THE INCOHERENT LAW OF ENVIRONMENTAL INJUNCTIONS

BY

PAUL BOUDREAUX*

Should an ongoing violation of an environmental statute be enforced by a permanent injunction? The Supreme Court made an injunction a hit-or-miss proposition in eBay v. MercExchange. *That decision set forth an incoherent four-part test for permanent injunctions. Most notably, the test includes a standalone "irreparable injury" factor, unmoored from the old equitable law principle favoring injunctions when monetary damages are inadequate to the injury. The* eBay *test conflates a preliminary injunction, which is a procedural mechanism, with a permanent injunction, which is a substantive remedy. The result is that courts struggle to give meaning to the "irreparable injury" element. Some courts treat "irreparable injury" as meaning "significant"—an unwise departure from old equity law. In environmental cases, where injunctions often matter more than damages, courts have denied relief for many reasons without a unifying principle.*

The incoherent injunction test is especially troubling to American law, which values certainty and adherence to statutory texts, such as the Administrative Procedure Act, which states plainly that courts "shall . . . set aside agency conduct . . . not in accordance with law." Courts (or Congress) should reverse the mischief of the eBay *test and revert to textualism or, in statute-driven environmental cases, adopt a presumption favoring injunctive relief absent compelling national reasons to refrain from an injunction.*

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* Professor, Stetson University College of Law, Gulfport and Tampa, Florida, boudreaux@law.stetson.edu. J.D., B.A., University of Virginia; L.L.M., Georgetown University. The author thanks Stetson law student research assistants Kimberly Hutchinson, Blake Kahn, and Anna Brulte. He also thanks his colleagues, especially Professor Jason Bent and Professor Marco Jimenez, for their useful comments on the ideas that underlie this Article.

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I. INTRODUCTION

Should a court permanently enjoin a party that is violating environmental law—for example, by polluting the air or harming an endangered species? Under federal law, the answer is maddeningly unclear. The Supreme Court aggravated this uncertainty in 2006 with *eBay Inc. v. MercExchange, L.L.C.* (*eBay*), announcing a four-part test for permanent injunctions without acknowledging that it was creating a new doctrine.[1]

As recent case law shows, the *eBay* test was, and remains, fundamentally flawed. First, the test conflated two different concepts: permanent injunctions and preliminary injunctions. Although these concepts sound similar, they differ sharply: a permanent injunction is a *substantive* remedy that resolves a legal controversy, whereas a preliminary injunction is a *procedural* mechanism that preserves the status quo pending litigation.[2] This distinction is underexplored in the literature.[3]

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[1] eBay Inc. v. MercExchange, L.L.C. (*eBay*), 547 U.S. 388, 390 (2006).

[2] This Article, which focuses in large part on legal language, places in quotation marks important terms taken directly from cases or statutes, while it uses italics to emphasize terms that are used in law but that are not quoted directly from legal authority.

[3] For example, in their otherwise extensive recent study of injunctions under federal law, two scholars failed to make this distinction between preliminary injunctions and

Second, *eBay* overlooked that the two concepts employ different factors. For permanent injunctions, courts traditionally granted relief when the plaintiff showed an injury not reparable by a *monetary ("legal") remedy*.[4] By contrast, the preliminary injunction standard considers, in part, whether the movant would suffer irreparable harm *before a final judgment on the merits*.[5] In *eBay*, the Court conflated these concepts and announced a four-part test with a freestanding "irreparable injury" requirement that is distinct from the judgment on the merits.[6] This requirement makes no sense if it is unmoored from the traditional question of whether monetary relief would suffice. Unsurprisingly, courts have struggled mightily with this element: courts have sometimes read "irreparable" to mean *significant*, contrary to linguistics or the history of injunctive law.

The ill-formed *eBay* test imposes its greatest mischief, perhaps, in environmental law. In many important environmental cases—such as whether the government must act to battle climate change,[7] whether a corporation must stop polluting beyond its permit limits, or whether conduct that unlawfully harms protected wildlife may continue—the relief demanded is an *injunction*. Citizens harmed by climate change, air pollution, or endangered species loss typically do not want money. They want action. Specifically, they want an injunction to stop the violations. Yet the result of the cockeyed new precedent is that federal courts are now empowered to deny *any* relief, even after a showing that a defendant is currently violating environmental law.[8] This remarkable result is compelled by neither statutory text nor the traditions of American law.

This approach also conflicts with a bedrock principle long advanced by conservative jurists: federal courts should not act as *super-legislatures* by deciding national policy. The extraordinary discretion granted by the new test also conflicts with statutory texts, including the Administrative

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permanent injunctions. F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1067–69 (2021). This article cited *eBay* only in a single footnote. *Id.* at 1068 n.26.

[4] To understand the complicated law of injunctions, one must understand the terminology. This point is one of the foundations of the *textualist* approach to interpreting legal statutes, constitutions, and codes that now dominates American jurisprudence: that words should be interpreted through their *plain meaning*, without extraneous considerations. *E.g.*, Sackett v. Env't Prot. Agency, 598 U.S. 651, 672 (2023) (statutes should be interpreted by their ordinary meaning); Bostock v. Clayton Cnty., 590 U.S. 644, 674 (2020) (same); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17, 23–25 (1997) (a discussion by the late Supreme Court justice, who vigorously advocated for this ordinary meaning method of interpretation).

[5] 43A C.J.S. *Injunctions* § 54 (2025).

[6] *eBay*, 547 U.S. at 391.

[7] *E.g.*, Massachusetts v. Env't. Prot. Agency, 549 U.S 497, 526, 533 (2007) (concluding that the U.S. EPA must, under the Clean Air Act (CAA), take steps to address the climate effects of automobile emissions); Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020) (considering a claim of an enforceable constitutional right to a clean environment). This does not mean that all such claims are wise. But they are significant.

[8] *See infra* Section VI(A).

Procedure Act (APA),[9] which is the foundational statute governing actions against federal agencies and straightforwardly instructs a federal court to "*set aside . . . agency action. . . not in accordance with law*."[10] The Supreme Court held in 2024 that the "text of the APA means what it says."[11]

This Article urges a similar return to textualism in applying environmental law. If that is deemed too strong for the courts or Congress, the law should presume that an injunction follows from proof of an ongoing violation, subject only to narrow exceptions for compelling national interests.

II. THE VAGUE TRADITIONAL LAW OF INJUNCTIVE RELIEF

A. Injunctions, Law, Equity, and Other Terms

The confusion over permanent injunctions appears to stem, in large part, from muddled terminology. This Part traces the Anglo-American history of separate law and equity court systems. Although the two systems merged in the federal courts, solidified by the Federal Rules of Civil Procedure (FRCP), adopted in 1938,[12] U.S. law still suffers from specialized terms inherited from that separation.

Although a full history lies beyond this Article, the following explanation suffices. In medieval England, the kings (who, after the Magna Carta, were not all-powerful) became dissatisfied with law courts, whose judges fixated on complicated legal processes and often denied relief.[13] Through the chancellor, the kings developed separate courts of chancery[14] empowered to issue orders in accordance with *equity*—a term,

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[9] Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2018).

[10] *Id.* at § 706(2)(A) (emphasis added).

[11] Loper Bright Enter. v. Raimondo (*Loper Bright*), 603 U.S. 369, 393 (2024). In *Loper Bright*, the Supreme Court overruled the *Chevron* doctrine, which held that federal courts, when interpreting ambiguous statutory terms, must defer to reasonable agency interpretations of these terms. *Id.* at 412. *Loper Bright* held that courts must apply "their own judgment" and may not defer to the agency. *Id.* at 392. The Supreme Court relied largely on the simple words of the APA, which states that "'the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions . . . .' 5 U.S.C. § 706." *Id.* at 391. The textualist-driven Court wrote: "The text of the APA means what it says." *Id.* at 393.

[12] *See* Ross v. Bernhard, 396 U.S. 531, 537–38 (1970) (explaining how the FRCP combined law and equity in the federal courts). Before this, federal courts followed the Federal Equity Rules when considering *equitable* claims. *See* Wallace R. Lane, *Twenty Years Under Federal Equity Rules*, 46 HARV. L. REV. 638–75 (1933) (discussing equity claims in federal court before the FRCP).

[13] As explained by Professor David Raack, the old English courts of law sometimes *did* issue orders that we might properly call "injunctions." David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 544–50 (1986). For a history in the early United States, *see* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 293–98 (3d ed. 2005).

[14] One state—Delaware—still retains a separate Court of Chancery, whose job is largely to handle corporate law, for which Delaware has a unique set of laws. *See* Randy J. Holland,

then and now, synonymous with *justice* or *fairness*.[15] Accordingly, it became commonplace to refer to these courts as "equity" courts. Equity courts readily issued injunctions: an order for a party to do, or not do, an act. Law courts, by contrast, were hesitant to issue orders directing conduct.[16] Chancery developed a distinct body of doctrine that came to be known as "equity," including maxims such as "equity must come with clean hands."[17] Another maxim held that equity would not issue an injunctive remedy if an "adequate remedy at law," meaning a remedy through the older court system, was available.[18] Some of this old doctrine continues to haunt modern American law.

The old doctrine is most vivid when discussing remedies (also called relief, redress, or awards). Most fundamentally, the word *law* can be used in its broadest, most common meaning: the rules and dispute resolution of a society. But under the old-fashioned nomenclature of remedies,[19] with its division between law courts and equity courts, *law* is sometimes narrowed to mean only that part of the legal system involving monetary relief.[20] That relief is often called a *remedy at law* or, even more confusingly, a *legal remedy*. Thus, some court-issued remedies, such as injunctions, are distinguished from legal remedies.[21] The legal remedy is damages, which in this sense is not synonymous with injury or harm but simply means the award of money.[22]

For clarity, this Article uses "remedy at law" to mean monetary relief or money. Similarly, this Article uses "injunction" or "injunctive remedy" (rather than "equitable remedy") for precision.[23] Clarity matters, given the confusion sown by the Supreme Court's recent interpretations.

Delaware's Business Courts: Litigation Leadership, 34 J. CORP. L. 771, 773–74 (2009) (explaining Delaware's Court of Chancery).

[15] *Equity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equity [https://perma.cc/UNN8-US5Q] (last visited Oct. 6, 2025) ("The derivative root of the noun, which gained stability in the English language during the 1300s, is Latin *aequus*, meaning 'even,' 'fair,' or 'equal'").

[16] FRIEDMAN, *supra* note 13, at xviii.

[17] OWEN M. FISS, INJUNCTIONS 10–13 (1972) (explaining the evolution of the Court of Chancery as a jurisprudence of equity).

[18] *See id.* at 9 (discussing the development of the doctrine that an injunction "is available only once it is shown that the legal remedies are inadequate").

[19] This Article uses the term *old-fashioned* here instead of *traditional* because the terminology is both outdated and illogical for the modern world, as this Article endeavors to explain.

[20] A term can refer both to a broad concept and to one of its constituent parts. If one asks: is your Lincoln Navigator car a Ford? The answer might accurately be "yes," because it is made by the Ford Motor Company, but "no," in that it is sold under the Lincoln brand, not the Ford brand. But such complications can lead to great confusion when used in law.

[21] Thus, a lawyer should know that a *legal remedy* does not include all remedies in the world of *law*.

[22] *Damage*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/damages [https://perma.cc/4HPM-S5JB] (last visited Oct. 6, 2025).

[23] I suggest that this old-fashioned usage can lead to dangerous ambiguity. We might run across an accurate but very confusing statement such as "the equitable remedy was lawful" (meaning that it did not violate any rules) or even "the legal remedy was equitable"

B. An Injunction Was "Discretionary," or Was It?

One oft-asserted maxim of equity has been that injunctive relief is "discretionary" and "not granted routinely."[24] This maxim made sense when equity courts were an alternative to traditional law courts, issuing injunctions only when the totality of the circumstances warranted. But it is also unacceptably vague to modern legal sensibilities, which prize certainty. Certainty, in legal and economic terms, allows parties to plan more efficiently: *May I trespass on my neighbor's property for my own benefit?*[25] *How much pollution may I dump into a river without violating the law?*[26]

In fact, federal courts have ignored the discretion maxim for decades. One illustration appears from a foundational case of 1970s environmental law (often called the "first generation" of such law): *Tennessee Valley Authority v. Hill (TVA v. Hill)*.[27] There, citizen-plaintiffs sued to enjoin the completion of a dam that was expected to wipe out the only known population of the snail darter, a fish protected by the new federal

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(meaning the monetary relief was fair). Using the term *equity* to refer to only one category of relief is especially inadvisable in the twenty-first century, when the most common popular use of the word *equity* refers to concepts of social justice, especially racial justice. Equity in the hotly disputed concept of DEI (meaning "diversity, equity, and inclusion") refers to racial or gender fairness. Equity is one of the most confusingly overused terms in law; it also means, for example, the amount of value in property when one subtracts the amount that an owner owes others, including encumbrance owners, relating to the property. *Equity*, MERRIAM-WEBSTER, *supra* note 15.

[24] WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2942 (3d ed. 2024) ("[W]hether to exercise equity jurisdiction and grant permanent injunctive relief is [at] the court's discretion."); Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power."); Salazar v. Buono, 559 U.S. 700, 714 (2010) ("An injunction is an exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief."); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–12 (1982) ("An injunction should issue only where the intervention of a court of equity 'is essential . . . '" (quoting Cavanaugh v. Looney, 248 U.S. 453, 456 (1919))); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."); WRIGHT & MILLER, *supra* note 24, § 2942 (discussing the maxim).

[25] Cedar Point Nursery v. Hassid, 594 U.S. 139, 152 (2021) (holding that a state law allowing union representatives to enter onto an employer's land for prolonged periods of time was a regulation appropriating a right to physically invade private property, and thus a *per se* taking).

[26] *See, e.g.*, Clean Water Act (CWA), 33 U.S.C. § 1342(a) (2018). The permit specifies with precision how much of a pollutant may be discharged. In practice, many courts have ignored the premise that injunctive relief is discretionary. Judges do not instruct juries that "if you find that the defendant committed armed robbery with no affirmative defense, the decision whether to convict is discretionary," or "if you find that the party is unjustly occupying land without justification, the decision whether to grant relief is wholly within your discretion, considering your ideas of fairness." *See, e.g.*, Gorman v. City of Woodinville, 283 P.3d 1082, 1085 (Wash. 2012) (when the elements of adverse possession of land are proven, "the adverse possessor is automatically vested with title"); Storey v. Patterson, 437 So.2d 491, 494–95 (Ala. 1983) (adverse possession is mandatory when elements are proven).

[27] Tenn. Valley Auth. v. Hill (*TVA v. Hill*), 437 U.S. 153 (1978).

Endangered Species Act of 1973 (ESA),[28] which prohibits both "taking" and "jeopardizing" listed species.[29] Writing for the Court, Chief Justice Warren Burger (a Republican Nixon appointee) concluded that completing the dam would violate the statute, and then considered whether the agency should be enjoined. The reasoning is worth quoting in detail:

> It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law. This Court made plain in *Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944), that "[a] grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." As a general matter . . . "[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion." D. Dobbs, Remedies 52 (1973). Thus, in *Hecht Co.* the Court refused to grant an injunction when . . . the District Court [found] that "the issuance of an injunction would have 'no effect by way of insuring better compliance in the future' and would [have been] 'unjust' to [the] petitioner and not 'in the public interest.'" 321 U.S. at 326.
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> But these principles take a court only so far. Our system of government is . . . tripartite . . . with each branch having certain defined [Constitutional] functions . . . . While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison,* 1 Cranch 137, 177 (1803), 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.
>
> Here we are urged to view the Endangered Species Act "reasonably," and hence shape a remedy "that accords with some modicum of common sense and the public weal." *Post,* at 196. But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. 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."
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> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do

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[28] Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544 (2018).

[29] *Id.* §§ 1536 (a)(2) ("jeopardizing" by a federal agency is unlawful), 1538(a)(1)(B) ("take" is unlawful).

> not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.[30]

This extraordinary passage, which concluded the opinion, is instructive in several ways.

First, the Court treated the law-equity distinction rather blithely, using the anachronistic term "chancellor," the name of the adjudicator in the defunct Court of Chancery.

Second, the Court appeared to suggest that employing discretion makes sense only when an injunction itself is not sensible. The only cited case, *Hecht Co. v. Bowles*,[31] concerned a Washington, D.C. department store's unintentional violations of extraordinary price controls imposed during World War II.[32] By denying an agency's request for an injunction, the Court reasoned that in this context an injunction—one of the "consequences of war"—would serve as a punishment, and "[t]he historic injunctive process was designed to deter, not to punish . . . . The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."[33] This passage suggested that an injunction was unwise because of the defendant's "good faith and diligence," not because injunctions were generally disfavored.[34]

Third, the Court rejected balancing the supposed benefits of denying an injunction (and completing the dam) against the value of the snail darter's survival.[35] Justice Lewis Powell's dissent urged such balancing for "the public weal."[36] (Notably, even after Congress created a possible exception to the no-jeopardy requirement, a federal committee decided that the dam was not worth completing.)[37] By contrast, Chief Justice Burger's majority opinion reasoned that justices "have no expert

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[30] *TVA v. Hill*, 437 U.S. at 193–95.

[31] Hecht Co. v. Bowles, 321 U.S. 321 (1944).

[32] *Id.* at 323–25.

[33] *Id.* at 329–31.

[34] *Id.* at 325.

[35] *TVA v. Hill*, 437 U.S. 153, 187–88 (1978).

[36] Justice Powell asserted that it was "the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal." *Id.* at 196 (Powell, J., dissenting). Note that he did not argue specifically for a denial of an *injunction*, but rather to read an *exception* into the statute that was not there. This observation helps reinforce the conclusion that the precepts of law of equity were not universally applied at the end of the twentieth century.

[37] *See, e.g.*, PERVAZE A. SHEIKH, CONG. RSCH. SERV., R40787, ENDANGERED SPECIES ACT (ESA): THE EXEMPTION PROCESS 15 (2017), https://www.congress.gov/crs_external_products/R/PDF/R40787/R40787.15.pdf [https://perma.cc/H739-W47D].

knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam."[38]

Fourth, the Court noted the case turned on a federal statute and congressional commands. The Court noted that the statute "admits of no exception."[39] The ESA's § 7 directs federal agencies not to "jeopardize," while § 4 prohibits any "take" (with limited exceptions[40] not relevant here).[41] It is one thing for a court to use unfettered discretion in denying an injunction under common law; it is another to do so in contravention of a clear command of Congress. As the Court concluded: "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto."[42] Stated differently: separation of powers requires courts to follow the precise words of Congress's commands and not disregard them, even if it might seem worthwhile to do so. This passage presages the modern reliance on textual interpretation of federal statutes.

Read in 1978, *TVA v. Hill* might have signaled the decline of the old maxim that injunctive relief is purely discretionary, as American law became increasingly statutory and command-oriented. But, as explained in Part IV below, this is not what happened.

C. Injunctive Relief Was Available When an Injury Was Irreparable by Money Damages

Another equity maxim held that an injunction was available only when there was "no adequate legal remedy," meaning that monetary relief would be insufficient.[43] Put another way, a claimant was entitled to an injunction by showing that the claimant's injury was *irreparable* by money damages. It is critical to recognize that the term *irreparable* is not synonymous with big, significant, or important. Rather, it means incapable of being *repaired*; "repair" means a return to the previous state

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[38] *TVA v. Hill*, 437 U.S. at 194.

[39] *Id.* at 173. It is also worth noting that this Court, as many courts did in the 1970s, relied more on the *purpose*, not the precise *words*, of the statute. Twenty-first century federal courts rely less on the intent of or purpose for a statute and more often on the "plain meaning" of the command. *See, e.g.*, Sackett v. U.S. Env't Prot. Agency, 598 U.S. 672 (2023); Bostock v. Clayton Cnty., 590 U.S. 674 (2020).

[40] A party may be permitted to engage in "incidental" take after receiving a permit from the Secretary of the Interior, in certain prescribed circumstances. ESA, 16 U.S.C. § 1539(a)(1)(B) (2018).

[41] *Id.* §§ 1536, 1538.

[42] *TVA v. Hill*, 437 U.S. at 194–95.

[43] WRIGHT & MILLER, *supra* note 24, § 2944; *see also* O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (explaining that "the 'basic doctrine of equity jurisprudence that courts 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'" (quoting Younger v. Harris, 401 U.S. 37, 43–44 (1971))).

or condition before an injury.[44] Thus, although courts often referred in shorthand to the "irreparable injury" requirement, it was more precise to state that "[t]he irreparable injury rule says that equitable remedies [monetary relief] are available if legal remedies will not adequately repair the harm."[45]

In 1990, Professor Douglas Laycock published in the *Harvard Law Review* a magisterial critique entitled *The Death of the Irreparable Injury Rule*.[46] Surveying and categorizing hundreds of twentieth-century cases, Laycock concluded that the irreparable injury rule was an "example of the confusion created by one of our most archaic 'rules' for choosing among remedies."[47] Although the maxim was often repeated, even a nineteenth century treatise recognized that "judges have been brought to see and to acknowledge . . . that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it . . . ."[48] Laycock showed that the irreparable injury rule was "wildly wrong as a description of what courts actually do."[49]

In practice, twentieth-century courts often ignored the rule and found "[money] damages adequate only when there was an identifiable reason to deny specific relief in a particular case."[50] Laycock concluded that "injunctions are the standard remedy in civil rights and environmental litigation"[51] among other areas of law.[52] The reasons for

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[44] WRIGHT & MILLER, *supra* note 24, § 2942; Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966) ("'[I]rreparable injury' means . . . that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired."); *Irreparable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/irreparable [https://perma.cc/5TEA-2TEG] (last visited Mar. 24, 2025) ("irreparable" is defined as "not reparable" or "irremediable"); *see Repair*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/repair [https://perma.cc/U9D2-FVYF] (last visited Oct. 6, 2025) ("repair" is defined as "to restore to a sound or healthy state").

[45] Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990).

[46] *Id.* at 687.

[47] *Id.* at 689.

[48] 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1357, at 389 (San Francisco: Bancroft–Whitney Co., 1887).

[49] Laycock, *supra* note 45, at 689. Interestingly, Laycock's exhaustive study was not cited or briefed in the *eBay* case—a fact that both shows the sometimes-myopic nature of litigation as well as the lack of relevance of even well-researched and trenchant critical legal scholarship.

[50] *Id.* at 691.

[51] *Id.* at 707 (footnotes omitted). Laycock cited, among other cases, Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) (denying an injunction on other grounds but noting that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages") and Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 323–26 (D.C. Cir. 1987) (granting a preliminary injunction to preserve wildlife habitat, air and water quality, and natural beauty).

[52] Laycock, *supra* note 45, at 707–08 (explaining the inadequacy of money damages in voting rights cases (citing Reynolds v. Sims, 377 U.S. 533, 585–87 (1964) (affirming an order for legislative reapportionment; no discussion of irreparable injury)), 713–14 (providing examples, including misappropriation of trade secrets, infringement of patents, interference

granting injunctions in environmental cases were that monetary damages cannot "replace clean air or water or a lost forest or species, or the cautionary effects of an environmental impact statement."[53] Laycock chided Justice Antonin Scalia, a noted traditionalist and legal historian, for assuming that the maxim remained a bedrock principle of American law.[54] Indeed, Laycock concluded that "there is no general presumption against equitable remedies." In sum, he wrote: "the irreparable injury rule is dead."[55]

But, as explained in Part IV below, the "irreparable injury" requirement has returned in the current century in a zombie form: bizarre and barely recognizable.

III. THE DISTINCTION BETWEEN THE PROCEDURAL MECHANISM OF THE PRELIMINARY INJUNCTION AND THE SUBSTANTIVE REMEDY OF THE PERMANENT INJUNCTION

At first blush, preliminary and permanent injunctions might seem similar: both are forms of equitable relief and both direct parties to do or not do something. But this is misleading: the two mechanisms are radically different. Though rarely emphasized in the legal literature, a preliminary injunction is a *procedural* mechanism, whereas a permanent injunction is a *substantive* remedy.

The purpose of a *preliminary* injunction is to preserve the status quo *ante*—the situation when the litigation started—*only until* the court enters final judgment.[56] Thus, a preliminary injunction is a procedural mechanism. A preliminary injunction (for which a less confusing name might be "short-term constraint") is more like other procedural rules, such as those for interrogatories or the standard for a motion to dismiss, than it is like a permanent injunction. For example, in a divorce case in which one spouse is engaging in risky behavior with the couple's assets, the court may order that spouse to preserve the assets pending the final judgment; without preservation, the assets might be irretrievably lost and the other spouse would suffer harm that could never be repaired by a final judgment.[57] Similarly, in an action challenging dam operations that may harm endangered salmon, a court may order the dam operator

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with contract, and "other kinds of unfair competition"); Bell v. Southwell, 376 F.2d 659, 662 (5th Cir. 1967) (voiding election results because of racial segregation at polling place); O'Connors v. Helfgott, 481 A.2d 388, 394 (R.I. 1984) (stating that "[n]o amount of monetary damages can rectify this vote dilution"); WRIGHT & MILLER, *supra* note 24, § 2948.1 (stating that when deprivation of a constitutional right is shown, "most courts hold that no further showing of irreparable injury is necessary").

[53] Laycock, *supra* note 45, at 708–09.

[54] *Id.* at 689 (citing Bowen v. Massachusetts, 487 U.S. 879, 926 (1988) (Scalia, J., dissenting)).

[55] Laycock, *supra* note 45, at 692.

[56] WRIGHT & MILLER, *supra* note 24, § 2947.

[57] *See, e.g.*, El-Dehdan v. El-Dehdan, 41 N.E.3d 340, 342 (N.Y. 2015) (quoting trial court's order to avoid asset dissolution pending the divorce proceeding).

to refrain from certain conduct until a decision on the merits; without such an order, the harm to the salmon could not be undone by a final judgment.[58]

Thus, when the FRCP took effect in 1938,[59] it included a rule governing preliminary injunctions. Rule 65, titled *Injunctions and Restraining Orders*,[60] addresses two types of judicial orders: "preliminary injunctions" in Rule 65(a), and "temporary restraining orders" in Rule 65(b), which can be obtained in some cases without notice to the opposing party.[61]

Both procedural mechanisms invoke the concept of "irreparable injury." To get a temporary restraining order, a movant must show that "irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."[62] This clarifies that the purpose of the "irreparable injury" requirement is to preserve the status quo until the opposing party can be heard at a subsequent preliminary injunction hearing. Rule 65 governs injunctions and restraining orders generally, but it does not supply a substantive standard for granting a *permanent* injunction; similarly, the most venerable treatise on civil federal procedure, originally written by Wright & Miller, discusses permanent injunctions across multiple sections, rather than in a single standalone entry.[63]

After Rule 65's adoption, federal courts converged on four factors relevant to granting a preliminary injunction. Although courts phrase them differently, Wright & Miller state the factors as:

> 1) the significance of the threat of *irreparable harm* to plaintiff if the [preliminary] injunction is not granted;
>
> 2) the state of the *balance* between this harm and the injury that granting the injunction would inflict on defendant;
>
> 3) the probability that plaintiff will *succeed on the merits*; and
>
> 4) the public interest.[64]

This explains why "irreparable harm" features in the preliminary injunction analysis. As Wright & Miller further explains:

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[58] *See* Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 788–89, 796 (9th Cir. 2005) ("'[C]ontinuation of the status quo could result in irreparable harm to a threatened species' indicating that 'the issuance of an injunction is appropriate.'").

[59] FED. R. CIV. P. For a brief history, see *Federal Rules of Civil Procedure*, U.S. COURTS, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure [https://perma.cc/KS58-AHYY] (last visited Oct. 6, 2025).

[60] FED. R. CIV. P. 65. It is based on former federal Rule of Equity 73.

[61] FED. R. CIV. P. 65(b).

[62] *Id*.

[63] FED. R. CIV. P. 65; *see* WRIGHT & MILLER, *supra* note 24, §§ 2941 (History and Scope of Rule 65), 2955 (Form and Scope of Injunctions or Restraining Orders).

[64] WRIGHT & MILLER, *supra* note 24, § 2948 (emphasis added).

> Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm *before a decision on the merits can be rendered*. Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief.[65]

Note the words that are emphasized. The "irreparable harm" factor has long been used for preliminary injunctions as a useful way to temporarily preserve the status quo pending a judgment on the merits. To this day, when litigators orally say "P.I." they mean a preliminary injunction.[66]

By contrast, a *permanent injunction* settles legal rights and responsibilities.[67] It does not freeze the status quo until relief on the merits; it *is* relief on the merits. A *permanent* injunction is a *substantive* remedy that may be ordered alongside or in addition to monetary relief. For example, a court may permanently enjoin an employer from requiring covered employees to work more than 60 hours a week, or from firing employees based on sexual orientation.[68] In environmental litigation, the Clean Water Act (CWA) authorizes government and citizen suits to "enforce" compliance through a permanent injunction and/or monetary penalties.[69]

This Part concludes with an environmental law analogy. A wildlife taxonomist (a classifier of animals) who examines both a sperm whale (*Physeter macrocephalus*) and the Palawan fruit bat (*Acerodon leucotis*) might conclude that they fit within a single category: they are both mammals— class of animals that feed milk to their offspring—as well as other similarities. But a practical person, such as someone who encounters them in the wild, would realize that they are two radically different animals; the whale is large, lives in the ocean, and eats other

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65 *Id.* § 2948.1 (emphasis added).

66 *See* Anna Christina Majestro, *Preparing for and Obtaining Preliminary Injunctive Relief,* AM. BAR ASS'N. (June 4, 2018), https://www.americanbar.org/groups/litigation/resources/newsletters/woman-advocate/preparing-obtaining-preliminary-injunctive-relief [https://perma.cc/NT5B-G9TZ] (referring to a preliminary injunction as a "PI").

67 *See Permanent Injunction*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/permanent_injunction [https://perma.cc/Y46B-HMUF] (last visited Oct. 6, 2025) ("A permanent injunction is a court order requiring a person to do or cease doing a specific action that is issued as a final judgment in a case.").

68 Bostock v. Clayton Cnty., 590 U.S. 644, 650–52 (2020) (holding that the firing of employees based solely on their homosexuality violated Title VII of the Civil Rights Act of 1964).

69 33 U.S.C. § 1319(b) (2018) (authorization to government to commence a civil action, including for an "injunction"); *id.* § 1319(d) (describing the civil penalties available under the statute); *id.* § 1365(a) (authorizing citizen suits). In the famous case of *Friends of the Earth v. Laidlaw Environmental Services Inc.*, 528 U.S. 167, 185–86 (2000), a case where injunctive relief was not available because the formerly offending facility had already closed, the Supreme Court held that a citizen group had standing to sue for only monetary award (which goes to the government, not the citizen plaintiffs) because monetary penalties "deter future violations," which in itself is redress to the citizens.

animals, while the bat is small, flies and sleeps on land, and eats plants. An attempt to treat the two animals similarly would make little sense. Similarly, it makes little sense for a litigator or a judge to mix elements from two radically different doctrines simply because they fit within a broad category of "injunctive" or "equitable" law. The preliminary injunction is a procedural mechanism designed to hold the status quo pending the outcome of litigation, whereas the permanent injunction is a substantive remedy that permanently redefines responsibilities and rights.

IV. THE RISE OF FEDERAL STATUTORY AND INJUNCTIVE LAW

By the end of World War II, the Supreme Court had concluded that traditional state law concepts of equity were available in federal courts,[70] notwithstanding the *Erie* doctrine, which held that there was no separate federal common law.[71] Then, after a decade in which the administrative state had grown under the New Deal and the war, Congress enacted landmark statutes such as the Federal Tort Claims Act of 1946, which gave courts the power to issue judgments against the United States.[72] Even more significant was the APA of 1946, which guided federal agencies and, just as importantly, set out how citizens may challenge agency actions in federal court.[73] Notably, this Act states that:

> The reviewing court *shall* —
>
> 1) *compel* agency action unlawfully withheld or unreasonably delayed; and
>
> 2) hold unlawful and *set aside* agency action, findings, and conclusions found to be—
>
> A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .[74]

On its face, this language directs federal courts to order action or restraint "in accordance with law." No balancing, irreparable harm requirement, or other prudential factors are mentioned, even though the statute, interestingly, does not use the verb "enjoin"—it uses the verbs "shall … compel" and "set aside."[75]

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[70] Guaranty Trust Co. v. York, 326 U.S. 99, 104–05 (1945).

[71] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[72] Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346–1361 (2018)).

[73] APA, 5 U.S.C. § 553 (2018) (stating the procedures for federal administrative agencies to follow when promulgating rules, including notice and comment requirements, among others).

[74] *Id.* § 706 (emphasis added).

[75] One might argue that federal courts' authority to "set aside" agency action, findings, and conclusions is akin to the power of *vacatur*, which might be considered somewhat

With the New Deal of the 1930s,[76] federal statutes began to govern national labor and workplace relations, ranging from the Social Security Act,[77] which imposed requirements on employers and employees,[78] to the Taft-Hartley Act of 1947,[79] which restricted union activity and authorized federal district courts to "enjoin" certain labor strikes and lockouts.[80] American law had entered into the modern age of statutory injunctive relief. The Civil Rights Act of 1964,[81] which made certain discriminatory employment practices unlawful, empowered federal courts to "enjoin the respondent from engaging in such unlawful employment practice."[82]

The first generation of federal environmental regulatory statutes[83] began with the Clean Air Act (CAA) of 1970,[84] which authorized the Environmental Protection Agency Administrator to seek a "permanent … injunction" against a violator.[85] Congress used nearly identical language in the CWA of 1972.[86] The ESA authorizes citizens to sue to "enjoin" any person in violation of the law.[87] Interestingly, the ESA also states:

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distinct from the general power of an injunction. A recent essay argued that the drafters of the APA did not intend such a distinction. John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REG. 119, 123, 126 (2023).

[76] *President Franklin Delano Roosevelt and the New Deal*, LIBRARY OF CONGRESS, https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/ [https://perma.cc/8UJW-XYCG] (last visited Oct. 6, 2025).

[77] Social Security Act, ch. 531, 49 Stat. 620 (1935) (current version codified as amended at 42 U.S.C. ch. 7).

[78] *Id.* §§ 801–802, 804, 49 Stat. 636–37 (1935).

[79] Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version codified at 29 U.S.C. §§ 158(b), 178).

[80] *Id.* §§ 8(b), 208(a), 61 Stat. 141, 155–56 (1947).

[81] Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 and 52 U.S.C. (2018)).

[82] *Id.* tit. VII, §§ 703, 706(g), 78 Stat. 255–57, 261.

[83] *See* Richard J. Lazarus, *The Greening Of America and The Graying Of United States Environmental Law: Reflections On Environmental Law's First Three Decades In The United States*, 20 VA. ENV'T L.J. 75, 77 (2001) (referring to the statutes around 1970—National Environmental Policy Act (NEPA), CAA, CWA, and ESA—as the "first generation" of federal environmental statutes). Interestingly, the first of these statutes, NEPA, did not include a separate enforcement section. NEPA, Pub. L. No. 91-190, §§ 101–102, 83 Stat. 852, 852–55 (1970) (codified as amended at 42 U.S.C. §§ 4331–32 (2018)). But suits against federal agencies may be brought through the APA's § 706. APA, Pub. L. No. 89-554, § 706, 80 Stat. 378, 393 (recodifying the Administrative Procedure Act) (codified as amended at 5 U.S.C. § 706(1), (2)(A)–(D) (2018)).

[84] CAA, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1686–88 (1970) (codified as amended at 42 U.S.C. § 7413(b)).

[85] *Id.* § 4(a), 84 Stat. 1676, 1686–88 (1970) (codified as amended at 42 U.S.C. § 7413(b)).

[86] CWA, Pub. L. No. 92-500, § 2 (adding § 309), 86 Stat. 816, 860 (1972) (codified as amended at 33 U.S.C. § 1319(b)) (power of the government to use for a "permanent … injunction"). CWA, Pub. L. No. 92-500, § 2 (adding § 505), 86 Stat. 816, 888–89 (1972) (codified as amended at 33 U.S.C. § 1365(g)) (a citizen may sue to "enjoin" a violator).

[87] ESA, Pub. L. No. 93-205, § 11(g)(1)(A), 87 Stat. 884, 900 (1973) (codified as amended at 16 U.S.C. § 1540(g)(1)(A)).

> The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).[88]

It is fair to conclude, therefore, that injunctive relief, once an adjunct to monetary relief, had become an essential feature of American law. Injunctive relief is the preferred remedy—indeed, often the only sensible remedy—for many violations of environmental law. For a proposed factory that would pollute the air or cause the death of endangered species, a citizen plaintiff does not want—and would not be made whole by—money damages. Rather, the plaintiff wants a court order to stop or at least modify the factory's unlawful conduct.

One benefit of statutory law, with its concise commands, is that it provides certainty to parties in our society. A core principle of modern textualist interpretation of statutes, championed by the late Justice Antonin Scalia and others, is that courts should apply the precise and ordinary meaning of statutory words, no more and no less.[89] Textualism rests on the premise that the legislature, not the courts, creates and determines statutory commands.[90] Textualism is also grounded in the idea that legal certainty is economically efficient: parties may act productively and confidently when they know the law's contours.[91]

Through the vague *eBay* test for permanent injunctions, however, the modern Supreme Court has undermined both the primacy of legislative text and the benefits of legal certainty.

V. THE INCOHERENT EVOLUTION OF THE PERMANENT INJUNCTION STANDARD

Early-twentieth-century federal courts sometimes described an *injunction* as "not a remedy that issues as of course"[92]—largely because of its association with old English courts of equity over courts of law. In a 1900 Supreme Court opinion involving a canal's alleged interference with irrigation, the Court stated off-handedly that an injunction should not issue for "trifling" matters.[93] As explained in Part II, these maxims did not necessarily reflect judicial practice in the past century. And it is

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[88] *Id.* at Pub. L. No. 93-205, § 11(g)(5), 87 Stat. 884, 902 (1973) (codified as amended at 16 U.S.C. § 1540(g)(5)).

[89] SCALIA, *supra* note 4, at 17, 23–25 (arguing for precise textualism).

[90] *Id.* at 13 (criticizing judicial activism in interpretation), 16–18 (criticizing a judicial search for "legislative intent").

[91] *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW ch. 20 (9th ed., 2014) (specifically 20.3 on rules versus standards); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986) (courts should interpret statutes to make them clear and coherent, in order that parties may arrange their affairs).

[92] Harrisonville v. Dickey, 289 U.S. 334, 337–38 (1933).

[93] Consolidated Canal Co. v. Mesa Canal Co., 177 U.S. 296, 320 (1900).

telling that few of these cases distinguished between preliminary and permanent injunctions, or between common-law cases (which courts create whole cloth) and statutory cases, (in which courts are to follow legislative commands).

A. Before eBay

How did the new law of environmental protection, replete with detailed commands, mesh with the shifting principles of injunctions? Many leading first-generation cases interpreting federal environmental statutes—roughly 1969 through 1980[94]—routinely enjoined federal actors with little apparent concern for the so-called equitable factors governing permanent injunctions. To be fair, many courts never used the term "injunction;" they simply assumed that a violation of law warranted an order to comply.

Perhaps the most significant early case of this generation was *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission,*[95] which the D.C. Circuit in 1971 called "only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment."[96] Soon after Congress adopted the National Environmental Policy Act of 1969,[97] environmentalists sued the Atomic Energy Commission (today called the Nuclear Regulatory Commission) for failing to prepare a "detailed statement" of the environmental impacts from granting an operating license to a nuclear power plant.[98] The agency noted that it had already granted a construction permit of the plant before the National Environmental Policy Act (NEPA) was enacted,[99] and that it had adopted rules delaying NEPA responsibilities until 1971 to allow an "orderly transition."[100]

The D.C. Circuit rejected that argument, holding "the plain language" of the new Act required immediate creation of what we now call "environmental impact statements" (EIS) for use in agency decision-making.[101] The court held that the agency "must go farther than it has in

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[94] *See* Bill L. Long, *Environmental Regulation: The Next Generation*, OECD OBSERVER 14, 14–15 (1997), https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=815bd25ac835ee61868c908fe869f0cf24792c97 [https://perma.cc/7DKX-WC5U] (referring to the age around the 1970s as the "first generation," with simple rules designed to limit environmental harm).

[95] Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n (*Calvert Cliffs*), 449 F.2d 1109 (D.C. Cir. 1971). Interestingly, this opinion was not appealed to the Supreme Court.

[96] *Id.* at 1111.

[97] NEPA, Pub. L. 91-190, 83 Stat. 852 (1969) (codified *at* 42 U.S.C. §§ 4321–4370h (2018)).

[98] *Calvert Cliffs*, 449 F.2d at 1127.

[99] *Id.* at 1127; NEPA, Pub. L. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321–4370h (2018)).

[100] *Calvert Cliffs*, 449 F.2d. at 1119.

[101] *Id.* at 1127.

its present rules. It must consider action, . . . file reports and papers, at the pre-operating license stage. . . . [and] [T]he Commission must revise its rules governing consideration of environmental issues."[102] While the court used "must" rather than "enjoin," this order was plainly injunctive. But the court did not weigh any equitable factors, even though some facts may have counseled against an injunction: the plant was already under construction; a delay would be costly; any failure to consider environmental impacts might not have caused irreparable injury to any identifiable person.

The most notable early Supreme Court environmental case to address the amorphous law of permanent injunctive relief was *TVA v. Hill,* in 1978.[103] The Court interpreted the fairly new ESA to enjoin a federal agency from finishing a partially built dam until the agency met its legal obligation to consult with an expert wildlife agency about the dam's effects on the endangered snail darter, to avoid extinction.[104] In this decision, Chief Justice Warren Burger, who graduated from law school in 1931,[105] even before adoption of the FRCP, cautioned that:

> It is correct, of course, that a federal judge sitting as a chancellor *[that is, in a court of equity]* is not mechanically obligated to grant an injunction for every violation of law. This Court made plain in *Hecht Co. v. Bowles,* 321 U.S. 321 (1944), that "[a] grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." As a general matter it may be said that "[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion." D. Dobbs, *Remedies* 52 (1973).[106]

But this was the only mention of the prudential issues in deciding an injunction. The opinion did not mention "irreparable injury," "balancing of interests," or any other specific "equitable" factor. Chief Justice Burger then emphasized that the statute imposed a clear command on agencies: "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."[107] And then: "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of

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[102] *Id.* at 1128–29.

[103] *TVA v. Hill*, 437 U.S. 153 (1978); *see supra* Section II(B).

[104] *TVA v. Hill*, 437 U.S. at 191–93 (implicitly applying the commands of consultation with expert agencies in ESA, § 7, and no "take," in § 9).

[105] *Warren E. Burger*, OYEZ, https://www.oyez.org/justices/warren_e_burger [https://perma.cc/CN8B-3EZZ] (last visited Oct. 6, 2025).

[106] *TVA v. Hill*, 437 U.S. at 193.

[107] *Id.* at 194.

veto."[108] To paraphrase: because the statutory command was clear, an injunction had to follow.[109]

That deferential approach to statutory commands did not last long. Four years later, in 1982, the Court declined to enjoin the Navy from dropping ordnance during training off Vieques, Puerto Rico, even though such ordnance fell within the definition of an unpermitted "discharge of any pollutant" into the navigable waters, in violation of the CWA.[110] The case of *Weinberger v. Romero-Barcelo*[111] was a classic example of bad facts making bad law. Faced with the prospect of halting military training during a tense period of the Cold War,[112] the Court invoked precedent about discretion in granting an injunction, including prudential reasons for not doing so. The court cited several cases—some involving permanent injunctions, others preliminary orders—without any distinction. The most important conclusion was that "[t]he Court has repeatedly held that the basis for injunctive relief in the federal courts has always been *irreparable injury and the inadequacy of legal remedies*."[113] But the four cited cases did not support as bold and sweeping a proposition as the *Romero-Barcelo* Court asserted.[114] The Court appeared to revive the older idea that *legal* remedies were preferred to *equitable* remedies. Interestingly, the Court's odd phrasing—"irreparable injury *and* the inadequacy of legal remedies,"—can be read to suggest that there were two separate elements. As explained in Part I, this was incorrect: traditionally, proof of irreparable injury matters to a permanent injunction claim *because* legal (monetary) remedies are inadequate. This imprecision may explain later errors in *eBay*, even though it came more than 20 years later.

The Court in *Romero-Barcelo* distinguished *TVA v. Hill* by pointing out that the "purpose and language" of the ESA led to a different result; it found that *TVA v. Hill* did not establish a precedent that *any* statutory violation automatically triggers an injunction.[115] But the Court did not explain why the ESA's statutory commands are more definitive than, say, those of the CWA, which states, for example, that any unpermitted "discharge of any pollutant" into navigable waters "shall be unlawful."[116]

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108 *Id.* at 194–95.

109 *See id.*

110 Weinberger v. Romero-Barcelo, 456 U.S. 305, 315 (1982).

111 *Id.* at 305.

112 Ronald Reagan, a long-time critic of Communism, was inaugurated as U.S. President in 1981. Two years later, he famously referred to the Soviet Union as "an evil empire" in his 1983 address to the National Association of Evangelicals. *See* Ronald Reagan, *Evil Empire Speech*, NAT'L ARCHIVES: THE RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, (Mar. 8, 1983), https://www.reaganlibrary.gov/archives/topic-guide/evil-empire-speech-03081983 [https://perma.cc/MNH8-TBZ7].

113 *Romero-Barcelo*, 456 U.S. at 312 (emphasis added).

114 For the four cases, *see* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975); Sampson v. Murray, 415 U.S. 61, 88 (1974); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506–07 (1959); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

115 *Romero-Barcelo*, 456 U.S. at 313–14.

116 33 U.S.C. § 1311(a) (2018).

Finally, *Romero-Barcelo* did not presume to create a test for injunctions; it merely cited "commonplace considerations" and concluded that a federal court may deny an injunction because of important interests, such as national security.[117]

Why did *Romero-Barcelo* rely so heavily on discretionary equitable principles only four years after *TVA v. Hill* discarded them? One cannot be sure, but, to follow the reasoning of Professor Laycock in his study of the irreparable harm factor, courts often trot out "discretion" when, on the merits, they do not wish to issue relief.[118] In *Romero-Barcelo*, the majority probably did not wish to hamper what they considered important military operations in the time of heightened Cold War tension between the Soviet Union and the U.S., which President Ronald Reagan would refer to as the "evil empire."[119] This supposition—that courts cite discretion when convenient but ignore it when not—is further bolstered by the recent cases cited below in Part VI of this Article.

B. The Bizarre eBay Doctrine

The little case of *eBay* seemed unlikely to signal a seismic shift in law: the narrow issue was whether a violation of a patent should trigger a permanent injunction.[120] A business sued the popular online seller, eBay, for patent infringement over tooling for electronic marketing.[121] The Court issued a terse opinion of barely two pages—a signal that this case drew limited interest from the Justices. Of all the areas of law, intellectual property is among those best suited for *monetary* damages: typically, two parties are arguing over monetary rights. Injunctive relief is often sought, but secondary to monetary compensation. Indeed, in a proceeding below, the U.S. Court of Appeals for the Federal Circuit applied its "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."[122] And the Supreme Court's majority opinion then stated explicitly that its purpose in granting certiorari was simply whether to affirm this general principle in *patent law only*.[123] But the Court instead used this small issue of patent law to state a bold new test for permanent injunctions in

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117 *Romero-Barcelo,* 456 U.S. at 313, 319, 320.

118 *See* Laycock, *supra* note 45, at 693, 756 ("The courts have generally manipulated such rules to achieve just and functional results"); *id.* at 726–27 ("W]henever a court cites the irreparable injury rule and denies the remedy that plaintiff seeks, there is some other reason for the decision").

119 Reagan, *supra* note 112.

120 *eBay*, 547 U.S. 388, 390 (2006).

121 *Id.* at 390–91.

122 *Id.* at 391.

123 *Id.* at 391. The sole question presented was "[w]hether this Court should reconsider its precedents, including *Continental Paper Bag Co. v. Eastern Paper Bag Co.,* 210 U.S. 405 (1908), on when it is appropriate to grant an injunction against a *patent infringer*." 546 U.S. 1029 (2005) (emphasis added).

general—in effect, remaking half (the "equitable" half) of all American law. The extraordinary passage was:

> According to well-established principles of equity, 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.[124]

With this paragraph, *eBay* created an "accidental revolution," in the words of one commentator, by establishing a four-part requirement test for a permanent injunction.[125]

The passage is one of the most astonishingly offhand creations in U.S. legal history. First, the Court's treatment of precedent was wrong. Neither *Romero-Barcelo* nor *Amoco Prod. Co. v. Vill. of Gambell* (*Amoco*)[126] had asserted a "four-part test" for permanent injunctions. As noted above, *Romero-Barcelo* set out no specific test; it referred only to "commonplace considerations."[127] And *Amoco* addressed a *preliminary*, not a permanent injunction,[128] and did not restate the usual four-factor preliminary injunction test, though it relied on *Romero-Barcelo*.[129]

How could the Supreme Court have been so wrong? If a litigator cited a case for a legal proposition but the cited case did not state such law, the lawyer might risk court-ordered sanctions.[130] I suggest several possible reasons for the Court's mistake. First, perhaps the Court wanted to clarify the law of permanent injunctions and decided that this little patent case was as good as a vehicle as any to make the assertion and to "fudge" the precedent. Courts are notorious for making new law while claiming to follow precedent, so as to avoid the slings and arrows of attack for making new law. But asserting that a four-part test existed when it did *not* raises the "fudging" to a new level of dissembling.

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[124] *eBay*, 547 U.S. at 391.

[125] Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 208–10 (2012); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 75–76 (2007); Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1025 (quoting DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 426 (4th ed. 2010) ("There was no such test before, but there is now.")).

[126] *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987).

[127] *Romero-Barcelo*, 456 U.S. 305, 313 (1982).

[128] *Amoco*, 480 U.S. at 540–41.

[129] *Id.* at 540–46.

[130] Federal Rule of Civil Procedure Rule 11 requires that attorneys certify that, among other things, "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2).

Substantively, the four-part *eBay* test makes little sense for permanent injunctions. Its most glaring error is splitting the "injury irreparable by a remedy at law" factor into two discrete factors: 1) "irreparable injury" *and* 2) "remedies available at law, such as monetary damages, are inadequate . . . ." This is illogical. Recall that the word "irreparable" does not mean *significant.*[131] It means something that cannot be *repaired*—that is, returned to a previous status. As noted above in Part III, "irreparable" in the law of *preliminary* injunctions refers to the possibility of repair by a judgment on the merits, whereas in the law of *permanent* injunctions, it referred to repair through monetary relief. But the *eBay* factor cannot be invoking either concept: the case did not concern a preliminary injunction, and *eBay*'s four-part test specifically removed the word "irreparable" from the second factor—a monetary remedy "at law" that is "inadequate to compensate" a party.

In sum, *eBay*'s freestanding "irreparable injury" factor has no apparent meaning, and the Court did not endeavor to provide one. That new factor leaves American law with no explanation of what "irreparable" might mean for permanent injunctions. A rough analogy might be an instruction to a runner to "hydrate, by ingesting both hydrogen and oxygen." The two are useful only when combined as H_2O. As shown below, courts have struggled as to how to apply this unmoored factor.

A second possible explanation for the Court's error is that the high court justices (Justice Thomas's name is on the majority opinion) and their law clerks (who often draft opinions) simply got confused. They knew that *Romero-Barcelo* and other opinions had used equitable considerations to deny a permanent injunction. And they recalled that there was an established four-part test in injunction law. So they simply conflated the two, ignoring the fact that the established four-part test existed for procedural, preliminary injunctions, not substantive, permanent injunctions.[132] Their ignorance probably was not wholly innocent, however, because the *eBay* test subtly removed the traditional preliminary factor of "likelihood of success on the merits," which of course makes no sense at all with a permanent injunction.[133] And it is notable that the Court avoided the word "irreparable" in the second factor, which appears to show willfulness in the new standard.

Finally, if the Court simply erred in applying the preliminary law standard, it made another momentous change by stating that a plaintiff "must" prove *all four* elements, using "and" as the conjunction.[134] The traditional preliminary injunction standard is a four-part balancing test, in which the four inquiries are merely *factors,* not *requirements*.[135] It is

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131 The word "irreparable" means "not repairable" or "irremediable." *Irreparable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/irreparable [https://perma.cc/5TEA-2TEG] (last visited Oct. 6, 2025).

132 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2948 (3d ed. 2024).

133 *eBay*, 547 U.S. 388, 392 (2006).

134 *Id.* at 391.

135 *See, e.g.*, WRIGHT & MILLER, *supra* note 132.

not, and has never been, a test that requires a showing of *all* four elements. For changing the law to require all four elements—thus creating a difficult hurdle for a plaintiff—*eBay* gave no explanation.

C. Ignoring eBay?

On its face, the four-part *eBay* test would appear to apply to *any* request for an injunction. Accordingly, one might expect that federal courts should universally apply the *eBay* test in all cases of injunctions, including cases of constitutional law and application of important federal statutes. But they have not done so. Consider three prominent court decisions since *eBay* in which the plaintiff sought an injunction.

In *Dobbs v. Jackson Women's Health Organization*,[136] a health provider sought to enjoin a Mississippi law restricting abortions; after a trial and subsequent appellate opinion, the Supreme Court in 2022 reversed 1973's *Roe v. Wade*[137] and concluded that the U.S. Constitution does not include a right to an abortion within the right to privacy that would justify overturning Mississippi's law.[138] Even though the breadth of the permanent injunction below was litigated,[139] neither *eBay* case nor its four-part test was ever mentioned in any of the briefs before any of the three levels of courts.[140]

Similarly, in *Bostock v. Clayton County*,[141] an employee sought an injunction against a private adverse employment action against her; the Supreme Court held in 2020 that discrimination on the basis of sexual orientation was a violation of the prohibition on discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964.[142] But neither *eBay* nor its standards were mentioned at any point in the circuitous litigation.[143]

In another important recent federal statutory case, *State National Bank of Big Spring v. Lew* (*Lew*),[144] a plaintiff asserted a significant challenge to the Dodd-Frank Act,[145] the major statutory amendment to

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136 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

137 Roe v. Wade, 410 U.S. 113 (1973).

138 *Dobbs*, 597 U.S. at 302.

139 *See* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 275–77 (5th Cir. 2019) (discussion of the breadth of the permanent injunction, but no mention of *eBay* or its test).

140 *See Dobbs*, 597 U.S. at 215; *Jackson Women's Health Org.*, 945 F.3d at 275–77; Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536 (S.D. Miss. 2018).

141 Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

142 42 U.S.C. § 2000e-2(a)(1) (2018).

143 Bostock v. Clayton Cnty., No. 1:16-CV-1460-ODE, 2017 WL 4456898, at *1 (N.D. Ga. 2017), *aff'd*, 819 F. App'x 891 (mem.) (11th Cir. 2020).

144 State Nat'l Bank of Big Spring v. Lew (*Lew*), 958 F. Supp. 2d 127, 130–31 (D.D.C. 2013), *aff'd in part*, *rev'd in part*, 795 F.3d 48 (D.C. Cir. 2015).

145 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

banking law made in response to the financial meltdown of 2008.[146] Yet *eBay* was never briefed or relied on by a court.[147]

Why was the new *eBay* test for injunctive relief absent in these key cases? Is it because constitutional law injunctions (as in *Dodd*) are not subject to *eBay*? Neither the text of *eBay*, nor the history of the law of permanent injunctions, support separating constitutional law from other areas of law. Is it because a violation of law today would seem to automatically justify injunctive relief, regardless of discretionary "equitable" factors? This seems closer to the mark. Yet the courts appear to hold environmental law, in some cases, to a different, and stricter, standard.

VI. THE "IRREPARABLE INJURY" OF *EBAY* IN ENVIRONMENTAL LAW

The ill-born four-part test in *eBay* has made permanent injunctions more difficult and unpredictable for environmental plaintiffs to obtain. After *TVA v. Hill*, precedent suggested that a clear statutory command (e.g., "A person shall not . . . ," which is common in environmental statutes) would require a court to hold that Congress has spoken and that an injunction must follow. After *Romero-Barcelo*, the enthusiasm cooled: important public interest considerations, such as national security, might lead a court to withhold a permanent injunction. After *eBay*, however, a plaintiff must navigate four requirements, the most puzzling of which is "irreparable injury."

This is especially frustrating because modern statutory interpretation increasingly depends on parsing the precise meaning of words. The most important issue in the new law of permanent injunctions, I suggest, is how courts interpret "irreparable" in context. Yet *eBay* has turned enforcement into legal quicksand. Unmoored from its traditional usage, some courts read "irreparable injury" to mean, in effect, *significance*, or *importance*.[148] If an injury is not significant, then the factor might not be met. This is, of course, radically different from either the old-fashioned maxim in the law of permanent injunctions referring to "harm that is irreparable by money damages," or the law in preliminary injunctions about "harm that is irreparable by a judgment on the merits." This interpretation grants to courts the *ad hoc* power to decide whether injury is significant enough to justify an injunction. This is an extraordinary arrogation of power to the federal courts to decide, in effect, whether they may override federal statutory commands. This interpretation is disturbing for environmental law, in which injunctive

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146 *Id.*; *see also* Noah Berman, *What is the Dodd-Frank Act?*, COUNCIL ON FOREIGN RELS. (May 8, 2023, at 1:21 PM EST), https://www.cfr.org/backgrounder/what-dodd-frank-act [https://perma.cc/LMP8-URL5].

147 *Lew*, 985 F. Supp. 2d 127.

148 *See, e.g.*, Animal Welfare Inst. v. Martin, 623 F.3d 19, 27 (1st Cir. 2010) (holding that the lack of long-term injury to animals was not "irreparable harm"). This case is discussed in the text below.

relief is often the sole remedy sought, especially by citizen plaintiffs. Below are some instructive recent examples of courts' denying an environmental injunction by applying *eBay's* "irreparable injury" requirement.

A. Cases Denying Relief Because of No "Irreparable Injury"

• *Winter v. Natural Resources Defense Council, Inc.* (*Winter*).[149] In a case echoing *Romero-Barcelo*, the plaintiff challenged the U.S. Navy's use of sonar as harmful to marine mammals, invoking several environmental statutes.[150] The Supreme Court reversed an injunction, holding that the Navy's interests in national security and training were in the public interest.[151] This exemplifies what textualist courts are *not* supposed to do in interpreting statutes: make a value judgment in weighing competing policies—marine mammal health versus military training.

• *Animal Welfare Institute v. Martin* (*Martin*).[152] Here, the court concluded that Maine's permitting of leg-hold traps resulted in an unlawful "take" of endangered Canada lynx.[153] But the First Circuit *denied* a permanent injunction because lynx caught in the painful and damaging traps usually recovered; thus, the harm was not "irreparable."[154] It is interesting to note that the irreparable standard here became a *veterinary* one: if an animal recovers from a serious injury, the injury is deemed reparable.[155] This approach is a far cry from the pre-*eBay* meaning of "irreparable" for either preliminary or permanent injunctions.

• *Monsanto Co. v. Geertson Seed Farms*.[156] Environmental groups and alfalfa growers challenged the Department of Agriculture's approval of genetically altered alfalfa under the Plant Protection Act.[157] The Supreme Court held that, even if the agency failed to study environmental effects adequately, an injunction was unwarranted because the plaintiffs had not sought relief under NEPA and had not shown that deregulation would cause harm.[158]

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149 Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).

150 *Id.* at 15–17.

151 *Id.* at 22–24.

152 *Martin*, 623 F.3d 19 (1st Cir. 2010).

153 *Id.* at 26–27.

154 *Id.* at 24.

155 This reasoning also fails to address the point that the injury to be remedied is not injury to the *animals*, but to human *plaintiffs*, who use and/or enjoy the existence of the animals. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining the requirements for standing).

156 Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).

157 *Id.*; Plant Protection Act, 7 U.S.C. §§ 7701–7786 (2018).

158 *Monsanto Co.*, 561 U.S. at 162–64.

• *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*[159] The Fifth Circuit affirmed the denial of an injunction for CAA violations.[160] The court reasoned that any future discharges would not be more harmful to the public or the environment than past emissions, and that an injunction would impose extreme burdens on ExxonMobil by requiring continuous documentation of compliance with the CAA.[161]

• *Northern Cheyenne Tribe v. Norton*.[162] An Indian tribe challenged the adequacy of a NEPA EIS for coal mining.[163] The Ninth Circuit affirmed a partial injunction, finding that the court properly weighed the equities and the parties' hardships.[164]

• *LAJIM, LLC v. General Electric Co.*[165] Here, the Seventh Circuit affirmed denial of an injunction concerning groundwater contamination and a violation of the Resource Conservation and Recovery Act (RCRA).[166] After concluding that findings of "imminent and substantial" danger under RCRA[167] should be "rare," the court balanced the harms and denied the injunction in large part because state orders had in theory accomplished much of what the plaintiffs were seeking.[168]

• *Liebhart v. SPX Corp*.[169] The Seventh Circuit interpreted "irreparable" as turning on the availability of an adequate alternative remedy under *state* law.[170] Landowners argued successfully that a corporation had contaminated their properties with toxic chemicals in violation of RCRA and Toxic Substances Control Act (TSCA).[171] The plaintiffs further argued that the corporation was obligated under RCRA to clean up because it had created an "imminent and substantial endangerment."[172] The district court refused a permanent injunction, largely because the state government already had developed a plan for an acceptable alternative cleanup.[173] The Seventh Circuit affirmed the denial of a federal injunction, citing *eBay* and stating that "[a] permanent injunction is not available as a matter of course; it remains a creature of equity, and so the district court has discretion to decide whether that relief is warranted, even if it has found liability."[174] Applying *eBay*'s

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159 Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 824 F.3d 507 (5th Cir. 2016).
160 *Id.* at 533.
161 *Id.*
162 N. Cheyenne Tribe v. Norton, 503 F.3d 836 (9th Cir. 2007).
163 *Id.* at 840.
164 *Id.* at 844.
165 LAJIM, LLC v. Gen. Elec. Co., 917 F.3d 933 (7th Cir. 2019).
166 *Id.* at 951; Resource Conservation and Recovery Act (RCRA) of 1976, 42 U.S.C. §§ 6901–6992k (2018).
167 RCRA, 42 U.S.C. § 6973(a).
168 *LAJIM, LLC*, 917 F.3d at 942, 948–49.
169 Liebhart v. SPX Corp., 998 F.3d 772 (7th Cir. 2021).
170 *Id.* at 779.
171 Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601–2697).
172 *Liebhart*, 998 F.3d at 774.
173 *Id.* at 777–78.
174 *Id.* at 779 (citing *eBay*); *id.* at 774 (providing the quote in-text).

"irreparable injury" factor, the court reasoned that "[w]hen a suitable remedy is available under state law, it becomes harder to establish the irreparable harm required for injunctive relief. In such cases there is a risk that additional relief imposed by the federal court may turn out to be duplicative or inconsistent with the ongoing remedy."[175]

• *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers.*[176] Here, the plaintiffs sued to stop an oil pipeline, alleging violations of various statutes, including NEPA.[177] The D.C. Circuit concluded that the risk of an oil spill was not "irreparable harm," largely because the court found the chance of a large oil spill was low.[178] The court cited *Monsanto* for the proposition that an injunction was a "drastic and extraordinary" remedy that should rarely be employed.[179]

The old distinction between *law* and its lesser cousin *equity*, which the U.S. legal system presumably had abolished in the early twentieth century, has resurfaced in the twenty-first century.

B. An Intermediate Approach

A novel approach to "irreparable injury" was set forth by a federal court in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*.[180] The court found that the agency had violated the ESA through its approval of a nationwide CWA § 404 permit for electrical utility work.[181] In considering a permanent injunction, the court applied the peculiar Ninth Circuit law, derived from *TVA v. Hill,* that the usual rules for injunctions do not apply in ESA cases because Congress intended the protection of endangered species to be "the highest of priorities."[182]

This Ninth Circuit principle, cherished by Western environmentalists, is curious in light of *eBay*, which implicitly rejected *TVA v. Hill*'s approach. Although the court in the snail darter case did refer to the "highest of priorities,"[183] it did not analyze why the ESA's priorities are more important to the nation than the priorities of the CWA,[184] the CAA,[185] CERCLA (which sets forth how to clean up releases

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175 *Id.* at 779.

176 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 540 F. Supp. 3d 45 (D.D.C. 2021).

177 *Id.* at 45–46.

178 *Id.* at 58.

179 *Id.* at 55.

180 N. Plains Res. Council v. U.S. Army Corps of Eng'rs, 460 F. Supp. 3d 1030 (D. Mont. 2020).

181 *Id.* at 1034.

182 *Id.* at 1042 (citing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 794 (9th Cir. 2005)).

183 *TVA v. Hill*, 437 U.S. 153, 174 (1978).

184 *See* 33 U.S.C. §§ 1251(a)(1)–(7) (outlining the Act's goals and policies of the CWA).

185 *See* 42 U.S.C. §§ 7401(a)–(c) (outlining the Act's finding of air pollution due to urban development, necessity for air emissions control, and overall purposes of the legislation).

of hazardous substances),[186] the Civil Rights Act of 1964,[187] or other wide-ranging federal statutes. Why treat the ESA differently?

The federal court in Montana held the three latter elements of the injunction test are assumed, thus placing all weight on the first element: "irreparable harm," which is not presumed in the Ninth Circuit.[188] For this factor, the court relied on Ninth Circuit precedent that "[a] court determines irreparable harm by reference to the purposes of the statute being enforced"[189] … and that "[t]he types of harms that may be irreparable 'will be different according to each statute's structure and purpose.'"[190] But the case cited for the latter proposition was a 1989 case (pre-*eBay*) addressing a *preliminary* injunction, where the issue was whether there would be irreparable injury only until final judgment on the merits.[191] Once again, lumping preliminary orders with final relief led to a confused result.

As to the request for a permanent injunction concerning construction of the controversial Keystone XL pipeline, however, the district court concluded: "[n]o evidence exists, however, that the construction of Keystone XL pipeline necessarily poses a greater risk under the ESA than the construction of other new oil and gas pipelines. The court will amend its order to narrow its injunctive relief . . . ."[192] Although the court's analysis was not thorough, it seemed to be interpreting the element of "irreparable harm" as meaning *overall harm to the public*—another twist in interpretation.

C. Cases Finding "Irreparable Injury"

Other environmental cases after *eBay*, by contrast, have found that a permanent injunction *was* justified.[193] In many, courts have concluded that "irreparable injury" existed, often without much analysis of what made the injury "irreparable." In many instances, a reader is left with the impression, once again, that the courts interpreted "irreparable" to mean *significant*.

In *Sierra Club v. Trump*,[194] the Ninth Circuit found that a Department of Defense transfer of funds to help build border security

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186 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601–9675.

187 42 U.S.C. § 2000a (2018).

188 *N. Plains Res. Council*, 460 F. Supp. 3d 1030, 1041–42 (D. Mont. 2020).

189 *Id.* at 1042 (citing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803, 818 (9th Cir. 2018)).

190 *Id.* (quoting Sierra Club v. Marsh, 872 F.2d 497, 502–03 (1st Cir. 1989)).

191 Sierra Club v. Marsh, 872 F.2d at 499.

192 *N. Plains Res. Council*, 460 F. Supp. 3d at 1043.

193 *See, e.g.*, Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 149–50 (1st Cir. 2008); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803, 806 (9th Cir. 2018); Me. People's All. v. Mallinckrodt, Inc., 471 F.3d 277, 297 (1st Cir. 2006).

194 Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019).

infrastructure in the Southwest was unlawful.[195] The court concluded that a permanent injunction was appropriate, finding that the plaintiffs' claims of harm to recreational and aesthetic interests were "irreparable," and suggesting that environmental harms most often are irreparable.[196] This interpretation, once again, appears to conflate "irreparable" with significant, but with a different conclusion on the merits than other courts.

Outside the famously liberal Ninth Circuit, a district court in the Eighth Circuit issued, in *United States v. Ameren Missouri,*[197] a permanent injunction against a coal-fired power plant for violating its CAA permit. [198] The court relied on evidence of potential harm to human health to satisfy the *eBay* "irreparable injury" factor, citing an earlier case that analyzed the factor in the *preliminary* injunction context.[199]

Finally, in *Conservation Law Foundation v. Ross*,[200] the U.S. District Court for the District of Columbia ordered a permanent injunction against gillnet fishing after finding that the National Marine Fisheries Services had not engaged in a sufficient ESA § 7 consultation.[201] The potential harm to imperiled North Atlantic right whales showed "irreparable injury," the court concluded.[202] This case seemed to be the flip side of the *Martin* case noted above, which involved leg-hold traps and lynx.[203] What explains the difference in outcome? It appeared to turn on the courts' unexamined, off-the-cuff conclusions about whether the animal was significant.

What are we to make of this variety of approaches to the "irreparable injury" requirement since *eBay*? It appears that whether an injunction is ordered is wholly determined by the discretion—and policy-based judgments—of the court. This is unsatisfactory.

VII. A PROPOSED NEW STANDARD FOR PERMANENT INJUNCTIONS

This Article has endeavored to show that the law of permanent injunctions in environmental law has become incoherent. By using one part of the traditional test for a preliminary injunction, and another part of an old maxim about permanent injunctions, and combining them without logic or explanation, the *eBay* test causes courts to flounder in giving meaning to "irreparable injury," leading to an inconsistent and unpredictable body of law.

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195 *Id.* at 675.
196 *Id.* at 706.
197 United States v. Ameren Mo., 421 F. Supp. 3d 729 (E.D. Mo. 2019).
198 *Id.* at 730.
199 *Id.* at 814.
200 Conservation L. Found. v. Ross, 422 F. Supp. 3d 12 (D.D.C. 2019).
201 *Id.* at 14.
202 *Id.* at 33.
203 *Martin*, 623 F.3d 19, 22 (1st Cir. 2010).

It is especially ironic that the current Supreme Court has revitalized unbounded *discretion* in permanent injunctions.[204] A fundamental principle of conservative jurisprudence is judicial *restraint*—that courts should be "umpires"[205] who merely follow the law that legislatures have created and that judges should refrain from acting as super-legislatures.[206] The law of permanent injunctions after *eBay* gives the federal courts expansive ability to decide whether "irreparable injury" exists—whatever it means—and whether the "public interest" favors relief.

One solution would be to discard *eBay* and follow a textualist approach. As stated in *TVA v. Hill,* when a federal statute makes conduct unlawful, courts should enforce it through an injunction.[207] This approach is one of judicial humility: as Chief Justice Burger's opinion stated, "We have no expert knowledge on the subject of endangered species."[208] How are judges equipped to compare their value to that of a dam? Judges might similarly reason today: how are we, isolated judges, able to make judgments as to the factors in the *eBay* test, such as whether injury to the plaintiff is significant (one approach to "irreparable injury") or whether the "public interest" would be served by an injunction against, for example, air pollution.[209] Congress has already made such policy judgments in the Clean Air Act, which include nuance and balancing in its statutory standards.[210] Such humility would be especially powerful in the environmental world, where injunctions are arguably the most important and sought-after form of relief.[211] A textualist approach also would hold the advantage of *predictability*: a corporation or federal agency that violates the law would have good reason to expect that, if it were sued, it would be enjoined. Parties would arrange their affairs accordingly.

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204 *eBay*, 547 U.S. 388 (2006).

205 Current Chief Justice John Roberts stated during his Senate confirmation hearing that "[j]udges are like umpires. Umpires don't make the rules, they apply them." John G. Roberts, Jr., *Chief Justice Roberts Statement - Nomination Process*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process [https://perma.cc/JT9S-9YE9] (last visited Oct. 6, 2025).

206 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980). A notable recent iteration of the conservative philosophy was Justice Samuel Alito's dissent, characterizing the majority opinion as improper "legislation" in *Bostock*, 590 U.S. 644, 683 (2020) (Alito, J., dissenting), which interpreted the Civil Rights Act of 1964 as including sexual orientation under the provision making unlawful discrimination "because of . . . sex."

207 *TVA v. Hill*, 437 U.S. 153, 193–95 (1978).

208 *Id.* at 194.

209 *See, e.g.*, 42 U.S.C. § 7612 (2018) (establishing standards for sources of hazardous air pollutants).

210 *See, e.g.*, *id.* § 7412(d) (setting forth standards for the emission of hazardous air pollutants by reference to the performance of other polluters, not by the best possible control); *id.* § 7410 (giving states discretion on how to achieve air quality standards, through implementation plans).

211 The late Justice Antonin Scalia wrote forcefully about limiting the policymaking role of unelected federal judges. SCALIA, *supra* note 4, at 17, 23–25.

Textualism would not mean a tyrannical reign of environmentalism over all other values. Most environmental statutes contain *exceptions* to their broad commands, and Congress may always add more. For example, the ESA allows a party to seek an "incidental take" permit for conduct that otherwise would violate the "take" prohibition.[212] After *TVA v. Hill*, Congress authorized an ad hoc committee to grant exemptions to the ESA consultation requirements for agencies.[213] The CWA's foundational requirements for technology-based effluent limitations are subject to variances for "fundamentally different factors."[214] And NEPA's impact statement requirements do not apply to actions of Congress, the President, the judiciary, or overseas conduct.[215]

In addition, most environmental statutes include compromises within their regulatory structure, in order to soften economic effects. For example, the CWA's technology standards require "consideration" of costs.[216] The Toxic Substacnes Control Act instructs the EPA to weigh costs versus benefits in regulating potentially risky consumer products.[217] And the CAA's standard for emissions of hazardous air pollutants—usually referred to as "MACT"—uses a formula that requires a good, but not the best, control of pollution emissions, by reference to the performance of other polluters.[218]

A potential drawback to the textualist approach, however, relates to courts' reluctance to order permanent injunctions: in some cases, the public interest (however perceived) may not be served by enjoining conduct that furthers the general good. The most notable application of this rationale since *eBay* has been *Winter*.[219] As noted in Part VI, *supra*, environmentalists sued to enjoin the Navy from using mid-frequency sonar in training exercises, arguing that the Navy had failed to complete an EIS, required by NEPA, and that the sonar might harm endangered whales, in violation of the ESA, among other claims.[220] After the district court issued a preliminary injunction, the Supreme Court reversed, applying the "public interest" factor, and reasoning that the plaintiff's alleged injuries "are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines."[221] While the appeal arose from the grant of

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212 16 U.S.C. § 1536(b)(4) (2018).

213 *Id.* § 1536(g) (allowing exemptions for the consultation requirements in § 1536(a)(2)). In 2025, there were rumors that the Trump administration wished to take greater advantage of this Committee. Catrin Einhorn, *Could Trump Use the 'God Squad' to Override Environmental Law?*, N.Y. TIMES (Jan. 29, 2025), https://www.nytimes.com/2025/01/28/climate/trump-endangered-species-god-squad.html [https://perma.cc/BXF4-SYTG].

214 33 U.S.C. § 1311(n)(5)(B) (2018).

215 40 C.F.R. §§ 1508.1(p), (q) (2024).

216 *E.g.*, 33 U.S.C. § 1316(b)(1)(B) (2018); *id.* § 1314(b)(4)(B) (requiring a comparison of benefits and costs).

217 15 U.S.C. § 2605(C)(2)(A) (2018).

218 42 U.S.C. § 7412(d)(3)(A) (2018).

219 *Winter*, 555 U.S. 7, 23–24 (2008).

220 *Id.* at 14–17.

221 *Id.* at 17, 32–33.

a preliminary injunction, the Supreme Court went out of its way to foreclose a future *permanent* injunction, concluding that "it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction."[222] This was judicial policymaking, undoubtedly. A textualist or believer in judicial restraint might lament such conduct. But it is also worth noting (although few courts have stated as such), that an injunction can be a potent remedy—more powerful, in some circumstances, than monetary relief. This phenomenon might justify restraint in its use—not because "equitable" relief is disfavored—but because it permanently coerces conduct.

This observation is bolstered by the theory of interpretation that statutes are often written in language that is broader than the focused goals of the law might require, because of the limitations of language and communication.[223] A prototypical meaning (the focus of the law) is surrounded by a larger, dictionary meaning.[224] In the ESA, the prototypical meaning of the "take" prohibition might be the shooting of protected grizzly bears and similarly dramatic violence.[225] A much broader meaning, however, has been the longstanding agency definition that prohibits even some unintentional take, such as habitat modification that injures the species in breeding, feeding, and sheltering.[226]

Accordingly, law could compromise between textualism and the fundamentally flawed *eBay* requirements. A new test, created either by the courts or Congress, could be stated as follows:

When a court finds that a statute is being violated, or that a violation is likely to recur, the court should issue a permanent injunction, except when 1) the plaintiff has a guaranteed alternative remedy in monetary or other forms that makes the plaintiff whole, or 2) when there is a long-term compelling national interest in the conduct that would be enjoined, and when the violation of law cannot be easily and readily fixed.

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[222] *Id.* at 32–33. The Court's dicta about a permanent injunction is interesting because the point of a preliminary injunction is to handle short-term disputes. With a denial of a preliminary injunction, the Navy could have conducted its training and at the same time begun its legally required EIS and ESA consultation; it could have been spurred to do so by the specter of permanent injunction if it failed to follow the environmental laws. But the Supreme Court foreclosed even this incentive.

[223] *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 40–41 (2016) (discussing the idea of a smaller "prototypical" within a larger legal meaning).

[224] *Id.*

[225] *See* Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act,* 29 ENV'T L. 463, 466–67 (1999) (referring to the oft-asserted distinction between what the ESA meant to its congressional drafters and how it is applied).

[226] 50 C.F.R. § 17.3 (2023) (regulatory definition of "harm" within "take"). The federal wildlife agencies in 2025 proposed to rescind this longstanding definition of "harm," arguing for a return to the supposedly traditional meaning of "take" as only intentional and direct injury. Rescinding the Definition of "Harm" Under the Endangered Species Act**,** 90 Fed. Reg. 16102 (Apr. 17, 2025).

This revised test could countenance many values highlighted in this Article. First, it would jettison *eBay*'s nonsensical free-standing requirement of "irreparable injury," which causes confusion.

Second, the revised test would keep the traditional recognition that monetary relief may be a sufficient remedy for a plaintiff in certain situations.[227] Consider an example similar to *eBay*: a plaintiff wins a patent infringement claim in a circumstance in which the infringement is unlikely to recur in the future.[228] Here, law might reasonably conclude that monetary damages are sufficient to make the plaintiff whole and that an injunction would be an unnecessary and cumbersome additional remedy. But an injury that would *not* be remedied sufficiently by monetary damages, such as ongoing harm to endangered species, would warrant injunctive relief.[229]

Third, the revised test would allow a court to deny injunctive relief for a "compelling national interest." This exemption accounts for *Winter* and *Romero-Barcelo*: sometimes a legal violation may be excused because an overwhelming value would be lost if an injunction issued. Both textualists and environmentalists may scoff at granting judges such policy authority when Congress could have created such statutory exceptions but did not. Also, environmental and non-environmental values may be served by simple steps to comply with the letter of environmental law. In *Winter*, for example, the Navy might have quickly completed an acceptable EIS and secured an incidental take permit (as the defendant was doing in *Martin*, the Canada lynx case), thus allowing it both to meet the statutory requirements and serve the compelling national interest.

This exception would be susceptible to criticism for its potential open-endedness: what counts as a "compelling national interest"? Could values beyond military or foreign policy meet this standard? Could "national job preservation" or "economic productivity" meet the standard? As with any legal test, there are bound to be uncertainties at the edges, which no simple, pithy standard can clarify—at least not in this Article. But inclusion of an exception for "compelling national interest" might be justified as a nod to the old-fashioned maxims of injunctive law and the perceived imperatives that led to *Romero-Barcelo* and *Winter*.

Please note, however, what the "compelling national interest" exception would not cover. It would not, for example, cover a purely *private* interest, as that of a timber company, whose logging unlawfully

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227 Now that courts of law and equity have been merged, for nearly a century, it makes sense to refer to "alternative" remedies to an injunction and not employ the confusing term of "remedies at law."

228 *See, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (an injunction may be issued if there is a "cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive").

229 Many environmental law opinions after *eBay* also have ignored the point that the injury to be remedied is not injury to the environment or to a species, but to human plaintiffs, who may use and/or enjoy the environment and its resources. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining the requirements for standing).

harms endangered species.[230] Nor would it encompass a purely *local* interest, as those of hunters in Maine.[231] And, by requiring "long-term" harm to a compelling national interest, it would not cover harm that could be resolved quickly, such as through obtaining a permit or creating an EIS that would meet the legal requirements.

Finally, it is critical to note that the proposed test would set forth a *presumption* in favor of injunctive relief. This would place the burdens of proof and persuasion on the party opposing the injunction. The presumption would also break from the old maxim giving judges unfettered "discretion" with injunctions, by directing them to enjoin unless one of the two exceptions were met. It would also reflect reality. Many modern courts appear to reject or ignore the *eBay* test, perhaps because of a reasonable assumption (*eBay* notwithstanding) that an injunction should issue as a matter of course in response to a violation of a statutory command.[232] After all, in a case against a federal agency, as many environmental cases are, the APA states that courts "shall . . . set aside agency action . . . found to be . . . not in accordance with law."[233] As the Supreme Court reasoned in *TVA v. Hill*, when faced with a violation of law, the federal courts

> have no expert knowledge on the subject of [the statute], much less do we have a mandate from the people to strike a balance of equities . . . . Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.[234]

VIII. CONCLUSION

The incoherence of the *eBay* test for permanent injunctions did not arise solely from the Supreme Court's mistakes. It was bolstered by two interlinked, but outmoded, ideas about law and remedies. The first outmoded idea is that an injunction is a secondary, disfavored, form of relief. This idea appeared to arise largely from a quirk of non-American history: the fact that English courts were hesitant to issue injunctive

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230 *See* Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 788 (9th Cir. 1995) (granting injunction, before *eBay*).

231 *Martin*, 623 F.3d 19, 22, 29–30 (1st Cir. 2010).

232 Professor Daniel Farber has set forth an argument that courts should apply a presumption in favor of the environment in environmental cases. DANIEL FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 11–12 (1999).

233 APA, 5 U.S.C. § 706 (2018).

234 *TVA v. Hill*, 437 U.S. 153, 193–95 (1978).

relief, until a second "equitable" court system was imposed. We no longer live in this pre-modern English world, and there is no reason one half of the world of law—often the most important half, as in environmental law—should remain a disfavored sibling. The second outmoded idea is that judges, and their discretion, form the foundation of American law. We live in an age of statutes, and these statutes dominate many important fields, including business law, family law, civil rights law, and, of course, environmental law.[235]

Congress creates the statutes that largely govern our nation; when they are challenged, courts review these laws for constitutionality.[236] Congress can, and often does, provide great detail, including exceptions, in its statutory commands. In this world, there is little reason for *eBay* and its incoherent squishiness. The federal courts should give injunctive relief its due and follow the statutory text—or at least a presumption—to carry out the commands of environmental law.

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[235] *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1, 7 (1982) (arguing, more than forty years ago, for changes in judicial power in an age of statutes).

[236] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).