ENSURING COMPLIANCE: EQUITABLE RELIEF IN THE FACE OF VIOLATIONS OF SUBSTANTIVE ENVIRONMENTAL STANDARDS

BY

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I. INTRODUCTION

Today I would like to address limits on the discretion that courts possess, when facing plaintiffs' requests for injunctive relief after they have successfully established that defendants are violating substantive requirements under our environmental laws. As a threshold matter, it is worth pointing out that our major environmental statutes routinely authorize enforcers—by which I mean both agencies such as the U.S. Environmental Protection Agency (EPA) and those proceeding under the relevant citizen-suit provisions—to seek both civil penalties and permanent injunctions in judicial actions.[1] With regard to injunctive relief, the statutes also commonly provide the courts with the explicit authority to restrain violations and/or compel compliance.[2]

In the ordinary course, one would expect these cases to work in a fairly straightforward fashion. Once an environmental plaintiff establishes that a regulated entity has been violating the law, the plaintiff would request an injunction as necessary to compel the defendant to promptly fix the underlying problems (e.g., inadequate treatment technology) that led to the relevant violations. The defendant

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[1] *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1319 (2012) (the Clean Water Act enforcement provision); 42 U.S.C. §§ 7413, 7477, 7604 (2012) (the Clean Air Act enforcement provisions).

[2] *See, e.g.*, 33 U.S.C. § 1319(b) (stating that a district "court shall have jurisdiction to restrain . . . violation[s] and to require compliance"); 42 U.S.C. § 7604(a) (stating that "the district courts shall have jurisdiction . . . to enforce . . . emission standard[s] or limitations" and "to compel . . . agency action").

would of course weigh in with its view as to both what, if anything, is necessary to halt the violations and how much time it needs to implement any required remedial measures. In the end, the court would determine both the appropriate remedy and how much time it should give the defendant to implement the relevant solution. On top of that, the plaintiff would seek, and the judge would likely impose, penalties for past violations. These penalties would be calculated both to recapture any economic benefit the defendant may have enjoyed by delaying its compliance and also to ensure that enforcement action generated some measure of deterrence.

Over the course of the last forty-one years, however, the United States Supreme Court has issued a series of opinions that have clouded these otherwise straightforward dynamics, at least insofar as they apply to injunctive relief. First, in *Tennessee Valley Authority v. Hill*[3] (*TVA v. Hill*), the Court relied on separation of powers concerns in finding that the jeopardy prohibition in § 7 of the Endangered Species Act[4] completely deprived the lower court of equitable discretion to do anything other than issue an injunction that would protect the relevant species.[5] Just three years later, however, the Court seemed to walk back on at least a broad application of *TVA v. Hill* in *Weinberger v. Romero-Barcelo*[6] (*Romero-Barcelo*). While issuing what I hope to demonstrate was a narrow holding, Justice White's opinion for the majority included some seemingly unqualified language about injunctions being an "extraordinary remedy" that should only be issued where both there would otherwise be "irreparable injury" and legal remedies would be inadequate.[7] But then nearly two decades later, in *United States v. Oakland Cannabis Buyers' Co-op*[8] (*Oakland Cannabis*), the Court—while giving lip service the same principles of equitable discretion highlighted in *Romero-Barcelo*—made clear that this discretion does not give courts the ability to "override Congress' policy choice[s], articulated in a statute, as to what behavior should be prohibited."[9]

More recently, however, the tide seems to have shifted back in the other direction. In a series of statutory-violation cases decided between 2006 and 2010—*eBay, Inc. v. Mercexchange, L.L.C.*[10] (*eBay*), *Winter v. Natural Resources Defense Council, Inc.*[11] (*Winter*), and *Monsanto Co. v. Geertson Seed Farms*[12] (*Monsanto*)—the Supreme Court stressed the need for the courts to apply traditional equitable factors before issuing injunctions.[13] The fact that the latter two cases were environmental cases underscored the possibility that they may serve to alter the analysis that would otherwise apply under *TVA v. Hill*, *Romero-Barcelo* and *Oakland Cannabis*. In *Monsanto*, the Court deemed the traditional four-factor

3 437 U.S. 153 (1978).
4 16 U.S.C. § 1536(a)(2) (2012).
5 *TVA v. Hill*, 437 U.S. at 193–95.
6 456 U.S. 305 (1982).
7 *Id.* at 312.
8 532 U.S. 483 (2001).
9 *Id.* at 497.
10 547 U.S. 388 (2006).
11 555 U.S. 7 (2008).
12 561 U.S. 139 (2010).
13 *eBay*, 547 U.S. at 391; *Winter*, 555 U.S. at 32; *Monsanto*, 561 U.S. at 157.

balancing approach to be applicable to requests for injunctive relief in cases under the National Environmental Policy Act of 1969[14] (NEPA):

> [A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: 1) that it has suffered an irreparable injury; 2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; 3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and 4) that the public interest would not be disserved by a permanent injunction.[15]

In this Essay, I will discuss the relationship between these six Supreme Court decisions, as they collectively bear on the proper judicial response to requests for permanent injunctions where necessary to abate violations of our substantive environmental laws. As will be seen, my thesis is that a correct reading of these cases—particularly of *TVA v. Hill*, *Romero-Barcelo* and *Oakland Cannabis*—indicates that courts have discretion about how and when compliance is to be achieved, but not about whether it should be achieved. If a court is convinced that it can generate prompt compliance by threatening stipulated penalties for any and all future violations, it need not issue an injunction at all. But in the end, compliance is and must be the bottom line. Where injunctions are likely to be the only way to generate prompt compliance, courts cannot undermine congressional mandates by relying on equitable principles to deny claims for such relief. In such circumstances, the equitable analysis must give way, at least to the extent that it might affect the very question of whether—as opposed to when—compliance will be achieved.

My analysis will proceed in three stages. First, I will provide brief overview of what I consider to be the three key cases that bear directly on the question at hand: *TVA v. Hill*, *Romero-Barcelo*, and *Oakland Cannabis*. Next, I will provide a synthesis of what I believe is the collective import of these decisions. And finally, I will explain why I believe that the three more recent opinions—*eBay*, *Winter*, and *Monsanto*—do not in any way undermine the significance of the earlier three decisions as they bear on the application of injunctive relief in enforcement cases.

Before I dive into this discussion, however, I would like to propose two relatively simple hypotheticals, to frame the analysis. In the first, I want to assume the presence of an industrial facility that is subject to stringent technology-based standards under the Clean Water Act,[16] but which installed a treatment system that is simply not capable of meeting the relevant requirements. Let us assume that, in order to meet the requirements, it would need to install additional treatment equipment at a cost that is significant, but not debilitating. But let us also assume that this particular facility discharges into very deep marine waters that are subject to strong tidal dispersion. And finally, I want us to assume that the company can show that, even with its existing treatment system (and the resulting violations), its discharges have, at most, only a *de minimis* adverse impact on the relevant waters, which—as it happens—readily meet all applicable water quality standards.

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14 42 U.S.C. §§ 4321–4370h (2012).

15 561 U.S. at 156–57 (quoting *eBay*, 547 U.S. at 391) (alteration in original).

16 33 U.S.C. §§ 1311–1313, 1316–1317 (2012).

My second hypothetical involves an impoverished municipality that has uncontrolled combined sewer overflows (CSOs), which means that the city's sewage system sometimes discharges raw sewage into a nearby river. Let us assume that these discharges are truly foul, and that they lead to extreme violations of water quality standards pertaining to bacteria, but that the relevant discharge events only occur during heavy storm conditions, when few, if any, people tend to swim, kayak, or otherwise come into contact with the water. We can even further assume that there have been no demonstrated cases of illness or other adverse effects from the uncontrolled discharges. And finally, let us also assume that it would cost the relevant municipality approximately $2 billion to reduce these CSO events to the extent necessary to comply with the Clean Water Act.

In both contexts, I want to assume that EPA has successfully established the relevant violations in the district court, and thus that the focus shifts to the appropriate relief. My first hypothetical is intended to highlight the question whether a district court judge can impose on plaintiffs the burden of showing—as a precondition to obtaining injunctive relief—a greater quantum of substantive harm than would be necessary to make out the underlying Clean Water Act violation. Would EPA, in such a case, need to show not just the permit violation (violation of the facility's technology-based limits), but also some degree of water quality harm to meet the "irreparable harm" requirement?

My second hypothetical calls into question the applicability of the third and fourth elements of the four-factor test.[17] Stated simply, it poses the question of whether, even if one assumes both the presence of irreparable harm and the inadequacy of money damages, a judge may resolve a case without generating complete compliance if she simply believes that the required compliance costs are not equitably justified, given the negative impacts those costs may have on both the defendant and the larger public interest.

II. AN OVERVIEW OF *TVA V. HILL*, *ROMERO-BARCELO*, AND *OAKLAND CANNABIS*

TVA v. Hill is certainly one of the most famous cases in the annals of environmental law: the legendary case in which the government was precluded—temporarily, as it turned out[18]—from closing the gates on a nearly-completed federal dam due to the fact that it was believed that doing so would render extinct the snail darter, a recently-discovered species of perch.[19] The Court found that Congress mandated this result through section 7 of the Endangered Species Act, which requires all federal agencies "to *insure* that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence" of a listed species.[20]

Finding an "irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7,"[21] Chief Justice Burger, writing for the majority, then addressed whether the district court still had the residual equitable power to deny

17 *See supra* note 15 and accompanying text.

18 Zygmunt J.B. Plater, *Tiny Fish, Big Battle*, TENN. B.J., Apr. 2008, at 14, 18–19.

19 *TVA v. Hill*, 437 U.S. 153, 157–58, 171–72 (1978).

20 *Id.* at 173 (quoting 16 U.S.C. § 1536 (1976 ed.)).

21 *Id.* at 193.

the requested injunction.[22] The Court found that it did not, noting that under our constitutional system,

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. *Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.*[23]

The Court concluded by noting that section 7's explicit text established that Congress had struck the equitable balance "in favor of affording endangered species the highest of priorities," thus precluding any residual balancing by the courts.[24]

The Supreme Court returned to the question of equitable discretion in environmental cases just three years later in *Romero-Barcelo*, this time in a case under the Clean Water Act.[25] Here, the question was whether the district court erred in declining to enjoin the Navy's continued, illegal discharges while EPA processed the Navy's permit application—which the district court had ordered the Navy to file.[26] The Court, in an opinion written by Justice White, began its analysis from a completely different place, quoting older cases for the proposition that injunctions do not issue as a matter of course, or where the harm may be "merely trifling."[27] The Court also stressed the need to consider the other equitable factors, including "the public consequences in employing the extraordinary remedy of injunction."[28] In concluding its introductory prelude on equitable discretion, the Court noted that, while Congress may guide or control courts' exercise of this discretion, courts should not "lightly assume that Congress has intended to depart from established principles."[29] In this vein, the Court quoted a 1946 case, *Porter v. Warner Holding Co.*,[30] for the proposition that, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[31]

Next, the *Romero-Barcelo* Court distinguished *TVA v. Hill* by noting that in the earlier case only by issuing an injunction could the lower court avoid extinction, and thereby "vindicate the objectives of the Act."[32] Here, by contrast, the Court found that the core purpose of the Clean Water Act is to protect the integrity of the Nation's waters, and that the permit program is just a means toward

22 *Id.* at 193–95.

23 *Id.* at 194 (alteration in original) (emphasis added) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

24 *Id.*

25 *Romero-Barcelo*, 456 U.S. 305 (1982).

26 *Id.* at 306–09.

27 *Id.* at 311 (quoting Consol. Canal Co. v. Mesa Canal Co., 177 U.S. 296, 302 (1900)).

28 *Id.* at 312.

29 *Id.* at 313.

30 328 U.S. 395 (1946).

31 *Romero-Barcelo*, 456 U.S. at 313 (quoting *Warner Holding Co.*, 328 U.S. at 398).

32 *Id.* at 314.

that end.[33] Earlier in the opinion, Justice White specifically had taken note of the district court's finding that the discharges "were not causing any 'appreciable harm' to the environment."[34] And with regard to the impact of ongoing discharges on the permit program, the Court observed that "[t]he District Court did not face a situation in which a permit would very likely not issue."[35]

Given these dynamics, the *Romero-Barcelo* Court concluded that the district court had the discretion to consider equitable dynamics in deciding whether to compel immediate cessation of the permitless discharges.[36] More specifically, it stated that, "[r]ather than requiring a district court to issue an injunction for any and all statutory violations, the [statute] permits the . . . court to order that relief it considers necessary to secure prompt compliance with the Act."[37]

The third case in this trilogy was *Oakland Cannabis*. In this case, the district court had enjoined the defendant Cooperative's provision of marijuana to its patients which—while legal as a matter of California law[38]—was in violation of the Controlled Substances Act.[39] When the Cooperative moved to modify the injunction to permit distributions that it considered to be medically necessary, the district court denied the request, finding that its "equitable powers [did] not permit it to ignore federal law."[40] On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the district court did have the equitable discretion to allow the Cooperative to continue to provide the marijuana, indefinitely; in that vein, it held that the lower court should have weighed the public interest, including "the serious harm in depriving patients of marijuana."[41]

The Supreme Court reversed.[42] While acknowledging that the Controlled Substances Act did not divest the lower court of all discretion in fashioning relief,[43] Justice Thomas, writing for the majority, found that "the mere fact that the District Court had discretion" did not mean that, in exercising this discretion, it "could consider any and all factors that might relate to the public interest or the conveniences of the parties."[44] Specifically, the Court concluded that the Ninth Circuit had erred in instructing the district court to consider the impact of the injunction on the public interest because, in passing the Act, Congress had already struck the balance in favor of a prohibition on the use of marijuana.[45] In reaching this conclusion, the Court quoted from *TVA v. Hill* in stressing that:

33 *Id.* at 314–15.

34 *Id.* at 309–10 (quoting Romero-Barcelo v. Brown, 478 F. Supp. 646, 706 (D.P.R. 1979)).

35 *Id.* at 320.

36 *Id.*

37 *Id.*

38 Compassionate Use Act of 1996, Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001).

39 *See* United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1091, 1105–06 (N.D. Cal. 1998); Comprehensive Drug Abuse Prevention and Control Act of 1970 § 841(a), 21 U.S.C. §§ 801–971 (2012).

40 *Oakland Cannabis*, 532 U.S. 483, 487–88 (2001).

41 *Id.* at 488 (citing United States v. Oakland Cannabis Buyers' Co'op., 190 F.3d 1109, 1114–15 (9th Cir. 1999)).

42 *Id.* at 499.

43 *Id.* at 496.

44 *Id.* at 497.

45 *Id.* at 498–99.

> [A] court sitting in equity cannot "ignore the judgment of Congress, deliberately expressed in legislation." A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought." Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.[46]

III. SYNTHESIZING *TVA V. HILL*, *ROMERO-BARCELO*, AND *OAKLAND CANNABIS*

The best reading of these cases is that, taken together, *TVA v. Hill*, *Romero-Barcelo*, and *Oakland Cannabis* stand for the proposition that courts cannot allow the traditional principles of equitable relief to impermissibly intrude on Congress's legislative mandates. In the end, courts must ensure that they effectuate Congress's will. Again, in the words of *Oakland Cannabis*, their choice, absent language to the contrary, "is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement should be preferable to no enforcement at all."[47] The courts' ability to apply equitable discretion is cabined within these bounds.

As made explicit in both *TVA v. Hill* and *Oakland Cannabis*, this limitation is grounded in separation of powers concerns. It is for Congress to set "the order of priorities" and it is "for the courts to enforce them when enforcement is sought."[48] Moreover, when properly understood, *Romero-Barcelo* is in accord. Despite the breadth of some of Justice White's language about the continued application of equitable principles, his actual framing of the relevant issue in the case indicates that he was fully aware of the overarching statutory constraints: "The issue in this case is whether the [Clean Water Act] requires a district court to enjoin immediately all discharges of pollutants that do not comply with the Act's permit requirements or *whether the district court retains discretion to order other relief to achieve compliance*."[49]

His stating of the Court's holding is in accord:

> We do not read the [Clean Water Act] as foreclosing completely the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the [Act] permits the district court to order *that relief it*

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46 *Id.* at 497–98 (second alteration in original) (emphasis added) (citations omitted) (first quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 551 (1937); and then quoting *TVA v. Hill*, 437 U.S. 153, 194 (1978)).

47 *Id.*

48 *Id.* at 497 (quoting *TVA v. Hill*, 437 U.S. at 194).

49 *Romero-Barcelo*, 456 U.S. 305, 306–07 (1982) (emphasis added) (citations omitted).

> *considers necessary to secure prompt compliance with the Act.* That relief can include, but is not limited to, an order of immediate cessation.[50]

As evident from the above quote, however, this is not to say that traditional equitable principles are completely displaced. Indeed, the Court specifically noted that the district courts may take them into account in determining how and when compliance is to be achieved, subject to abuse of discretion review.[51] Further, the obligation to ensure that compliance is achieved does not necessarily even require that a court impose any injunction at all.[52] The Supreme Court referenced this dynamic not only in *Romero-Barcelo*, but also in both *TVA v. Hill* and *Oakland Cannabis*.[53] In the end, though, the key point—as reflected in the above quote—is that the court's resolution must be calculated to achieve compliance with the relevant standard, and, indeed, to do so promptly.

In *Romero-Barcelo*, the Court noted, approvingly, that the district court had determined that ordering the Navy to apply for a permit would do just that.[54] It underscored this point in its penultimate paragraph:

> The District Court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. *Should it become clear that no permit will be issued and that compliance with [the Clean Water Act] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck*.[55]

One final point from these cases is worth highlighting a little more plainly. In both *Romero-Barcelo* and *Oakland Cannabis*, the Supreme Court determined that the lower courts were required to generate compliance under the Clean Water Act and the Controlled Substances Act, respectively, despite the fact that neither statute had language specifically compelling the courts to achieve this result.[56] In the injunctive context, for example, in both contexts the relevant provisions merely give the courts jurisdiction to enjoin violations, without requiring that they do so.[57] The mandate comes from the Congressional edicts in the provisions to be enforced, rather than from the enforcement provisions themselves. Again, as explicitly reflected in both *TVA v. Hill* and *Oakland Cannabis*, this dynamic is dictated by

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50 *Id.* at 320 (emphasis added); *see also id.* at 318 ("[w]e read the [Clean Water Act] as permitting the exercise of a court's equitable discretion . . . to order relief that will achieve *compliance* with the Act.").

51 *Id.* at 320.

52 *Id.* at 314, 320.

53 All three cases reference the idea that a grant of jurisdiction to issue equitable relief does not suggest an absolute duty to do so in all circumstances. *Id.* at 313, 320; *TVA v. Hill*, 437 U.S. 153, 193 (1978); *Oakland Cannabis*, 532 U.S. 483, 496 (2001).

54 *Romero-Barcelo*, 456 U.S. at 310.

55 *Id.* at 320.

56 *See id.* at 318; *see also Oakland Cannabis*, 532 U.S. at 497–98.

57 33 U.S.C. § 1319(b) (providing the relevant court with "jurisdiction to restrain such violation and to require compliance."); 21 U.S.C. § 882(a) (under the Controlled Substances Act, the court "shall have jurisdiction . . . to enjoin violations of this subchapter"); *see also Oakland Cannabis*, 532 U.S. at 496 ("[t]he Controlled Substances Act vests district courts with jurisdiction to enjoin violations of the Act").

separation of powers concerns: "Once Congress . . . has decided the order of priorities in a given area, it is. . . for the courts to enforce them when enforcement is sought."[58]

Turning to our hypotheticals, it is clear that under these authorities courts would be required to compel compliance. Again, my first hypothetical—involving the inadequate treatment that does not lead to any discernible environmental harm—raises the question whether courts may decline to compel compliance where violations do not result in irreparable harm. In my view, *Romero-Barcelo* firmly indicates that the answer to this question is "no." Again, the Supreme Court decided that case based on a district court finding that the discharges were not harming the environment.[59] Despite the absence of irreparable harm though, the Court never wavered from the basic idea that compliance would still need to be achieved.[60] Indeed, as mentioned, the Court specifically noted that the district court would need to reconsider its remedy if it turned out that the permit would not issue.[61]

My second hypothetical concerns CSO controls that may impose billions of dollars in compliance costs on a beleaguered community, despite the absence of any evidence that the bacteria issues involved have led to any known human health impacts. In so doing, of course, it speaks to the question of whether a court, in deciding whether to compel compliance—could consider the potential harm to either the defendant and/or the larger public interest. Under traditional equitable balancing, these factors would of course be relevant.[62] In the context of substantive statutory violations, however, *Oakland Cannabis* squarely indicates that these concerns are out of bounds, at least insofar as they relate to whether the court must find a way to ensure compliance.[63] Again, the Court in that case held that courts "cannot, in their discretion, reject the balance that Congress has struck in a statute."[64] Even more to the point, the Court concluded the relevant subsection of its opinion in the following terms:

> To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.[65]

None of this is to suggest, of course, that a district court would be compelled to issue an injunction in either of my hypothetical situations. According to these cases, however, what the Clean Water Act would mandate in both situations is compliance—even "prompt compliance," in the words of the *Romero-Barcelo* Court.[66] Given the scale of the potential penalties available under the statute—the

58 *TVA v. Hill*, 437 U.S. at 194; *Oakland Cannabis*, 532 U.S. at 497 (alteration in original) (quoting *TVA v. Hill*, 437 U.S. at 194).

59 *Romero-Barcelo*, 456 U.S. at 309–10.

60 *Id.* at 314–15, 318, 320.

61 *Id.* at 320.

62 *See supra* note 13 and accompanying text.

63 *Oakland Cannabis*, 532 U.S. at 497–98.

64 *Id.* at 497 (citing *TVA v. Hill*, 437 U.S. 153, 194–95 (1978)).

65 *Id.* at 498.

66 *Romero-Barcelo*, 456 U.S. at 320.

maximum daily fines are now up to $54,833 per day for each violation[67]—it is certainly possible that a court could determine that it could compel prompt compliance through the threat of significant stipulated penalties for any future violations. But still, compliance is the bottom line. And cases like *Romero-Barcelo* and *Oakland Cannabis* make clear that there is no gap in this context between what is illegal and what courts may enjoin, if a relevant court determines that the issuance of such an injunction is the best way to ensure prompt compliance.

IV. THE POTENTIAL IMPACT OF *EBAY*, *WINTER*, AND *MONSANTO*

In my view, the Supreme Court's opinions in these three more recent cases in no way undermine the Court's approaches in the earlier three decisions. As an initial matter, it is important to note that none of these decisions gives any hint that it was intended to overrule any of the prior decisions. Instead, the only one of the previous three cases that the Court even cites in each of these opinions is *Romero-Barcelo*, and in each instance it does so favorably—for differing but fairly bland propositions about general principles of equity.[68] One would certainly expect that if the Court were going to overrule such significant opinions, based as they are on significant constitutional, separation-of-powers concerns, that it would at least mention that it was doing so.

Additionally, the more recent cases are readily distinguishable. Starting with the two environmental cases, *Winter* and *Monsanto*, both of these cases involved NEPA. As the Court recognized in *Winter*, however, "NEPA imposes only procedural requirements to 'ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'"[69] Thus, *Winter* and *Monsanto* simply did not implicate cases such as *TVA v. Hill*, *Romero-Barcelo*, and *Oakland Cannabis*, which involve the relationship between equitable principles and the substantive standards of federal law.[70] In the latter context, the earlier cases strongly indicate that equitable principles must yield if they would undermine congressionally-established priorities.

eBay, by contrast, involved infringement—a substantive violation of the Patent Act.[71] Pointedly, however, the Patent Act involves private rights, not public ones.[72] The plaintiffs in Patent Act cases are patent holders, not the United States or citizens acting as private attorneys general. And the available remedies involve

67 40 C.F.R. § 19.4 tbl.2 (2018).

68 *See eBay*, 547 U.S. 388, 391 (2006) (citing *Romero-Barcelo*, 456 U.S. at 311–13, 320) (discussing the requirements for establishing a preliminary injunction and the equitable discretion of the court); *Winter*, 555 U.S. 7, 20 (2008) (citing *Romero-Barcelo*, 456 U.S. at 311–12) (discussing the requirements for establishing a preliminary injunction); and *Monsanto*, 561 U.S. 139, 165 (2010) (citing *Romero-Barcelo*, 456 U.S. at 311–12) (stating that "[a]n injunction is a drastic remedy, which should not be granted as a matter of course").

69 *Winter*, 555 U.S. at 23 (alteration in original) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).

70 *See TVA v. Hill*, 437 U.S. at 193; *Romero-Barcelo*, 456 U.S. at 314; *Oakland Cannabis*, 532 U.S. at 496.

71 547 U.S. at 390–91. *See also* 35 U.S.C. §§ 1–13 (2012).

72 J. Janewa OseiTutu, *Private Rights for the Public Good?*, 66 S.M.U. L. REV. 767, 770 (2013).

either injunctions or private damages.[73] Thus, the dynamics under the Patent Act are fundamentally different than those that pertain under statutes such as the Clean Water Act, which contemplate that the Sovereign (or a private attorney general) will represent the public interest. As the Supreme Court noted in *TVA v. Hill*, "it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."[74] And as the Court reiterated in both *Romero-Barcelo* and *Oakland Cannabis*, in such contexts the question for the courts is not whether compliance is in the public interest, but rather how compliance should be achieved.[75]

Moreover, the very fact that there is an alternative remedy—private damages—under the Patent Act that will fully compensate the patent holder serves to further distinguish the two contexts.[76] This, of course, aligns with traditional equitable analysis, which considers whether alternative remedies exist that are adequate to compensate for the relevant injuries.[77] Under the Clean Water Act, by contrast, there are no monetary damages, but rather only civil penalties, which are designed to deter future violations, not compensate for damages caused.[78] Moreover, even if monetary damages were available, the Supreme Court has recognized in *Amoco Production Co. v. Village of Gambell*,[79] that environmental injuries "can seldom be adequately remedied by money damages."[80]

V. CONCLUSION

The simple question addressed in this Essay is whether courts have an obligation to correct violations of substantive environmental law, when demonstrated, regardless of the presence or absence of demonstrated harm to the environment or other perceived equitable dynamics. The answer is that they do. While they may take equities into account in determining how or exactly when the defendant must remedy the underlying causes of its violations, the relevant Supreme Court precedent indicates that courts must fashion remedies designed to generate "prompt" compliance.

73 *See* 35 U.S.C. §§ 283, 284.

74 *TVA v. Hill*, 437 U.S. at 194.

75 *Romero-Barcelo*, 456 U.S. at 314–15; *Oakland Cannabis*, 532 U.S. at 497.

76 The Patent Act of 1790, 1 Stat. 109, at 111 § 4 (Apr. 10, 1790): *see also* 35 U.S.C. §§ 1–13 (2012).

77 *See supra* note 13 and accompanying text.

78 *See, e.g.*, Tull v. United States, 481 U.S. 412, 422 (1987).

79 480 U.S. 531 (1987).

80 *Id.* at 545.