

A FAREWELL TO HARMS: AGAINST PRESUMING IRREPARABLE INJURY IN CONSTITUTIONAL LITIGATION

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Although irreparable injury is an essential element to obtaining injunctive relief, most federal circuit courts have held that irreparable injury should be presumed in constitutional cases.¹ Thus, the ability of a plaintiff to secure an injunction against a claimed violation of the Constitution frequently turns on whether she has made a sufficient showing of the probability of success on the merits of her constitutional claim.² The Supreme

1. The term "constitutional cases" encompasses all claims brought against government officials for violating an individual's federal constitutional rights. Constitutional actions against state officials generally are brought pursuant to 42 U.S.C. § 1983. Such actions against federal officials are generally brought pursuant to the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

2. The type of showing on the merits that is required for a preliminary injunction is not uniform among or even within the federal circuits. Some decisions imply that a showing higher than a 51% chance of success is required. *See, e.g.,*

Court disapproved of the practice of presuming irreparable harm for federal statutory claims but has not addressed the issue with respect to constitutional claims.³ A few circuit courts, sensing that the Court will not endorse a blanket presumption, opted to limit the presumption to certain constitutional claims.⁴

This Article argues that the presumption should be eliminated altogether. The history of the injunctive remedy in this country and in England, from which we inherited our equity law, reflects a consistent and unyielding view that irreparable injury is an essential element of proof. The Supreme Court has never suggested that courts should approach the question of injunctive relief differently in constitutional cases and has repeatedly emphasized the irreparable injury element in that context. The Court has further stated that, although constitutional rights are important, they do not warrant any relaxation of the traditional requirements for obtaining remedies. Courts should not presume damages for constitutional wrongs; why then should they presume irreparable harm?

Conclusive presumptions can be justified on the ground that they save judicial time and resources by eliminating needless litigation over matters that are incontrovertible or self-evident, but the existence and extent of harm from constitutional infractions is not guaranteed, even for purposes of standing to sue.⁵

Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16 n.3 (1st Cir. 2002) (requiring a “strong showing” of the likelihood of success). Other courts have implied that a showing well below 50% will suffice. *See, e.g.,* Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984) (explaining that plaintiff must show that she has a “better than negligible” chance of succeeding in order to obtain a preliminary injunction). *See generally* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495 (2003) (discussing the various standards).

In a series of recent decisions, the Supreme Court has indicated that the requisite showing is that the plaintiff is more likely to prevail than not. *See* Anthony DiSarro, *Freeze Frame: The Supreme Court’s Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 83–90 (2011).

3. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757, 2759–60 (2010); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). *See infra* text accompanying notes 126–142.

4. *See* *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299–304 (D.C. Cir. 2006); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349–50 (2d Cir. 2003), *overruled in part on other grounds by* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). *See infra* text accompanying notes 141–58.

5. Indeed, standing determinations in constitutional cases frequently turn on whether an alleged injury affects the plaintiff “in a personal and individual way,”

It also is difficult to see how a presumption of irreparable harm will save a significant amount of time or resources. In cases where irreparable injury is both substantial and apparent, a presumption would appear to be unnecessary since proof of the injury can quickly and easily be demonstrated.

The more plausible explanation for the presumption might be that courts fear that close scrutiny of irreparable injury will reveal numerous instances where constitutional violations are virtually harmless. Courts are willing to acknowledge constitutional wrongs as harmless in criminal cases and even when it comes to civil damages claims, as the numerous nominal damages recoveries in Section 1983 cases attest, but they seem resistant to the concept of harmlessness when injunctive relief is sought. The presumption obscures the perhaps discomfiting reality that many constitutional infractions produce either no injury or one that damages can adequately redress.

The courts' fear in this regard seems irrational. A plaintiff who cannot show irreparable harm can always obtain a declaratory judgment of unconstitutionality. The declaratory remedy was specifically created by Congress to provide a remedy for plaintiffs asserting constitutional claims who cannot satisfy the requirements for injunctive relief.⁶ The remedy would seem superfluous if irreparable harm can simply be presumed in every case.

Although the presumption of irreparable harm has been applied to applications for permanent injunctions as well as preliminary ones, this Article will focus on the appropriateness of the presumption in connection with preliminary injunctions. As with most civil litigation, substantially all constitutional tort cases settle before a final determination of the merits.⁷ Thus, the

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)), or simply reflects the "generalized interest of all citizens in constitutional governance." *Id.* at 1441–42 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974)).

6. See 28 U.S.C. § 2201(a) (1994).

7. See Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 661–62, 662 n.9 (2006) (observing that the vast majority—more than 95%—of Section 1983 and *Bivens* cases are disposed of before trial); see also Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2011, Table C-4, Cases Terminated, by Nature of Suit and Action Taken*, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx>.

preliminary injunction has become, much like class certification, a “momentous” pretrial ruling that “[w]ith vanishingly rare exception . . . sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs’ case by trial.”⁸ The recognition that a preliminary injunction decision is “no mere . . . procedural ruling” is reflected in the fact that Congress has expressly authorized interlocutory appeals from these pretrial determinations.⁹

Presuming irreparable harm invites applications for preliminary injunctions in constitutional cases by eliminating what is usually the most difficult element for a plaintiff to satisfy. It is far preferable that constitutional questions be resolved on summary judgment or at trial than on a preliminary injunction ruling. In preliminary injunction proceedings, important constitutional questions will be decided tentatively and usually upon an incomplete evidentiary record produced at abbreviated and rushed hearings. They will lead to appeals that apply the least rigorous appellate standard. Final judgments on constitutional questions, by contrast, will produce definitive holdings and be subject to nondeferential appellate review.

Eliminating the presumption of irreparable harm will force courts to do what they do best: Think. They should deliberate in each instance about whether the harm that is claimed is truly one that cannot adequately be remedied after trial and is substantial enough to warrant the issuance of an injunction. If such harm cannot be shown, the plaintiff should be relegated to a declaratory judgment. The declaratory remedy, however, needs to become a truly adequate alternative to the injunction and thus courts must end the practice of awarding attorneys’ fees to

8. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009). Scholars have recognized the significant effect that preliminary injunction rulings have on settlement of litigation. See Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 573–74 (2001) (noting that plaintiffs often seek preliminary injunctions to pressure defendants to settle cases). A defendant who has been preliminarily enjoined has an increased incentive to settle: Avoiding the risk of being held in contempt for having violated the injunction. See Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 284 (2010).

9. See Nagareda, *supra* note 8, at 98–99. Like a class certification determination, a preliminary injunction ruling is the basis for an interlocutory appeal in federal practice. See 28 U.S.C. § 1292(a)(1) (2006).

plaintiffs who secure injunctions but not to those who obtain only declaratory relief.

Part I of this Article explores the origins of the irreparable injury requirement in federal practice and the central role it has come to play in federal litigation. Part II addresses the jurisprudential basis for the presumption of irreparable harm in constitutional cases, and the Supreme Court's 2006 *eBay* decision and its progeny, which reject the presumption in statutory cases. Those decisions should prompt courts to eschew presumptive injunctions in Section 1983 litigation.

Part III analyzes the implications of eliminating the presumption and discusses the significant adjudicative benefits that such a change would produce. It also addresses the need for a revised approach to attorneys' fees-shifting so that the declaratory judgment will be equal in status to the injunction in the remedial hierarchy. Finally, Part IV considers theoretical justifications for making injunctions more accessible in constitutional cases and concludes that those justifications do not justify the presumption.

I. THE DEVELOPMENT OF THE IRREPARABILITY ELEMENT

Throughout its history as a remedial device, the concept of irreparable harm has always played a role of central importance.

A. *Pre-Revolutionary English Practice*

The injunction, and equity practice in general, arose because English law courts rigidly adhered to a writ system, whereby a plaintiff could assert a claim only for specific, pre-existing writs, such as trespass or nuisance.¹⁰ When a plaintiff could not fit his claim within the narrow requirements of a writ, he would petition the King's chancellor for relief.¹¹

10. OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 60 (2d ed. 1984); Denlow, *supra* note 2, at 500–01.

11. ROBERT S. THOMPSON & JOHN A. SEBERT, JR., *REMEDIES: DAMAGES, EQUITY AND RESTITUTION*, § 3.01, at 221 (2d ed. 1989); Susan H. Black, *A New Look at Preliminary Injunctions: Can Principles From the Past Offer Any Guidelines to Decision-makers in the Future?* 36 ALA. L. REV. 1, 3–4 (1984).

As these petitions grew in number, the chancery came to function much like a court.¹² Over time, common law courts sought to protect their jurisdictional terrain from encroachments by chancery courts, by forcing equity courts to decline jurisdiction where the claimant had an adequate remedy in the law courts.¹³ The injunction evolved as a tool for equity courts to restrain conduct that was adjudged to be unlawful, provided a plaintiff could show irreparable injury—an injury which the common law could not adequately address.¹⁴

B. Post-Separation Federal Practice

The irreparability requirement was included in the Judiciary Act of 1789, enacted by the First Congress, which authorized the creation of federal courts, the jurisdiction of which included both law and equity.¹⁵ Section 16 of the Act, providing that actions in equity could not proceed if there was a “plain, adequate and complete” remedy at law, was specifically intended to incorporate the pre-revolutionary English standard.¹⁶

The adequate remedy rule was applied in one of the Supreme Court’s most noteworthy decisions of the Marshall Court era: *Osborn v. Bank of the United States*.¹⁷ The Supreme Court upheld an injunction that restrained a state official from taxing, in a repeated and confiscatory manner, a federal bank with the “avowed purpose of expelling the Bank from the

12. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990).

13. Black, *supra* note 11, at 4; Laycock, *supra* note 12, at 699–700; *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 997 (1965).

14. See John Leubsdorf, *The Standard For Preliminary Injunctions*, 91 HARV. L. REV. 525, 536–37 (1978); Rhoda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 649–52 (1990); see also WILLIAM W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 266–68 (1867) (describing remedies in equity).

15. See Ch. 20, § 11, 1 Stat. 73, 78.

16. See *Harrison v. Rowan*, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819) (No. 6,143) (Washington, Circuit Justice); see also *Mayer v. Foulkrod*, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (No. 9,341) (“The only inquiry here must be, what are the principles, usages, and rules of courts of equity, as distinguished from courts of common law, and . . . defined in that country, from which we derive our knowledge of those principles.” (quoting *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 213 (1818))).

17. 22 U.S. 738 (1824).

State”¹⁸ Chief Justice Marshall rejected the argument that the federal bank had an adequate remedy at law in the form of a trespass action for damages, reasoning that the bank sought protection, “not from the casual trespass of an individual . . . but from the total destruction of its franchise, [and] of its chartered privileges”¹⁹

Although early federal courts recognized the importance of the injunction as a remedial device to prevent irretrievable and inestimable losses, they were cognizant of the potential overreaching nature of the remedy. As Supreme Court Justice Joseph Story, perhaps the most authoritative commentator on equity jurisprudence in the early days of the Republic, noted in his treatise, equity courts should exercise “extreme caution” when considering injunctions, and they should be issued “only in very limited clear cases.”²⁰ He cited with approval the following language from an 1830 circuit court opinion by Supreme Court Justice Henry Baldwin:

There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages.²¹

The Supreme Court emphasized the rigorous nature of the irreparable injury standard in its seminal 1908 ruling in *Ex Parte Young*.²² Deflecting concerns that permitting private litigants to obtain injunctions against state officials for their allegedly unconstitutional conduct would bring forth a “great flood of litigation,” the Court expressed confidence that federal court judges would limit issuance of the remedy to situations where

18. *Id.* at 840.

19. *Id.*

20. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA, § 959b, at 172 (11th ed. 1873).

21. *Id.* at 172 n.1 (citing *Bonaparte v. Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1,617) (Baldwin, Circuit Justice)); see also *Truly v. Wanzel*, 46 U.S. (5 How.) 141, 142 (1847).

22. 209 U.S. 123 (1908).

a state official's action produces "great and irreparable injury" to the complainants.²³

C. *Twentieth-Century Federal Practice*

With the promulgation of the Federal Rules of Civil Procedure in 1938, the federal court procedures for equity and law were merged.²⁴ The irreparable injury requirement, though its original purpose was to maintain the distinction between law and equity courts, did not fade away. It had come to fulfill other important functions.

First, the requirement serves to prevent erosion of a civil litigant's right to a jury trial, enshrined in the Seventh Amendment.²⁵ Supreme Court Justices, in early circuit court rulings, declared that the term "common law" in the Seventh Amendment's text refers to the common law of England and that civil jury rights should be determined based on the distinction between law and equity as reflected in English law.²⁶ Thus, if a particular cause of action is analogous to a legal claim in eighteenth-century English practice, then it should be tried before a jury in federal court.²⁷ If, on the other hand, a claim is similar to what was traditionally an

23. *Id.* at 166–67; *see also* *Mass. State Grange v. Benton*, 272 U.S. 525, 528 (1926) ("[N]o injunction ought to issue . . . unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."). Most state courts applied the same standard. JAMES L. HIGH, *A TREATISE ON THE LAW OF INJUNCTIONS* § 22, at 20 (4th ed. 1905).

24. *See* Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1057–58 (1958).

25. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

26. *See, e.g.,* *Bains v. The James & Catherine*, 2 F. Cas. 410, 418 (C.C.D. Pa. 1832) (No. 756) (Baldwin, Circuit Justice); *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, Circuit Justice); *see also* *Parsons v. Bedford*, 28 U.S. 433, 447 (1830) ("By *common law*, they meant . . . suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.").

27. For instance, the Supreme Court has held that a jury should determine both liability and damages in a copyright infringement action because such tasks were performed by juries in eighteenth-century English practice. *See* *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353–55 (1998); *see also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989) (finding a statutory cause of action by a bankruptcy trustee to recover a fraudulent conveyance was analogous to the eighteenth-century English common law actions for trover and thus should be tried before a jury).

equitable claim, then no jury trial right would exist.²⁸ The legal or equitable nature of the remedy sought is of particular importance in the analysis.²⁹ Thus, by constraining the availability of the equitable injunctive remedy, the irreparable harm rule serves to preserve civil jury trial rights.

Second, the substantive principles of equity applied by the English chancery courts, including the irreparable injury requirement, define the contours of the equity jurisdiction conferred by Congress to the federal courts in the Judiciary Act of 1789.³⁰ Those principles are also incorporated into Federal Rule of Civil Procedure 65, which authorizes federal courts to grant injunctions in federal cases.³¹ Although the present Supreme Court remains bitterly divided over whether the particular types of equitable relief that can be awarded are limited to those granted by eighteenth-century English chancery courts,³² all of the Justices

28. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 379–84 (1996) (construction of the patent claim should not be relegated to a jury); *Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567–69 (1990) (finding that a claim that a labor union breached its duty of fair representation was analogous to an English equitable claim for breach of fiduciary duty against a trustee).

29. Compare *Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (holding that money damages is a remedy at law and triable by jury), with *Tull v. United States*, 481 U.S. 412, 422–25 (1987) (finding equitable remedy of disgorgement not triable before a jury).

30. See DiSarro, *supra* note 2, at 92–93. The Judiciary Act of 1789, which conferred jurisdiction to federal courts to adjudicate “suits . . . in equity,” § 11, ch. 20, 1 Stat. 78, was construed as having adopted the substantive principles of equity that were “administered by the English Court of Chancery at the time of the separation of the two countries.” *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

31. FED. R. CIV. P. 65. The rule contains no substantive elements and merely specifies procedural requirements for the granting of injunctive relief. See *id.*; see also *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2941, at p.31 (2d ed. 1995) (“[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.”).

32. See, e.g., *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213–15 (2002) (holding that a plaintiff’s claim for restitution was not typically available in equity and could not be asserted under a statute limiting remedies to equitable ones); *Grupo Mexicano*, 527 U.S. at 322 (observing that a federal court lacks the equitable power to issue a pre-judgment asset freeze order because such a remedy had “never been available before” in equity).

are in agreement that the substantive principles of equity are constrained by eighteenth-century English equity practice.³³

Third, the Supreme Court determined that even where a federal statute specifically provides for the injunctive remedy, a federal court should nevertheless apply the traditional substantive prerequisites for obtaining such relief.³⁴ The Court has explained that the irreparable injury prerequisite to injunctive relief:

reflect[s] a “practice with a background of several hundred years of history,” a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts’ discretion, but we do not lightly assume that Congress has intended to depart from established principles.³⁵

Fourth, the irreparable injury requirement establishes a bias in favor of legal remedies in the interests of judicial efficiency and fairness.³⁶ The bias protects defendants from the exaggerated harm an injunction frequently imposes when the decree’s language restrains activity beyond that which is alleged to be unlawful, or where its imprecision forces a defendant to choose between foregoing potentially permissible conduct and facing a civil contempt motion.³⁷ Injunctions, moreover, impose significant burdens on courts by requiring them to participate in the crafting of the decree and to entertain applications to enforce, modify, or vacate that decree.³⁸ The irreparable injury standard also prevents

33. *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., dissenting in part) (“From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England; we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.”) (internal citations omitted).

34. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313–14 (1982). Congress is free to authorize a departure from established equitable principles, but it must do so explicitly.

35. *Id.* at 313 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); see also *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541–44 (1987) (applying the same approach in the preliminary injunction context).

36. EDWARD YORIO & STEVE THEL, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* §§ 2.1, 2.3, 23.1–23.4. (2d ed. 2011); Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 355–58 (1981); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 392–97 (1983).

37. See Shreve, *supra* note 36, at 389; DiSarro, *supra* note 8, at 284; see also *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (describing precision needed in pleadings).

38. DiSarro, *supra* note 8, at 317–22; Shreve, *supra* note 36, at 389–90.

courts from considering harms that are distant or conjectural,³⁹ or that are insubstantial, such as a plaintiff's psychic dissatisfaction with the defendant's noncompliance with the law.⁴⁰

Accordingly, the irreparable injury component has come to serve important functions other than merely preserving long-extinct jurisdictional boundaries.

D. Injunctive Relief for Constitutional Claims

Under the Supreme Court's equitable jurisprudence, where the plaintiff's claim is grounded in the Constitution, as opposed to a federal statute or common law, she is not relieved from having to demonstrate irreparable injury. Indeed, many of the earliest injunction cases involved constitutional claims and emphasized the necessity of irreparable injury. *Osborn v. Bank of the United States* involved a challenge to the constitutionality of a state statute under the Supremacy Clause⁴¹ and *Ex Parte Young* presented an attack on state railway rates that were alleged to be confiscatory in violation of the Due Process Clause of the Fourteenth Amendment.⁴² The federalism-based abstention doctrine of *Younger v. Harris*⁴³ also is predicated on the principle of irreparable injury; specifically, because an individual can raise a constitutional challenge to a state statute as a defense to a pending state criminal proceeding, he will not suffer irreparable injury and cannot enjoin the state prosecution.⁴⁴

39. See *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919) (holding that an injunction must be shown to be necessary to prevent "great and irreparable injury" (citing *Ex Parte Young*, 209 U.S. 123, 166 (1908)); see also *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 500 (1925) (injury must be "actual and imminent"); *Fenner v. Boykin*, 271 U.S. 240, 243 (1926) (requiring showing of "extraordinary circumstances where the danger of irreparable loss is both great and immediate").

40. See, e.g., *Consol. Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900) ("[I]t is familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling.")

41. 22 U.S. 738, 867-68 (1824) ("[T]he Court adheres to its decision in the case of *McCulloch* against *The State of Maryland*, and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void.")

42. 209 U.S. 123, 143-44 (1908).

43. 401 U.S. 37 (1971).

44. See *id.* at 43-44. See generally Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266 (1976).

Several observations can be gleaned from this Supreme Court jurisprudence. First, when a government rule, policy, or conduct is alleged to infringe a constitutionally protected expressive right, the plaintiff can demonstrate the requisite irreparable injury by showing that she and others are precluded from exercising that right.⁴⁵ This showing usually encompasses proof that the government rule, practice, or action has a widespread chilling effect on the exercise of that right.⁴⁶

Second, a plaintiff seeking an *ex ante* determination of constitutionality, but who cannot demonstrate irreparable injury, is not without a remedy. As the Supreme Court stated in *Steffel v. Thompson*, a declaratory judgment may be awarded to plaintiffs who cannot establish irreparable injury but who wish to present federal constitutional challenges in advance of taking action.⁴⁷ Indeed, Congress specifically enacted the Declaratory Judgment Act to provide redress to plaintiffs who could not qualify for injunctive relief and to provide courts with an alternative to the intrusive effects of an injunction.⁴⁸

45. *Steffel v. Thompson*, 415 U.S. 452, 463 n.12 (1974) (“[A] showing of irreparable injury might be made in a case where . . . an individual demonstrates that he will be required to *forgo* constitutionally protected activity in order to avoid arrest.”); *Dombrowski v. Pfister*, 380 U.S. 479, 485–86 (1965) (observing that facts “suggest[ing] that a substantial loss or impairment of freedoms of expression will occur . . . clearly show irreparable injury”).

46. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”); *Dombrowski*, 380 U.S. at 487–90 (finding appellants’ “offers of proof outlin[ing] the chilling effect on free expression” adequate to “establish the threat of irreparable injury required by traditional doctrines of equity”); *cf. Younger*, 401 U.S. at 51 (“Where a statute does not directly abridge free speech, but—while regulating a subject within the State’s power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.”).

47. 415 U.S. at 466 (observing that Congress enacted the Declaratory Judgment Act to address complaints voiced by plaintiffs who were dissatisfied with this existing method of testing the constitutionality of state action, which “placed upon them the burden of demonstrating the traditional prerequisites to equitable relief—most importantly, irreparable injury”); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.”).

48. *See* 28 U.S.C. § 2201(a) (1994). The doctrine of state sovereign immunity enshrined in the Eleventh Amendment and elsewhere in the structure of the Consti-

Third, a plaintiff seeking preliminary injunctive relief must make a greater showing than that which would be sufficient to obtain a permanent injunction following a trial.⁴⁹ That is, the plaintiff must demonstrate that equitable relief awarded after trial will not suffice.⁵⁰ On this point, the Supreme Court's decision in *Sampson v. Murray*,⁵¹ though not a constitutional case, is instructive.⁵² *Sampson* emphasizes that courts must consider whether a permanent injunction can prevent most or all of the irreparable injury that is likely to occur. As the Court explained:

The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.⁵³

This concept has significant implications. Federal Rule of Civil Procedure 65(a)(2) permits a district court to order a full trial on the merits in lieu of resolving a preliminary injunction motion.⁵⁴ The modern trend in federal civil litigation is for preliminary injunction motions to involve expedited discovery and lengthy

tution does not bar actions against state officers for injunctive or declaratory relief. See *Alden v. Maine*, 527 U.S. 706, 757 (1999).

49. See, e.g., *Doran*, 422 U.S. at 931–32 (observing that respondents were entitled to preliminary relief because “a substantial loss of business and perhaps even bankruptcy” would result from waiting until they obtained a final judgment).

50. This is the clear import of the Court's ruling in *Doran*. If the loss of constitutionally protected rights sufficed to demonstrate irreparable injury for purposes of preliminary injunctive relief, there would have been no need for the Court to rely upon the potential of bankruptcy as support for the relief in that case.

51. 415 U.S. 61 (1974).

52. The *Sampson* decision has been followed in cases that did involve constitutional claims. See, e.g., *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994).

53. *Sampson*, 415 U.S. at 90 (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)); accord *Acierno*, 40 F.3d at 653 (To show irreparable harm for purposes of obtaining preliminary injunctive relief, “a plaintiff must ‘demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.’” (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989))).

54. A court can utilize this procedure, even absent consent of the parties, so long as the court provides “clear and unambiguous notice [of its intended action] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

evidentiary hearings at which live witnesses appear and are cross-examined.⁵⁵ The enormous time and effort expended on these proceedings should prompt courts to seriously consider whether it might make more sense to simply try the case.⁵⁶ If the case can be tried to final judgment without expending significant additional expenditure time or resources, then trial should be the preferred method of adjudication.⁵⁷

It would be wrong to think that presuming irreparable harm can eliminate the need for prolonged evidentiary hearings. In most instances, evidentiary hearings are held to assist the court in resolving complex factual questions concerning the merits and potential defenses to the claims.⁵⁸ Presuming irreparable harm, if anything, would tend to increase a court's interest in conducting these hearings because the likelihood of success on the merits has become the determinative issue. Issuance of the injunction hinges on the court's resolution of this question, and the court will strive to do all it can to ensure that it renders a correct decision on it.

If the constitutional question can be decided without the need for any fact-finding, such as where the facts are stipulated to by the parties or where there is no genuine dispute as to the material facts, the court can convert the preliminary injunction motion into one for summary judgment.⁵⁹ This procedure, too,

55. *E.g.*, *Four Seasons Hotels & Resorts, B.V. v. Consorico Bark, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003); *Drywall Tapers and Pointers, Local 1974 v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n.*, 954 F.2d 69, 76 (2d Cir. 1992) (evidentiary hearing is generally required on a motion for a preliminary injunction); *see also* *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1141 (9th Cir. 2009) (Smith, J., dissenting) (discussing when an evidentiary hearing is required for a preliminary injunction motion), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *Denlow*, *supra* note 2, at 533–35.

56. *See* *Denlow*, *supra* note 2, at 533–35.

57. For example, in *Branti v. Finkel*, 445 U.S. 507 (1980), a case involving claims that government employees were going to be terminated because of their political beliefs in violation of the First Amendment, the district court held a plenary trial of the case on an application for a preliminary injunction. Following a trial lasting several days, the court found in favor of plaintiffs and entered final judgment, permanently enjoining the defendants from terminating plaintiffs due to their political affiliation. *Id.* at 508–09, 508 n.2.

58. *E.g.*, *Four Seasons*, 320 F.3d at 1210 (holding that an evidentiary hearing is required to resolve material factual disputes on a preliminary injunction motion); *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988).

59. *See* *Air Line Pilots Assoc. Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 (9th Cir. 1990) (holding that a district court can convert a motion for a preliminary

will permit the court fully to resolve the constitutional question and to enter final judgment.

Of course, there are instances where the need for injunctive relief is immediate and a full plenary trial cannot be conducted or complex summary judgment motions cannot be resolved before determining the appropriateness of injunctive relief. A court should be free to preserve the status quo so that it can adjudicate constitutional claims in an orderly fashion. It should not permit a plaintiff's claim to become moot by refusing to enjoin unlawful action before the claim is determined. In those instances, the preliminary injunction remedy is an indispensable judicial device that should be utilized freely in the adjudication of constitutional claims.

Lastly, the Court has imposed a standing limitation on claims for injunctive relief in constitutional cases.⁶⁰ The Supreme Court held that a plaintiff is precluded from seeking injunctive relief against constitutional injury unless she can show to a "substantial certainty" that she will likely suffer the same harm in the future.⁶¹

The effects of the *Lyons* standing rule on a plaintiff's ability to obtain injunctive relief in constitutional cases have been exag-

injunction into a motion for summary judgment provided that it notifies the parties of its intention and permits them to submit evidence); *see also* North Dakota Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1030 (D.N.D. 2005) (converting motion for preliminary injunction into a motion for summary judgment); PDK Labs Inc. v. Ashcroft, 338 F. Supp. 2d 1, 6 (D.D.C. 2004) (granting summary judgment based on preliminary injunction motion); *Athenaco, Ltd v. Cox*, 335 F. Supp. 2d 773, 779 (E.D. Mich. 2004) (same).

60. *See* *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In *Lyons*, an alleged victim of an illegal police chokehold lacked standing to seek injunctive relief barring use of the chokehold because there was "no more than conjecture" that he would be subjected to that chokehold if he were ever arrested in the future. *Id.* at 108. The standing doctrine pronounced in that case has been a frequent target of scholarly criticism. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1386 (2000) (arguing that none of the plaintiffs in *Brown v. Board of Education*, *Hutto v. Finney*, *Roe v. Wade*, or *Regents of the University of California v. Bakke* would "have been able to scale the equitable standing bar erected in *Lyons*"); Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute's Misuse of Lyons's "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L. J. 837, 838-40 (2010).

61. *Lyons*, 461 U.S. at 105-06 (observing that past injuries supply a predicate for compensatory damages, but not for prospective equitable relief); *see also* *Deshawn E. v. Safir*, 156 F.3d 340, 344-48 (2d Cir. 1998) (plaintiff seeking injunctive relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future).

gerated.⁶² *Lyons* is easy to distinguish because it involved a single claimant and no established policy or custom.⁶³ Courts held that *Lyons* does not apply where there is a realistic threat of future harm arising from an official policy or practice,⁶⁴ or a credible threat of future injury to a class of individuals.⁶⁵

II. THE PRESUMPTION OF IRREPARABLE HARM

Over the past few decades, federal circuit courts have stated that irreparable injury may be presumed in cases involving an alleged violation of a constitutional right.⁶⁶ Some circuit courts have limited the presumption to the First Amendment context,⁶⁷ while others have employed the presumption for all

62. See Gilles, *supra* note 60, at 1399 n.57 (2000) (suggesting that *Lyons* has had a tumultuous impact on efforts to obtain injunctive relief in civil rights cases because the author keycited *Lyons* and counted 42 cases in which courts distinguished the case, and 1158 cases in which courts applied the *Lyons* equitable standing bar to deny standing).

63. 461 U.S. at 109–11.

64. *E.g.*, Honig v. Doe, 484 U.S. 305, 320–22 (1988); Kolender v. Lawson, 461 U.S. 352, 352 n.3 (1983); *Deshawn E.*, 156 F. 3d at 344; Church v. City of Huntsville, 30 F.3d 1332, 1337–38 (11th Cir. 1994); LaDuke v. Nelson, 762 F.2d 1318, 1323–24 (9th Cir. 1985).

65. *Deshawn E.*, 156 F. 3d at 344 (holding that a class of minors demonstrated a sufficient likelihood of future harm at the hands of New York's police department); Thomas v. County of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992) (class action alleging that deputy sheriffs abused minority citizens); Nicacio v. INS, 768 F.2d 1133, 1136–37 (9th Cir. 1985), *amended*, 797 F.2d 700, 702 (9th Cir. 1985) (finding plaintiffs in class action suit had standing to seek prospective relief).

66. *See, e.g.*, Pac. Frontier v. Pleasant Grove City, 414 F.3d 1221, 1235 (10th Cir. 2005) (“We therefore assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of their commercial speech rights.”); Tucker v. City of Fairfield, 398 F.3d 457, 464 (6th Cir. 2005); Joelner v. Vill. of Washington Park, 378 F.3d 613, 620 (7th Cir. 2004); Newsom v. Albemarle Ctny. Sch. Bd., 354 F.3d 249, 254 (4th Cir. 2003); Brown v. Cal. Dep’t of Trans., 321 F.3d 1217, 1225 (9th Cir. 2003); Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly, 309 F.3d 144, 178 (3d Cir. 2002) (“Limitations on the free exercise of religion inflict irreparable injury.”); Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002); Siegel v. LePore, 234 F.3d 1163, 1178 (11th Cir. 2000); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999); Miss. Women’s Med. Clinic v. McMillan, 866 F.2d 788, 795 (5th Cir. 1989); *see also* 11A C. WRIGHT, A. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 2948.1 at 161 (2d ed. 1995) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).

67. *See, e.g.*, Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 299–304 (D.C. Cir. 2006); Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir.

constitutional claims.⁶⁸ Only the First Circuit has declined to use a presumption.⁶⁹

A. *Saving Time or Avoiding Difficult Questions?*

Use of a presumption of irreparable harm has not been unique to constitutional claims. Although the Supreme Court never sanctioned use of the presumption, federal circuit courts established a practice of presuming irreparable harm in a variety of contexts, including intellectual property infringement, environmental litigation, antitrust or dealer termination cases, and false advertising.⁷⁰ The surface rationale for the presumption is judicial economy. Courts, based on their experience, identified these types of cases as the most likely to present situations where damages are not an adequate remedy. If an injunction is the only appropriate remedy, why waste time on irreparable injury? Instead, courts can focus all their attention on whether the plaintiff can make a sufficient showing of potential success on the merits so as to justify provisional relief.

Probing a bit deeper, however, reveals two further rationales. In the intellectual property arena, courts reasoned that the

1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm).

68. See, e.g., *Overstreet v. Lexington Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (“Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff’s constitutional rights.”); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (alleged violation of Fourth Amendment rights); *Mitchell v. Cuomo*, 748 F.2d 804, 805–06 (2d Cir. 1984) (holding that the presumption applies to Eighth and Fourteenth amendment rights against cruel and unusual punishment); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (observing that a violation of privacy constitutes an irreparable harm).

69. *Pub. Serv. Co. v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (observing that an alleged denial of procedural due process, without more, does not automatically trigger a finding of irreparable harm); *Rushia v. Town of Ashburnham*, 701 F.2d 7, 10 (1st Cir. 1983) (“[T]he fact that [plaintiff] is asserting First Amendment rights does not automatically require a finding of irreparable injury.”).

70. See, e.g., *Zino Davidoff S.A. v. CVS Corp.*, 571 F.3d 238, 246–47 (2d Cir. 2009) (trademark infringement); *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 161–62 (2d Cir. 2007) (false advertising); *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1155–56 (9th Cir. 2006) (copyright infringement); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988) (employment discrimination); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) (violation of an environmental regulation); *Menominee Rubber Co. v. Gould, Inc.*, 657 F.2d 164, 166–67 (7th Cir. 1981) (antitrust violations).

owner's statutory right to exclude mandated an entitlement to an injunction as opposed to damages.⁷¹ In the fields of environmental law and false advertising, courts seem more inclined to presume irreparable injury because of the difficulties associated with proving injury.⁷² Presuming irreparable harm lets courts off the hook; there is no need to explain precisely how the plaintiff has been injured and why that injury is irreparable through damages. Constitutional tort cases tend to have more in common with these cases than with exclusionary rights cases. How precisely is a plaintiff harmed by observing a religious symbol on public property, having to wait until a certain time to make a speech, or being briefly detained at a traffic stop by police officers? Is any such harm truly irreparable?

Another problem with a subject-matter approach to injunctions is that it is based on the premise that the injuries suffered by all plaintiffs in each area are identical. Yet, common sense suggests the injuries are not. Damages might not be a suitable remedy for an owner of intellectual property who never licenses that property, but it might provide sufficient redress to one who frequently licenses the property. A person who is delayed from expressing a viewpoint can be irreparably injured if the timing of the message is critical to its impact, but unharmed if the communication is as effective coming later rather than sooner.

The presumption of irreparable harm is incapable of adapting itself to varying facts and circumstances. It is not simply a type of evidentiary presumption authorized under the Federal Rules of Evidence.⁷³ Those presumptions merely shift the bur-

71. *Zino Davidoff, S.A.*, 571 F.3d at 246 (trademark); *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008) (copyright); *LGS Architects, Inc.*, 434 F.3d at 1155–56 (copyright); *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (patent); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989) (patent); *Tally-Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1029 (11th Cir. 1989) (trademark).

72. See, e.g., *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988); see also *Time Warner Cable, Inc.*, 497 F.3d at 161 (“[I]t is virtually impossible to prove that so much of one’s sales will be lost or that one’s goodwill will be damaged as a direct result of a competitor’s advertisement . . .” (quoting *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 316 (2d Cir. 1982))); *Save Our Ecosystems*, 747 F.2d at 1250 (“Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.”).

73. Cf. Fed. R. Evid. 301.

den of production from the plaintiff to the defendant.⁷⁴ They do not affect the ultimate burden of persuasion, which remains with the plaintiff; indeed, if evidence that counters the presumption is introduced, the presumption dissipates.⁷⁵ By contrast, presumptions of irreparable harm are not rebuttable; they conclusively remove the issue from the case.⁷⁶

A presumption of irreparable harm cannot be justified even if it were rebuttable. Rebuttable presumptions normally are used because the party against whom the presumption operates is usually in possession of the evidence that can rebut the presumption. For example, the employer knows why the plaintiff was terminated and the presumption of discriminatory discharge forces her to share that information with the court. Similarly, the government is in the best position to put forth a compelling interest for a regulation that infringes a constitutional right, and thus it is appropriate that it bear the burden of production (or even persuasion) on that issue. For irreparable injury, by contrast, the plaintiff is in possession of all the evidence as to why the injury cannot simply be redressed by damages or by a post-trial equitable remedy. Forcing a defendant to prove a negative with respect to a plaintiff's injury would be an overwhelming burden.

There might be another factor in play in the use of the presumption in constitutional cases: It excuses a court from having to grapple with conceptually difficult questions regarding the nature of the harm experienced by one who has been deprived of a constitutional right. In many instances, it is impossible to identify any cognizable injury that has been sustained by the victim of a constitutional deprivation. That is why courts routinely award nominal damages to plaintiffs who prevail on constitutional claims but do not succeed in establishing a resulting injury. It may be an arduous task to characterize as irreparable the harm of being forced to see a religious symbol on government-owned land or of being deprived of the right to march in a parade as part of an association or group. To pre-

74. Of course, an evidentiary presumption can shift a burden of production from a defendant to a plaintiff where the defendant originally bears that burden, as is the case with an affirmative defense.

75. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11 (1993).

76. See *Salinger v. Colting*, 607 F.3d 68, 77–78 (2d Cir. 2010).

sume irreparable harm sweeps these complicated and thought-provoking issues under the carpet.

B. *Shaky Legal Basis for the Presumption*

Courts employing the presumption in constitutional cases have not engaged in lengthy elaborations of the reasons for the presumption's use. They simply cited the Supreme Court's decision in *Elrod v. Burns*⁷⁷ as grounds for the presumption.

Elrod involved Republican employees of a county sheriff's department that were being terminated by the newly elected Democratic sheriff.⁷⁸ The employees filed suit, alleging that they were being discharged solely for their political beliefs in violation of the First Amendment and promptly moved for a preliminary injunction.⁷⁹ The district court denied the motion and dismissed the action, stating that the plaintiffs failed to state a claim upon which relief could be granted.⁸⁰ The court of appeals reversed, concluding the employees stated a cognizable claim and that they were entitled to preliminary injunctive relief.⁸¹

The Supreme Court granted certiorari on the issue of whether the plaintiffs stated a cognizable First Amendment claim.⁸² Justice Brennan, writing for a plurality consisting of Justices White and Marshall, concluded that patronage dismissals are unconstitutional under the First Amendment and that the

77. 427 U.S. 347, 374 (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citation omitted). As the District of Columbia Circuit recognized in *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299–300 (D.C. Cir. 2006), federal courts employing the presumption have cited "*Elrod* only in passing, devoid of any analysis of its particular context."

78. *Elrod*, 427 U.S. at 349–50.

79. *Id.* at 330.

80. *Id.*

81. *Burns v. Elrod*, 509 F.2d 1133, 1134 (7th Cir. 1975).

82. *Elrod*, 427 U.S. at 349 ("This case presents the question whether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments."). The standard of review demonstrates that the Court's review was limited to the issue of whether the claim was legally cognizable and not whether the plaintiffs were entitled to preliminary injunctive relief. The Court accepted the truth of all of the plaintiffs' "well-pleaded allegations." *Id.* at 350 n.1. That is the applicable standard for adjudging whether a claim is cognizable, not for determining whether the plaintiff is entitled to preliminary injunctive relief.

plaintiffs had therefore stated a cognizable claim.⁸³ The plurality went further and declared that interlocutory injunctive relief was warranted because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁸⁴

Justices Stewart and Blackmun refused to join in “the plurality’s wide-ranging opinion” and concurred only in the judgment that the plaintiffs had adequately stated a claim.⁸⁵ Because the plurality’s discussion of irreparable harm did not enjoy support from a majority of Justices, nor was it the narrowest opinion that supported the result in the case, it is not binding precedent.⁸⁶ Furthermore, because the sole issue before the Court was whether a claim was stated, and not the propriety of the grant of interlocutory injunctive relief, the plurality’s voluntary remarks regarding irreparable injury were obiter dicta.

Even limited to the employment context, the *Elrod* plurality’s remarks do not correctly describe the law. In *Sampson v. Murray*, the Court held that a government employee alleging wrongful termination does not suffer irreparable injury where she can obtain reinstatement and back pay at the conclusion of the case.⁸⁷ Courts have applied this same reasoning in cases involving the termination of government employment due to constitutionally protected activity.⁸⁸ As the Second Circuit explained, any chilling effect on an employee’s exercise of First Amendment rights is produced by the threat of a permanent loss of a job; allowing the employee to retain her position pending resolution of the case cannot “abate that effect.”⁸⁹ The *Elrod*

83. *Id.* at 373.

84. *Id.* at 373–74 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)).

85. *Id.* at 375 (Stewart, J., concurring in the judgment). Three Justices dissented. *See id.* at 376 (Powell, J., dissenting). And one, Justice Stevens, took no part in the case. *Id.* at 374.

86. *See* *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299–304 (D.C. Cir. 2006) (recognizing *Elrod* as not binding precedent); *see also* *Marks v. United States*, 430 U.S. 188, 192–93 (1977) (discussing that when no single rationale behind a decision enjoys the assent of a majority, the holding of the Court is “that position taken by those Members who concurred in the judgments on the narrowest grounds”).

87. 415 U.S. 61, 90–91 (1974).

88. *E.g.*, *Savage v. Gorski*, 850 F.2d 64, 67–68 (2d Cir. 1988); *Am. Postal Workers Union v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985).

89. *Savage*, 850 F.2d at 68; *see also* *Am. Postal Workers Union*, 766 F.2d at 722 (“[W]e fail to understand how a chilling of the right to speak or associate could

plurality's statement that irreparable injury necessarily exists in an employment termination context is erroneous.

Outside the employment context, the *Elrod* remarks are indefensible. If the loss of a First Amendment right were sufficient to constitute irreparable injury, there would be no *Younger* abstention doctrine.⁹⁰ Under that doctrine, when an individual has an adequate opportunity to present a federal constitutional challenge in a state judicial or administrative enforcement proceeding, she will not be irreparably injured by an alleged deprivation of her First Amendment rights.⁹¹ If the loss of First Amendment rights, for even minimal periods of time, automatically constituted irreparable harm, the ability to secure eventual vindication of the right through the state or agency proceeding would be immaterial. Similarly, if deprivation of an expressive right *itself* were per se irreparable harm, then there would be no reason for the Court in *Doran* to have analyzed the potential consequences on the plaintiff's business from a compelled cessation of the expressive activity; yet the Court, in affirming the injunctions, relied heavily upon the conclusion that bankruptcy could result if the plaintiff's bar could not feature topless dancing.⁹²

C. Theoretical Justifications for Presumptive Remedies

Although there is little in the academic literature that seeks to justify a presumption of irreparable harm in constitutional cases, there is ample scholarship arguing in favor of an expan-

logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech . . . stems not from the interim discharge, but from the threat of permanent discharge, which is not vitiated by an interim injunction.”).

90. *Cf. Younger v. Harris*, 401 U.S. 37, 49–52 (1971) (holding that federal courts should abstain from interfering with a pending state criminal proceeding where the defendant can lodge his federal constitutional claim as a defense to prosecution).

91. *E.g., Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626–30 (1986) (concluding that the *Younger* doctrine applies to state administrative proceeding that is judicial in nature); *Juidice v. Vail*, 430 U.S. 327, 331 (1977) (concluding that *Younger* abstention applied to private civil contempt proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975) (concluding that *Younger* abstention applied to state civil enforcement proceedings).

92. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (“[A]bsent preliminary relief [the respondents] would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief.”).

sion and strengthening of remedies where constitutional rights are implicated. These arguments have not succeeded in persuading courts to create or expand remedies for constitutional violations, so they should fare no better as justifications for a presumption of irreparable harm.

1. Closing the Remedial Gap

First, some contend that remedies should become more accessible so that each and every violation of a constitutional right can be redressed with a remedy.⁹³ When remedies are unavailable, they argue, courts avoid recognizing constitutional rights.⁹⁴ The existence of a right for which there is no remedy “create[s] cognitive dissonance for many judges.”⁹⁵ Consequently, remedies should be plentiful and freely attainable, so that courts will be inclined to expand the scope of rights protected by the Constitution.

Even scholars who believe that the expansion of constitutional rights is the desideratum, however, recognize that there need not be a remedy for every single constitutional violation. It is sufficient that there simply be “a general system of constitutional remedies adequate to keep government generally within the bounds of law.”⁹⁶ That is, so long as governments can potentially be subject to remedies, they will have incentives to comply with their constitutional obligations. Excessively po-

93. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) (noting the structural interest in providing constitutional remedies that are designed not simply to redress individual wrongs but to furnish incentives for officials generally to respect constitutional norms); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 198 (1998) (arguing that remedial law “needs to systematically favor the plaintiff, in order to compensate for the systematic under-enforcement of constitutional rights . . .”).

94. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 874–93 (1999) [hereinafter Levinson, *Rights*] (“Rights are often shaped by the nature of the remedy that will follow if the right is violated.”); see also Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 55 (1979) (noting that judges will tend to distort the true meaning of constitutional rights by tailoring them to fit what effective remedies are available).

95. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 704 (2009).

96. Fallon & Meltzer, *supra* note 93, at 1778–79; see also Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (recognizing that constitutional remedies is inevitably “a jurisprudence of deficiency” between “declaring a right and implementing a remedy”).

tent remedies will encourage litigiousness and risk making the “business of government” unduly difficult as public officials become paralyzed by the fear of liability.⁹⁷ A rights-remedies gap in constitutional torts, moreover, might be beneficial because it would facilitate the growth of constitutional law by reducing the costs associated with innovation.⁹⁸ Requiring that there be a remedy for every constitutional violation may actually discourage courts from expanding constitutional rights. Courts may come to fear that pronouncing a new constitutional right will imprudently increase the costs of good government.⁹⁹

The professed fear of an ever-widening remedial gap repeatedly has failed to persuade the Supreme Court to create new remedies or to lower the bar for existing ones. The Court has limited damages recoverable from a constitutional violation to actual losses¹⁰⁰ and has prohibited damages awards predicated on the inherent value of constitutional rights.¹⁰¹ The Court also has declined to afford remedies for third-party harms—such as those experienced by potential listeners of speech that is unconstitutionally suppressed¹⁰²—or for the psychic injuries experienced by those who observe unconstitutional conduct.¹⁰³

97. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 59–81 (1983).

98. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *YALE L.J.* 87, 89–90 (1999). Although Jeffries was addressing money damage awards, scholars have recognized that structural injunctions have their own “enormous difficulties and costs.” See Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 *U. CHI. L. REV.* 345, 416–17 (2000) [hereinafter, Levinson, *Making Government Pay*].

99. As Levinson posits, the Supreme Court distinction between unlawful de jure segregation and nonactionable de facto segregation was driven as much by remedial considerations as by substantive doctrine. Levinson, *Rights*, *supra* note 94, at 875–78. He makes the same point with respect to prison reform litigation. *Id.* at 878–82 (arguing that the complications of implementing prison reform remedies influenced the way the Court interpreted the Eighth Amendment).

100. *E.g.*, *Carey v. Phipus*, 435 U.S. 247, 257–60 (1978) (limiting recovery under Section 1983 to compensation for actual losses).

101. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 304–10 (1986) (rejecting a claim that recovery should be available under Section 1983 for the abstract value of a constitutional right that has been violated).

102. Levinson, *Making Government Pay*, *supra* note 98, at 372.

103. See *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (noting that plaintiff cannot sue if she has suffered no injury as a result of the alleged constitutional infraction, “other than the psychological consequence presumably produced by observation of conduct with which one disagrees”); see also Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle*:

Indeed, the Court recently refused to lower the standard of municipal liability under Section 1983 based on the argument that remedies for constitutional violations, particularly non-monetary ones, should be more accessible.¹⁰⁴

2. *The Constitutional Damages Deficiency*

Second, some assert that injunctions are an essential constitutional remedy because damage awards lack a true deterrent effect.¹⁰⁵ Governments do not care about paying damage awards because they use the taxpayers' money.¹⁰⁶ Even if they do care, traditional compensatory damages for constitutional torts are too difficult to obtain in light of existing immunity doctrines.¹⁰⁷ When damages are finally awarded, they are usually so small that they do not justify the suit.¹⁰⁸

These arguments, too, have not fared well. The Court rejected them when considering whether extra-compensatory damages should be available,¹⁰⁹ or whether punitive damages are appropriate, in cases involving constitutional claims against municipalities.¹¹⁰ The Court also has not found these arguments

Hein v. Freedom From Religion Foundation, Inc. and the Future of Establishment Clause Adjudication, 2008 B.Y.U. L. REV. 115, 158–59 (2008) (noting that visual or aural exposure to a constitutional wrong, such as observing at a courthouse patently unfair trials, blatant acts of racial discrimination, or cruel and unusual punishments, does not constitute a cognizable injury).

104. L.A. Cnty. v. Humphries, 131 S. Ct. 447, 447, 449 (2010) (observing that the requirement of municipal fault enunciated in *Monell* applies not just to damages claims but to claims for injunctive relief as well).

105. See, e.g., Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 876 (2001) (arguing that structural reform injunctions are a “uniquely appropriate remedial regime” for constitutional wrongs); Levinson, *Making Government Pay*, *supra* note 98, at 416–17 (suggesting that courts should rely more heavily on injunctions because they represent the “the best hope for preventing constitutional violations”).

106. Levinson, *Making Government Pay*, *supra* note 98, at 416–17 (arguing that constitutional violations cannot be deterred by a damages remedy “where a majority is willing to bear the costs of paying compensation or where a powerful interest group benefits from the unconstitutional activity”).

107. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 40–42 (1997); Wells, *supra* note 93, at 167–69 (1998).

108. AMAR, *supra* note 107, at 42–43 (noting that injuries from violations of the Fourth Amendment may be mostly dignitary and out-of-pocket losses may be “small or nonexistent”).

109. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986).

110. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

persuasive when asked to imply new private rights of action for constitutional wrongs.¹¹¹

Many scholars now recognize that damages awards serve a systemic deterrent function.¹¹² Similarly, many courts have expressed the view that even a nominal damage award can prompt a municipality to change its policies.¹¹³ Indeed, even a cursory review of annual reports prepared and distributed by municipal law departments reveals that municipalities measure themselves by the success rate in Section 1983 litigation and the aggregate amount of damages awarded against their agents.¹¹⁴ Federal case management statistics indicate that over the past four years, the total number of federal civil rights actions consistently represented a ten- to twenty-percent share of the federal civil docket.¹¹⁵ These statistics certainly do not suggest that

111. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Schweiker v. Chilicky*, 487 U.S. 412, 425–27 (1988); *Bush v. Lucas*, 462 U.S. 367, 378–90 (1983); *Chappell v. Wallace*, 462 U.S. 296, 298 (1983).

112. *See Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (discussing the deterrent effect of imposing Section 1983 damages liability on municipalities); *see also* Fallon & Meltzer, *supra* note 93, at 1788 (“Though a damages award does not require discontinuation of such practices, it exerts significant pressure on government and its officials to respect constitutional bounds.”). Akhil Reed Amar advocated that damages can be an effective means of redressing constitutional violations and that they can be a sufficient deterrent to unconstitutional conduct provided that judicially-created immunities be abolished. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512–17 (1987).

113. *E.g.*, *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317–18 (2d Cir. 1999) (observing that nominal damage award could “encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue”); *Cadiz v. Kruger*, No. 06 C 5463, 2007 WL 4293976, at *10 (N.D. Ill. Nov. 29, 2007) (noting that a nominal damages verdict against the city that misconduct stemmed from unconstitutional municipal policies, practices, or customs could provide a greater incentive for change than a damages award against individual officers that the City could dismiss as the product of aberrational conduct by rogue employees).

114. *See, e.g.*, CITY OF CHI. DEP’T OF LAW, JUDGMENT VERDICT & SETTLEMENT REPORT (2010), http://www.cityofchicago.org/content/dam/city/depts/dol/JudgementAndSettlementRequests/2010_expenditures_through_12312010_accessible.xls; L.A. CITY ATTORNEY’S OFFICE, NEWS FROM THE CITY ATTORNEY’S OFFICES, <http://atty.lacity.org/NEWS/index.htm> (reporting victories in constitutional litigation) (last visited February 1, 2012); N.Y.C. LAW DEP’T, ANNUAL REPORT (2010), <http://www.nyc.gov/html/law/downloads/pdf/2010AR.pdf>.

115. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS 148 tbl. C-2A (2010), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02ASep10.pdf>.

there is any growing or serious deficiency when it comes to civil enforcement of constitutional rights.

3. *Prophylaxis*

Third, injunctions are arguably needed because they provide the court with an opportunity to impose prophylactic measures. In addition to directing the cessation of unconstitutional conduct (or mandating constitutionally required conduct), the injunctive decree can compel additional steps that might provide a level of assurance that the proscribed conduct will not be repeated. The imposition of prophylaxis is a means of insuring that a remedy will be effective and will produce socially desirable conduct.¹¹⁶

Prophylactic injunctions, however, tend to over-penalize the defendant and are difficult to reconcile with the doctrine of judicial restraint.¹¹⁷ Courts are wary of entering injunctions that go beyond addressing the specific wrongdoing.¹¹⁸ Supreme Court Justices have flatly declared that federal courts lack the

116. See Gewirtz, *supra* note 96, at 608 (suggesting that a prophylactic decree reduces the risk that the remedy will turn out to be ineffective or that the defendant will evade or misinterpret its remedial duties); see also Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 330 (2004) (arguing that prophylactic relief “sweeps broadly to include legal conduct” and “such breadth is the core of its effectiveness”).

117. See David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 629–30 (1988) (“Without principles to guide the exercise of equitable discretion, the judge acts as a policy maker in framing the remedy, which throws into question the legitimacy of the judicial power to grant [prophylactic remedies.]”); see also John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1122–23 (1996) (arguing that prophylactic injunctions violate principles of judicial restraint).

118. See *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (“[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution”); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (invalidating injunctive relief that included prophylactic measures); *Cardenas v. Massey*, 269 F.3d 251, 265 (3d Cir. 2001) (overturning prophylactic relief); see also *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (equitable remediation “must be tailored to the violation . . . not used to launch the federal courts on ambitious schemes of social engineering”); *Newman v. Alabama*, 559 F.2d 283, 287 (5th Cir. 1977) (“[Injunctive] remedy must be designed to accomplish [the goal of eradicating cruel and unusual punishment], not to exercise judicial power for the attainment of what we as individuals might like to see accomplished in the way of ideal prison conditions.”), *rev’d in part on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 782 (1978).

constitutional competence to impose prophylactic measures.¹¹⁹ Structural injunctions, where federal judges manage complex institutions, such as police departments, prisons, or hospitals, are contrary to the Framers' design for a limited federal equity power.¹²⁰ Structural injunctions contravene the separation of powers principles embedded in the Constitution by requiring judges to play an administrative role akin to executive officials.¹²¹

Congress entered this fray by enacting the Prison Litigation Reform Act (PLRA),¹²² which is intended to prevent excessive federal court interference in the operations and administration of state and municipal detention facilities.¹²³ Congress determined that federal courts were frequently enforcing requirements for operation of state and municipal prisons that went beyond what was required to comply with federal law and contrary to principles of federalism and comity.¹²⁴ The PLRA thus provides for the termination of federal court injunctions or consent decrees that cannot be supported by findings that “the relief is narrowly drawn,” “extends no further than necessary to correct the violation of the Federal right,” and “is the least intrusive means necessary to correct the violation of the Federal right.”¹²⁵

The injunction is thus becoming a more restrained tool in the judicial workshop.

119. *Dickerson v. United States*, 530 U.S. 428, 446, 461, 465 (2000) (Scalia, J., dissenting) (criticizing the use of any form of constitutional prophylaxis as incongruent with constitutional values); *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) (“I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.”).

120. *See Missouri*, 515 U.S. at 126–31.

121. *Brown v. Plata*, 131 S. Ct. 1910, 1953 (2011) (Scalia, J., dissenting).

122. 18 U.S.C. § 3626.

123. *See Rowe v. Jones*, 483 F.3d 791, 794–95 (11th Cir. 2007).

124. *See Benjamin v. Jacobson*, 172 F.3d 144, 158–60 (2d Cir. 1999) (*en banc*).

125. 18 U.S.C. § 3626(b)(2)–(3) (2006). The PLRA also provides for the termination of pre-existing consent decrees unless they can be supported by “need-narrowness-intrusiveness” findings. *Id.*

III. ELIMINATING THE PRESUMPTION

A. *eBay: The Supreme Court Takes Aim at Irreparable Harm Presumptions*

In *eBay Inc. v. MercExchange, L.L.C.*,¹²⁶ the Supreme Court held that the Federal Circuit's practice of presuming irreparable injury in patent infringement cases was improper.¹²⁷ The Court's decision was unanimous and simple: The long-standing tradition of equity practice requires that a court assess separately each of four factors—including irreparable injury—to determine whether to grant injunctive relief.¹²⁸ Courts should not presume that element even if, in their experience, it is usually present.¹²⁹

In his concurring opinion, Chief Justice Roberts remarked that he did not expect the Court's ruling to have a significant impact on patent cases.¹³⁰ He explained that federal courts had developed the presumption for categories of cases where irreparable injury typically existed.¹³¹ Nevertheless, the Chief Justice recognized that the law of equity is trans-substantive¹³² and thus it should apply to all categories of cases.¹³³ Absent an

126. 547 U.S. 388 (2006).

127. *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338–39 (Fed. Cir. 2005), *rev'd*, 547 U.S. 388 (2006). The Court rejected the assertion that the right of exclusion inherent in a patent justifies a statutory right to enjoin future infringements. *eBay*, 547 U.S. at 392.

128. *eBay*, 547 U.S. at 391–92. Though the case involved a permanent injunction, courts have read *eBay* as precluding presumptions of irreparable harm for preliminary injunctions in patent cases. *E.g.*, *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1167 (C.D. Cal. 2009); *Tiber Labs., LLC v. Hawthorn Pharm., Inc.*, 527 F. Supp. 2d 1373, 1380 (N.D. Ga. 2007); *Sun Optics, Inc. v. FGX Int'l, Inc.*, No. 07-137-SLR, 2007 WL 2228569, at *1 (D. Del. Aug. 2, 2007).

129. *eBay*, 547 U.S. at 391–92.

130. *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring) (concluding that the long tradition of awarding injunctions in cases involving patent infringement was “not surprising”).

131. In making this observation, he uttered the line made famous by Oliver Wendell Holmes that “a page of history is worth a volume of logic.” *Id.* at 395 (Roberts, C.J., concurring) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Justices Scalia and Ginsburg joined in the Chief Justice's concurring opinion. *Id.* at 394.

132. *eBay*, 547 U.S. at 394–95.

133. *See* Schoenbrod, *supra* 117, at 631–32 (noting that the tendency among courts to “compartmentalize” when determining the suitability of injunctive relief and thus to disregard the “trans-substantive” nature of equity law is inconsistent with the purpose of equitable injunctions).

indication by Congress that a different standard apply, courts should adhere to the traditional four-factor test.¹³⁴ As Justice Kennedy noted in his concurring opinion, courts should always exercise their deliberative faculties and not simply rely upon history or past experience.¹³⁵

Federal courts have applied *eBay*'s teaching to other areas of the law and have discontinued the practice of presuming irreparable harm in copyright cases,¹³⁶ trademark and false advertising cases,¹³⁷ and environmental cases.¹³⁸ Indeed, the Second Circuit has gone so far as to suggest that *eBay*'s reasoning should apply to all types of cases:

[N]othing in the text or the logic of *eBay* suggests that its rule is limited to patent cases. . . . Therefore, although today we are not called upon to extend *eBay* beyond the context of copyright cases, we see no reason that *eBay* would not apply with equal force to an injunction in *any* type of case.¹³⁹

Clearly, the trend is against the presumption of irreparable harm for federal statutory claims. It is hard to see why a contrary rule should apply for constitutional claims. Historically, the irreparable injury requirement was applied consistently to both constitutional and statutory claims. Concerns about the erosion

134. As the Supreme Court has repeatedly declared, "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (citing *Hecht Co. v. Bowles*, 321 U.S. 321 (1944)).

135. See *eBay*, 547 U.S. at 396–97 (Kennedy, J., concurring). Specifically, Justice Kennedy noted changes in the field of patent law, including the emergence of patent owners that "use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees" and "the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times." Justices Breyer, Souter and Stevens joined in Justice's Kennedy's concurrence. *Id.* at 395.

136. See, e.g., *Salinger v. Colting*, 607 F.3d 68, 77–78 (2d Cir. 2010); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1323 (11th Cir. 2008); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d. 532, 543 (4th Cir. 2007).

137. See, e.g., *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir. 2008); accord *Paulsson Geophysical Serv., Inc. v. Sigmar*, 529 F.3d 303, 312 (5th Cir. 2008) (intimating that *eBay* bars the presumption in trademark cases); *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1137–38 (9th Cir. 2006) (applying *eBay* four factor test in trademark case).

138. See *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (observing that presumed injunctions are improper in environmental cases).

139. *Salinger*, 607 F.3d at 77–78 & n.7.

of jury trial rights from injunctive relief becoming more accessible should also apply to constitutional claims.

More importantly, the analytical framework of *eBay* and other statutory cases involving the substantive requirements for obtaining an injunction is grounded in the notion that Congress understood at the time of enactment that irreparable injury was a prerequisite to attaining such relief.¹⁴⁰ Although rights predicated on the Constitution are not conferred by Congress, the remedies available to enforce those rights are mostly the product of a statutory grant. Section 1983 provides that governmental entities and agents “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”¹⁴¹ The assumption that Congress intends to incorporate the traditional requirements of equity jurisprudence into statutes that expressly provide for an equitable remedy should apply to Section 1983 as well. Indeed, the Court has declared that nothing in the text of Section 1983 suggests that the plaintiff seeking an injunctive remedy should face a relaxed standard of liability.¹⁴²

B. Circuit Courts Rethink the Wisdom of the Presumption

Federal circuit courts have begun to retreat from a blanket presumption of irreparable harm in constitutional cases. The Second Circuit held that the presumption should be limited to cases where “a plaintiff alleges injury from a rule or regulation that directly limits speech.”¹⁴³ In other situations, where it is

140. See *Monsanto*, 130 S. Ct. at 2757 (concluding that courts should not presume that an injunction is the proper remedy for a statutory violation); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 12 (2008) (finding that Congress did not intend for a preliminary injunction to be issued based on a possibility of irreparable harm); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982) (explaining that the irreparable injury requirement reflects a “practice of which Congress is assuredly well aware”).

141. 42 U.S.C. § 1983 (2006).

142. *L.A. Cnty. v. Humphries*, 131 S. Ct. 447, 448 (2010) (“Nothing in § 1983 suggests that the causation requirement [contained in the statute] should change with the form of relief sought.”)

143. *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349–50 (2d Cir. 2003) (“In contrast, in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech,” the presumption should not apply, and the “plaintiff must establish a causal link between the injunction sought and the alleged injury.”); see also *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (“Even when a complaint alleges First Amendment injuries, however, our

“not clear that a particular statute, policy, or practice will have any adverse effect on protected First Amendment liberties, the moving party must demonstrate some likelihood of a chilling effect on their rights.”¹⁴⁴

This approach, although more sophisticated than using a blanket presumption, is still unsatisfactory. The Supreme Court has, in the Free Exercise Clause context, sought to distinguish between laws that are aimed at religious expression and laws that are not so aimed but nonetheless affect religious expression.¹⁴⁵ It has not, however, attached significance to the distinction elsewhere in the First Amendment.¹⁴⁶ The Second Circuit, moreover, has not applied the distinction in a consistent or principled manner. For instance, the court held that laws requiring artists to obtain licenses to exhibit their work directly affect expressive rights and thus qualify for the presumption,¹⁴⁷ while a regulation mandating that police officers inform the department of their intention to speak publicly about department policy, and provide a summary of the speech, does not directly affect speech.¹⁴⁸

case law suggests that at least in circumstances in which a plaintiff does not allege injury from a rule or regulation that directly limits speech, irreparable harm is not presumed and must still be shown.”).

144. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006); *see also* *Hohe v. Casey*, 868 F.2d 69, 72–73 (3d Cir. 1989) (“[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury Rather the plaintiffs must show ‘a chilling effect on free expression.’” (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965))); *cf.* *Laird v. Tatum*, 408 U.S. 1, 13–14 & n. 7 (1972) (discussing the “chilling” effects and First Amendment rights).

145. *See, e.g., Emp’t. Div. v. Smith*, 494 U.S. 872, 877–78 (1990) (strict scrutiny standard applies only to laws that directly burden religion, not laws of general application that happen to affect religious practices). *Smith’s* holding has been partially abrogated by statute, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006). *See also* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

146. Justice Scalia opined that general laws regulating conduct that happen to affect expression should not be subject to heightened scrutiny, but none of the other Justices has agreed. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572–80 (1991) (Scalia, J., concurring in the judgment).

147. *See, e.g., Tunick v. Safir*, 209 F.3d 67, 69–70 (2d Cir. 2000); *Bery v. City of New York*, 97 F.3d 689, 693–95 (2d Cir. 1996).

148. *See Latino Officers Ass’n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999); *see also* *Charette v. Town of Oyster Bay*, 159 F.3d 749, 755–56 (2d Cir. 1998) (zoning regulation that required closure of topless bar did not directly affect speech); *cf.* *Amandola v. Town of Babylon*, 251 F.3d 339, 343 (2d Cir. 2001) (per curiam) (“We must perforce acknowledge that this Court has not spoken with a single voice on the issue of whether irreparable harm may be presumed with respect to complaints alleging the abridgement of First Amendment rights.”).

The primary benefit from application of a presumption is to conserve the courts' and parties' resources from litigating in-controvertible issues. Limiting the presumption to ill-defined categories of constitutional infringements will likely not serve this purpose. The parties will likely spend at least as much time and effort fighting over whether the policy or action directly or indirectly infringes expressive rights than if the plaintiff were simply required to demonstrate irreparable harm.¹⁴⁹

The D.C. Circuit also sought to limit the presumption.¹⁵⁰ It explained that a presumption of irreparable harm should be reserved for situations where "the allegedly impermissible government action would chill" constitutionally protected behavior.¹⁵¹ This approach is also flawed. First, the court acknowledged that its "chilling" test made no sense in the context of Establishment Clause claims because those claims implicate expressive activity on the part of the government, not private parties.¹⁵² Second, the D.C. Circuit relied on the presumption because it improperly concluded that only proof of a tangible injury can satisfy the irreparable injury element.¹⁵³ The court's view that irreparable harm cannot encompass intangible injury is contrary to well-settled jurisprudence.¹⁵⁴

More importantly, these circuit courts erroneously conflate the concept of injury with an analysis of the merits. Looking at

149. An affidavit or declaration from the plaintiff often can supply the needed proof. *Dombrowski v. Pfister*, 380 U.S. 479, 485–87 (1965) ("Appellants' . . . offers of proof outline the chilling effect on free expression . . . threatened in this case.").

150. See *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299–304 (D.C. Cir. 2006).

151. *Id.* at 301.

152. See *id.* at 302.

153. *Id.* at 298–99 ("Having failed to assert a tangible injury that constitutes irreparable harm, Appellants are left to argue that the Navy's alleged violation of the Establishment Clause per se constitutes irreparable harm.").

154. Indeed, in one of the most notable findings of irreparable injury in the history of American jurisprudence, a unanimous Supreme Court made unmistakably clear that irreparable injury encompasses intangible harm:

[I]ntangible considerations: . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession . . . apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954) (internal quotation marks omitted).

whether a statute or rule of general application indirectly affects constitutional rights or chills expressive activity is simply a means of assessing whether a party has a potentially meritorious First Amendment claim. It does not address the severity of the injury the plaintiff sustained. How difficult or burdensome is it for the artist plaintiff to obtain the license or permit? What happens to the police officer if she does not notify the department of a public speaking engagement? Courts should address these hard questions and not simply forge ahead on cruise control.

There is a recent indication that the Ninth Circuit may be in favor of scrapping the presumption in constitutional cases.¹⁵⁵ The court vacated a preliminary injunction on the grounds that the district court erred in concluding that the plaintiff was likely to succeed on a First Amendment claim.¹⁵⁶ Although it did not have to consider whether the irreparable injury existed, it did criticize the district court for relying upon presumptions rather than actual fact-findings.¹⁵⁷ Perhaps the Ninth Circuit is heading in the right direction.

C. *The Fate of Presumed Damages in Constitutional Litigation*

Judicial reluctance to presume irreparable harm in constitutional cases would be consistent with its reticence to presume damages in such cases.

1. *The Court's Presumed Damages Cases*

In *Carey v. Phipus*, the Supreme Court addressed the argument that because compensatory damages are so difficult to prove for some constitutional violations (such as a violation of procedural due process rights where the underlying deprivation was ultimately justified) a court should presume damages without proof of actual injury.¹⁵⁸ The plaintiff in *Carey* relied upon the concept of presumed damages, which had been developed in the common law of defamation as a means of ensuring that victims of slander or libel—who often cannot prove injury to reputation—would have a remedy.¹⁵⁹ The Court re-

155. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009).

156. *Id.* at 681.

157. *Id.* at 681 n.14.

158. *Carey v. Phipus*, 435 U.S. 247, 248 (1978).

159. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

jected the argument, noting that a person who is denied procedural due process can suffer mental and emotional distress, which can be proven and for which recovery could be obtained.¹⁶⁰ Consequently, there was no need to presume damages to compensate an injured plaintiff.¹⁶¹

The Court acknowledged that, in addition to compensation for injury, monetary remedies deter the commission of wrongful acts.¹⁶² It reasoned, however, that the importance of constitutional rights does not warrant the creation of a "deterrent more formidable than that inherent" in a traditional award of compensatory damages.¹⁶³ Where a plaintiff cannot prove injury, she is entitled to an award of nominal damages, which emphasizes the "importance to organized society that [constitutional] rights be scrupulously observed . . ."¹⁶⁴ The Court further noted that punitive damages and the potential of awarding attorneys' fees to a prevailing plaintiff served to deter government officials from disregarding constitutional rights.¹⁶⁵

Some federal courts limited *Carey's* holding to procedural due process violations,¹⁶⁶ but the Supreme Court, in *Memphis Community School District v. Stachura*, confirmed that *Carey's* reasoning applied to substantive constitutional rights, such as those protected under the First Amendment.¹⁶⁷ The Court reasoned that the importance of a constitutional right does not warrant a departure from the traditional rule that compensa-

160. *Carey*, 435 U.S. at 263–64.

161. *Id.* at 264 ("[N]either the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.").

162. *Id.* at 256–57.

163. *Id.*

164. *Id.* at 266.

165. *Id.* at 257 n.11. At the time the Court decided *Carey*, most federal circuit courts had held that punitive damages could be obtained against government officials, at least where they acted with a malicious intention of depriving a plaintiff of her constitutional rights. *Id.* (citations omitted). The Court eventually clarified that punitive damages could be assessed against government officials, *see generally* *Smith v. Wade*, 461 U.S. 30 (1983), but not against governmental entities themselves. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). As for attorneys' fees, 42 U.S.C. § 1988 makes a defendant potentially liable for a prevailing plaintiff's attorneys' fees in Section 1983 litigation. *See infra* Part IV.C.1.

166. *See, e.g.*, *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1409 (10th Cir. 1985); *Herrera v. Valentine*, 653 F.2d 1220, 1228 (8th Cir. 1981); *Konczak v. Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979).

167. 477 U.S. 299, 309–10 (1986).

tory damages can only be awarded where the plaintiff can prove that she sustained an injury from the deprivation of a constitutional right.¹⁶⁸ Although the Court would not rule out the possibility that presumed damages might be appropriate in some circumstances, it indicated that they should be used only where compensatory damages were unavailable and never as a means to augment a potential compensatory damages recovery.¹⁶⁹ Because virtually all constitutional infractions will produce some type of mental or emotional injury, federal courts have almost uniformly refused to award presumed damages in constitutional litigation.¹⁷⁰

2. Seventh Amendment Concerns

There is no reason to forbid presuming damages in constitutional law cases but to permit presumed injunctions. A significant concern factor militating against presumed damages is the potential effect of that remedy on Seventh Amendment rights. A defendant (as well as a plaintiff) has a Seventh Amendment right to have a jury determine both the fact and the extent of any damages.¹⁷¹ The existence of injury and the measure of ac-

168. *See id.* at 307–11.

169. *Id.* at 310–11 (noting that where “some form of presumed damages may possibly be appropriate,” those damages can only be a “substitute for ordinary compensatory damages, not a supplement for an award that fully compensates the alleged injury”).

170. *See, e.g.,* Horina v. City of Granite City, 538 F.3d 624, 637–38 (7th Cir. 2008) (First Amendment right to distribute handbills); Phillips v. Hust, 477 F.3d 1070, 1080–81 (9th Cir. 2007) (prisoner’s First Amendment right of access to the courts); Azimi v. Jordan’s Meats, Inc., 456 F.3d 228, 234–35 (1st Cir. 2006) (no presumed damages for victim of racial and religious discrimination); Randall v. Prince George’s Cnty., 302 F.3d 188, 207–09 (4th Cir. 2002) (no presumed damages for unlawful seizure); Searles v. Van Bebber, 251 F.3d 869, 875–79 (10th Cir. 2001) (free exercise rights); Slicker v. Jackson, 215 F.3d 1225, 1229–32 (11th Cir. 2000) (excessive force claim under Fourth and Fourteenth Amendments); Norwood v. Bain, 143 F.3d 843, 855–56 (4th Cir. 1998) (illegal search), *aff’d in part, rev’d in part*, 166 F.3d 243 (4th Cir. 1999) (en banc) (per curiam), *cert. denied*, 527 U.S. 1005 (1999); Kelly v. Curtis, 21 F.3d 1544, 1557 (11th Cir. 1994) (false arrest, malicious prosecution, and illegal detention claims); Baumgardner v. Sec’y, U.S. Dep’t of Hous. & Urban Dev., 960 F.2d 572, 581–83 (6th Cir. 1992) (gender discrimination in housing); Lewis v. Harrison Sch. Dist., 805 F.2d 310, 317–18 (8th Cir. 1986) (violation of free speech rights).

171. *See, e.g.,* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353–55 (1998) (damages for copyright infringement); Curtis v. Loether, 415 U.S. 189 (1974) (damages for housing discrimination).

tual damages are matters that are subject to the prohibitions of the Re-examination Clause of that amendment.¹⁷²

These constitutional guarantees counsel against any judicial encroachment upon the jury's prerogative to determine damages. When presumed damages are ordered, the court instructs the jury that some amount of damages must be awarded to the plaintiff.¹⁷³ The defendant is essentially deprived of her right to have the jury exercise its discretion to deny awarding any damages for the wrongdoing.¹⁷⁴ And, where a jury declines to award damages and the trial or appellate court decides that presumed damages should be awarded, it is essentially re-examining the jury's findings on injury (or lack thereof) and

172. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001). The Re-examination Clause provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. See also *St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 707 (1915) ("The award [of \$5,000] does seem large, but the power, and with it the duty and responsibility, of dealing with this matter rested upon the courts below. It involves only a question of fact and is not open to reconsideration here.").

173. See, e.g., *Kerman v. City of New York*, 374 F.3d 93, 132–33 (2d Cir. 2004) (jury should have been instructed that where the defendant's unlawful conduct is responsible for a deprivation of the plaintiff's liberty, the plaintiff is entitled to compensatory damages as a matter of law). See generally *When A Jury Can't Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. (forthcoming 2012).

174. A jury must follow the law and thus where there is no serious dispute that a defendant's actions caused an objectively determinable injury to the plaintiff, a jury cannot refuse to award damages to that plaintiff. See, e.g., *Westcott v. Crinklaw*, 133 F.3d 658, 661 (8th Cir. 1998); see also *Atkins v. New York City*, 143 F.3d 100, 103 (2d Cir. 1998) (if it is "clear from the undisputed evidence" that the plaintiff sustained an injury that was caused by unconstitutional conduct, then "the jury's failure to award some compensatory damages should be set aside and a new trial ordered"); *Haywood v. Koehler*, 78 F.3d 101, 104 (2d Cir. 1996) (appellate court can determine whether plaintiff in constitutional tort case is "entitled to some compensatory damages as a matter of law"). However, where the sole injury is an emotional or other intangible harm, such as mental anguish, most courts have held that a jury is not required to award damages because it is always permitted to disbelieve the subjective claims of a litigant. See, e.g., *Kerman*, 374 F.3d at 123–24 ("As to whether [plaintiff] experienced mental suffering or psychological injury, the jury was not required to credit [his] subjective representations or the testimony of [his] brother [or of his psychiatrist]."); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 314 (2d Cir. 1999) (a jury can legitimately refuse to award damages for intangible harms which are dependent on the victim's credibility); *Robinson v. Cattaraugus Cnty.*, 147 F.3d 153, 160 (2d Cir. 1998) (the fact that the jury credited plaintiffs' account on liability "did not require it to believe plaintiffs' evidence as to either the fact or the extent of their emotional suffering").

impermissibly augmenting a jury verdict of no damages (or nominal damages of one dollar).¹⁷⁵

Presuming the appropriateness of injunctive relief also raises Seventh Amendment concerns. A plaintiff who cannot prove irreparable injury should be relegated to a claim for money damages or declaratory relief, which can also trigger jury trial rights.¹⁷⁶ Consequently, when irreparable injury is presumed in a situation where the plaintiff is unable to demonstrate such harm, the defendant is deprived of her right to a jury trial on the underlying claim. This erosion of the Seventh Amendment's guarantees is why the Court has consistently been reluctant to expand the scope of its equity jurisdiction.¹⁷⁷

3. *The Reinvoigorated Compensatory Damages Remedy*

The Court in *Carey* acknowledged that recovering damages for intangible harms was difficult, but it was not so insurmountable as to justify presumed damages.¹⁷⁸ In the years following the *Carey* and *Stachura* decisions, it has become easier for plaintiffs to obtain compensatory damages for mental and emotional harms from constitutional wrongs. Over the past two decades, federal courts have relaxed the applicable evidentiary requirements for proving intangible harm. The days when federal courts insisted that a plaintiff prove emotional injury or mental anguish through expert medical testimony or other corroboration, such as psychiatric treatment, are gone.¹⁷⁹ Most federal courts today will permit

175. See, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 486–87 (1935); see also *Campos-Orrego v. Rivera*, 175 F.3d 89, 97 (1st Cir. 1999) (“[T]he Seventh Amendment flatly prohibits federal courts from augmenting jury verdicts”); *Robinson*, 147 F.3d at 162 (“[T]he Seventh Amendment generally prohibits a court from augmenting a jury’s award of damages”); *Gibeau v. Nellis*, 18 F.3d 107, 111 (2d Cir. 1994) (“[A] federal court’s increase of a jury award would constitute impermissible additur”); *Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir. 1990) (“[T]he order of an additur by a federal court violates the seventh amendment”).

176. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959).

177. See *supra* Part I.C.

178. See *Carey v. Phipus*, 435 U.S. 247, 263–64 (1978).

179. Compare *Cowan v. Prudential Ins. Co. of Am.*, 852 F.2d 688, 690–91 (2d Cir. 1988) (affirming emotional damage award based on corroborating testimony), *Rowlett v. Anheuser-Busch Inc.*, 832 F.2d 194, 204–05 (1st Cir. 1987) (affirming emotional damage award of \$123,000 based on plaintiff’s testimony and testimony from psychiatrist), and *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986) (affirming compensatory award based on testimony by plaintiff and other witnesses), with *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1265

an emotional distress damages award to be based solely on the uncorroborated testimony of the plaintiff.¹⁸⁰

Courts also have been willing to expand the types of afflictions that will qualify for cognizable intangible harm. Federal courts were initially reticent to recognize and permit redress for intangible harms that were viewed as not objectively determinable or that produced no medically detectable physical manifestations.¹⁸¹ Courts eventually accepted a variety of ailments that were entirely subjective and indeterminate.¹⁸² Proof

(10th Cir. 1995) (vacating emotional damage award as excessive when it was based solely on the testimony of the plaintiff), *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1505–06 (11th Cir. 1989) (jury award for emotional distress was grossly excessive when based solely on plaintiff's testimony), *cert. denied*, 513 U.S. 1155 (1995), *Gunby v. Pa. Elec. Co.*, 840 F.2d 1108, 1121 (3d Cir. 1988) (reversing an emotional distress award based on the lack of corroborating evidence), *cert. denied*, 492 U.S. 905 (1989), and *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985) (reversing an emotional damage award and remanding with instructions to award nominal damages because plaintiff offered only his own testimony), *cert. denied*, 475 U.S. 1015 (1986).

180. *See, e.g.*, *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9th Cir. 2003) (“[Plaintiff’s] testimony alone is enough to substantiate the jury’s award of emotional distress damages.”); *Randall v. Prince George’s Cnty.*, 302 F.3d 188, 208–09 (4th Cir. 2002) (“We have recognized, in the § 1983 context, that a ‘plaintiff’s testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation.’”); *Oden v. Oktibbeha Cnty.*, 246 F.3d 458, 470–71 (5th Cir. 2001); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 513 (9th Cir. 2000) (upholding a \$1,000,000 compensatory emotional distress damage award based on testimony of plaintiff); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998).

181. *See, e.g.*, *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996) (“Not only is emotional distress fraught with vagueness and speculation, it is easily susceptible to fictitious and trivial claims”) (internal citations omitted); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 939–40 (5th Cir. 1996) (rejecting, as a matter of law, compensatory damages claim predicated on feelings of low self-esteem and inferiority and commenting that “[h]urt feelings, anger and frustration are part of life”). The Equal Employment Opportunity Commission had emphasized the importance of a physical manifestation of harm, such as “ulcers, gastrointestinal disorders, [or] hair loss” to obtain compensatory damages for intangible injuries from actionable discrimination under Title VII or Section 1981. EEOC POLICY GUIDANCE NO. 915.002 § II(A)(2) (July 14, 1992), available at <http://www.eeoc.gov/policy/docs/damages.html> (“The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations.”).

182. Plaintiffs have been able to recover for a variety of mental and emotional conditions and afflictions, such as humiliation, inadequacy, loss of self-esteem, anxiety, loneliness, sleeplessness, loss of appetite, crying, or headaches. Michelle Cucuzza, *Evaluating Emotional Distress Damage Awards To Promote Settlement Of Employment Discrimination Claims In The Second Circuit*, 65 BROOK. L. REV. 393, 417 (1999); *see also* Robert S. Mantell, *The Range of Emotional Distress Compensable Under*

of many of these afflictions, such as loss of appetite, crying, loneliness, or sleeplessness, is often provided through the testimony of the plaintiff or a family member.¹⁸³

An accessible compensatory damages remedy for intangible harm not only further undercuts the rationale for presuming damages but also chips away at the logic of presuming irreparable harm. Presuming irreparable injury arguably still makes sense where it can easily be proven and courts can avoid expending time and resources confirming the obvious. It makes less sense in those instances where courts initially concluded that damages were too difficult to prove. If compensatory damages for intangible harms are more attainable today, courts should be less inclined to find them to be an inadequate remedy.¹⁸⁴

This is not to suggest that any constitutional violation should be allowed to occur simply because the plaintiff has an ex post damage remedy. The legal system would not permit prospective tort defendants to maim and kill people simply because our tort system has managed to come up with a palatable way to compensate for the loss of limb or life. But it does suggest that perhaps some conduct need not be restrained simply because it might ultimately be shown to violate a constitutional guarantee. In short, an invigorated compensatory damages remedy reduces the extent to which courts must rely on injunctive relief.

IV. IMPLICATIONS OF ELIMINATING THE PRESUMPTION

Eliminating a presumption of irreparable harm in constitutional cases should not have a significant impact on the granting of permanent injunctive relief. As with patent cases, the presumption arose only because courts frequently observed

Anti-Discrimination Laws, RODGERS, POWERS & SCHWARTZ LLP (1999), <http://www.theemploymentlawyers.com/Articles/Emotional%20distress%20damages.htm> (describing concentration deficiency, confusion, loss of enjoyment of life, hopelessness, trust issues, and weight loss or gain).

183. Cucuzza, *supra* note 182, at 415–417 & nn. 126–31 (collecting cases).

184. Of course, damages are an adequate remedy for a constitutional wrong only where they can be awarded. If damages are precluded by doctrines of state sovereign immunity, see, for example, *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting), or official immunity, see, for example, *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 36 (2d Cir. 2003) (listing circumstances where officials will be shielded from liability through qualified immunity), then the remedy cannot be deemed adequate for purposes of denying injunctive relief.

that the abridgement of a constitutional right could not be redressed through an award of monetary damages.¹⁸⁵ The validity of this observation is not diminished simply because the presumption is eliminated. Where a plaintiff cannot vindicate her constitutional rights solely through receipt of a monetary award, she generally will still be able to obtain injunctive relief, as long as she establishes irreparable injury.

There will, however, certainly be some cases where elimination of the presumption will lead to a denial of injunctive relief. This may occur in cases involving loss of employment, as in *Sampson v. Murray*¹⁸⁶ or where the plaintiff cannot establish the requisite chilling effect.¹⁸⁷ Injunctions also might be unavailable in situations where the plaintiff is essentially requesting that a defendant be prohibited from taking action that would violate the Constitution. As explained in Judge Tjoflat's well-reasoned concurring opinion in *Chandler v. James*,¹⁸⁸ where a defendant is restrained from acting in derogation of constitutional rights, instead of required to take action to avoid violating such rights, the sole means for enforcing the injunction will be to impose a flat monetary sanction.¹⁸⁹ A coercive sanction—a monetary assessment that accumulates until the action is completed—cannot be used in that situation.¹⁹⁰ Judge Tjoflat reasoned that it would be inappropriate for a court to grant an injunction where a coercive sanction cannot be used.¹⁹¹

A. *The Declaration as an Alternative Remedy*

Some judges have gone so far as to opine that certain constitutional violations are so inconsequential that they do not merit any remedy. In a recent Second Circuit decision, holding that First Amendment rights were violated in connection with a

185. *E.g.*, *Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1059 (9th Cir. 2009) (quoting *Nelson v. NASA*, 530 F.3d 865, 881–82 (9th Cir. 2008)).

186. 415 U.S. 61 (1974).

187. *See supra* text accompanying note 142.

188. 180 F.3d 1254 (11th Cir. 1999) (Tjoflat, J., concurring).

189. *Id.* at 1266–77.

190. *Id.* at 1266–69 (“Coercive sanctions, however, are not available, because the act to be prevented by the injunction has already occurred—in other words, there is no way to purge the contempt.”).

191. *Id.* at 1270 (explaining that remedying the violation of an injunction with a flat monetary penalty is tantamount to awarding damages where a court previously held damages to be an inadequate remedy).

dispute over a student-run newspaper at a city university, Chief Judge Dennis Jacobs described the case as “about nothing” and a “silly thing” that should not “occupy the mind of a person who has anything consequential to do.”¹⁹² Another circuit judge vented in a case involving an Establishment Clause claim by a high school student based on a religious painting on a public school wall: “[T]his picture does implicate an ‘establishment’—but not one of religion. What is established is a class of ‘eggshell’ plaintiffs of a delicacy never before known to the law.”¹⁹³ On these occasions, judges are prone to cry out for a *de minimis* or “harmless error” rule, whereby constitutional infractions that produce no real injury are disregarded.¹⁹⁴ These protestations are entirely misguided.

As noted above, the remedy of a declaratory judgment is available to plaintiffs who cannot establish irreparable injury. The central point of *Steffel*, a First Amendment case, was that the declaratory judgment could provide redress to plaintiffs who cannot qualify for injunctive relief.¹⁹⁵ If all constitutional violations automatically give rise to a presumption of irreparable injury, then the *Steffel* decision is incomprehensible.

A declaration provides a plaintiff with the same advantage that an injunction provides: an *ex ante* enumeration of the rights of the parties.¹⁹⁶ The judicial declaration might not always be as effective as an injunction, as it is not a coercive edict.¹⁹⁷ A state or local government that ignores a declaratory

192. *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, C.J., concurring in part and dissenting in part). Though he filed a dissenting opinion, Chief Judge Jacobs acknowledged that he had not even bothered to read the majority decision. *Id.*

193. *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 684 (6th Cir. 1994) (Guy, J., concurring).

194. *See, e.g., Riley v. Dorton*, 115 F.3d 1159, 1166 (4th Cir. 1997) (applying a *de minimis* rule excusing batteries that produce no serious injuries), *abrogated by Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (applying a harmless error rule by giving the school the opportunity to show that it would not have rehired plaintiff even had it not considered his constitutionally protected conduct).

195. *See supra* text accompanying notes 46–47.

196. *See Chandler*, 180 F.3d at 1271 n.12.

197. In the post-*Brown* school desegregation cases, for instance, declaratory relief surely would not have sufficed; indeed, injunctive relief failed in that situation. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 221–24 (1964) (noting that ten years after the Court had ordered the school board to admit students on a racially non-discriminatory basis, it had taken no discernible steps to effectuate the order).

judgment is not acting contrary to a court order as it would be in the case of an injunction.¹⁹⁸ Nevertheless, the Court observed in *Steffel* that, although a state or local government might not be obliged, under pain of contempt, to honor a federal court declaration, it would likely do so in any event.¹⁹⁹

Indeed, a declaratory judgment has preclusive effect in future litigation between the parties with respect to the matter declared.²⁰⁰ If a federal court declares a state law unconstitutional, that determination will be binding on the state in future litigation.²⁰¹ For this reason, the declaration can be quite effective in causing the cessation of unconstitutional conduct.²⁰² It is less intrusive than the injunction, avoiding federalism and separation of powers concerns.²⁰³ There is no danger that a declaration will contain invasive prophylaxis or deter lawful conduct due to a defendant's desire to avoid a contempt hearing.²⁰⁴

More importantly, a declaratory judgment action that is fully litigated to final judgment does not bar a plaintiff from bring-

198. *Chandler*, 180 F.3d at 1271 n.12.

199. *Steffel v. Thompson*, 415 U.S. 452, 469–70 (1974) (“[A] federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute.”).

200. *See Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196 (2d Cir. 2010) (the preclusive effect of a declaratory judgment action is limited to the matters actually declared in the action); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 33 (1982); 18A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4446 (2d ed. 2002).

201. *Samuels v. Mackell*, 401 U.S. 66, 72–73 (1971) (noting that a declaratory judgment of unconstitutionality has the same practical impact as a formal injunction in light of its res judicata effect); *see also In re Nassau Cnty. Strip Search Cases*, 742 F. Supp. 304, 320–21 (E.D.N.Y. 2010) (analyzing potential collateral estoppel consequences of a judicial declaration of unconstitutionality).

202. For example, a federal district court held that a blanket policy of a suburban county in New York to strip search misdemeanor detainees violated the Fourth Amendment and issued a declaration to that effect. *See Shain v. Ellison*, 53 F.Supp. 2d 564, 568 (E.D.N.Y. 1999), *aff'd*, 273 F.3d 56 (2d Cir. 2001). Although the Second Circuit refused to permit the entry of an injunction in that case, *Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004), the county abandoned the strip search policy based on the district court's declaration. The case is now proceeding as a class action for damages. *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006); *see also In re Nassau Cnty. Strip Search Cases*, 742 F. Supp. 2d at 304.

203. *Steffel*, 415 U.S. at 469–70; *Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir. 1992) (noting that declaratory judgment is an effective remedy for plaintiff who cannot establish irreparable injury in First Amendment case).

204. *See Chandler v. James*, 180 F.3d 1254, 1271 n.12 (11th Cir. 1999) (Tjoflat, J., concurring).

ing a subsequent action for coercive relief based on the declaration.²⁰⁵ The general rule that a plaintiff must assert all possible claims in a proceeding or else have them barred by *res judicata* does not apply to declaratory judgment actions.²⁰⁶ Thus, a plaintiff confronted with an intransigent defendant who refuses to honor a declaration can bring a second action for injunctive relief (or damages).²⁰⁷ In short, a plaintiff can obtain injunctive relief to halt unconstitutional behavior if a declaration ultimately fails to effect that change.

B. Interlocutory Injunctions and Constitutional Determinations

The most significant consequence of eliminating a presumption of irreparable harm should occur in the preliminary injunction context. At present, courts employ the presumption in connection with requests for preliminary injunctive relief, and there is some surface logic to this approach. It is somewhat logical to conclude that if a harm is somewhat irreparable for final judgment purposes, it is also irreparable during the pendency of the lawsuit. The critical phrase in the *Elrod* plurality's rule—"for even minimal periods of time"²⁰⁸—suggests that all constitutional harm is irreparable for preliminary injunctive relief purposes.

As demonstrated above, however, the irreparable harm analysis for preliminary injunctions differs from the post-judgment analysis because it must include some consideration of the effectiveness of a post-judgment injunctive remedy, as well as a sense of how quickly and efficiently the court and the parties can get to a post-judgment environment.²⁰⁹ When courts reflexively presume irreparable injury and proceed to decide constitutional claims in the context of a preliminary injunction motion, the legal system and public interest are both disserved.

205. See *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992) (upon obtaining a declaratory judgment, a plaintiff may continue to pursue further declaratory or coercive relief in subsequent litigation).

206. See, e.g., *Harborside*, 959 F.2d at 372; *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir. 1988); *Smith v. City of Chicago*, 820 F.2d 916, 919 (7th Cir. 1987); *Minneapolis Auto Parts Co. v. City of Minneapolis*, 739 F.2d 408, 410 (8th Cir. 1984); *RESTATEMENT (SECOND) OF JUDGMENTS* § 33 cmt. c (1982).

207. See *Samuels v. Mackell*, 401 U.S. 66, 72 (1971).

208. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

209. See *supra* text accompanying notes 49–53.

A final judgment following a trial or summary judgment produces a definitive holding on the constitutionality of challenged conduct, as opposed to a ruling on a preliminary injunction motion, which is only a tentative decision that conduct is likely or possibly unconstitutional.²¹⁰ As the Supreme Court has recognized, it is not accurate to refer to constitutional determinations on preliminary injunction motions as “holdings,” because nothing has been definitively decided. Even where a court uses language suggesting that it is making a definitive determination of constitutionality, the ruling still will be considered provisional and non-final.²¹¹

Final determinations, following trial or summary judgment, would produce more definitive determinations on questions of constitutional law.²¹² They also would facilitate a more satisfactory appellate process. Appeals from final judgments are subject to the traditional standards of de novo review for legal conclusions and clearly erroneous for facts.²¹³ By contrast, appeals from interlocutory injunction rulings are subject to the far more deferential abuse of discretion standard.²¹⁴

Even where the parties are willing to accept an imperfect form of judicial determination, why should courts encourage the determination of constitutional issues of significant public

210. See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (rejecting the argument that a ruling on a preliminary injunction motion is tantamount to a decision on the underlying merits “because it improperly equates ‘likelihood of success’ with ‘success’”).

211. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 317 (1985) (citing *Camenisch*, 451 U.S. at 395) (commenting that “any conclusions reached at the preliminary injunction stage are subject to revision . . .”).

212. Indeed, far from constituting binding authority in other cases, legal conclusions made by a court in resolving a preliminary injunction motion are not even deemed binding on the parties in the case in question. *Camenisch*, 451 U.S. at 395 (“[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.”).

213. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) (de novo review of conclusions of law); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394–95 (1948) (facts reviewed under “clearly erroneous” standard).

214. See, e.g., *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931–32 (1975) (“But while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion.”); see also *McCreary Cnty. v. ACLU*, 545 U.S. 844, 867 (2005) (decision of the district court to grant a preliminary injunction is reviewed under the abuse of discretion standard).

import through an adjudicative technique that is more prone to error and less final than a trial?²¹⁵ As the Court acknowledged, the foundation for an assessment of constitutionality made in connection with a preliminary injunction motion “will be more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court.”²¹⁶ The inadequate nature of this procedure can be eliminated when a court exercises its prerogative to advance a trial on the merits or to convert a preliminary injunction motion into one for summary judgment.²¹⁷ Adjudicating the entire case on an expedited basis gives the plaintiff the opportunity for prompt redress of any irreparable harm while protecting the public’s right to a definitive determination.

C. *Attorneys’ Fees Shifting Jurisprudence and its Impact on Remedies*

1. *The Declaratory Judgment/Injunction Distinction*

A declaratory judgment cannot be a true and effective alternative to an injunction if courts treat it as a second class citizen. The Supreme Court has subordinated the declaration to the injunction for purposes of awarding attorneys’ fees.²¹⁸ As a consequence, civil rights plaintiffs have an incentive to pursue injunctions instead of declaratory judgments, and courts, desirous that

215. Indeed, many district courts have held that “there is generally a reduced evidentiary standard in preliminary injunction motions . . .” *E.g.*, *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002).

216. *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (noting that, with respect to a First Amendment claim, “the preliminary injunction hearing was necessarily hasty and abbreviated” and, not surprisingly, produced an erroneous conclusion).

217. In many instances, a case can be tried in the time period it takes to determine a preliminary injunction motion that requires an evidentiary hearing. *Denlow*, *supra* note 2, at 534 (“[I]n most situations it would be more efficient to consolidate the trial on the merits with the motion for a preliminary injunction under Rule 65(a)(2).”). Nevertheless, many district judges like preliminary injunction motions, because it allows them to conduct evidentiary hearings, to decide complex constitutional questions based on what is “likely,” and to secure a more deferential form of appellate scrutiny.

218. *See Rhodes v. Stewart*, 488 U.S. 1, 2–4 (1988) (per curiam) (explaining that a declaratory judgment issued in favor of a party does not automatically render that party a “prevailing party” within the meaning of Section 1988).

plaintiffs' lawyers get paid, are more prone to grant the former in preference to the latter.²¹⁹

Courts in Section 1983 cases are statutorily authorized to require a defendant to pay the attorneys' fees incurred by the plaintiff where the plaintiff is the "prevailing party."²²⁰ The Supreme Court repeatedly has held that the touchstone of the prevailing party inquiry is whether there has been a "material alteration" of the behavior of the defendant towards the plaintiff that is the product of a court order, and not a voluntary decision.²²¹ A declaratory judgment constitutes a court order and thus should plainly qualify as a basis for conferring prevailing party status on a plaintiff. Unfortunately, however, the Supreme Court has cast significant doubt on whether a declaratory judgment suffices for this purpose.

In *Hewitt v. Helms*, the Supreme Court held that a judicial finding of a due process violation that was tantamount to a declaratory judgment could not support an attorneys' fees award unless the plaintiff could make a further showing that the dec-

219. See, e.g., *McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010); *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006); *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003); *Watson v. Cnty. of Riverside*, 300 F.3d 1092, 1095-96 (9th Cir. 2002); *Young v. City of Chicago*, 202 F.3d 1000, 1000 (7th Cir. 2000).

220. 42 U.S.C. § 1988 (2006). Other civil rights statutes have similar provisions. See 29 U.S.C. § 216(b) (2006) (fee shifting provision incorporated into the Age Discrimination in Employment Act); 42 U.S.C. § 12205 (2006) (Americans With Disabilities Act); 42 U.S.C. § 2000e-5(k) (2006) (Title VII); 42 U.S.C. § 3613(c)(2) (2006) (Fair Housing Act); 42 U.S.C. § 1973l(e) (2006) (Voting Rights Act). Courts have interpreted these nearly-identically worded provisions consistently. See, e.g., *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

Although the term "prevailing party" is facially neutral, it is interpreted and applied so that a losing plaintiff rarely will be liable for fees. See Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 29 (1987). To recover attorneys' fees, a plaintiff need not prevail on all or most of its claims, nor even its primary claim. See *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-93 (1989). A defendant, on the other hand, must prevail on all of the claims asserted against it and prove that the claims were either frivolous or groundless. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

221. *Tex. State Teachers Ass'n*, 489 U.S. at 792-93. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 & n.7 (2001) (a consent decree, but not a settlement agreement, can confer prevailing party status); *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (absent a direct benefit, the plaintiff achieves only a symbolic victory, which § 1988(b) does not compensate); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (emphasizing the need for a court-ordered change).

laration, and not some other factor, caused the defendant to alter her behavior toward the plaintiff.²²² The Court reiterated this point in *Rhodes v. Stewart*, sustaining a denial of fees to plaintiffs who obtained a declaratory judgment that their First Amendment rights had been violated, but who failed to show that the judgment affected “the behavior of the defendant toward the plaintiff.”²²³

These rulings have influenced federal circuit courts to deny prevailing party status to plaintiffs who have obtained only declaratory relief, except where the plaintiff can make an additional showing that the declaration was a primary factor that caused a material change in the defendant’s behavior.²²⁴ These cases surely would dampen a plaintiffs’ civil rights attorney’s enthusiasm for declaratory judgments.

In contrast, securing an injunction, even one obtained consensually via stipulated settlement, has repeatedly been held to constitute a sound basis upon which to award fees.²²⁵ Courts have emphasized that an injunction specifically requires the defendant to alter her behavior toward the plaintiff.²²⁶ Indeed, most circuit courts have held that the granting of a preliminary injunction, even though it does not represent a definitive ruling on the

222. 482 U.S. at 761.

223. 488 U.S. at 4.

224. Compare *Brister v. Faulkner*, 214 F.3d 675, 687 (5th Cir. 2000) (plaintiffs who obtained a declaratory judgment that a policy was unconstitutional were not prevailing parties because that judgment did nothing to alter the legal relationship between those parties), *Bonner v. Guccione*, 178 F.3d 581, 594 (2d Cir. 1999) (jury’s finding of sexual harassment is of no more legal consequence than a declaratory judgment to that effect and does not support award of attorneys’ fees), and *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 847 (11th Cir. 1991) (same), with *Owner-Operator Indep. Drivers Ass’n v. Bissell*, 210 F.3d 595, 599 n.1 (6th Cir. 2000) (fees awarded where declaratory judgment forced defendant to resign and caused a restructuring of state agency).

225. See *Nat’l Black Police Ass’n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 527–29 (D.C. Cir. 1999) (plaintiffs, who obtained an injunction, had prevailing party status because the injunction altered the legal relationship between the parties). In *Buckhannon Board & Care Home*, 532 U.S. at 604 (2001), the Supreme Court held that a consent decree, because it affects a court-ordered change in the legal relationship of the parties, can confer prevailing party status, but that an ordinary settlement agreement does not; see also *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002).

226. See *Carbonell v. INS*, 429 F.3d 894, 901 (9th Cir. 2005) (stipulated injunction contained in a court order); *Oil, Chem. & Atomic Workers Int’l Union v. Dep’t of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002); *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

merits and does not constitute law of the case for purposes of further proceedings in the action, will confer prevailing party status on a plaintiff.²²⁷ These courts have reasoned that the issuance of an injunction removes any doubt as to why the defendant changed her behavior: The defendant was compelled to do so by a coercive injunctive decree enforceable under pain of contempt.²²⁸ Once a preliminary injunction is granted, a plaintiff can collect attorneys' fees, as long as the preliminary injunction is not "reversed, dissolved, or otherwise undone by the final decision in the same case."²²⁹ This clearly leads civil rights plaintiffs not only to seek injunctions, but also to seek such relief preliminarily so they can lock in their entitlement to fees, subject only to forfeiture in the event that they lose at trial.

2. *Nominal Damages and Fees Shifting*

Fee-shifting decisions concerning awards of nominal damages further demonstrate the influence that judicial pronouncements on prevailing party status have on the pursuit and awarding of remedies. As previously explained, federal courts have almost uniformly held that plaintiffs who are unable to prove actual damages from a constitutional violation are limited to an award of nominal damages.²³⁰ The qualifier "almost uniformly held" must be used because the Second Cir-

227. *See, e.g.*, *UFO Chuting of Haw., Inc. v. Smith*, 508 F.3d 1189, 1197 (9th Cir. 2007) (noting that a party has "prevailed . . . when it has obtained a preliminary injunction"); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 187 F.3d 633, Nos. 98-2565, 99-1110, 1999 WL 598846 at *11 (4th Cir. Aug. 10, 1999) ("[A] plaintiff that has received a preliminary injunction against the defendant's alleged unlawful conduct may obtain prevailing party status under 42 U.S.C. § 1988 without obtaining a favorable final judgment following a full trial on the merits of its claim."); *Haley v. Pataki*, 106 F.3d 478, 483-84 (2d Cir. 1997); *Dahlem v. Bd. of Educ.*, 901 F.2d 1508, 1512 (10th Cir. 1990); *Maloney v. City of Marietta*, 822 F.2d 1023, 1024 (11th Cir. 1987); *Grano v. Barry*, 783 F.2d 1104, 1109 (D.C. Cir. 1986); *Taylor v. City of Ft. Lauderdale*, 810 F. 2d 1551, 1558 (11th Cir. 1987); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980).

228. *See, e.g.*, *McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010); *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006); *see also* *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003) (awarding attorneys' fees to plaintiffs who obtained preliminary injunction); *Watson v. Cnty. of Riverside*, 300 F.3d 1092, 1095-96 (9th Cir. 2002) (same); *Young v. City of Chicago*, 202 F.3d 1000, 1000 (7th Cir. 2000) (same).

229. *Sole v. Wyner*, 551 U.S. 74, 83 (2007). Section 1988 requires lasting relief, not temporary, "fleeting success." *Id.*

230. *See supra* text accompanying note 170.

cuit has seemingly bucked this trend and has authorized—indeed, directed—lower courts to award presumed damages to plaintiffs who successfully prove that they are victims of certain constitutional violations.²³¹

Significantly, the Supreme Court ruled in *Farrar v. Hobby* that nominal damages cannot ordinarily support a basis for fee shifting.²³² The Court held that a plaintiff who is awarded nominal damages is technically a prevailing party, but that the de minimis nature of a nominal damages award should prompt the court to deny fees.²³³ Justice O'Connor filed a concurring opinion, adding that fees should be awarded in nominal damages cases where the legal issue decided was "significant" or where the decision "accomplished some public goal."²³⁴

Since *Farrar* was decided, most of the federal circuit courts have awarded attorneys' fees in cases involving nominal damages recoveries either by distinguishing *Farrar* on its facts²³⁵ or by citing to Justice O'Connor's concurring opinion.²³⁶ The Second Circuit, however, has remained faithful to the majority holding in *Farrar* and has held that a nominal damages award will produce no fee shifting.²³⁷ That the Second Circuit denies

231. See *Kerman v. City of New York*, 374 F.3d 93, 123, 130 (2d Cir. 2004) (presumed damages are appropriate for cases involving "loss of liberty," such as false arrest and unlawful detention).

232. 506 U.S. 103 (1992).

233. *Id.* at 117.

234. *Id.* at 121 (O'Connor, J., concurring). She opined that, even considering these indicia of success, *Farrar's* victory was de minimis. *Id.* at 122.

235. *Farrar* involved an unusually large disparity between the damages the plaintiff sought (\$17 million) and the damages the district court awarded (\$1). *Id.* at 116.

236. See, e.g., *Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169, 176 (3d Cir. 2009) ("[W]e find no case in which a court of appeals has interpreted *Farrar* to require the automatic denial of fees that Appellants seek when only nominal damages are awarded."); *Cummings v. Connell*, 402 F.3d 936, 947 (9th Cir. 2005); *Mercer v. Duke Univ.*, 401 F.3d 199, 206–09 (4th Cir. 2005) (plaintiff who obtained only nominal damages was awarded \$350,000 in attorney fees because the legal issue was significant and the litigation served a public purpose); *Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 121 (1st Cir. 2004) (municipal employees awarded only nominal damages but were awarded fees); *Murray v. City of Onawa*, 323 F.3d 616, 619 (8th Cir. 2003); *Brandau v. Kansas*, 168 F.3d 1179, 1182 (10th Cir. 1999); *Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir. 1996); *Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996).

237. See *Husain v. Springer*, 494 F.3d 108, 135 n.17 (2d Cir. 2007) (noting possible effect of counsel's concession that the only relief that will be sought is nominal damages on his ability to recover attorneys' fees); *Amato v. City of Saratoga*

attorneys' fees for nominal damages awards and has authorized presumed damages in lieu of nominal damages cannot be dismissed as coincidental. Here, too, the recognition of a presumed remedy may have been influenced by a plaintiff's ability to recover attorneys' fees.

The Supreme Court's fee-shifting jurisprudence has the unfortunate effect of inducing civil rights plaintiffs to pursue injunctive relief, specifically preliminary injunctive relief, in lieu of the equally effective declaratory judgment. That jurisprudence makes a mockery of the Court's earlier assurances that declaratory judgments and nominal damages awards are bona fide remedial alternatives in civil rights cases.

If courts insist upon proof of irreparable injury in constitutional cases and relegate plaintiffs who fail to make such a showing to the declaratory judgment remedy, they must eliminate any subordination of the status of that remedy. Plaintiffs obtaining declaratory judgments should face the same prospect of being able to recover attorneys' fees as plaintiffs who obtain injunctions. This would eliminate the incentive for civil rights plaintiffs to seek injunctions instead of declarations simply because the former will better position the plaintiff for fee-shifting.

CONCLUSION

Requiring proof of irreparable harm should have little impact in cases where the injury is apparent and incontrovertible. But it will be significant in those cases where the existence or extent of injury, let alone one that can fairly be classified as irreparable, are questionable. Courts will have to consider a variety of factors to determine whether permanent or provisional injunctive relief is appropriate: the nature of the right in question, the context in which the right is impacted, the severity of any deprivation, the burdens placed on the exercise of the right, the importance of a timely exercise of the right, and the adverse consequences beyond deprivation that will result. Courts will have to ensure that they do not effectively give governments a license to violate constitutional guarantees by making injunctions too difficult to ob-

Springs, 170 F.3d 311, 317 n.5 (2d Cir. 1999) (noting that nominal damage award can be grounds for denying an attorney's fee award); *Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996) ("*Farrar* indicates that the award of fees in . . . a case [involving a nominal damages recovery] will be rare.>").

tain. At the same time, injunctions should not be so easy to get that constitutional questions are always resolved through preliminary injunction rulings.

The federal criminal justice system has come to accept the notion that not all constitutional wrongs have judicial consequences. There is the harmless error doctrine there. In the civil domain, lawyers and judges are reluctant to accept that truth. When it comes to injunctions, judges seem unwilling to swallow the possibility of harmless unconstitutional conduct; so they presume that harm. It is time to restore the focus on harm and force district courts to find actual irreparable harm before issuing injunctions.