard for injunctions in any context. . . . [W]e see no reason that *eBay* would not apply with equal force to an injunction in any type of case.”).

⁷¹ See, for example, *Voice of the Arab World*, 645 F3d at 31 (trademark infringement); *CoxCom, Inc v Chaffee*, 536 F3d 101, 104, 112 (1st Cir 2008) (Digital Millennium Copyright Act, 17 USC § 1201); *Salinger*, 607 F3d at 73–74 (copyright); *Osmose, Inc v Viance, LLC*, 612 F3d 1298, 1320 (11th Cir 2010) (false advertising under the Lanham Act, 15 USC § 1125(a)).

other types of economic harms,⁷² environmental cases,⁷³ constitutional cases,⁷⁴ and cases arising under various other statutes.⁷⁵

B. Mandatory Statutory Injunctions

A “clear statement” rule protects courts’ discretion to determine whether to grant statutory injunctions to successful plaintiffs.⁷⁶ Occasionally, a statute’s text or legislative history

⁷² See, for example, *Sanders v Mountain American Federal Credit Union*, 689 F3d 1138, 1144 (10th Cir 2012) (Truth in Lending Act (“TILA”), 15 USC § 1601); *Smith v Sohaan Development, Inc.*, 2013 US Dist LEXIS 79708, *1, *3 (MD Fla) (preliminary injunctions under the Fair Labor Standards Act (“FLSA”), 29 USC § 201 et seq); *FXDirectDealer, LLC v Abadi*, 2012 US Dist LEXIS 49588, *19–20 (SDNY) (Computer Fraud and Abuse Act, 18 USC § 1030).

⁷³ See, for example, *Animal Welfare Institute v Martin*, 623 F3d 19, 27–28 (1st Cir 2010) (Endangered Species Act, 16 USC § 1531 et seq); *National Resources Defense Council, Inc v Texaco Refining and Marketing, Inc.*, 906 F2d 934, 941 (3d Cir 1990) (Clean Water Act, 33 USC § 1365); *Brooklyn Heights Association v National Park Service*, 777 F Supp 2d 424, 434–35 (EDNY 2011) (Land and Water Conservation Fund Act of 1965, 16 USC § 460i-8).

⁷⁴ Courts have held that the four-factor test must be applied in preemption cases under the Supremacy Clause, *United States v Alabama*, 691 F3d 1269, 1281, 1301 (11th Cir 2012); *Independent Training and Apprenticeship Program v California Department of Industrial Relations*, 730 F3d 1024, 1032 (9th Cir 2013); Seventeenth Amendment challenges to Senate elections, *Judge v Quinn*, 2008 US App LEXIS 28077, *26 (7th Cir); challenges to prison regulations and conditions of parole under the First and Fourteenth Amendments, *Couch v Jabe*, 737 F Supp 2d 561, 574 (WD Va 2010); Due Process and Equal Protection challenges to ballot regulations, see *Dudum v City and County of San Francisco*, 2010 US Dist LEXIS 94031, *15–16 (ND Cal), affd *Dudum v Arntz*, 640 F3d 1098 (9th Cir 2011); and numerous other constitutional provisions including the Fourth Amendment, *Allegheny County Prison Employees Independent Union v County of Allegheny*, 124 F Appx 140, 141–42 (3d Cir 2005); Commerce Clause, *Heffner v Murphy*, 866 F Supp 2d 358, 431–33 (MD Pa 2012); Property Clause, *Minard Run Oil Co v United States Forest Service*, 894 F Supp 2d 642, 663 (WD Pa 2012); Due Process Clause, *Esso Standard Oil Co v Lopez-Freytes*, 522 F3d 136, 148 (1st Cir 2008); and First Amendment, *Brown v Colegio de Abogados de Puerto Rico*, 613 F3d 44, 49 (1st Cir 2010). Compare with *Regents of University of California v Bakke*, 438 US 265, 320 (1978) (holding, without balancing other equitable factors, that a student was “entitled to [an] injunction” requiring his admission to medical school because the school’s affirmative action program violated his rights under the Fourteenth Amendment).

⁷⁵ See, for example, *Bedrossian v Northwestern Memorial Hospital*, 409 F3d 840, 845 (7th Cir 2005) (“Congress did not intend to dispense of [sic] the irreparable harm requirement in either USERRA or the False Claims Act.”); *United States v Miami University*, 294 F3d 797, 817–20 (6th Cir 2002) (considering all factors except for the balance of hardships before issuing an injunction under the Family Education Rights and Privacy Act (“FERPA”), 20 USC § 1234c(a)(4), against a school’s release of students’ disciplinary records).

⁷⁶ Under a “clear statement rule,” a court will “presume” that an “established background understanding . . . is part of [a] statute,” unless “the legislature clearly intends to displace [it].” William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U Pa L Rev 1007, 1011 (1989). The clear statement rule establishing

may be sufficiently clear to override the presumption that Congress intended to preserve this discretion.⁷⁷ The Supreme Court has never identified certain language as necessary or sufficient to satisfy this requirement, however, and the standards it has applied have varied from case to case.

For example, the Court has held that a court may exercise equitable discretion both where a statute provides that it “may” issue an injunction,⁷⁸ as well as where a law states that the court “shall” grant injunctive relief.⁷⁹ Likewise, when a statute provides that a court “shall have jurisdiction” to grant an injunction, the Court has sometimes held that courts retain discretion over the exercise of that power,⁸⁰ while concluding on other occasions that such language makes injunctive relief mandatory.⁸¹

The Court also has pointed to the availability of alternate potential remedies, such as damages, fines, or imprisonment, as a basis for determining that injunctive relief is discretionary,⁸² yet has affirmed the need for equitable balancing even under

a presumption in favor of equitable balancing is an application of the broader principle that Congress is presumed to legislate consistently with both the common law and longstanding historical practice, absent clear evidence of contrary legislative intent. See, for example, *Morissette v United States*, 342 US 246, 263 (1952).

⁷⁷ Of course, the converse is true as well; statutes such as the Prison Litigation Reform Act of 1995, Pub L No 104-134, 110 Stat 1321 (1996), codified as amended in scattered sections of 11, 18, 28, and 42 USC, prohibit courts from issuing injunctions even when they would do so under traditional equitable principles.

⁷⁸ *eBay*, 547 US at 392. See also *New York Times Co, Inc v Tasani*, 533 US 483, 505 (2001) (holding that, because the Copyright Act provides that courts “may” enjoin infringement, they are not required to do so), quoting 17 USC § 502(a).

⁷⁹ *Hecht*, 321 US at 328 (holding that the phrase “shall be granted,” as used in the Emergency Price Control Act of 1942’s remedial provision, “is less mandatory than a literal reading might suggest”).

⁸⁰ *Weinberger*, 456 US at 313 (holding that the FWPCA, 33 USC § 1319(b), which grants courts “jurisdiction to restrain . . . violation[s] and to require compliance,” does not require courts to enjoin all violations).

⁸¹ *United Steelworkers of America v United States*, 361 US 39, 56 (1959) (holding that the Labor Management Relations Act, 29 USC § 178, which gives courts “jurisdiction . . . to enjoin [any] such strike” that imperils national security, does not allow courts to exercise equitable discretion over awarding injunctive relief). See also *Hill*, 437 US at 194 (holding that the Endangered Species Act, 16 USC § 1540(g)(1), requires courts to issue injunctive relief, even though it states only that “any person may commence a civil suit . . . to enjoin [violations]” and federal courts shall have “jurisdiction . . . to enforce” the statute).

⁸² See *Weinberger*, 456 US at 314. See also *Oakland Cannabis*, 432 US at 497 (holding that courts have discretion as to whether to issue injunctions under the Controlled Substances Act, in part because “criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance”).

statutes that lack such alternatives.⁸³ A statutory declaration that courts should issue injunctions “in accordance with the principles of equity,” however, bolsters the presumption that a particular provision requires equitable balancing.⁸⁴ Applying its clear statement rule, the Court has required equitable balancing to determine the propriety of injunctive relief under laws including the Emergency Price Control Act of 1942,⁸⁵ FWPCA,⁸⁶ Alaska National Interest Lands Conservation Act (ANILCA),⁸⁷ NEPA,⁸⁸ Patent Act,⁸⁹ Controlled Substances Act,⁹⁰ and the Copyright Act.⁹¹

Conversely, in a few cases, the Supreme Court has found Congress’s intent sufficiently clear to overcome the presumption of equitable discretion over injunctive relief. For example, in *United States v City and County of San Francisco*,⁹² the Court held that a court need not engage in equitable balancing before issuing an injunction under the Raker Act.⁹³ The Act granted the City and County of San Francisco various lands and rights-of-way in Yosemite National Park and Stanislaus National Forest to allow the city to build and operate facilities for supplying water and electricity, but prohibited the City from transferring any of those rights to a private person or corporation.⁹⁴ San Francisco violated this condition by allowing a private utility to sell and distribute power generated through the land grants.⁹⁵ The Supreme Court held that the Government was entitled to an injunction to enforce the Raker Act’s

⁸³ See *Amoco*, 480 US at 543 n 8.

⁸⁴ *eBay*, 547 US at 392, quoting 35 USC § 283.

⁸⁵ Pub L No 77-421, § 205(a), 56 Stat 23, 33 (1942), codified at 50 USC § 901 et seq; see *Hecht*, 321 US at 328–29.

⁸⁶ 33 USC § 1251. See *Weinberger*, 456 US at 306–07.

⁸⁷ 16 USC § 3120. See *Amoco*, 480 US at 534.

⁸⁸ 42 USC § 4332. See *Monsanto*, 561 US at 156–58; *Winter*, 555 US at 20–23.

⁸⁹ 35 USC § 283. See *eBay*, 547 US at 391.

⁹⁰ 21 USC §§ 841(a), 882(a). See *Oakland Cannabis*, 532 US at 497–98.

⁹¹ 17 USC § 501. See *Dun v Lumberman’s Credit Association*, 209 US 20, 23 (1908) (holding that, even though the plaintiff had established copyright infringement, the lower court “wisely exercised” its discretion “in refusing an injunction and remitting the appellants to a court of law to recover such damage as they might there prove that they had sustained”). See also *Campbell v Acuff-Rose Music, Inc.*, 510 US 569, 578 n 10 (1994).

⁹² 310 US 16 (1940).

⁹³ Raker Act, Pub L No 63-41, § 6, 38 Stat 242, 245 (1913).

⁹⁴ Raker Act §§ 1, 6, 38 Stat at 242.

⁹⁵ *San Francisco*, 310 US at 30–31.

restrictions without equitable balancing.⁹⁶ Automatic injunctive relief was “both appropriate and necessary” to “enforce covenants [that Congress] exacted from a grantee of rights” and make Congress’s “declared polic[ies] . . . effective.”⁹⁷

Likewise, in *Tennessee Valley Authority v Hill*,⁹⁸ the Court held that §§ 7 and 11(g) of the Endangered Species Act (“ESA”) require courts to enjoin any federal activities that jeopardize the existence of, or would modify or destroy a habitat that is critical for, an endangered species.⁹⁹ Section 11(g) provides that a plaintiff may sue “to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this [Act].”¹⁰⁰ The Court held that the ESA reflects Congress’s clear intent to require automatic injunctive relief.¹⁰¹

The majority explained, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”¹⁰² It concluded that allowing courts to “stri[k]e a balance of equities” and decide for themselves whether injunctive relief “accords with common sense and the public weal” would “pre-empt [this] congressional action.”¹⁰³ Then-Justice Rehnquist dissented, arguing that the ESA’s remedial provisions do not reveal any congressional intent to strip courts of their traditional discretion to determine whether to enjoin statutory violations.¹⁰⁴ It appears that lower

⁹⁶ Id (holding that the Raker Act “does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued”).

⁹⁷ Id.

⁹⁸ 437 US 153 (1978).

⁹⁹ Id at 194–95 (discussing 16 USC §§ 1536, 1540(g)).

¹⁰⁰ 16 USC § 1540(g)(1)(A).

¹⁰¹ *Hill*, 437 US at 193–94.

¹⁰² Id at 194.

¹⁰³ Id at 194–95 (quotation marks omitted).

¹⁰⁴ Id at 211 (Rehnquist dissenting). Elsewhere, the Court similarly held that, in passing the Labor Management Relations Act (“LMRA”), 29 USC § 178, which allows courts to enjoin industry-wide strikes that “imperil the national . . . safety,” id, Congress did not “intend[] that the issuance of injunctions should depend upon judicial inquiries” about the propriety of such relief. *United Steelworkers*, 361 US at 41. Justice Frankfurter, in a concurring opinion, agreed that “[t]he purpose of Congress expressed by [the LMRA] precludes courts from exercising ‘ordinary equitable discretion’ or ‘balancing conveniences’ in deciding whether to issue injunctions. Id at 55–56

courts have been somewhat more willing than the Supreme Court to find statutory language sufficiently clear to overcome the traditional presumption of judicial discretion to grant statutory injunctions.¹⁰⁵

C. Academic Approaches to Statutory Injunctions

Commentators have debated whether and when courts should have equitable discretion to decline to issue statutory injunctions. Many scholars, accepting *eBay*'s four-factor balancing test, argue that courts applying it should be more sensitive to the goals of the statutes being enforced.¹⁰⁶ Others contend that certain elements of the *eBay* standard should be deemed automatically satisfied when a plaintiff seeks a

(Frankfurter concurring). Rather, an “injunctive remedy . . . [is] commanded as a matter of policy by Congress.” *Id.* at 56. It does not appear that the LMRA was written with the specificity now required by *Weinberger*, *eBay*, and even *Hill*. It provides only that a court “shall have jurisdiction to enjoin” any “industry-wide strike [that] threatens national defense,” and to “make such other orders as may be appropriate.” *Id.* at 40, quoting 29 USC § 178. Read in light of later cases, this delegation of authority does not suggest that Congress intended to remove courts’ equitable discretion concerning injunctive relief. See note 80. Moreover, the Act’s creation of alternate remedies, permitting courts to issue “other such orders as may be appropriate,” 29 USC § 178, bolsters the notion that injunctive relief is not mandatory. See note 82. Justice Douglas made many of these points in his dissent, arguing that, “[i]n situations no more clouded with doubt than the present one[,] we have refused to read a statutory authority to issue a decree as a command to do it.” *United Steelworkers*, 361 US at 72 (Douglas dissenting).

¹⁰⁵ See, for example, *Joshua A. v Rocklin Unified School District*, 559 F3d 1036, 1037 (9th Cir 2009) (holding that the Individuals with Disabilities Education Act, 20 USC § 1415(j), entitles plaintiffs to automatic interim relief without “show[ing] the traditionally required factors”); *CBS Broadcasting, Inc v EchoStar Communications Corp*, 450 F3d 505, 527 n 32 (11th Cir 2006) (holding that the Satellite Home Viewer Act of 1988, 17 USC § 119, reveals “congressional intent” to require the issuance of injunctive relief without applying “traditional equitable principles”). See also *City of New York v Golden Feather Smoke Shop, Inc*, 597 F3d 115, 120–21 (2d Cir 2010) (holding that government agencies are entitled to a preliminary injunction under the Contraband Cigarette Trafficking Act, 18 USC § 2341, and the Cigarette Marketing Standards Act, NY Tax L § 483, based solely on a showing that they are likely to prevail on the merits).

¹⁰⁶ See, for example, Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 Harv Envir L Rev 205, 236 (2011) (arguing that appellate courts should “tailor[] the normal equitable requirements for injunctive relief to account for the particularities of NEPA’s mandate to protect environmental review procedures”); Avalyn Taylor, *Rethinking the Irreparable Harm Factor in Wildlife Mortality Cases*, 2 Stan J Animal L & Pol 113, 134 (2009) (“[C]ourts should look to the primary goals of a given statute to define the scope and nature of the harm to be considered in the irreparable harm analysis.”); Leslye A. Herrmann, Comment, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U Chi L Rev 1263, 1287 (1992) (“[C]ourts should grant injunctions to prevent the harm that a statute was designed to combat” and “incorporat[e] [the statute’s] scheme and purpose in the balancing process.”).

statutory injunction.¹⁰⁷ One intriguing piece advocates that equitable relief be based on a system of presumptions, such as a rebuttable presumption that violations of certain duties or laws cause irreparable harm, and “safety valves,” rather than ad hoc judicial balancing.¹⁰⁸

Many scholars argue that courts should be presumptively required to issue injunctions to remedy statutory violations, denying them only under certain specified circumstances. Doug Rendleman, for example, contends that “a substantively successful plaintiff’s default remedy ought to be an injunction, *prima facie*, if the plaintiff wants one.”¹⁰⁹ The *eBay* factors, he adds, should be available as affirmative defenses a defendant may assert to defeat injunctive relief.¹¹⁰

David Schoenbrod, in contrast, believes that *eBay*’s four-factor test gives courts too much policymaking authority.¹¹¹ He maintains that a court should have discretion to decline to issue a statutory injunction only if “(a) different relief is consistent with the goals of the statute and (b) the case involves a factor justifying departure from the statutory rule that was not reflected in its formulation.”¹¹² Ronald M. Levin similarly concludes that “a court may not rely on equity to repudiate a

¹⁰⁷ 78 Harv L Rev at 1059 (cited in note 59) (approving of courts that “issue a preliminary injunction without requiring a showing of irreparable injury” where “a statute forbids conduct with which the plaintiff is threatened,” because the choice between damages and injunctive relief should be based on “careful study in each case, rather than as a . . . general preference for damage relief”); Comment, 57 Yale L J at 1024 (cited in note 36) (“[L]egislative provision for an injunction liberates the remedy from many of the bonds of equity by satisfying of itself conditions which the Chancellor would otherwise require to be established in each case.”).

¹⁰⁸ Gergen, Golden, and Smith, 112 Colum L Rev at 220–26 (cited in note 26). One case note offers an equally creative suggestion, contending that courts should exercise equitable discretion when a government agency seeks an injunction to enforce a federal law, to “allow[] for a check and balance upon [the agency] rather than . . . giv[ing] agencies complete control.” Leecia D. Carnes, Case Note, *Agency Power v Court Discretion: Should Courts Have the Discretion to Not Enforce Injunctive Relief Recommended by Statutes?*, United States v Mass. Water Res. Auth., 9 Mo Envir L & Pol Rev 96, 104 (2002).

¹⁰⁹ Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 Rev Litig 63, 87 (2007). His argument applies to all injunctions, not just those issued as a result of a statutory violation.

¹¹⁰ Id at 87. Rendleman also believes that the “irreparable harm” and “inadequate remedy at law” factors are duplicative. Id.

¹¹¹ David Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 Minn L Rev 627 (1988).

¹¹² Id at 647.

statutory objective outright.”¹¹³ It may decline to issue an injunction only if a violation “is expected to be temporary, the requirement being violated is merely a means to an ultimate statutory purpose, the defendant’s impairment of that underlying purpose is minimal or nonexistent, and the costs to the defendant of complying with the injunction would be high.”¹¹⁴

Several authors reject even the limited level of judicial discretion over statutory injunctions that Rendleman, Schoenbrod, Levin, and others defend. In his seminal article on this issue, Zygmunt J.B. Plater explains that, while a court may exercise discretion in adjudicating equitable defenses or determining the exact scope of a remedy,¹¹⁵ it lacks “discretion or authority to exercise equitable powers so as to permit violations of statutes to continue,”¹¹⁶ even if a violation is technical, minor, or would result in great public benefit.¹¹⁷ When a statute is violated, a court may refuse to issue an injunction only if it is confident that such relief is unnecessary to ensure that the defendant complies with the statute in the future.¹¹⁸

Gene Shreve similarly concludes that courts should issue injunctions as a matter of course when statutes are violated, at least if such violations are likely to continue.¹¹⁹ Particularly when a government entity seeks an injunction, performing equitable balancing requires courts to “second-guess[]” and “question[] the judgment of another branch of the federal government” about whether irreparable harm will occur or other remedies are adequate.¹²⁰ Jared A. Goldstein echoes this

¹¹³ Levin, 53 Duke L J at 340 (cited in note 56).

¹¹⁴ *Id.*

¹¹⁵ Plater, 70 Cal L Rev at 526, 568 (cited in note 26).

¹¹⁶ *Id.* at 525–26. See also *id.* at 527 (“When a court in equity is confronted on the merits with a continuing violation of statutory law, it has no discretion or authority to balance the equities so as to permit that violation to continue.”); *id.* at 533.

¹¹⁷ *Id.* at 526–27.

¹¹⁸ *Id.* at 528. Allowing courts to decline to enjoin statutory violations based on equitable balancing, he contends, empowers them to effectively amend legislation. *Id.* at 527. It is the legislature’s role to enact any necessary amendments or exceptions to overbroad or even harmful laws. *Id.* at 528.

¹¹⁹ Shreve, 51 Geo Wash L Rev at 405 (cited in note 26). See also Fregeau, 18 BC Envir Affairs L Rev at 503 (cited in note 28) (“[F]ederal courts do not have the discretion to balance the equities when violations of statute occur. If the law has been violated, and if those violations likely will continue, then an injunction against those violations must issue.”).

¹²⁰ Shreve, 51 Geo Wash L Rev at 402–03 (cited in note 26).

sentiment, arguing that “balancing the equities in statutory cases violates separation-of-powers principles” by allowing courts to exercise the essentially legislative power “to choose among competing federal policies.”¹²¹ Owen Fiss, another well-known advocate of injunctive relief, extols the special utility of injunctions in civil rights cases.¹²²

Finally, still other scholars reject the notion that a single standard should apply to statutory injunctions, and contend instead that the proper test depends on the statute at issue. Most notably, Daniel Farber, emphasizing the importance of implementing congressional intent,¹²³ contends that when a statute imposes an absolute duty that a person must obey, a court automatically should issue injunctions to prevent violations.¹²⁴ When it imposes only a qualified duty, requiring a person to use “best efforts” to comply, the court may engage in equitable balancing.¹²⁵ John Leubsdorf’s influential article concerning the standard for preliminary injunctions contends more generally that, “[s]ometimes, when the legislature has found transcendent value in the interests it is protecting, a plaintiff demonstrating irreparable injury should automatically receive relief unless extraordinary harm faces the defendants. But glib assumptions that all statutory injunctions are alike should be avoided.”¹²⁶

This Article suggests a different approach. Like Farber and Leubsdorf, it rejects the notion that a single, consistent standard should apply to all statutory injunctions. Rather than varying based on the law being enforced, however, it suggests that the standard for statutory injunctions should depend instead on the nature of the order the plaintiff seeks.¹²⁷

¹²¹ Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 Va L Rev 485, 516–17 (2010).

¹²² See generally Owen Fiss, *The Civil Rights Injunction* (Indiana 1978).

¹²³ Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U Pitt L Rev 513, 515 (1984).

¹²⁴ Id at 537–38.

¹²⁵ Id. He urges that any doubts be resolved in favor of automatic equitable relief, at least under environmental statutes. Id at 542–44. Michael Axline makes a similar argument, although based on a different, more complex statutory taxonomy. Michael D. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 Harv Envir L Rev 1 (1988).

¹²⁶ Leubsdorf, 91 Harv L Rev at 563 (cited in note 26).

¹²⁷ See Part III.

II. EQUITABLE BALANCING AND THE CIVIL RIGHTS ACT

Supreme Court doctrine concerning equitable balancing, as synthesized and reaffirmed in *eBay*,¹²⁸ raises a range of questions that the Court has yet to address about the availability of injunctive relief under the Civil Rights Act,¹²⁹ as well as other laws which incorporate its remedial provisions,¹³⁰ such as the Americans with Disabilities Act (ADA).¹³¹ The Court has recognized that “[t]he fashioning of appropriate remedies” under the Civil Rights Act “invokes the sound equitable discretion of the district courts”¹³² yet, as described below, also has expressed a strong preference for making remedies under the Act broadly available.¹³³

The Supreme Court has never specifically considered the availability of injunctions under the Act, but its rulings concerning attorneys’ fees and backpay are instructive. In 1968, only a few years after the Act’s passage, the Court held that a plaintiff who obtains an injunction under Title II “should ordinarily recover . . . attorney’s fee[s] unless special circumstances would render such an award unjust.”¹³⁴ Declaring that “[a] Title II suit is . . . private in form only,” the Court explained, “When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”¹³⁵ Making attorneys’ fees widely available to successful litigants, the Court reasoned, would encourage potential

¹²⁸ 547 US at 394.

¹²⁹ Civil Rights Act, 78 Stat 241.

¹³⁰ See, for example, 42 USC § 2000a-3(a).

¹³¹ See, for example, 42 USC § 12188(a)(1).

¹³² *Franks v Bowman Transportation Co, Inc*, 424 US 747, 770 (1976).

¹³³ Four Justices, in a concurring opinion, arguably went even further, stating that when a defendant violates Title VII, “an injunction concerning future conduct ordinarily is, and should therefore be routinely awarded once liability is established.” *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v Norris*, 463 US 1073, 1092 (1983) (Marshall concurring). Alex Reinert points out that, although the Court professes a preference for injunctive relief in civil rights cases, plaintiffs often are unable to obtain injunctions due to barriers such as standing, mootness, and limits on attorneys fees. Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L Rev 931, 935–36, 943–45 (2010).

¹³⁴ *Newman v Piggie Park Enterprises, Inc*, 390 US at 402, 402 (1968).

¹³⁵ *Id* at 401–02.

plaintiffs “to advance the public interest by invoking the injunctive powers of the federal courts.”¹³⁶

A few years later, in the 1975 case *Albemarle Paper Co v Moody*,¹³⁷ the Court considered the standard for backpay awards under Title VII. It affirmed that backpay “is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts ‘may’ invoke.”¹³⁸ Courts must exercise their discretion, however, in light of the Act’s “large objectives,” which include combatting “a historic evil of national proportions.”¹³⁹ Backpay awards further those objectives by deterring discrimination and compensating victims.¹⁴⁰

“Where racial discrimination is concerned,” *Albemarle* elaborated, a court “has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”¹⁴¹ The Court explained that “[i]mportant national goals would be frustrated by a regime of discretion that ‘produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.’”¹⁴² It concluded that “backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”¹⁴³

In later cases, the Court recognized that “[t]he *Albemarle* presumption in favor of retroactive liability can seldom be overcome,” yet insisted that it “does not make meaningless the district courts’ duty to determine that such relief is appropriate.”¹⁴⁴ Indeed, it has occasionally found that

¹³⁶ Id at 402.

¹³⁷ 422 US 405 (1975).

¹³⁸ Id at 415, quoting 42 USC § 2000e-5(g).

¹³⁹ *Albemarle*, 422 US at 416, quoting *Hecht*, 321 US at 331.

¹⁴⁰ *Albemarle*, 422 US at 418.

¹⁴¹ Id, quoting *Louisiana v United States*, 380 US 145, 154 (1965).

¹⁴² *Albemarle*, 422 US at 417, quoting *Moragne v States Marine Lines*, 398 US 375, 405 (1970).

¹⁴³ *Albemarle*, 422 US at 421. See also *Norris*, 463 US at 1092 (“Absent special circumstances a victim of a Title VII violation is entitled to whatever retroactive relief is necessary to undo any damage resulting from the violation.”).

¹⁴⁴ *City of Los Angeles Department of Water & Power v Manhart*, 435 US 702, 719 (1978).

defendants have overcome *Albemarle's* strong presumption in favor of backpay. In *City of Los Angeles Department of Water and Power v Manhart*,¹⁴⁵ the Court held that a city violated Title VII by requiring female employees, because of their longer actuarial lifespans, to contribute more to a pension fund than male employees.¹⁴⁶ The Court nevertheless held that the district court's order requiring restitution of all the "excess" premiums that female employees had paid into the system was erroneous.¹⁴⁷

The Court explained that, prior to its ruling, a reasonable pension administrator could have assumed that such premium differentials were lawful, or even that it would have been illegal to make male employees effectively subsidize women by charging both genders the same rates.¹⁴⁸ Awarding backpay therefore was unnecessary to ensure that other administrators would change their policies to comply with the ruling.¹⁴⁹ Moreover, retroactively applying the court's ruling through backpay awards could jeopardize pension funds' solvency and insureds' benefits.¹⁵⁰ The "devastating" effect that a remedial order could have on "innocent third parties" made the district court's backpay order improper.¹⁵¹ Thus, while *Albemarle's* strong presumption of backpay is not absolute, *Manhart's* standard for overcoming it is extraordinarily high, focusing primarily on whether such relief would have widespread adverse effects on third parties, rather than the litigants themselves.¹⁵²

Lower courts have adopted a range of approaches in determining whether to grant injunctions under the Civil Rights Act. Many of those cases overlook not only the general standards governing statutory injunctions, but also the Court's rulings addressing other forms of relief under the Act. Some courts simply ignore the *eBay* factors and mechanically award

¹⁴⁵ 435 US 702 (1978).

¹⁴⁶ *Id.* at 716–17.

¹⁴⁷ *Id.* at 723.

¹⁴⁸ *Manhart*, 435 US at 719–20.

¹⁴⁹ *Id.* at 720–21.

¹⁵⁰ *Id.* at 721.

¹⁵¹ *Id.* at 722–23.

¹⁵² See, for example, *Norris*, 463 US at 1092 (holding that "there are no special circumstances justifying the denial of retroactive relief" against pension funds that paid female public employees lower benefits than male employees based on premiums collected after *Manhart*).

injunctions to successful plaintiffs,¹⁵³ while others have expressly held that those factors are inapplicable¹⁵⁴ without engaging in the analysis the Supreme Court requires.¹⁵⁵ The Seventh Circuit, for example, has held that a successful Title VII plaintiff need not satisfy the *eBay* factors to obtain injunctive relief, but rather is entitled to an injunction so long as the “discriminatory conduct could possibly persist in the future”¹⁵⁶—an issue that goes to standing rather than equitable considerations.¹⁵⁷

Other courts purport to apply the *eBay* factors (or the *Winter* factors, in the preliminary injunction context), but hold that most or all of them are presumptively satisfied, or even satisfied as a matter of law, in Civil Rights Act cases¹⁵⁸—seemingly in tension with *eBay*’s express repudiation of such

¹⁵³ See, for example, *EEOC v Pacific Press Publishing Association*, 535 F2d 1182, 1187 (9th Cir 1976) (holding that Title VII “mandates the grant of a preliminary injunct[ion] whenever the EEOC seeks it under § 2000e-5(f)(2) so long as its procedural requirements are met”). See also *Reiter v MTA New York City Transit Authority*, 457 F3d 224, 230 (2d Cir 2006); *Board of Education of City School District of City of New York v Harris*, 622 F2d 599, 614–15 (2d Cir 1980).

¹⁵⁴ See, for example, *United States v City of New York*, 2010 US Dist LEXIS 95083, *13 (EDNY) (“Consistent with the statutory language and congressional intent, those powers [to issue injunctions] are activated as soon as a Title VII violation is established, rather than upon a further showing of injury or a weighing of hardships and the public interest.”); *O’Sullivan v City of Chicago*, 478 F Supp 2d 1034, 1043 (ND Ill 2007) (“Once a Title VII violation has been shown, district courts have broad discretion to issue injunctions addressed to the proven conduct.”). Compare with *Long v Coast Resorts, Inc.*, 267 F3d 918, 923 (9th Cir 2001) (holding that “there is no room for discretion” to deny injunctive relief when a resort’s ADA violations “resulted in the very discrimination the statute seeks to prevent”); *United States v Wood*, 295 F2d 772, 784 (5th Cir 1961) (holding that the irreparable injury and inadequate remedy at law requirements do not apply to injunctions against violations of the Civil Rights Act of 1957, 42 USC § 1971).

¹⁵⁵ See Section I.B.

¹⁵⁶ *O’Sullivan*, 478 F Supp 2d at 1043, quoting *Miles v Indiana*, 387 F3d 591, 601 (7th Cir 2004). See also *EEOC v Autozone, Inc.*, 707 F3d 824, 840 (7th Cir 2013); *Bruso v United Airlines, Inc.*, 239 F3d 848, 864 (7th Cir 2001).

¹⁵⁷ Compare with *Lyons*, 461 US at 104.

¹⁵⁸ See, for example, *Jean-Baptiste v District of Columbia*, 958 F Supp 2d 37, 49 n 15 (DDC 2013) (“[T]he four-factor test would appear to be satisfied in any Title VII case in which a verdict is rendered for the plaintiff.”); *EEOC v DCP Midstream, LP*, 608 F Supp 2d 107, 110 (D Me 2009) (“[A] finding of liability, coupled with Title VII’s congressional endorsement of equitable relief, is sufficient to meet the first three prongs of the [*eBay*] test. The fourth prong is likewise met because . . . the public has an interest in the enforcement of federal statutes.”) (quotation marks omitted). See also *Silver Sage Partners, Ltd v City of Desert Hot Springs*, 251 F3d 814, 827 (9th Cir 2001); Gergen, Golden, and Smith, 112 Colum L Rev at 231 (cited in note 26) (“Irreparable injury is generally presumed for violations of civil rights without question.”).

presumptions and categorical rules.¹⁵⁹ Some cases instead conclusorily declare that the plaintiff is required to establish only some of the *eBay* factors,¹⁶⁰ while still others affirm that the factors apply, but find it unnecessary to address them for various reasons based on the posture of the case.¹⁶¹

Very few of the courts that require plaintiffs in Civil Rights Act cases to satisfy *eBay*'s requirements for injunctive relief have offered sustained explanations of how those factors apply in the civil rights context.¹⁶² The Western District of Pennsylvania, affirming *eBay*'s applicability,¹⁶³ has suggested that it would not treat them as merely *pro forma*:

The court simply cannot agree with plaintiff's argument that in every Title VII case in which a plaintiff prevails on a claim a permanent injunction should issue against the employer. If the court were to follow that reasoning, the standard for obtaining injunctive relief would be eviscerated. An injunction may be appropriate relief in Title VII cases where entitlement to such relief is proven.¹⁶⁴

One example of a court relying on *eBay*'s non-merits requirements to deny injunctive relief under the Civil Rights

¹⁵⁹ See *eBay*, 547 US at 393. See also *Monsanto*, 561 US at 157–158.

¹⁶⁰ See, for example, *Rose v Cahee*, 727 F Supp 2d 728, 740 (ED Wis 2010) (holding that, to obtain a permanent injunction under the ADA, the plaintiff must demonstrate the absence of an adequate remedy at law, but not irreparable harm). Compare with *Gebru v Sears, Roebuck & Co*, 2009 US Dist LEXIS 77283, *10 (ND Tex) (holding that irreparable injury is required for an injunction to issue in a Title II case).

¹⁶¹ See, for example, *Gonzalez v National Board of Medical Examiners*, 225 F3d 620, 632 (6th Cir 2000) (holding, in an ADA case, that because "Plaintiff has no likelihood of success on the merits, we need not consider whether he would otherwise be entitled to a preliminary injunction"); *Vasich v City of Chicago*, 2013 US Dist LEXIS 1740, *26–29 (ND Ill) (appearing to accept the applicability of the *eBay* factors while concluding that the plaintiff's ability to satisfy them "is an open question that is not before the Court at this stage"). See also *Lyninger v Motsinger*, 2010 US Dist LEXIS 116802, *2–3 (D Nev) (ADA case); *Civil Service Employees Association v New York State Department of Parks, Recreation and Historic Preservation*, 689 F Supp 2d 267, 276–77 (NDNY 2010).

¹⁶² For examples of the more substantive discussions, see, for example, *United States v City of New York*, 2010 US Dist LEXIS 111064, *28–31 (EDNY); *McElroy v Simon Property Group, Inc*, 2008 US Dist LEXIS 69622, *17–23 (D Kan). See also *Pashby v Delia*, 709 F3d 307, 329–31 (4th Cir 2013) (applying *Winter* standard to preliminary injunction under the ADA); *Jones v National Conference of Bar Examiners*, 801 F Supp 2d 270, 286–91 (D Vt 2011) (same).

¹⁶³ *Prise v Alderwoods Group, Inc*, 2010 US Dist LEXIS 89857, *10 (WD Pa).

¹⁶⁴ Id at *13.

Act's remedial provisions (albeit in the ADA context) is the Fourth Circuit's ruling in *A Helping Hand, LLC v Baltimore County*.¹⁶⁵ After a methadone clinic opened in a residential area, the county passed an ordinance prohibiting medical clinics from operating within 750 feet of a residence.¹⁶⁶ The trial court determined that the ordinance violated the Due Process Clause and enjoined the County from enforcing it for two years.¹⁶⁷ On appeal, the Fourth Circuit held that "the injunction cannot stand" because "[t]he Clinic has not demonstrated that it will suffer irreparable injury absent an injunction."¹⁶⁸ The court expressly rejected the contention that constitutional violations "per se constitute[] irreparable harm."¹⁶⁹ Although the ordinance "could require the Clinic to relocate," which would "result in some costs and inconvenience for the Clinic," the court concluded that such injury was not irreparable and "money damages could compensate any cost to the Clinic."¹⁷⁰

It is unclear how the Supreme Court's early line of Civil Rights Act cases should be reconciled with its subsequent holdings on statutory injunctions. *eBay* supports a two-tier approach to statutory injunctions, under which courts should presumptively apply its four-factor-test to decide whether to award injunctive relief,¹⁷¹ unless Congress clearly and unequivocally removes that discretion by requiring courts to automatically award injunctions to prevailing plaintiffs.¹⁷²

The Supreme Court's early Civil Rights Act cases suggest that a third alternative could be added to this framework, under which courts would make injunctions more widely available under laws such as the Civil Rights Act, without requiring that they be automatically awarded.¹⁷³ A court could implement such an intermediate approach in a variety of ways, including relieving a plaintiff from having to establish certain *eBay*

¹⁶⁵ 355 F Appx 773 (4th Cir 2009).

¹⁶⁶ Id at 774.

¹⁶⁷ Id at 775.

¹⁶⁸ Id at 776.

¹⁶⁹ *A Helping Hand*, 355 F Appx at 777.

¹⁷⁰ Id at 776.

¹⁷¹ See Section I.A.

¹⁷² See Section I.B. As discussed above, the Court has applied loose and inconsistent standards over the years in deciding whether Congress has manifested such intent clearly enough. Id.

¹⁷³ See notes 134–143 and accompanying text.

factors, or assuming they are met as a matter of law; holding a plaintiff to a lower burden of proof in determining whether each factor is satisfied; resolving any doubts in the plaintiff's favor; or treating the *eBay* factors as affirmative defenses that a defendant must prove in order to defeat injunctive relief.¹⁷⁴ Courts even could extend *Albemarle* by awarding injunctive relief whenever the Civil Rights Act makes it available, except in very rare cases where it would cause unfair, substantial, widespread harm to third parties.¹⁷⁵

Tipping the scales in favor of injunctive relief by adopting any of these possible “middle tier” approaches in certain cases raises difficulties, because *eBay* emphatically rejected the notion that injunctive relief should be presumptively available for statutory violations.¹⁷⁶ More generally, a tripartite framework for statutory injunctions also would exacerbate the challenges courts face in discerning congressional intent. Rather than applying a clear statement rule (or some vaguely-defined variation of one¹⁷⁷) to determine whether a statute requires automatic injunctive relief, a court would have to parse the statute's text and legislative history even more closely to determine whether such relief is intended to be automatic, as in *TVA v Hill*;¹⁷⁸ strongly presumptive under *Albemarle*;¹⁷⁹ or instead determined based on the traditional equitable principles set forth in *eBay*.¹⁸⁰ In most cases, Congress is unlikely to have discussed, much less expressly and definitively agreed upon, this issue with such granularity.

Any such remedial trichotomy also would exacerbate a related problem that arises from courts' implementation of current doctrine. Many courts—including the Supreme Court—purport to apply a clear statement rule to decide whether they may exercise equitable discretion to deny statutory injunctions, yet in practice often base their decisions on their own assessment of whether a statutory purpose is sufficiently

¹⁷⁴ See notes 109–110 and accompanying text.

¹⁷⁵ *Albemarle*, 422 US at 421.

¹⁷⁶ See notes 33–34.

¹⁷⁷ See notes 78–84.

¹⁷⁸ 437 US 153 (1978). See notes 98–103 and accompanying text.

¹⁷⁹ *Albemarle*, 422 US at 421.

¹⁸⁰ 547 US at 391, 393–94. See, for example, *Weinberger*, 456 US at 306–07 (1982) (pre-*eBay* case denying injunctive relief based on traditional factors).

important to warrant automatic injunctive relief.¹⁸¹ This approach puts courts in the awkward and inappropriate position of making quintessentially political choices, rather than engaging in statutory interpretation. Allowing courts to categorize each statute in three possible ways, rather than only two, increases the likelihood of subjective, inconsistent, and unpredictable decisionmaking.

It is tempting to treat civil rights and anti-discrimination statutes as *sui generis* and endorse the creation of a special remedial category for them, but there is not an objective, predictable, and defensible way to determine the laws, or types of laws, to which any such category would be limited. Plaintiffs can credibly claim to be protecting incommensurable, fundamentally important public interests in many other types of disputes, such as environmental or constitutional cases. Indeed, courts have been willing to treat federal laws other than civil rights statutes as transcendently important,¹⁸² while paradoxically subjecting plaintiffs in constitutional cases to the *eBay* test.¹⁸³ It seems inappropriate for the judiciary to attempt to classify the relative importance of various federal statutes or constitutional provisions.

Another concern about a tripartite approach is that it adds an additional level of analysis and complexity to courts' decisionmaking without necessarily providing any marginal benefit beyond *eBay*'s four-factor test. *eBay*'s irreparable injury, balance-of-hardships, and public interest factors already allow courts to consider the nature of the rights and interests that a statute protects. It is unnecessary to require courts to also take such considerations into account in deciding, as a threshold matter, whether to apply some sort of modified or heightened

¹⁸¹ See, for example, *Hill*, 437 US at 193–95.

¹⁸² *Id.* at 194–95 (enjoining operation of a newly constructed \$78 million dam to protect the endangered snail darter, because the ESA makes protecting “endangered species the highest of priorities”).

¹⁸³ See, for example, *Lyons*, 461 US at 111; *Younger*, 401 US at 44–45. The Court arguably has modified the *eBay* standard in certain constitutional cases, however, by holding that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v Burns*, 427 US 347, 373 (1976). One commentator contends that the most plausible explanation for this holding is that “courts fear that close scrutiny of irreparable injury will reveal numerous instances where constitutional violations are virtually harmless.” Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 Harv J L & Pub Pol 743, 746 (2012).

variation of the *eBay* standard. Thus, despite the facially persuasive case for adopting a tripartite approach to statutory injunctions, or even extending *Albemarle* to all injunctions under the Civil Rights Act, the theoretical and doctrinal drawbacks strongly counsel against it. Part III of this Article, however, proposes an alternate approach to statutory injunctions that can be applied in any context, including cases under the Civil Rights Act.

III. AN ALTERNATE APPROACH TO STATUTORY INJUNCTIONS

This Part proposes a new approach for determining whether a court should grant a statutory injunction to a plaintiff who has proven her case on the merits. As under current law, a court should automatically grant an injunction when a statute expressly and unequivocally requires it to do so. In deciding whether a law mandates injunctive relief, however, the court should focus solely on whether it is drafted in mandatory terms, rather than attempting to assess the law's perceived importance or otherwise infer Congress's implicit intent.¹⁸⁴

For laws that simply authorize injunctive relief without affirmatively mandating it, the standard that a court should apply depends on the nature of the restrictions it is considering. Broadly speaking, provisions in injunctions can be classified into two broad categories (remedial and prospective),¹⁸⁵ and further divided into four specific types:

- (i) remedial orders for non-monetary relief: A court should grant a plaintiff's request for a non-monetary remedial order, if possible, unless the combined burden or harm that such an order would cause for the defendant and third parties would overwhelmingly outweigh the benefit to the plaintiff.

¹⁸⁴ Compare with *Hill*, 437 US 194–95; *United Steelworkers*, 361 US at 55–56; *San Francisco*, 310 US at 30–31.

¹⁸⁵ This Article's definitions for these categories are crafted to avoid the shortcomings of the way in which the Supreme Court has distinguished between retrospective and prospective relief under the Eleventh Amendment. See *Edelman v. Jordan*, 415 US 651, 677 (1974). See, for example, John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 Wm & Mary Bill of Rights J 857, 864 n 42 (2013); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L J 1, 88 n 353 (1988).

(ii) remedial orders for monetary relief: Requests for remedial orders requiring the payment of money should be treated as actions for compensatory damages.

(iii) prospective orders that prohibit statutory violations: When a successful plaintiff has standing to seek prospective relief, a court should enjoin repeated, ongoing, or impending statutory violations, either directly, by reference to the statute itself, or indirectly, by prohibiting conduct that the court has held violates that statute. The court should consider the propriety of enforcing the injunction during subsequent contempt proceedings. Congress, however, should avoid authorizing prospective injunctions as remedies, and instead make contempt-type remedies directly available for statutory violations.

(iv) prospective prophylactic orders: Courts should decline to issue purely prophylactic injunctions that purport to prohibit conduct that is not otherwise illegal.

A proposed order may be comprised of provisions of different types; each should be considered separately under the appropriate standard.

This proposed framework seeks to serve several main functions. Primarily, it offers a way of eliminating anachronistic equitable doctrines, many of which result in arbitrary or substantively undesirable results in the modern era. Just as importantly, the framework attempts to protect separation of powers, by ensuring that courts do not usurp the legislative function. Finally, it seeks to promote justice, by providing protection and relief for victims of statutory violations, while preserving enough judicial flexibility to allow courts to ensure that the relief granted is appropriate to the circumstances of each case. The recommended changes may be accomplished through judicial rulings and revisions to current doctrine, but could be greatly aided by legislation.¹⁸⁶

¹⁸⁶ Professor Rendleman briefly mentioned and dismissed the possibility that *eBay's* equitable balancing requirements might stem from Article III and therefore "cannot be abrogated except by constitutional decisions or constitutional amendment." Doug Rendleman, *Irreparability Irreparably Damaged*, 90 Mich L Rev 1642, 1665 (1992). Professor Shreve likewise suggested that Congress may not "usurp the federal courts' power to decide when to issue injunctions." Shreve, 51 Geo Wash L Rev at 399 (cited in

A. Remedial Provisions

Remedial provisions in injunctions attempt to rectify harm that a plaintiff suffered prior to the court's judgment, but do not otherwise attempt to prevent future statutory violations or protect the plaintiff's rights against subsequent abridgement. By definition, a remedial injunction may be awarded only after a statutory violation has occurred; remedial injunctions generally may not be awarded in pre-enforcement challenges or other lawsuits based on impending or threatened harms. A provision requiring backpay for a victim of employment discrimination would be remedial, for example, because it concerns funds that the plaintiff already has been denied in violation of federal law. Reinstatement, in contrast, would not be considered remedial, but rather "prospective"¹⁸⁷ because such an order would concern the defendant's future compliance with Title VII.

Remedial orders may be further broken down into two self-explanatory sub-categories: monetary and non-monetary. Other commentators have argued that remedies instead should be classified as either specific or substitutionary.¹⁸⁸ "Specific" remedies seek to "prevent harm to [the] plaintiff, repair the harm in kind, or restore the specific thing that [the] plaintiff lost."¹⁸⁹ "Substitutionary" remedies, in contrast, provide the plaintiff money to compensate for harm that the plaintiff suffered.¹⁹⁰

Although this traditional distinction is compelling, it raises unnecessary complications regarding the proper classification of

note 26). Professor Plater persuasively rejects that view, finding it "difficult to argue that legislatures could not, if they desired to do so and did so explicitly and unequivocally, take over the entire field of a court's equitable discretion . . . in a statute-based action." Plater, 70 Cal L Rev at 553 n 112 (cited in note 26).

¹⁸⁷ A strong argument could be made that an order restoring an employee to a job that she was denied due to illegal discrimination is a type of remedial order, since it aims to put the employee in the same position she would have occupied, had the defendant not violated the law in the first place. This Article contends that there are important distinctions between remedying past statutory violations and preventing future ones, however, which would be obfuscated by classifying such an essentially forward-looking injunction as "remedial." Nevertheless, disagreements at the margins regarding the category into which certain types of orders should be placed do not necessarily undermine the validity of the categories themselves or this Article's overall recommended framework.

¹⁸⁸ Greabe, 21 Wm & Mary Bill of Rights J at 865 (cited in note 185).

¹⁸⁹ Id.

¹⁹⁰ Id.

orders requiring “restitution of a specific sum of money.”¹⁹¹ A monetary award may be considered either “specific” or “substitutionary,” depending on the plaintiff’s precise cause of action and the label she assigns to the relief she seeks (for example, whether she sues for compensatory damages, reliance damages, restitution, or disgorgement). Thus, under some circumstances, a monetary remedy is treated as compensatory damages (a remedy at law), whereas other times it is the object of an injunction. Classifying relief as either monetary or non-monetary captures the benefits of the specific-substitutionary distinction while avoiding some of the difficulties and arbitrariness that arise from that dichotomy’s inconsistent treatment of monetary relief.¹⁹²

Courts should apply a heavily modified form of *eBay*’s requirements when considering provisions in injunctions requiring non-monetary remedial relief. They should award such relief, if possible, unless the aggregate burden or harm the order would cause for the defendants and third parties would overwhelmingly outweigh the benefit to the plaintiffs. Conversely, when a statute allows a plaintiff to seek an injunction ordering the payment of money, the court should treat the claim as an action for compensatory damages.

1. Eliminating the irreparable injury and inadequate remedy at law factors for non-monetary relief.

Most basically, a plaintiff should not have to satisfy *eBay*’s irreparable injury or inadequate remedy at law requirements to obtain an injunction. As Owen Fiss points out, these factors effectively establish a hierarchy of remedies in which injunctions occupy a disfavored position.¹⁹³ Compensatory damages—money—are regarded as the default remedy; a plaintiff generally may obtain injunctive relief only if such damages (a “remedy at law”) are unavailable or unreasonably difficult to calculate.¹⁹⁴

¹⁹¹ Id.

¹⁹² See Subsection III.A.3.

¹⁹³ Fiss, *The Civil Rights Injunction* at 38 (cited in note 122).

¹⁹⁴ Douglas Laycock has famously argued that the irreparable injury rule has been drastically undermined, because courts are willing to find that it has been satisfied under a range of other circumstances, as well. See generally Douglas Laycock, *The Death of the Irreparable Injury Rule* (Oxford 1991).

Whatever the merits of this approach for common-law causes of action, it is particularly inappropriate for statutory violations. Congress generally prohibits conduct to attempt to prevent it from occurring, and to protect certain rights and interests. And laws typically are not understood as giving people a choice between complying with a prohibition, and violating it so long as they compensate anyone who is adversely affected as a result. Thus, a court should attempt to provide plaintiffs, to the greatest extent possible, with the specific rights and interests that a statute protects.¹⁹⁵ Whenever possible, a court should aim to directly or specifically undo the effects of a past statutory violation, rather than relegating the plaintiff to a substitute monetary judgment. It is likely this instinct that led many pre-*eBay* courts to either skip an irreparable injury analysis when deciding whether to issue statutory injunctions, or else conclude that violations of a statutory right constituted irreparable injury as a matter of law.¹⁹⁶

The irreparable injury and inadequate remedy at law requirements are largely anachronisms. English Chancery Courts required petitioners to demonstrate that they lacked an adequate remedy at law to avoid interfering with Common Pleas, which had jurisdiction over common-law claims.¹⁹⁷ Modern federal courts, in contrast, have jurisdiction over actions in both law and equity.¹⁹⁸ The original justification for this limitation on the exercise of equitable powers therefore no longer applies.

¹⁹⁵ Shreve, 51 Geo Wash L Rev at 387 (cited in note 26) (“[C]ourts will devalue plaintiff’s rights by substituting for injunctive relief the prospect of compensation or consolation.”). See also 78 Harv L Rev at 1020 (cited in note 59) (“[I]t may be thought improper or unfair to allow the defendant unjustifiably to inflict harm on the plaintiff, leaving the latter with no alternative but to seek monetary compensation. . . . [N]o presumption in favor of one form of relief is tenable.”). Compare with Rendleman, 90 Mich L Rev at 1649 (cited in note 186). But see Susan Frelich Appleton, *Standards for Enjoining Teacher Strikes: The Irreparable Harm Test and Its Statutory Analogues*, 69 Iowa L Rev 853, 860–61 (1984) (arguing that a court’s refusal to issue an injunction based on the irreparable injury rule “does not necessarily signal judicial condonation” of the illegal act).

¹⁹⁶ See, for example, notes 67–68.

¹⁹⁷ Frederic William Maitland, *Equity: A Course of Lectures* 3–5 (Cambridge 1936) (A. H. Chaytor, W. J. Whittaker, and John Brunyate, eds); Shreve, 51 Geo Wash L Rev at 385 (cited in note 26). See also Leubsdorf, 91 Harv L Rev at 530 (cited in note 26).

¹⁹⁸ US Const Art III, § 2, cl 1 (“The judicial power shall extend to all cases, in law and equity.”).

The primary modern justification for the irreparable injury and inadequate remedy at law requirements is to promote judicial economy. According to this argument, plaintiffs should presumptively receive damages because awarding them is easier for courts than crafting and enforcing injunctions.¹⁹⁹ This justification is an overgeneralization and appears to lack empirical support. In many cases, it likely would be fairly easy for a court to provide non-monetary remedial relief, and there is no reason to believe that the difficulties associated with crafting an appropriate injunction—particularly when litigants submit proposed orders—are systematically greater than those present in damages actions.

Damages claims can be burdensome because the parties often must introduce additional evidence, beyond that relating to liability, to establish the proper amount of damages. The court often must resolve legal disputes concerning the propriety of recovery for certain types of harm, and make difficult subjective determinations, such as the proper valuation for a plaintiff's emotional distress, pain and suffering, or loss of body parts. Moreover, although courts must hold contempt proceedings when defendants disobey injunctions, subsequent judicial proceedings are similarly required when defendants refuse to satisfy monetary judgments. Thus, particularly in the absence of supporting empirical evidence, judicial economy is not a facially persuasive reason for systematically favoring monetary judgments over injunctions ordering non-monetary relief.

Another main reason why courts limit the availability of injunctions is because of their chilling effect on otherwise legal conduct.²⁰⁰ This concern primarily applies, however, to prospective provisions that seek to govern a defendant's future behavior.²⁰¹ A purely remedial provision, in contrast, would require only the return of the interest or property of which the plaintiff was wrongly deprived, if possible, without regard to the defendant's future conduct.

¹⁹⁹ Shreve, 51 Geo Wash L Rev at 387–89, 395, 419 (cited in note 26); 78 Harv L Rev at 1020 (cited in note 59); Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U Fla L Rev 346, 346 (1981).

²⁰⁰ Shreve, 51 Geo Wash L Rev at 387–89, 419 (cited in note 26).

²⁰¹ See Section III.B.

Finally, Rendleman has argued that the irreparable injury rule protects the role of the jury by compelling plaintiffs to seek legal remedies—which trigger the Seventh Amendment’s right to a jury trial²⁰²—whenever reasonably possible.²⁰³ Considering the dearth of jury trials that occur each year,²⁰⁴ however, this rationale is largely theoretical. Moreover, many commentators have raised powerful concerns about juries that might warrant limiting their availability, including doubts that lay jurors can understand the law and accurately follow the judge’s instructions;²⁰⁵ related questions about jurors’ ability to understand and evaluate complicated or technical evidence or expert opinions;²⁰⁶ apprehension about jurors’ ability to draw accurate conclusions based on their observations of witnesses’ speech, tone, and demeanor;²⁰⁷ and fear of jurors’ bias.²⁰⁸

Even if it is necessary or advantageous to protect the jury’s role in civil cases, judges could use them to make liability determinations²⁰⁹ or render special verdicts,²¹⁰ or even rely on them in an advisory capacity,²¹¹ while still crafting remedial orders themselves when there are no damages to calculate. Thus, courts should abandon the irreparable injury and inadequate remedy at law requirements for injunctive relief.

²⁰² See US Const Amend VII.

²⁰³ Rendleman, 90 Mich L Rev at 1645 (cited in note 186).

²⁰⁴ John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L J 522, 524 (2012).

²⁰⁵ See, for example, Walter W. Steele Jr and Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 NC L Rev 77, 77–78 (1988).

²⁰⁶ See, for example, Michael A. Fisher, *Going for the Blue Ribbon: The Legality of Expert Juries in Patent Litigation*, 2 Colum Sci & Tech L Rev 1, 1–2 (2001); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DePaul L Rev 355, 356–57 (1998).

²⁰⁷ See, for example, Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 Neb L Rev 1157, 1159–60 (1993).

²⁰⁸ See, for example, Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich L Rev 63, 66 (1993).

²⁰⁹ Compare with *Beacon Theaters, Inc v Westover*, 359 US 500, 508 (1959) (“Whatever permanent injunctive relief [a plaintiff] might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict.”).

²¹⁰ See FRCP 49(a)(1).

²¹¹ See FRCP 39(c).

2. Modifying the balance-of-hardships and public interest factors for non-monetary relief.

Courts should apply modified versions of *eBay*'s balance-of-hardships and public interest factors when considering non-monetary remedies for statutory violations. A court should order such relief for a successful plaintiff, if possible, unless the combined burden or harm it would cause for the defendant and third parties²¹² would overwhelmingly outweigh the benefit to the plaintiff.

This proposed standard tilts the scale much more heavily in favor of injunctive relief than the traditional *eBay* factors. A defendant should not be able to avoid satisfying its statutory obligations or providing the most effective relief for a statutory violation, simply because the court concludes that the resulting burdens would exceed the marginal benefit to the plaintiff. As one commentator persuasively puts it,

The defendant in an injunction proceeding who asks the court to balance the remedies in his favor is, in effect, asking the court to approve of his decision not to comply with the duties that law-abiding citizens comply with voluntarily. Thus, the court is being asked to voice its approval of lawless conduct.²¹³

By passing a statute, Congress already has made the policy decision to impose certain burdens or reallocate resources and, so long as that decision is constitutional, a court should not second-guess it at the remedial stage of a lawsuit. Rather than allowing or requiring courts to reassess congressional policy decisions,²¹⁴ the new framework's proposed application of the

²¹² See Orin H. Lewis, Note, "*The Wild Card That Is the Public Interest*": Putting a New Face on the Fourth Preliminary Injunction Factor, 72 Tex L Rev 849, 854 (1994) (arguing that the "public interest" prong of the *eBay* test should allow courts to consider the "particularized nonparty harm" that an injunction would cause); Laura W. Stein, *The Court and the Community: Why Non-Party Interests Should Count in Preliminary Injunction Actions*, 16 Rev Litig 27, 34, 37–39, 63 (1997) (arguing that, in considering the "public interest" prong of the *eBay* test, the court should consider any harm to non-parties, unless the underlying statute specifically precludes consideration of it).

²¹³ Farber, 45 U Pitt L Rev at 535–36 (cited in note 123).

²¹⁴ Schoenbrod, 72 Minn L Rev at 638 (cited in note 111) (cautioning that some courts use equitable balancing to "countermand legislative priorities established in the law of liability by ignoring the statutory rule based on their own policy choices"); Farber, 45 U Pitt L Rev at 542–43 (cited in note 123); *Weinberger*, 456 US at 335 (Stevens dissenting).

balance-of-hardships and public interest prongs recognizes Congress's primacy in determining legal obligations, while preventing the unwarranted imposition of massive hardship.

Some might object that courts should not be permitted to selectively underenforce statutes, even in such rare cases, because it is Congress's constitutional responsibility to amend the law as necessary to avoid unintended or overly harsh consequences.²¹⁵ Other commentators, approaching the issue from a remedial equilibration perspective,²¹⁶ maintain that courts should automatically issue injunctions to remedy statutory violations, but take into account undue hardship, the public interest, and other such equitable factors when interpreting a statute at the liability stage, to determine whether the challenged conduct violates it.²¹⁷

This Article's proposed framework recognizes the need for a "safety valve" to protect against the imprudent issuance of potentially destructive injunctions.²¹⁸ It advocates that this safety valve be very limited, however, and incorporated at the remedies phase, rather than affect statutory interpretation at the liability stage. Congress necessarily legislates at the "wholesale" level, and cannot always foresee or address all

²¹⁵ Plater, 70 Cal L Rev at 527–28, 586 (cited in note 26); Farber, 45 U Pitt L Rev at 543 (cited in note 123). See also *Weinberger*, 456 US at 329–30 (Stevens dissenting).

²¹⁶ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L Rev 857, 884 (1999) (arguing that a "right may be shaped by the nature of the remedy that will follow if the right is violated"). Compare with Comment, 57 Yale L J at 1048 (cited in note 36) (arguing that, because injunctions are a milder alternative to potentially ruinous financial liability or imprisonment, courts may be willing to construe new laws providing for injunctive relief more broadly than they would if a different remedy were required); John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L J 87, 87–90 (1999) (arguing that courts are likely to construe constitutional rights more broadly when an injunction, rather than damages, is the only available remedy).

²¹⁷ Fregeau, Comment, 18 BC Envir Affairs L Rev at 539 (cited in note 28). Fregeau argues:

The Supreme Court should acknowledge equitable discretion to be nothing more than a process of statutory interpretation. . . . The courts, via statutory interpretation, would decide if Congress meant to prohibit the conduct in question. If Congress did not prohibit the action, then no injunction would issue. If, however, Congress meant to prohibit the conduct in question, then an injunction would be required.

Id. He elaborates that courts may consider the likelihood of harm to the litigants and third parties, the public interest, and "exigent or exculpatory situations" when interpreting a statute. Id at 542.

²¹⁸ Compare with Gergen, Golden, and Smith, 112 Colum L Rev at 206 (cited in note 26).

possible “retail” applications of a statute and its consequences.²¹⁹ Individuals who are adversely affected by a statute, even if unintentionally, cannot count on legislators to even consider their plight, much less undertake the substantial burden of amending the law.²²⁰ Courts, in contrast, have at least a theoretical obligation to consider and be responsive to the arguments that the litigants before them assert.²²¹

Incorporating a limited degree of flexibility at the remedies stage is more respectful of Congress’s legislative role than allowing equitable concerns to affect the court’s interpretation of a statute’s substantive provisions. Moreover, faithful interpretation and application of a statute at the liability stage makes the exercise of (carefully circumscribed) discretion at the remedies stage both descriptively more likely to occur and normatively more defensible,²²² especially in light of courts’ traditional discretion over the issuance of injunctions.²²³

Schoenbrod offers a similar recommendation, but would permit a court to deny injunctive relief only under much narrower circumstances. He contends that a court should grant a statutory injunction to a successful plaintiff unless: “(a) different relief is consistent with the goals of the statute *and* (b) the case involves a factor justifying departure from the statutory rule that was not reflected in its formulation.”²²⁴ Schoenbrod emphasizes, “To justify deviation from the statutory rule, therefore, a defendant must demonstrate that the case presents a factor that the legislature did not already take into account when the rule was formulated.”²²⁵ His approach is a

²¹⁹ Compare with Lewis, 72 Tex L Rev at 876–77 (cited in note 212) (advocating that courts weigh harm to third parties that “substantially deviate[s] from the harm normally anticipated as a consequence of the enforcement of the substantive law”).

²²⁰ See William N. Eskridge Jr., *Vetogates*, *Chevron*, *Preemption*, 83 Notre Dame L Rev 1441, 1444–47 (2008).

²²¹ See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 Georgetown L J 121, 125 (2005) (“[A]djudicative legitimacy depends . . . on [judicial] decisions that squarely confront [litigants’] proofs and arguments, even if the court determines that they do not ultimately supply an appropriate basis for resolution.”).

²²² Levinson, 99 Colum L Rev at 884 (cited in note 216).

²²³ See note 28.

²²⁴ Schoenbrod, 72 Minn L Rev at 647 (cited in note 111).

²²⁵ Id at 649. See also Stein, 16 Rev Litig at 32 (cited in note 212) (arguing that, when deciding whether to issue an injunction, a court should consider any harm the injunction would cause unless doing so would be “inconsistent with the purposes of the underlying law”).

good start and faithful to the Court's rulings in *Hill*²²⁶ and *Oakland Cannabis*,²²⁷ but tolerates a substantial amount of potentially unwarranted hardship, for both defendants and third parties, that equitable discretion is intended to alleviate.

Schoenbrod's approach also seems to be in greater tension with *eBay* and cases applying it than this Article's recommendations. For example, in *Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*,²²⁸ the district court—in a ruling upheld by the Federal Circuit²²⁹—refused to enjoin the sale of medical devices that vascular surgeons required to perform surgery, but infringed the plaintiff's patent. The court explained:

[Considering] the important role that these products play in aiding vascular surgeons who perform life saving medical treatments, sound public policy does not favor removing Gore's items from the market. The risk is too great. Placing Gore's infringing products out of reach of the surgeons who rely on them would only work to deny many sick patients a full range of clinically effective and potentially life saving treatments. The Court finds that the strength of this factor alone precludes it from imposing a permanent injunction.²³⁰

Congress unavoidably knew that protecting patents would limit access to other people's intellectual property and that, at least in the modern era, medical technology and pharmaceuticals comprise a substantial fraction of protected materials. Thus, restrictions on the availability of patented medical equipment cannot be deemed an unexpected or

²²⁶ 437 US at 193.

²²⁷ 532 US at 497.

²²⁸ 2009 US Dist LEXIS 31328, *30 (D Ariz), affd 670 F3d 1171 (Fed Cir 2012), vacd in part on other grounds, 476 F Appx 747 (Fed Cir 2012) (per curiam) (en banc), affd 682 F3d 1003 (Fed Cir 2012).

²²⁹ *Bard Peripheral Vascular, Inc v W.L. Gore & Associates, Inc*, 670 F3d 1171 (Fed Cir 2012), vacd in part on other grounds, 476 F Appx 747 (Fed Cir 2012) (per curiam) (en banc), affd 682 F3d 1003 (Fed Cir 2012).

²³⁰ *Bard Peripheral Vascular*, 2009 US Dist LEXIS 31328 at *30. See also *Psihoyos v John Wiley & Sons, Inc*, 2011 US Dist LEXIS 115835, *14–15 (SDNY) (“[E]njoining the defendant from selling its existing inventory of five-hundred page academic textbooks, when each is alleged to contain no more than two to three photographs that may or may not have been properly registered by the plaintiff, would impose a severe hardship on the defendant and constitute an inappropriate use of the Court's equitable powers.”).

overlooked consequence of the intellectual property system. Schoenbrod's proposed approach does not appear to permit courts to refrain from ordering the destruction or return of infringing materials under such circumstances.

This Article's proposal does, however, leave open the possibility that a plaintiff who prevails under a statute that authorizes only injunctive relief might be denied any meaningful remedy at all. Scholars such as Rendleman contend that, "[w]hen an injunction is the plaintiff's only meaningful remedy," declining to grant it "sacrifices the plaintiff's right[s]."²³¹ Such an outcome stems from the underlying statute's remedial limitations, however, rather than any abuse of discretion by the court.

3. Monetary relief.

Courts should treat equitable claims for monetary relief as suits for compensatory damages. The distinctions among remedies such as damages, restitution, disgorgement, backpay, and other ways of seeking money are further remnants of the English judiciary's bifurcation between common-law courts and Chancery. The wide range of arbitrary disparities that such distinctions create has been well documented elsewhere.²³² Although a full discussion of this issue is beyond the scope of this Symposium, this Article tentatively recommends that courts treat all causes of action for monetary relief—whether they historically would be considered legal or equitable—as damages suits.

B. Prospective Provisions

Many commentators argue that courts generally should grant prospective injunctions, prohibiting future violations of the law, to prevailing plaintiffs as a matter of course. Zygmunt J.B. Plater, for example, contends that "a court has no discretion or authority to exercise equitable powers so as to permit violations of statutes to continue,"²³³ even if the violation is

²³¹ Rendleman, 27 Rev Litig at 86 (cited in note 109).

²³² See, for example, Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 Ala L Rev 119 (2006).

²³³ Plater, 70 Cal L Rev at 525–26 (cited in note 26). See also Fregeau, Comment, 18 BC Envir Affairs L Rev at 541 (cited in note 28) ("If the statute is interpreted to prohibit

technical, minor, or would result in great public benefit.²³⁴ He explains, “The moment that a district court judge sitting in equity begins to consider whether a valid statute must be obeyed . . . the judicial system departs from the careful boundaries that have been maintained in this country over two centuries and invades the core function of the legislature.”²³⁵

Under current law, this is a reasonable approach to prevent courts from effectively amending or nullifying laws or otherwise undermining the legislature’s authority, with one caveat that much of the literature tends to overlook. Prospective orders should either prohibit violations of a particular statutory provision, or instead bar certain threatened, recurring, or ongoing conduct that the court has determined violates the statute. Courts should avoid entering broad, prophylactic injunctions that prohibit otherwise lawful activities.²³⁶ An injunction “that gives the plaintiff more than [her] rightful position . . . takes away the defendant’s right to engage in perfectly legal conduct.”²³⁷

Determining that certain conduct should be prohibited is a quintessentially legislative function, particularly in the federal system, where federal courts generally lack the ability to make common law.²³⁸ Moreover, statutes reflect a careful balance among numerous interests. The precise scope of a statutory prohibition often embodies tradeoffs, compromises, and concessions necessary for the statute to traverse the legislative process’s numerous vetogates.²³⁹ A court that unilaterally imposes additional restrictions on defendants may potentially undo a legislative “deal,” leading to results that were not, and could not have been, enacted through the legislative process itself. And when courts impose additional “prophylactic”

the actions in question, then an injunction must issue.”); Farber, 45 U Pitt L Rev at 538 (cited in note 123) (arguing that, if a statute imposes an “absolute duty” of compliance, courts should issue injunctions as a matter of course to enforce it).

²³⁴ Plater, 70 Cal L Rev at 526–27 (cited in note 26).

²³⁵ Id at 592 (cited in note 26). See also Axline, 12 Harv Envir L Rev at 44 (cited in note 125).

²³⁶ Schoenbrod, 72 Minn L Rev at 647–48 (cited in note 111). But see Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buff L Rev 301, 314–18 (2004).

²³⁷ Schoenbrod, 72 Minn L Rev at 629 (cited in note 111).

²³⁸ See *Erie Railroad Co v Tompkins*, 304 US 64, 78 (1938).

²³⁹ See Eskridge, 83 Notre Dame L Rev at 1444–47 (cited in note 220); John F. Manning, *Textualism and Legislative Intent*, 91 Va L Rev 419, 440–42 (2005).

restrictions, they generally cannot even claim to be applying the type of expertise and careful empirical study upon which administrative agencies purportedly rely when promulgating regulations.²⁴⁰ Additionally, it is contrary to rule-of-law values to allow a court to effectively create a new law that is enforceable only against a particular defendant or defendants. Thus, while, under current law, courts should issue prospective injunctions against statutory violations, they should not include purely prophylactic provisions in such orders.

Once a court issues an injunction, it has broad discretion to decide whether, through civil or criminal contempt remedies, to enforce it. It is preferable for judicial discretion to enter into the equation at the contempt stage, rather than the injunction stage. Whereas declining to issue a statutory injunction puts a court in the uncomfortable position of failing to enforce a federal law, in direct tension with Congress, the court necessarily has far greater discretion over the enforcement of its own orders. The separation of powers and policymaking concerns of declining to enforce a court order—or declining to do so immediately, or with full force—are far less than those raised by failing to provide a remedy for a statutory violation. Thus, enjoining statutory violations has the generally overlooked virtue of elegantly transitioning the dispute from one arising under federal law to one arising under a court order, thereby greatly expanding the permissible scope of enforcement discretion a court might employ.

This discussion reveals the problems with relying on injunctions as prospective remedies for statutory violations. As mentioned earlier, the use of injunctions as statutory remedies is something of an anachronism. The injunction originated as a remedy available in Chancery when a claimant lacked an adequate remedy at law. A petition could invoke equity to enforce moral rights and obligations that the ossified common law, mired in the writ system, would not evolve to recognize.²⁴¹ Transplanting the injunction from these equitable origins to use as a prospective statutory remedy makes little sense; as

²⁴⁰ See *City of Arlington v FCC*, 133 S Ct 1863, 1876 (2013).

²⁴¹ See John H. Langbein, et al, *History of the Common Law: The Development of Anglo American Legal Institutions* 272 (Aspen 2009). See also, Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash L Rev 429, 442–44 (2003).

discussed in greater detail below, Congress should cease authorizing such relief.

A prospective statutory injunction may serve four purposes: (i) prohibiting a defendant from violating a statute, (ii) clarifying that certain conduct violates a statute, (iii) proscribing additional conduct that does not violate a statute, and (iv) enhancing the consequences of statutory violations. None of these functions provides a sufficient rationale for Congress to continue authorizing courts to issue prospective injunctions against statutory violations (as opposed to remedial injunctions, discussed earlier²⁴²).

First, and most basically, an injunction is not necessary to prohibit a defendant from violating a statute, because the statute itself already forbids the conduct at issue and establishes the parties' respective legal rights and obligations. A court order simply directing compliance with a certain statute or regulation undermines the importance or primacy of the underlying legal provision itself.

Second, a prospective statutory injunction is not required to play a law-clarifying role. One might argue that an injunction offers the advantage of allowing a court to prohibit a defendant from engaging in certain specific conduct that the court has concluded would violate the underlying statute. A court can specify that certain conduct violates a statute in other ways, however, such as through judicial opinions and declaratory judgments. Furthermore, once a statute such as the Civil Rights Act has been the subject of a substantial amount of litigation, there will be no need for such clarification in whole categories of cases. Thus, an injunction is unnecessary to clarify that certain conduct violates a statute.

Third, a court may include prophylactic provisions in an injunction to bar certain conduct that does not violate the statute itself. As discussed earlier, courts should avoid issuing these types of injunctions, and Congress should not authorize them.

Finally, the most significant effect of an injunction is to change the remedy for statutory violations, by subjecting the defendant to the possibility of civil and criminal contempt.²⁴³ A

²⁴² See Subsection III.A.2.

²⁴³ See Morley, 35 Cardozo L. Rev. at 2463 (cited in note 20) (explaining remedies for violations of court orders in greater detail).

defendant who violates a statute that provides for injunctive relief, by definition, faces the possibility of being subject to an injunction. It has been argued that this gives the defendant a “relatively free bite of forbidden fruit.”²⁴⁴ Instead of requiring courts to issue injunctions as an “intermediate” step, Congress instead should permit courts to enforce statutes directly through civil contempt-type proceedings (although potentially with a different name, to reflect this new context).²⁴⁵ Allowing courts to grant such relief directly for statutory violations would bolster the deterrent effect of federal laws and the speed with which they may be enforced. It also would promote judicial economy, allowing courts to skip a largely unnecessary step and alleviating the need for disputes over whether injunctions should issue and how they should be crafted.²⁴⁶

IV. CONCLUSION

Statutes such as the Civil Rights Act that rely heavily on injunctions as remedies raise critical questions about the scope of courts’ power to decline to provide relief for past violations of the law or allow future violations to continue unabated. Some of these difficulties arise from doctrines that have been carried

²⁴⁴ Comment, 57 Yale L J at 1044 (cited in note 36). See, for example, Stuart R. Cohn, *Demise of the Director’s Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule*, 62 Tex L Rev 591, 636 (1983).

²⁴⁵ Congress also could consider allowing courts to directly enforce certain statutes through criminal contempt-type proceedings, without the need to first issue an antecedent injunction. Such proceedings would be conducted in accordance with the constitutional rights of the accused, including the right to a jury, where applicable. See US Const Amend VI; 18 USC § 3691; *Taylor v Hayes*, 418 US 488, 495–96 (1974). Of course, it would be much more direct for Congress to simply establish violations of those statutes as criminal offenses. The primary advantage of Congress providing for a criminal contempt-type remedy, rather than simply enacting a criminal statute, is that a court would be able to appoint a prosecutor to pursue a contempt-type charge if the Government is unwilling or unable to do so. See FRCP 42(a)(2). The judiciary generally lacks similar authority to compel enforcement of criminal laws. While it may be appropriate for courts to exercise such authority to enforce their own orders, however, *Young v United States*, 481 US 787, 795–96 (1987), allowing them to do so to directly enforce a statute would raise serious questions under the Take Care Clause, US Const Art II, § 3, cl 5. See *United States v Valenzuela-Bernal*, 458 US 858, 863 (1982). Thus, particularly as a first step, providing for the immediate imposition only of civil-contempt type remedies for statutory violations is a preferable course of action.

²⁴⁶ A statute making civil contempt-type remedies immediately available against federal, state, and local government agencies and officials who violate the Constitution or federal statutes also might reduce or eliminate the need for injunctions in public law cases. Compare with Morley, 35 Cardozo L Rev at 2465–87 (cited in note 20) (explaining the importance of injunctive relief in public law cases).

over from the English Chancery courts and no longer serve a useful purpose. Whereas most earlier commentators have argued that courts should apply either a single, universal standard to determine whether to issue statutory injunctions, or instead use different standards based on the type of statute at issue, this Article contends that the applicable standard instead should depend on the nature of the requested relief.

Non-monetary remedies for statutory violations generally should be available unless the harm they would cause to the defendant or third parties would substantially outweigh the benefit to the plaintiff. Injunctions against future statutory violations, in contrast, should issue as a matter of course, though Congress should strongly consider amending federal laws to alleviate the need for such relief, and instead make contempt-type remedies immediately available to deter violations. These proposals would help promote judicial economy by eliminating the often unnecessary “intermediate” step of issuing an injunction; abolish anachronistic doctrines, such as the irreparable injury and inadequate remedy at law requirements, that can lead to arbitrary or unfair results; protect separation of powers, by limiting the opportunity and need for courts to make quintessentially policy-based judgments concerning federal laws, and facilitate just outcomes.