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Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, The

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The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*

David S. Schoenbrod**

TABLE OF CONTENTS

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INTRODUCTION

Suppose a judge finds that the defendant has or will soon cause illegal and irreparable harm to the plaintiff unless an injunction issues. That is, the plaintiff has met the traditional prerequisites for injunctive relief.[1] The plaintiff prays for an injunction that would prevent the harm or, if the harm has already occurred, that would restore the position that the plaintiff would have had but for the wrong—"plaintiff's rightful position."[2]

May the judge do anything but issue an injunction that completely and immediately preserves or restores the plaintiff's rightful position—no more and no less? Judges maintain that they have equitable discretion to grant injunctive relief that is less than complete or deny it altogether to avoid issuing injunctions that do more harm than good.[3] Such equitable discretion, however practical its purpose, takes away rights granted to the plaintiff by the law of liability embodied in stat-

1. There are of course additional prerequisites—such as jurisdiction over the parties and the subject matter, standing, whether a cause of action is available to this plaintiff, the court's authority to issue an injunction in this kind of case, and the absence of defenses such as laches, estoppel, and unclean hands.

Some scholars see irreparable harm and no adequate remedy at law as two separate requirements, while others do not. *Compare, e.g.*, Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 392-93 (1983) (two separate requirements) *with* D. LAYCOCK, MODERN AMERICAN REMEDIES 335-36 (1985) (two formulations of same rule).

2. D. LAYCOCK, *supra* note 1, at 15.

3. In *Hill v. TVA*, for example, the district court rejected the plaintiff's argument that the court's discretion was limited to fashioning a remedy to insure compliance with the legislation at issue in the case. 419 F. Supp. 753, 763 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978); *see also* D. DOBBS, REMEDIES 54 (1973) (noting that court may deny plaintiff equitable relief when injunction would cause economic waste).

utes, constitutions, or common law authorities. By denying protection to a plaintiff who has successfully proven that *only* an injunction will prevent illegal and irreparable harm, the judge leaves the plaintiff short of the rightful position.

Similarly, judges maintain that they have equitable discretion to grant injunctive relief that gives the plaintiff more than the rightful position.[4] Such use of equitable discretion enforces the plaintiff's rights granted by the rules of liability but takes away the defendant's right to engage in perfectly legal conduct. As a result, the judge puts the plaintiff in a better than rightful position and does so at the defendant's expense.

This Article asks when, if at all, judges may legitimately exercise their equitable discretion to grant more or less than the plaintiff's rightful position.[5] Those who conceive of judging as policy making believe that judges should have broad discretion in formulating injunctive relief to fine tune the policy decisions reflected in the law of liability.[6] In contrast, much, if not most, of the legal profession maintains that judges should employ methods of reasoning that differ from the policy making in which legislators and administrators engage.[7] Yet, efforts to state how judges should make decisions have focused on decisions as to liability rather than on decisions regarding the availability and scope of injunctive relief.[8] Without principles to

4. *See* Bailey v. Proctor, 160 F.2d 78, 82-83 (1st Cir.) (allowing district court to place in receivership and to liquidate solvent investment trust), *cert. denied*, 331 U.S. 834 (1947).

5. Professor David Shapiro notes that courts exercise discretion as to jurisdiction under a wide variety of doctrinal headings from forum non conveniens to abstention, topics beyond the scope of this Article. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548-61 (1985). That this discretion is handled under multiple doctrinal headings and often silently should amplify concern about the exercise of judicial power in the absence of articulated governing principles. Shapiro offers principles that confine that discretion regardless of the applicable jurisdictional doctrine. *See id.* at 579-89 (listing equitable discretion, federalism and comity, separation of powers, and convenience of judicial administration).

6. The leading example is Professor Abram Chayes. *See infra* text accompanying notes 49-56.

7. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 24-27 (2d ed. 1986) (stating judicial function includes policy-making role different from that of legislature or executive); H. HART & A. SACKS, LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 160-61 (tent. ed. 1958) (comparing judge's power of reasoned elaboration with president's power of continuing discretion); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-60 (1975) (stating that courts should rely on principle rather than policy when deciding hard cases).

8. *See, e.g.*, R. DWORKIN, LAW'S EMPIRE (1986) (using *TVA v. Hill* as one of four examples of judicial role, but focusing on decision about liability rather

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 more or less than the rightful position.

This Article articulates substantive principles to constrain and legitimate the exercise of equitable discretion in fashioning injunctive relief. In particular, the Article determines what considerations may justify an injunction that requires the defendant to do more or less than that which achieves the plaintiff's rightful position.[9] Part I shows that judges have failed to articulate a meaningful measure of injunctive relief. In Parts II and III, the Article examines the power to grant relief that gives the plaintiff less than the rightful position and the power to give the plaintiff more. In both contexts the Article critiques existing approaches—balancing the equities and tailoring the remedy—to the exercise of these powers and proposes and defends a new principle to guide equitable discretion. The proposed approach is normatively satisfactory because it reconciles the need for flexibility at the remedies stage with appropriate respect for statutes, constitutions, common law precedent, and the role of courts. The proposed principle is also descriptively useful because it accounts for the results in diverse and seemingly inconsistent cases. Indeed, the principle makes explicit what is implicit in the case law. Because courts have caused confusion by failing to make explicit how equity should honor the law of liability, the Article concludes that courts should use the proposed principle as the measure of injunctive relief.

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than remedy). Those scholars that have rejected unconstrained policy making in framing injunctive relief have not provided a meaningful principle by which to constrain it. As one scholar stated: "In public law cases, the relationship of remedy to violation is ambiguous and indirect, but it is not entirely non-existent." Schwarzchild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 906; *see also* Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 602 (1983) ("My own view, reached with difficulty and held with doubt, is that at least some form of Interest Balancing is indeed appropriate in constitutional cases. Competing costs should not always be excluded completely from the remedial calculus."). Professor Douglas Laycock has made the most headway toward providing meaningful guidance for fashioning injunctive relief. *See* D. LAYCOCK, *supra* note 1, at 213-321. This Article provides a principle to guide equitable discretion in formulating injunctive relief that should satisfy both those who accept and those who reject a policy-making concept of judging.

9. This Article does not address determining the plaintiff's rightful position.

I. THE FAILURE OF COURTS TO DEFINE THE SCOPE OF EQUITABLE DISCRETION

Remedies case law provides separate measures of injunctive relief for different substantive areas of law such as trespass or school segregation.[10] Most casebooks and treatises on remedies also compartmentalize the subject.[11] Dean Roscoe Pound

10. When courts have sought to generalize, they have done so in vague terms. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419-20 (1977) (tailoring remedy to fit nature and extent of constitutional violation); Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (stating that injunctive relief must be related to condition alleged to offend Constitution, must be remedial in nature, and must take into account interests of state and local authorities in managing their own affairs); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971) (balancing individual and collective interests). They fail to bridge the gap between aphorism and result. *See generally infra* text accompanying notes 18-40.

11. Chapters in remedies casebooks and treatises often have titles such as "Relief Against Contracts Induced by Fraud or Misrepresentation" or "Relief against Contracts Induced by Mistake." *See* H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY xiii (2d ed. 1948). McClintock's book is similar to other quality works in the field. *See, e.g.*, R. CHILDRES & W. JOHNSON, EQUITY, RESTITUTION AND DAMAGES xxiii-xv (2d ed. 1974); D. DOBBS, *supra* note 3, at xix-xxiii; E. RE, CASES AND MATERIALS ON REMEDIES xxxiii-xxxix (1982); R. THOMPSON & J. SEBERT, REMEDIES: DAMAGES, EQUITY AND RESTITUTION xi-xxvii (1983).

Professor Owen Fiss broke with this tradition by organizing his book on injunctions along transsubstantive lines. *See* O. FISS, INJUNCTIONS xv-xxiv (1972). The book, now in its second edition, deals with the question raised in this Article rather obliquely. *See* O. FISS & D. RENDLEMAN, INJUNCTIONS 79-88, 107-08 (2d ed. 1984) (discussing balancing equities and remedial discretion).

Professor Laycock's remedies casebook also avoids compartmentalization. *See* D. LAYCOCK, *supra* note 1, at ix-xxiv. His book addresses rightful position in one chapter, *see id.* at 213-321, and balancing the equities in another, *see id.* at 907-29. He does not distinguish rightful position from tailoring the remedy, as does this Article. *See infra* text accompanying notes 20-23. He explicitly recognizes a need for some exercise of equitable discretion when a court considers doing less than putting plaintiff in its rightful position but not when the court considers doing more. *See* D. LAYCOCK, *supra* note 1, at 245. At the same time, however, he points to concerns that would fit within this Article's proposed principle as a possible way of reconciling seemingly irreconcilable cases. For example, he suggests federalism concerns as a way of reconciling the first Milliken v. Bradley, 418 U.S. 717 (1974), opinion with Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *See* D. LAYCOCK, *supra* note 1, at 268-69. Because Laycock does not clearly distinguish tailoring from the rightful position concept, he does not recognize the close relationship between the tailoring and balancing the equities doctrines. *See infra* text accompanying notes 237-50.

Much of the law review writing also focuses on remedies for specific substantive areas. *See, e.g.*, Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984) (environmental statutes); Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779 (1976) (SEC injunctions); Gewirtz, *supra* note 8, *passim*

called such compartmentalization "the decadence of equity" because the purpose of equity's flexibility gets lost in crystallized, particularized, subject-specific rules.[12] The compartmentalization of remedial law stands in stark contrast to civil procedure[13] or conflicts of law,[14] each of which provides a set of "trans-substantive"[15] principles to guide decisions regardless of the subject matter of the case.

This compartmentalized approach is inadequate,[16] even when the violation falls within an established substantive compartment. Precedent only tells judges what measure of injunctive relief was appropriate in similar cases. Citing such precedent does not, however, discharge judges' responsibility to justify the exercise of power through explanations grounded in broadly applicable principles. Indeed, judges do generally feel the need to provide a principled justification for a finding of liability. They should be even more anxious to justify a decision, for example, to deny full injunctive relief to a plaintiff who lacks an adequate remedy at law. It is not enough to say that according to the judge's policy sense, the infringement of the plaintiff's legal rights is not important enough to justify the injunctive relief requested.

The compartmentalized approach to injunctions causes even greater difficulty when the violation does not fit neatly within an established substantive compartment because the law of remedies lacks transsubstantive principles to guide judges in fashioning injunctive relief. Professor Daniel Farber defends the absence of a transsubstantive approach to injunctive relief: "[t]he focus . . . should always be on congressional intent, un-

(racial segregation in schools). A particularly useful exception is Shreve, *supra* note 1.

12. *See* Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 26-27 (1905).

13. Shreve, *supra* note 1, at 395-96 (describing the "methodology movement in modern procedure").

14. Interest analysis and other features of choice of law are inherently transsubstantive. *See generally, e.g.*, B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 584-628 (1963) (defending theory that interest analysis should be starting point in any choice of law problem).

15. This term seems to have been coined by Robert Cover in describing the development of the rules of procedures. *See* Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) ("a great trans-substantive code of procedure"). The substantive law applicable in a given case may affect how these procedural rules are applied. *Id.*

16. *See generally* D. DOBBS, *supra* note 3, at 108-11 (reviewing standards for grant or denial of injunctive relief).

clouded by the equity mystique."[17] Judges cannot, however, escape the quite appropriate concern about the undisciplined use of judicial power by focusing solely on the intent behind the law of liability. Because legislation usually fails to define explicitly the degree of equitable discretion permissible in enforcing its rules of conduct, deducing legislative intent about injunctive relief is not a mechanical exercise. Interpretation is necessary, and it must rest upon understandings about the relationship between right and remedy. These understandings must, by their very nature, be transsubstantive.

Perhaps because courts need meaningful transsubstantive principles of injunctive relief, judges sometimes mistakenly write as if such principles exist. For example, in *Brown v. Board of Education*,[18] the United States Supreme Court stated that "the courts will be guided by equitable principles" in ending unconstitutional school segregation[19] but did not define those principles or show how the Court's remedial approach was consistent with the approach used in other substantive areas of law.

Two equitable doctrines might offer transsubstantive guidance on the measure of injunctive relief: balancing the equities and tailoring the remedy. Balancing the equities requires the judge to weigh the consequences, good and bad, of issuing an injunction to achieve the plaintiff's rightful position.[20] If the harm of an injunction achieving that position outweighs its benefits, the judge will deny or limit the injunction, thereby achieving something less than the plaintiff's rightful position.[21] Tailoring the remedy requires the judge to aim for the plaintiff's rightful position in fashioning injunctive relief.[22] In doing

17. Farber, *supra* note 11, at 515.

18. 349 U.S. 294 (1955). *Brown* is the seminal case on remedies for unconstitutional school segregation.

19. 349 U.S. at 300. The Court went on to state that "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* (footnotes omitted).

20. *See, e.g.*, Dolske v. Gormley, 58 Cal. 2d 513, 520-21, 375 P.2d 174, 179, 25 Cal. Rptr. 270, 275 (1962) (considering factors including good faith, proportionate hardships, plaintiff's delay in seeking injunction, and whether plaintiff will suffer irreparable injury).

21. *E.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 225-28, 257 N.E.2d 870, 873-74, 309 N.Y.S.2d 312, 317-18 (1970) (granting injunction to take effect only if defendant failed to pay permanent damages); *see infra* text accompanying notes 41-201.

22. *See* Fiss, *The Supreme Court, 1984 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46-47 (1979) (criticizing Supreme Court's use of

so the judge sometimes imposes conditions on the defendant that go beyond, putting the plaintiff in a position better than the rightful position.[23]

Standing alone, however, these doctrines fail to provide a meaningful measure of injunctive relief. Consider, for example, the famous snail darter case, *TVA v. Hill*.[24] The Tennessee Valley Authority (TVA), a federal agency, had built a dam that, when used, would have violated the Endangered Species Act, which prohibited federal agencies from injuring a critical habitat of an endangered species.[25] The threatened species, a fish called the snail darter, ate snails that could live only on gravel.[26] Once the dam's reservoir was full, sediment would gradually cover the gravel, thereby eliminating the snail's habitat and thus the snail darter's food source.[27] If tailoring the injunction to the plaintiff's rightful position had been the exclusive measure of relief, the judge would have had to enjoin the dam's use and prohibit filling the reservoir. Instead, the lower court balanced the equities, holding that "a court of equity" should not render an expensive dam useless to save an obscure species discovered only after TVA had constructed the dam.[28] The Supreme Court disagreed, holding that the violation must cease because Congress had made species preservation the statute's paramount goal.[29]

In *TVA* the Supreme Court seemed to reject the balancing doctrine in favor of tailoring.[30] Suppose, however, that scientists agreed that filling the reservoir would have created a new, upstream habitat for the snail darter at the same time that it illegally destroyed the old habitat.[31] If achieving the statute's

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tailoring principle in school desegregation cases); *see also* Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 536, 543-45 (1982) (noting that court will weigh efficacy of spectrum of options in tailoring remedy).

23. *E.g.*, Bishop Processing Co. v. Davis, 213 Md. 465, 470-76, 132 A.2d 445, 447-50 (1957) (enjoining operation of processing plant when no less severe method existed to prevent plant's emission of nauseating odor); *see infra* text accompanying notes 202-17.

24. 437 U.S. 153 (1978).

25. Hill v. TVA, 419 F. Supp. 753, 754-55 (E.D. Tenn. 1976) (citing Endangered Species Act of 1973, § 7, 16 U.S.C. § 1536 (1976)), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

26. *Id.* at 755-56.

27. *Id.* at 756.

28. *Id.* at 760.

29. TVA v. Hill, 437 U.S. 153, 193-95 (1978).

30. *Id.*

31. The judge might dispose of this situation by construing the statute to

goals is more important than ending violations, as suggested by some courts,[32] including the Supreme Court,[33] then the judge might well deny relief. Suppose, however, that despite the new upstream habitat, the snails and therefore the fish were nonetheless endangered by erosion from privately owned farms. Destruction of the snail darter's habitat by private parties would not violate the statute. If statutory goals are the measure of relief, the judge would nevertheless order TVA to protect the snails from the farmers. If so, the snail darter would be in a better than rightful position because it would receive broader protection than that granted by the statute.[34]

These examples illustrate that the balancing and tailoring doctrines leave a host of questions unanswered. For example, under the tailoring doctrine, it is unclear whether the injunction must fit the rule that was violated, the rule's goals, or some looser measure. Similarly, it is unclear why balancing was available in some cases[35] but not in others.[36] As the *TVA* case demonstrated,[37] courts disagree about the applicability of balancing even in the same case. It is not at all clear how balancing the equities differs, if at all, from second-guessing the decisions of legislators or others who laid down the law of liability.

Moreover, the mere existence of two separate doctrines causes confusion. Balancing seems to sanction departures from rightful position while tailoring pulls in the other direction. Yet balancing the equities and tailoring deal with the same sub-

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require designation of the new snail bed and reversing the designation of the old one. The statute, however, may not support such an interpretation.

32. *See infra* notes 53-56 and accompanying text.

33. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 314-15 (1982) (stating that enjoining violation was not sole means of ensuring compliance with statutory purpose); *infra* notes 76-79 and accompanying text. *Weinberger* was recently reaffirmed in a preliminary injunction case. *See* Amoco Prod. Co. v. Village of Gambell, 107 S. Ct. 1396, 1403 (1987).

34. The Supreme Court has held that a violator may be ordered to do more than what a statute requires of a nonviolator. A sharply divided Supreme Court so held in recent cases on judicially ordered affirmative action remedies for employment discrimination. *See infra* notes 251-53 and accompanying text. Whether TVA should prevail is discussed at *infra* text accompanying notes 100-08.

35. For example, the Supreme Court used the balancing the equities approach to fashion injunctive relief in Weinberger v. Romero-Barcelo, 456 U.S. at 312.

36. *See, e.g.*, Little Joseph Realty v. Town of Babylon, 41 N.Y.2d 738, 745, 363 N.E.2d 1163, 1168, 395 N.Y.S.2d 428, 433-34 (1977).

37. TVA v. Hill, 437 U.S. 153 (1978); *see supra* text accompanying notes 24-30.

stantive problem—the extent to which courts may respond to concerns other than the plaintiff's rightful position.[38] The different labels for these doctrines come not from their content but from the context in which they are applied: balancing responds to pleas to do less than achieve the plaintiff's rightful position, while tailoring responds to pleas that the court should do more.[39] Consequently, the same principle should guide equitable discretion whether it has the balancing *or* the tailoring label.[40]

II. GRANTING LESS THAN THE PLAINTIFF'S RIGHTFUL POSITION

A. THE BASIC DOCTRINE: BALANCING THE EQUITIES

Balancing the equities allows a judge to withhold injunctive relief altogether or to issue an injunction that stops short of fully achieving the plaintiff's rightful position.[41] Balancing involves more than a judicial cost–benefit analysis. In deciding whether to grant or deny the injunction, balancing requires the

38. Adopting the view that tailoring and balancing address the same substantive problem would resolve a conflict among scholars. Some scholars view balancing the equities as a hurdle that the plaintiff must surmount before the court tailors the remedies, *see* D. DOBBS, *supra* note 3, at 52-55; Plater, *supra* note 22, at 543, while another sees balancing as following the court's fashioning of the remedy, *see* D. LAYCOCK, *supra* note 1, at 921-22. Both perceptions are correct views of parts of the larger picture, which encompasses three essential stages in the development of equitable relief. First, before balancing the equities, a judge determines at least approximately the plaintiff's rightful position because a judge who does not know the rightful position does not know what to balance. Second, the court balances the equities to determine whether it should aim to achieve the plaintiff's rightful position or something less. Third, the court tailors specific, enforceable injunction terms designed to achieve the desired position. This third stage also can require trade-offs because enforceability may well prompt injunction terms that limit the defendant's otherwise lawful conduct. The seeming conflict among scholars arises from focusing on fewer than all three of these stages. This partial view leads to problems in Plater's description of equitable discretion. *See infra* notes 57-84 and accompanying text.

These three stages provide analytical constructs rather than descriptions of judicial conduct. In reality, a judge might not consciously undertake the first stage or might reconsider whether to issue an injunction at all after confronting the difficulties of tailoring a remedy to achieve the plaintiff's rightful position.

39. *See supra* notes 20-23 and accompanying text.

40. *See infra* text accompanying notes 202-04.

41. Although authors may not mean exactly the same thing, the doctrine also is known as "the balance of convenience," F. MAITLAND, EQUITY 327 (A. Chaytor & W. Whittaker rev. 2d ed. 1947), or "[b]alancing [e]quities and [h]ardships," D. DOBBS, *supra* note 3, at 52.

court to weigh not only the quantitative impact on the parties and the public,[42] but also the parties' ethical positions[43] and the fairness to all concerned.[44] For example, in *Boomer v. Atlantic Cement Co.*,[45] the court held that the cement company could continue its nuisance because abatement would require closing a $45 million plant that employed hundreds of workers while the nuisance reduced the plaintiffs' property values by only damages.[46] The injunction allowed the defendants, who argued that closing down the plant would be unfair,[47] to avoid abatement by paying the plaintiffs $185,000.[48]

B. CONTRASTING APPROACHES TO BALANCING THE EQUITIES IN STATUTORY CASES

1. The Policy-Making Approach

Scholars who conceive of the judicial function as policy making see equitable discretion as an opportunity to fine tune the policy decisions embodied in the law of liability.[49] Professor Abram Chayes, for example, argues that judges should have broad equitable discretion to frame injunctive relief.[50] He suggests that in traditional, private law cases, balancing the equities of the case involves "large discretionary elements" and that in public law litigation—which includes statutory, constitutional, and common law cases with broad public impacts—"the discretionary component is dramatically enhanced."[51] Indeed,

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42. Some courts will consider the detriment but not the benefit to the public of granting the injunction. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 225-26, 257 N.E.2d 870, 871-72, 309 N.Y.S.2d 312, 314-15 (1970) (stating that protecting the general public from pollution was not task for courts).

43. The court will, for example, consider the intentional nature of the defendant's violation. Similarly, it will consider the plaintiff's apparent encouragement of the defendant's conduct or delay in bringing suit, regardless of whether such conduct rises to estoppel or laches. *See* D. DOBBS, *supra* note 3, at 52-54.

44. *See id.* at 51-54.

45. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

46. *Id.* at 225-28, 257 N.E.2d at 873-75, 309 N.Y.S.2d at 316-19.

47. *Id.* at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

48. In essence, the court forced the plaintiffs to sell an easement to pollute their homes. *See id.* at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319.

49. R. DWORKIN, *supra* note 8, at 13, 108-09 (arguing that most judges and lawyers view law as interpretive enterprise, not that they accept Dworkin's theory of interpretation).

50. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-94 (1976).

51. Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 46 (1982); *see also* O. FISS & D. RENDLEMAN, *supra* note 11, at 107-08. Chayes does not explicitly give common law examples of public law lit-

Chayes characterizes the decree in public law litigation as "*pro tanto* a legislative act" and the judge as a "policy planner."[52] Under Chayes's position, the judge apparently enjoys the same broad equitable discretion to fashion injunctive relief in constitutional, common law, and statutory cases.

The policy-making approach, however, fails to explain what judges actually do in cases involving statutory violations. Theoretically, the approach allows judges at the remedial stage to countermand legislative priorities established in the law of liability by ignoring the statutory rule based on their own policy choices. Yet, the *TVA* majority, enforcing the rule of liability, asserted that the judge could not use equitable discretion to second-guess the legislative policy embodied in the statute.[53] Similarly, in *Little Joseph Realty v. Town of Babylon*,[54] when the violator of a zoning ordinance cited *Boomer* as precedent for withholding injunctive relief, the court distinguished *Boomer* on the basis that liability in that case arose from common law nuisance rather than a statute or an ordinance.[55] The court held that an injunction must issue to curb the zoning violation because otherwise the court would be usurping the legislative function by rezoning the land.[56]

Professor Zygmunt Plater who, like Chayes, views balancing the equities as policy making,[57] recoils from Chayes's broad approach, asserting that courts lack the discretion to balance the equities in denying injunctive relief for continuing statutory

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igation, but some common law cases have the characteristics of public law cases. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); *infra* notes 185-91 and accompanying text.

52. Chayes, *supra* note 50, at 1300 (emphasis in original). Fiss seems to concur in the vision of the judge's role. *See* Fiss, *supra* note 22, at 29 (asserting that courts' function is not just to resolve disputes, but to give meaning to public values); *see also, e.g.*, J. LIEBERMAN, THE LITIGIOUS SOCIETY 115 (1981) (stating that simple court decree is not sufficient remedy for complexity of public law litigation).

Justice Rehnquist embraced a Chayes-like policy-making approach, at least in one context, in TVA v. Hill, 437 U.S. 153, 213 (1978) (dissenting). He argued that the District Court had properly exercised its equitable discretion in denying the injunction because Congress's purpose in preserving the snail darter "was more than outweighed" by "the significant public and social harms that would flow from such relief and . . . [TVA's] demonstrated good faith." *Id.*

53. 437 U.S. at 194-95.

54. 41 N.Y.2d 738, 363 N.E.2d 1163, 395 N.Y.S.2d 428 (1977).

55. *Id.* at 744, 363 N.E.2d at 1167-68, 395 N.Y.S.2d at 433 (citing *Boomer*, 26 N.Y.2d at 225-26, 257 N.E.2d at 873, 395 N.Y.S.2d at 316-17).

56. *Id.* at 745, 363 N.E.2d at 1168, 395 N.Y.S.2d at 433.

57. Plater, *supra* note 22, at 535.

violations.[58] Plater bases his rule on the belief that judges should avoid intruding upon legislative choices.[59] Plater perhaps fears that judicial policy making in the form of balancing the equities could undercut victories won in the legislative forum.[60]

Plater's desired ban on judicial second-guessing of legislative judgments, however, conflicts with the widespread application of traditional equitable discretion in cases involving statutory violations. For instance, in *Hecht Co. v. Bowles*, the violator of a wartime price control statute argued that an injunction was unwarranted because the violation was unintentional and he had instituted new procedures to prevent future violations.[61] Accepting that argument, the Supreme Court held that the trial judge indeed had equitable discretion to refuse to enjoin the violator and thereby deviate from the statutory rule.[62]

Attempting to distinguish *Hecht*, Plater argues that the case does not mean that judges have the discretion to allow violations of the law to continue.[63] He distinguishes balancing the equities from two other kinds of equitable discretion involved in issuing an injunction.[64] First, there is "threshold balancing," which includes various prerequisites to injunctive relief.[65] If the prerequisites to injunctive relief exist, the court can engage in balancing the equities to determine what conduct the court

58. *Id.* at 527.

59. *Id.* at 590-91.

60. Plater lawyered for the environmental interests in TVA v. Hill, 437 U.S. 153 (1978). *See* Plater, *supra* note 22, at 592 n.320.

61. 321 U.S. 321, 325-26 (1944).

62. *Id.* at 328.

63. *See* Plater, *supra* note 22, at 546-56.

64. *Id.* at 536. Plater's distinctions are not altogether new. *See, e.g.*, Chayes, *supra* note 51, at 46 (distinguishing discretion to make remedial arrangements from decree's ultimate purpose of rectifying defendant's conduct). Fiss and Rendleman list seven kinds of discretion involved in the issuance of injunctions. *See* O. FISS & D. RENDLEMAN *supra* note 11, at 107-08 (open-ended terms in determining liability, prerequisites to permanent relief, prerequisites to preliminary relief, choice of methods in enforcing injunction, question of when injunction will be enforced, equitable defenses, control of sanctions for violations of injunction). Plater's categories are combinations of some of those listed by Fiss and Rendleman. *See, e.g.*, Plater, *supra* note 22, at 536-37 ("threshold balancing" combines prerequisites to permanent relief and equitable defenses).

65. Plater, *supra* note 22, at 537. For example, Plater includes in threshold balancing various kinds of estoppel such as laches, unclean hands, lack of adequate remedy at law, and irreparable harm. *Id.*

will permit or forbid.[66] Second, the court has discretion in "fashioning remedies" to determine what relief, if any, will make the defendant conform to the conduct decided upon at the balancing stage.[67] Plater concludes that in a statutory case the court has discretion in threshold balancing and fashioning remedies but that *"it has no discretion or authority to balance the equities so as to permit that violation to continue."*[68]

Plater justifies this distinction by arguing that balancing the equities involves judicial second-guessing of legislative decisions while threshold balancing and fashioning the remedy do not.[69] Threshold balancing and fashioning the remedy, however, entail discretion closely related to that which Plater would forbid—balancing the equities—as contrary to legislative choice. For example, the doctrines of impossibility, laches, estoppel, and unclean hands, all involved in threshold balancing or fashioning remedies,[70] require courts to balance enforcement of statutory rules against other priorities.[71] Plater ultimately

66. In Plater's terms, the court decides "which conduct will be permitted to continue and which will be subordinated." *Id.* at 536.

67. *Id.* at 536, 543. This category includes decisions to grant an injunction and specify its terms and decisions to deny an injunction either because the defendant will no longer violate the law or because compliance would be impossible. *Id.* at 543-44.

68. *Id.* at 527 (emphasis in original). Plater asserts that the courts have followed his rule without adequately articulating it. *Id.* at 567.

69. *Id.* at 592. Plater points particularly to Hecht Co. v. Bowles, 321 U.S. 321 (1944), as no threat to legislative decision making because the defendant will adhere to the legislated rules of conduct. *See* Plater, *supra* note 22, at 556.

70. *See supra* notes 65, 67 and accompanying text.

71. Plater implicitly acknowledges that threshold balancing involves weighing legislative goals against other priorities. *See* Plater, *supra* note 22, at 537 n.39 (noting that plaintiff with unclean hands might prevail over defendant whose statutory violation was egregious) (citing Leo Feist v. Young, 138 F.2d 972, 973 (7th Cir. 1943)).

For an example of the prerequisites to injunctive relief involving balancing the enforcement of statutory rules against other priorities, Plater would allow discretion to forgive compliance when it is impossible, but not when it is impracticable. *Id.* at 580-82. The difference between impracticability and impossibility, however, is one of degree rather than kind. The impossibility doctrine in contract law has been expanded to encompass extreme expense as well as literal impossibility. *See, e.g.*, Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966); 6 A. CORBIN, CONTRACTS § 1320, at 323 (1962).

The de minimis doctrine, which authorizes judges to ignore statutory violations that cause only limited damage, is another element of threshold balancing that resembles balancing the equities. The size of the damages is, however, also a factor in balancing the equities. The de minimis doctrine might be distinguished from ordinary balancing of the hardships in that the former considers only the size of the harm to the plaintiff while the latter also considers the

fails to differentiate between equitable discretion that does and does not challenge legislative perogatives, and thus his attempt to distinguish *Hecht* fails.

Indeed, Plater's rule is underinclusive: it prohibits balancing equities in formulating injunctive relief because balancing allegedly intrudes upon legislative choices, yet it permits the exercise of other forms of equitable discretion that also require courts to balance legislative goals. Plater does, however, recognize this problem of underinclusiveness in one context. He acknowledges that postponing compliance with a statute on the basis of cost or feasibility involves balancing similar to that involved in balancing the equities.[72] Attempting to avoid this difficulty, he states that "courts must order immediate compliance where it is physically and legally feasible."[73] Plater's broad standard for feasibility would encompass almost every statutory case, and consequently most injunctions would simply enforce the statute's rule immediately.

Courts, however, use a standard of feasibility far more flexible than Plater's standard in granting time to comply. In *Weinberger v. Romero-Barcelo*,[74] the district court rejected the Navy's contention that dropping bombs into the water for target practice was not pollution under the Clean Water Act,[75] which prohibited polluting without a permit.[76] On appeal the Navy sought to continue target practice while it applied for the statutorily required permit.[77] Plater argued that the Supreme

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stake of the defendant and the public. Nonetheless, the amount of harm to the plaintiff small enough to qualify as de minimis has no absolute size, but it is likely in practice to be relative to the plaintiff's and defendant's overall circumstances.

De minimis damages also cannot be distinguished from balancing the equities on the basis that they are ordinarily involved in a situation in which the plaintiff's interest is significantly smaller than the defendant's, because that is also true for many instances in which courts balance the hardships. In *Boomer*, for instance, the court balanced the equities when the plaintiffs incurred $185,000 in permanent damages and the defendant's plant had cost more than $45,000,000. 26 N.Y.2d 219, 225-26, 257 N.E.2d 870, 873, 309 N.Y.S.2d 312, 316-17 (1970); *see supra* notes 45-48 and accompanying text. In cases in which balancing stopped specific performance of a covenant with regard to the use of land, the relative magnitude of the plaintiff's and the defendant's interest seemed to count only when the disparity was grossly in the defendant's favor. *See infra* notes 197-201 and accompanying text.

72. *See* Plater, *supra* note 22, at 581.
73. *Id.* at 582.
74. 456 U.S. 305 (1982).
75. *Id.* at 309 (citing 33 U.S.C. §§ 1311(a), 1323(a) (1982)).
76. *Id.* at 308 (citing § 1311(a)).
77. *Id.* at 310-11.

Court should require the Navy to stop immediately, apparently because it was physically and legally feasible to avoid violating the law.[78] The Supreme Court disagreed, allowing the Navy to continue its target practice.[79]

Plater errs in viewing *Weinberger* as an aberration[80] because many other courts, even in the pollution area, also have permitted violators to continue with their activities while taking the steps necessary to comply with the applicable statute.[81]

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78. *See* Plater, *supra* note 22, at 576-79, 592-94.

79. Weinberger v. Romero-Barcelo, 456 U.S. at 320.

80. *See* Plater, *supra* note 22, at 594.

81. *See, e.g.*, Alabama Air Pollution Control Comm'n v. Republic Steel Corp., 646 F.2d 210, 214-15 (5th Cir. 1981) (upholding trial court's denial of injunction and civil penalty against violator as within sound discretion of court because violator was making good faith efforts to reduce pollution); Environmental Defense Fund v. EPA, 636 F.2d 1267, 1286-87 (D.C. Cir. 1980) (refusing to invalidate regulations that the court held were invalidly adopted under statute forbidding use of PCBs after certain date unless EPA approved regulation, and instead remanding "those portions of the record for further proceedings consistent with this opinion," thereby allowing certain economically important uses of PCBs to continue); Conservation Soc'y v. Secretary of Transp., 508 F.2d 927, 937-39 (2d Cir. 1974) (finding that public interest justified allowing construction of highway to proceed despite NEPA violation and assumed water pollution violation), *vacated*, 423 U.S. 809 (1975); 1 W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER 517-19 (1986) (discussing widespread use of delayed compliance orders under Clean Air Act).

In the famous *Reserve Mining* litigation, courts allowed a serious polluter a decade to comply. *See* Reserve Mining Co. v. Minnesota Pollution Control Agency, 434 F. Supp. 1191 (D. Minn. 1976); United States v. Reserve Mining Co., 417 F. Supp. 791 (D. Minn. 1976); 417 F. Supp. 789 (D. Minn.), *aff'd*, 543 F.2d 1210 (8th Cir. 1976); 412 F. Supp. 705 (D. Minn. 1976); 408 F. Supp. 1212 (D. Minn. 1976); 394 F. Supp. 233 (D. Minn. 1974), *modified sub nom.* Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975), *modified en banc sub nom.* Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976) (recusal order); 380 F. Supp. 11 (D. Minn.), *stayed*, 498 F.2d 1073 (8th Cir.), *motion to vacate stay denied*, 418 U.S. 911, *motion to vacate or modify stay denied*, 419 U.S. 802 (1974) (Douglas, J., dissenting); *see also* Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977); Reserve Mining Co. v. Minnesota Pollution Control Agency, 294 Minn. 300, 200 N.W.2d 142 (1972). Plater would distinguish the *Reserve Mining* litigation on the basis that the parties and judges seemed to think of it as more of a common law case. *See* Plater, *supra* note 22, at 571-74. As such, it was outside the scope of Plater's rule banning judicial discretion in statutory cases. As Plater acknowledges, however, that litigation involved violations of three different statutes. *Id.* at 572-75. He dismisses two of the statutes on the basis that they provided room for judicial discretion in defining liability or the court's remedial role. *Id.* at 572. If Plater means to suggest that courts should be denied equitable discretion only when the statute defines liability inflexibly, his rule is of much narrower import than he implies. In any event, the third statute defined liability inflexibly under Plater's terms. It prohibited discharges into the waters without a permit. *Id.* at 573 (citing 13 U.S.C. § 407 (1976)). Plater dismissed that statute by pointing out that its violation came to the fore only after the other violations were established and that its relevance

Judges who grant time for compliance do not necessarily countermand legislative priorities because most legislation expressly grants time to comply with new legal requirements.[82] Furthermore, when regulators themselves violate statutory timetables for issuing regulations, judges use a standard of reasonable feasibility to determine how quickly they must cure their violations.[83] Courts therefore do not accept Plater's rigid standard of feasibility for determining compliance time, and so he fails to deal adequately with the one context in which he recognizes the underinclusiveness of his rule.

In addition to being underinclusive in banning the exercise of discretion that intrudes on legislative choices, Plater's rule does not explain the case law. Plater argues, based on his search of the case law, that his rule comports with what judges

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to the remedy was simply overlooked. *Id.* at 573. In Plater's view, proper recognition of the Refuse Act violation would have meant an automatic injunction. *See id.* at 579-82.

This explanation is difficult to credit for two reasons. First, the litigation lasted for years after the Refuse Act violation was found. *See id.* at 573. The case was hotly contested and came to the attention of numerous lawyers and judges, *id.* at 571 n.220, specifically on the issue of how to exercise equitable discretion, *see id.* at 572. That none of them suggested that there was no discretion to exercise refutes Plater's assertion that judges invariably and instinctively refuse to allow statutory violations to continue. Second, if the court had issued an injunction forbidding the violation, the plant would have had to close for many years while it developed alternative ways of disposing of the waste. The plant was the predominate employer in an area of high unemployment and accounted for 12% of domestic iron ore production. Reserve Mining Co. v. EPA, 514 F.2d 492, 535-37 (8th Cir. 1975), *modified sub nom.* Reserve Mining v. Lord, 529 F.2d 181 (8th Cir. 1976). The court simply would not close such a plant so long as its threat to health was not acute and its operation seemed to work in good faith to correct the violation.

82. *E.g.*, Clean Air Act, 42 U.S.C. §§ 7410(a)(2)(A), 7412(c)(1)(B), 7521(a)(2) (1982). The Clean Water Act's provision outlawing the discharge of pollutants, 33 U.S.C. § 1311(a), is an exception in form, but not substance. Before enactment of the Clean Water Act in 1972, judicial interpretation of another law meant that most sources of water pollution were in violation for failure to have permits to pollute. 2 W. RODGERS, *supra* note 81, at 12, 167-69, 372 (1986) (citing § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (1982)). Obviously, the Justice Department did not move to shut down American industry. Equally obviously, when the Clean Water Act prohibited pollution without a permit, pollution sources could not apply for and receive permits immediately. EPA did not move against sources that lacked permits until the mid-1970s.

83. Illinois v. Costle, 12 Env't Rep. Cas. (BNA) 1597, 1598-99 (D.D.C. 1979). In *Costle* Judge Gesell based the timetable for the EPA's transition to compliance upon the agency's assessment of how it should allocate its resources among many competing tasks. *Id.* at 1598. As a result the agency got years to complete tasks that the statute mandated should be completed in a matter of months. *See id.*

actually do, because he discovered no cases that used balancing the equities to allow statutory violations to continue.[84] Courts, however, frequently do balance the equities to allow violations to continue, not just temporarily, but permanently.[85] A line of such cases has arisen under a statute that forbids filling in certain wetlands without a permit from the Corps of Engineers.[86] Although judges ordinarily cure violations by ordering the defendant to restore the wetland,[87] which achieves the plaintiff's rightful position, courts do claim the discretion to order something other than this usual remedy.[88] Factors considered include the feasibility of restoring the original site, other ways of achieving environmental goals, and whether the defendant violated the law knowingly.[89]

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84. Plater cites older Supreme Court cases for the proposition that "statutory declarations of public policy would limit the court's equitable discretion with regard to substantive rules of conduct." *See* Plater, *supra* note 22, at 557 (citing United States v. City of San Francisco, 310 U.S. 16 (1940); Virginia Ry. v. System Fed'n 40, 300 U.S. 515 (1937)). The language of these cases, however, emphasizes the need for remedies that do not conflict with statutory goals rather than the rote issuance of injunctions requiring compliance with statutory rules. *See, e.g.*, United States v. City of San Francisco, 310 U.S. at 31-32 ("We cannot accept the contention that administrative rulings—such as those here relied on—can thwart the plain purpose of a valid law."); *see also* Virginian Ry. v. System Fed'n 40, 300 U.S. at 552-53 ("The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief.").

85. *See infra* text accompanying notes 145-46.

86. *See infra* note 89.

87. Restoring the wetland involves removing the fill and replanting indigenous vegetation.

88. *See, e.g.*, United States v. Context-Marks Corp., 729 F.2d 1294, 1296-97 (11th Cir. 1984) (upholding partial restoration order on equitable grounds); United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1301 (5th Cir. 1976) (noting that courts should approach such cases "with a touch of equity"). *Sexton Cove* is the leading case stating this position. *See* United States v. Cumberland Farms, 647 F. Supp. 1166, 1180 (D. Mass. 1986) (stating that parties agreed that *Sexton Cove* provided legal framework for determining whether restorative injunction was appropriate), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1016 (1988).

89. For example, one court allowed a public college that had filled in a mangrove swamp to leave the wetland unrestored and ordered the college to turn other dry land into a replacement wetland. *See* United States v. Board of Trustees, 531 F. Supp. 267, 275 (S.D. Fla. 1981). The court noted that the college had not willfully violated the statute and that restoration of the original site would disrupt the campus. *Id.* In another case, farmers that had put a wild wetland into cranberry production were not required to destroy cranberry beds but only had to take action, such as maintaining water levels, to prevent additional wetland harm. United States v. Huebner, 752 F.2d 1235, 1245 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985). In a case arising under a state

Another example of courts balancing the equities in cases involving statutory violations arises under title VII's prohibition against employment discrimination.[90] In these cases judges ordinarily grant injunctions that prohibit future violations and require reparative relief to restore the rightful position of the plaintiff.[91] Courts, however, claim discretion to withhold reparative relief, but only for reasons that do not defeat the broad purposes of the Act.[92] The employer's good faith is not considered a sufficient reason to withhold relief, but avoiding the disruption of the legitimate expectations of nonvictim employees with seniority may be.[93]

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law forbidding removal and fill in state waters without a permit, the Oregon Supreme Court answered affirmatively the question of whether "despite that the defendant has acted contrary to the command of the legislature, the equities are such that the violation may continue if its ill effects are alleviated." Oregon *ex rel.* Cox v. Davidson Indus., 291 Ore. 839, 846-47, 635 P.2d 630, 634 (1981). The court was fully aware of the distinction made by Plater, *supra* note 22, at 529, between situations in which failure to grant an injunction does not result in a continuing violation of the law, *see supra* text accompanying note 58, and those in which such failure does result in continuing violations, *see, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321 (1944). *See* 291 Ore. at 846-47; 635 P.2d at 635.

90. *See* 42 U.S.C. § 2000(e) (1982). Another example involves the Federal Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982) (FLSA). Under the FLSA the remedy for failure to pay minimum wage or overtime is both preventive and reparative. The FLSA prohibits future violations and restores the victims of the present violation to their rightful positions by affirmatively decreeing that the defendant shall give back pay. *Id.*; *see* Wirtz v. Milton J. Wershow Co., 416 F.2d 1071, 1073 (9th Cir. 1969) ("The court having jurisdiction of the cause enjoys 'the historic power of equity to provide complete relief in the light of the statutory purposes.' " (quoting Mitchell v. Robert DeMario Jewlery, Inc., 361 U.S. 288, 335 (1959))). *But cf.* Mitchell v. Bland, 241 F.2d 808, 810 (5th Cir. 1957) ("The nature of injunctive relief is that it is prospective, prophylactic, preventive,—not punitive."). Nonetheless, a balancing of the equities can result in underpaid employees not receiving back pay. *See, e.g.*, Schultz v. Mistletoe Express Serv., 434 F.2d 1267, 1273 (10th Cir. 1970) (stating that grant or denial of restitution depends upon equitable considerations).

91. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (noting reparative relief under title VII typically includes backpay).

92. *Id.* (dictum).

93. *Id.* at 422 ("[U]nder Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor."); *see also* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 721-23 (1978) (holding that gender discrimination in pension contributions should be remedied only prospectively because of nonvictim employees' legitimate expectations); International Bhd. of Teamsters v. United States, 431 U.S. 324, 376 (1977) (asserting that "equitable balance . . . should be struck between statutory rights of victims and the contractual rights of non-victim employees").

In *Manhart*, the reparative injunction involved monetary compensation. 435 U.S. at 721-23. Whether the relief is called an injunction or damages

Although the wetland and title VII cases differ from *TVA*[94] and *Weinberger*[95] because they involved repairing past violations rather than preventing future ones,[96] the rightful position concept calls for courts to issue injunctions for both purposes. Reparative injunctions differ from preventive injunctions in that undoing a statutory violation is generally more difficult than avoiding it in the first place, a factor that the legislature probably did not consider when it formulated and enacted the law of liability. Preventive injunctions, however, also can present such factors, as when it is more difficult for a defendant to end an ongoing violation than it would have been to avoid the violation in the first place and the legislature anticipated that the statute would have a prospective impact only. Courts have declined to issue preventive injunctions in such cases, thereby allowing the violation to continue at least for awhile.[97] The

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should not change the result. *Cf.* Edelman v. Jordan, 415 U.S. 651, 668 (retroactive award of monetary relief, which was directed on its face against state official individually, would be paid by state and therefore was indistinguishable from award of damages against state).

94. 437 U.S. 153 (1978); *see supra* text accompanying notes 24-30.

95. 456 U.S. 305 (1982); *see supra* text accompanying notes 74-79.

96. Professor Laycock questions whether an ironclad distinction exists between preventive and reparative injunctions, but he finds the terms useful for descriptive purposes. Laycock, *Injunctions and the Irreparable Injury Rule* (Book Review), 57 TEX. L. REV. 1065, 1073-75 (1979).

97. For example, in Louisiana v. Lee *ex rel.* Guste, 635 F. Supp. 1107 (E.D. La. 1986), a court declined to enjoin a large dredging operation, although the federal permit required to dredge was issued in violation of the NEPA. *Id.* at 1129 (citing 42 U.S.C. §§ 4321-4370 (1982)). The court ordered the federal agency to reevaluate the permit in light of the Act but allowed the privately run dredging to continue in the meantime. *Id.* Although the dredging clearly violated the Act, the court concluded that halting it in the interim would probably work economic disaster on the dredgers. *Id.* at 1128. Plater considers claims that courts have balanced the equities in the NEPA cases, Plater, *supra* note 22, at 574-75, and dismisses them on the basis that they were preliminary injunction cases or cases in which "procedural compliance had already substantially occurred." *Id.* at 575. In *Lee*, which was decided after Plater wrote, however, the court issued a permanent injunction. *Id.* at 1129. In the course of a detailed analysis of the scope of its equitable discretion to allow a violation to continue, the court clearly showed it was aware of the difference between NEPA cases involving preliminary injunctions and those involving permanent injunctions. *See id.* at 1124-25.

The *Lee* court relied upon *Environmental Defense Fund v. Marsh*, which held that the decision to grant or deny a permanent injunction, when a NEPA violation continues, requires the judge to consider the objectives of the Act in light of the larger public interest. *See Lee*, 635 F. Supp. at 1129 (*citing Marsh*, 651 F.2d 983, 1005-06 (5th Cir. 1981)). Because the defendant's violation in *Marsh* was blatant, the court reversed the lower court's denial of the injunction but authorized that court to allow aspects of the project to go forward should the defendants demonstrate that the public interest would suffer irrep-

presence of factors not comprehended in the legislative calculus may provide a persuasive basis for a rule that generally bans balancing in fashioning injunctive relief in statutory cases but allows balancing in cases involving such factors. Plater's rule,[98] however, makes no such distinction. In any case, the stated rationale for Plater's rule—avoiding judicial intrusion into legislative choices—does not justify a complete ban on balancing the equities in statutory cases.

2. A More Compliant Approach

Professor Chayes's elastic approach permitting broad discretion to balance equities in all cases, especially those with broad public policy impacts, and Professor Plater's rigid approach allowing no discretion to balance in statutory cases both fail to explain what judges actually do. Rather, judges promise plaintiffs that a judge's policy opinions will not trump legislative policy, and they promise defendants that a statute will not be enforced rigidly in contravention of its spirit. The analysis of Plater's rule suggested that flexibility in structuring injunctive relief in statutory cases is compatible with respect for legislative choice. The following principle codifies the results of this analysis:

> The injunction should impose terms to achieve the plaintiff's rightful position unless (a) different relief is consistent with the goals of the statute *and* (b) the case involves a factor justifying departure from the statutory rule that was not reflected in its formulation, but the injunction may never aim to achieve more than the plaintiff's rightful position.

Unlike Chayes's and Plater's approaches, this proposed principle successfully explains when judges framing injunctive relief in statutory cases will or will not deviate from the statu-

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arable harm. *Marsh*, 651 F.2d at 1006-07. In light of the defendant's bad faith, saving construction costs would not constitute a sufficient demonstration, but something like flood prevention might.

Plater distinguishes two NEPA cases that allowed violations to continue, *see* State of Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978), *vacated in part sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978), and Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977), on the basis that enjoining the federal actions challenged in those cases was unnecessary to serve the purpose of the NEPA. Plater, *supra* note 22, at 575 n.240-41. This is quite a step away from his position that the court must prevent violations of a rule, rather than look behind the rule to see whether upholding the rule is consistent with legislative priorities. *See, e.g.*, Atchison, T. & S.F. Ry. v. Alexander, 480 F. Supp. 980, 1003 (D.D.C. 1979) (following *Realty Income Trust*, 564 F.2d at 438).

98. *See supra* text accompanying notes 57-69.

tory rule. The Supreme Court has stated that a judge formulating injunctive relief must honor the the legislature's goals rather than a personal conception of the public interest.[99] Indeed, the language of the *TVA* opinion suggests the Court rejected the TVA's proposed remedy, which jeopardized the snail darter's survival, because the Endangered Species Act had made species preservation its paramount goal.[100] Under the proposed principle, the facts of *TVA*[101] similarly would not justify deviation from the statutory rule because such variance would not have been consistent with the Act's goals and thus the first prong of the proposed principle would not have been satisfied.

Courts, however, should not read *TVA* as adopting Plater's rule that judges must always enforce statutory rules strictly.[102] When a statute's goals will be fulfilled without enforcement of the statutory rule, the *Weinberger* opinion indicates that a judge can excuse compliance with the rule. Unlike the Endangered Species Act, the Clean Water Act[103] at issue in *Wein-*

99. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) ("[S]uch discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' " (quoting United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d))); *see also* Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944) (Court must exercise power bestowed by Congress "in light of the large objectives of the Act").

The Court's reason for concluding that a violation will not undercut the statute's goals must be capable of general application without frustrating those goals. As the Supreme Court stated in *Albemarle Paper*, "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421.

100. *See* 437 U.S. 153 (1978). "Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought. . . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . ." *Id.* at 194.

101. *See supra* text accompanying notes 24-27.

102. Although one can read *TVA* as suggesting that courts must always enforce statutory rules strictly, this interpretation would mean that Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), silently overruled *TVA*. Alternatively, the *TVA* Court might have meant that it must enforce the Endangered Species Act strictly because Congress intended that this particular act should be strictly enforced. The Court has long said that Congress can mandate the provision of a particular remedy. *See, e.g., Hecht Co.*, 321 U.S. at 330. This interpretation of *TVA* limits the case's significance and also fails to explain why the statutory language in *TVA* should be read as mandatory while that in *Hecht* should not be.

103. 33 U.S.C. §§ 1251-1376 (1982).

berger did not make environmental values paramount. The Act specifically contemplated allowing pollution based upon a balancing of environmental and other goals.[104] The Navy's activities were not, according to the evidence, damaging water quality.[105] Consequently, although the Navy had violated the statute's rule not to pollute without a permit, the court could have found that allowing the Navy to continue polluting while it applied for a permit did not contravene legislative goals. Thus, the Court's decision not to require the Navy to achieve the plaintiff's rightful position satisfied the first prong of the proposed principle, which requires that deviations from the plaintiff's rightful position comport with statutory goals.

To justify relief that does less than immediately and fully return the plaintiff to the rightful position, however, the second prong of the proposed principle requires the defendant to show more than consistency with the statute's goals. The goal of the Endangered Species Act, the statute involved in *TVA*, is to preserve threatened species,[106] and its rule is that federal agencies may not damage critical habitats of those species.[107] If a federal agency that wanted to destroy a critical habitat of an endangered species offered to preserve the species in a specially constructed new habitat, a court nevertheless should not allow violation of the statutory rule solely on the basis that the statutory goal would be achieved because Congress expressly chose the means—preserving critical habitats—to achieve its goal of species preservation.[108] Allowing the agency to destroy the habitat would countermand a specific legislative choice. To justify deviation from the statutory rule, therefore, a defendant must demonstrate that the case presents a factor that the legislature did not already take into account when the rule was formulated.

For example, in *Hecht Co. v. Bowles*, the wartime price control statute required retailers to base current prices on prices

104. *See* Weinberger v. Romero-Barcelo, 456 U.S. at 316-18.

105. The Supreme Court noted in its opinion that the district court found that the Navy's discharges of pollutants into the sea had not harmed water quality. *Id.* at 307.

106. 16 U.S.C. §§ 1531-1543 (1982) (amending 16 U.S.C. §§ 1531-1543 (1976)).

107. *Id.* § 1536.

108. Courts acknowledge that agencies, like courts, have equitable discretion in individual cases. *See, e.g.*, Alabama Power Co. v. Costle, 636 F.2d 323, 358-59 (D.C. Cir. 1979). An agency's power to exempt entire categories of cases from a statutory rule, however, is limited and cannot be justified simply on the basis that such power would be a desirable way to achieve statutory goals. *Id.* After all, Congress specified how the goals should be achieved.

charged during a pre-inflationary base period.[109] Even if the retailer could show that violating the rule with respect to a specific good would not undercut the statutory goal of controlling inflation, a court could not permit such a violation because Congress decided to apply the rule to all goods regardless of whether application to a specific good was necessary to achieve the statutory goal.[110] Assume, however, that a fire in the Hecht Company's bookkeeping department made it impossible without great expense to determine what prices the company had charged during the base price period. This hardship is a factor that Congress probably did not consider.[111] Under these facts, the court could have appropriately excused the company from basing its prices on those it charged during the price period if the statute's anti-inflation goals were protected by, for example, requiring the Hecht Company to charge the same prices as charged by a comparable store in another city.

Perhaps the factor that would most frequently permit departure from the statutory rule is hardship caused by a good faith error as to one's duties.[112] In deciding what conduct to forbid, legislatures typically contemplate that persons will be aware of the law's applicability. As a result, in cases in which the plaintiff seeks a reparative injunction, courts sometimes do not require full repair of past violations if the defendant justifiably believed he was acting in accordance with the law.[113] In contrast, in cases involving preventive rather than reparative injunctions, courts normally do not allow the defendant to rely on an erroneous view of the law as an excuse to engage in a new violation but may allow it as an excuse for a preexisting violation.[114] In cases involving a preexisting violation, courts

109. 321 U.S. 321, 322 n.1 (1944).

110. Another way to reach a similar result is to say that fairness among sellers and buyers was an additional goal and that this goal would be served by making the price rule applicable to all transactions.

111. *See also supra* notes 64-98 and accompanying text (citing other examples of factors that a legislature would not have considered).

112. Even a violator that is clearly in good faith, however, cannot always escape reparative relief. For instance, good faith alone does not excuse violators of the minimum wage requirements of the Federal Labor Standards Act of 1938, 29 U.S.C. § 201 (1982), from handing over back pay because that would contravene the Act's income distribution goals. *See supra* note 90. In Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), however, the statutory goals were far more flexible. *See supra* text accompanying notes 75-79.

113. *See, e.g.*, pollution control cases discussed *supra* note 81.

114. *See* Weinberger v. Romero-Barcelo, 456 U.S. at 320 (allowing defendant to continue violation pending permit compliance in case involving preventive injunction).

typically grant time to comply to account for the defendant's reliance on the ongoing violation, but only if doing so appears consistent with the statute's goals.[115] Because legislatures formulate rules expecting that defendants will know that the law applies, defendants are more likely to face hardships that the legislature did not anticipate when the plaintiff seeks reparation for the defendant's past violation or cessation of ongoing violation rather than an order preventing the defendant from engaging in a new violation. Courts should not permit a defendant to argue reliance if the statutory violation was in bad faith—that is, with knowledge. Otherwise, the defendant would be allowed, in essence, to amend the legislation's effective date. Courts should, however, treat a defendant as acting in good faith when the defendant has a colorable but ultimately unsuccessful claim.[116]

Consistent with the idea that a good faith defendant's reliance is likely a factor that the legislature did not consider, the Court's decision in favor of the Navy in *Weinberger*[117] can be defended under the proposed principle when characterized as sanctioning an ongoing violation. The statute at issue in *Weinberger*[118] did not lay down a rule of conduct but rather established a rule of procedure through which an agency would delineate permissible conduct.[119] Thus, in *Weinberger* the

115. *Id.* at 318 (noting that courts usually require detailed schedule of compliance).

116. See *infra* note 184. A recent example arose under legislation that set a deadline by which the operator of certain television stations had to sell them or the newspapers that he owned. *See* N.Y. Times, Jan. 26, 1988, at B3, col. 5-6 (describing unreported 1988 opinion by the U.S. Court of Appeals for the District of Columbia). In the context of the owner's challenge to the legislation's constitutionality, the court held that the owner could violate statutory provisions until 45 days after a decision on the merits of the legal action. *Id.* at col. 5. Otherwise, the owner would have had to choose between abandoning his claim or selling his assets overnight, a hardship that the legislation did not contemplate.

117. 456 U.S. at 320; *see supra* text accompanying notes 75-79.

118. 456 U.S. at 308-09 (citing Clean Water Act, 33 U.S.C. §§ 1133(a), 1323(d) (1982)).

119. The plaintiffs in *Weinberger* argued that the procedures of the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982), for permitting pollution were exclusive and left no room for the exercise of equitable discretion. 456 U.S. at 318. At that juncture, however, the plaintiffs were making a narrow argument of statutory interpretation that conflicted with a long-standing judicial practice to interpret statutes so as not to eliminate such discretion unless Congress has made a clear statement to the contrary. *See* Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944) (invoking this judicial practice). In contrast, the plaintiffs in *TVA v. Hill* relied upon the paramount congressional goal of species preservation. 437 U.S. 153, 174-87 (1978).

Navy was not engaged in conduct that Congress had expressly prohibited and could conform to the legislative plan by simply repairing its previous failure to procure a permit.[120] Indeed, Congress clearly intended polluters to have an opportunity to apply for a permit before being shut down.[121] *Weinberger* therefore did not allow conduct that Congress had decided was contrary to the public interest. Rather, it allowed only the temporary violation of a procedural requirement. Consequently, the majority's decision to balance the equities in favor of a presumptively good faith defendant did not countermand a legislative choice.

C. DOES THE PROPOSED PRINCIPLE HELP DECIDE CASES?

Although the proposed principle seems to explain what judges actually do, it will fail to provide future assistance in deciding cases unless the judge can ascertain the statute's goals and the factors that the legislature took into account. Fortunately, in interpreting statutes for the purpose of determining liability, courts rely on these same concepts. Courts regard the goals of a statute, otherwise known as legislative purpose,[122] and the statute's context as central in statutory interpretation.[123] Courts use the statute's rules, structure, and goals together with the various conversations revealed in the statute's legislative history to construct the legislature's goals and the factors that it considered.[124] Courts can use the same process in providing equitable relief to deduce the factors that the legisla-

120. *See* 456 U.S. at 320.

121. *See id.*

122. As Professors Henry Hart and Albert Sacks put it, *"[t]he meaning of a statute is never plain unless it fits with some intelligible purpose."* H. HART & A. SACKS, *supra* note 7, at 1157 (emphasis in original).

123. A statute's context includes its context not just in the cultural sense, but also "in the narrower sense of [the] surrounding coordinate fund of relevant assumptions [or factors] that the language vehicle takes into account." R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 108 (1975).

124. The legislature, as a collective body, does not have mental states, and thus the concepts of its purposes and assumptions are fictions. The legislative history may contain speeches or writings pertinent to goals and assumptions, but typically through the voice of only some of the participants who may tell only some or conflicting parts of the story. Professor Ronald Dworkin distinguishes between "conversational" and "constructive" approaches to interpretation, with the former based exclusively upon the creators' statements about what the text involves and the latter based upon the interpreters' own reading of the text and surrounding information. R. DWORKIN, *supra* note 8, at 49-55. Dworkin argues that the constructive approach is appropriate to law. *Id.* at 54.

ture took into account.[125]

After determining the relevant factors and goals, if the case presents a factor outside the legislative calculus and the legislature's goals do not require an injunction ordering immediate compliance, the judge must still decide how much flexibility is consistent with the legislative goals. For instance, when the cost to the defendant of complying with the statute is a function of the time allowed to do so, the judge will have to evaluate the relative priority that the legislature placed upon its regulatory objectives versus the costs of achieving them. This decision regarding the appropriate flexibility in fashioning equitable relief involves a limited exercise of discretion.

Although the principle proposed to guide balancing the equities is not mechanical, it is not judicial policy making in disguise.[126] In deciding how much flexibility in fashioning injunctive relief is consistent with legislative goals, a judge does not have unbounded discretion because interpretation of the statute provides standards to guide the exercise of that discretion. In contrast, the policy-making approach denies that the

125. Consider, for example, the Freedom of Information Act (FOIA), in which Congress provided that government documents should be made available to the public, except for enumerated exceptions. 5 U.S.C. § 552(a)-(b) (1982). If a document is not within one of these exceptions and is withheld, the agency is liable. *Id.* § 552(c). After a finding of liability, courts generally may not deny an injunction requiring the agency to turn the document over because doing so would cause harm. *See generally* Long v. IRS, 693 F.2d 907, 910 (9th Cir. 1982) (holding that injunction was necessary to prevent prolonged delays and repeated litigation); Tennessean Newspapers v. FHA, 464 F.2d 657, 661 (6th Cir. 1972) (stating that Congress intended to require disclosure under FOIA absent an exemption); Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (finding that Congress did not intend to confer on courts general power to deny relief on grounds apart from FOIA's exemptions); General Servs. Admin. v. Benson, 415 F.2d 878, 880 (9th Cir. 1969) (stating that effect on public is primary consideration in weighing effects of disclosure and nondisclosure). Courts have interpreted the enumerated exceptions to mean that Congress has weighed the pros and cons of document disclosure with some care to investigate competing factors. *See, e.g.*, 448 F.2d at 1077 (stating that FOIA strikes balance among competing concerns through disclosure requirement and specific exemptions). Courts nonetheless say that exceptional cases may arise in which an injunction may be denied. *See, e.g., Tennessean Newspapers*, 464 F.2d at 661 (implying that claim of executive privilege may be sufficient grounds for denying injunction). Although no such case appears to have arisen, courts have left the door open to a showing that a particular case presents a factor that was not within the congressional calculus.

126. The proposed principle grants the judge what Dworkin has called discretion "in a weak sense" rather than in "a stronger sense." Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32-34 (1967). For Dworkin an official has discretion in the strong sense when "on some issue he is simply not bound by standards set by the authority in question." *Id.* at 33.

judge is bound by such standards, or at least it fails to say how the judge's discretion is limited.[127] Thus, the proposed principle would assist judges by identifying both the important issues and the relevant arguments. As the case law now stands, judges must grope to understand what determines the availability and scope of an injunction unless there is precedent right on point. The proposed principle provides judges transsubstantive guidance for fashioning injunctive relief.

D. WHICH APPROACH BEST FITS THE JUDICIAL ROLE?

The judge's role should affect the measure of injunctive relief in at least three ways. First, the measure must simultaneously meet the judge's need for both flexibility to adapt the law to varying conditions and for constraint to justify the exercise of judicial power. Second, the measure must be consistent with principles of statutory interpretation. Third, regardless of a legislature's desire to confer broad discretion on courts, the measure must not be so flexible as to amount to an unconstitutional delegation of legislative power.

1. The Judge's Need for Flexibility and Justification

In determining liability, the judge decides only whether the elements of the violation are present, whereas in balancing the equities when fashioning a remedy, the judge also considers whether there are factors that make it unfair to order the defendant to stop the violation immediately.[128] For instance, if the defendant builds a structure that violates the setback requirements of the local zoning ordinance, that is the beginning and end of the question of liability.[129] If the plaintiff wants the

127. Dworkin wrote of discretion in another weak sense—when the official is subject to review. *Id.* at 32. A trial judge's decision applying the policy-making approach can be appealed, but that approach still falls short of providing standards to control the discretion of the appellate court. That does not mean, however, that the policy-making approach necessarily allows judges to decide on whim because discretion in the weak sense does not mean that an official is "free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion." *Id.* at 34.

128. The law of liability is, however, still relevant at the remedy stage. In assessing the hardship to the plaintiff of denying an injunction, the court must use the plaintiff's rightful position under the law of liability as a bench mark. Similarly, in determining whether the irreparable injury prerequisite for an injunction is met, the court must use the same bench mark in assessing the substantiality of plaintiff's injury.

129. Aside, of course, from questions such as jurisdiction.

violation enjoined, however, the judge will want to know whether the defendant encroached intentionally or recklessly, the cost to defendant of removing the encroachment, whether removing the encroachment will harm innocent third parties, the importance to the plaintiff of having the encroachment removed, and so on. Courts make this broader inquiry at the remedial stage primarily because granting an injunction rather than damages presents a greater threat of gross inefficiency.[130]

Consequently, equity introduces flexibility into the cold enforcement of law to address the inefficiencies associated with injunctive relief. This flexibility is justified because the judicial process in cases that seek remedies at law has sources of flexibility not available in cases that seek equitable relief. In suits for damages, much of what goes into balancing the equities in injunction cases gets reflected in jury nullification, the determination of the amount of compensatory or punitive damages,[131] limits on garnishment and execution designed to avoid severe hardship, and sometimes a kind of balancing of the equities in the damage context itself.[132] Moreover, criminal actions involve flexibility in prosecutorial discretion, jury nullification, and sentencing judgment. Thus, a suit for an injunction without balancing the equities would present a rare instance of the judicial process without a safety valve.

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130. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115-24 (1972) (illustrating problems encountered in implementing economically efficient remedy in context of pollution control rules). For instance, if the remedy were damages only, the defendant could choose the cheaper of the alternatives of paying the plaintiff or removing the encroachment. If an injunction issues, the choice shifts to the plaintiff who can then make the defendant spend large sums to remove even a minor encroachment or pay a sum disproportionate to the damage done. Alternatively, the defendant could pay the plaintiff to relent so that, arguably, the difference between injunctive and damage relief would go more to distribution than to efficiency. *See id.* at 1118. If plaintiffs are numerous, however, striking such a deal may be impossible. Even if the plaintiffs are not numerous, a stubborn set of plaintiffs can refuse to accept a payment that a judge would consider more than reasonable. *Id.* at 1119.

In addition to threatening gross inefficiency, the injunction also curbs the defendant's liberty more than money damages, but denying an injunction impinges upon the plaintiff's liberty as well.

131. *Cf.* O. FISS, THE CIVIL RIGHTS INJUNCTION 101 n.34 (1978) (citing concurrence by Justice Rehnquist in Albemarle Paper Co. v. Moody, 422 U.S. 405, 441 (1975), for its comparison between discretion in issuing injunction and workings of jury).

132. *See, e.g.*, Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 113-14 (Okla. 1962) (holding that measure of damages when contract has not been performed was diminution in value because of nonperformance rather than cost of performance of entire contract), *cert. denied*, 375 U.S. 906 (1963).

Although Plater claims that judges should not balance the equities in statutory cases and should apply statutory rules strictly,[133] the reasons for balancing in nonstatutory cases apply fully to statutory cases. In nonstatutory cases, courts balance the equities because injunctive enforcement of a rule of liability that is fair and efficient in general may be unfair or inefficient in a particular context. In formulating statutory rules, legislatures can rarely confine statutory definitions of violations to instances in which enjoining them would invariably be fair and efficient. Judges need the kind of flexibility that they have in nonstatutory cases to act as a safety valve to prevent unfair and inefficient application of a statutory rule. Plater argues that legislative relief, not balancing the equities, provides the appropriate safety valve in statutory cases.[134] That safety valve, however, is available only in extraordinary cases that get priority on the legislative agenda, such as *TVA v. Hill*,[135] not in garden variety cases. The proposed principle provides a safety valve for all statutory cases by giving judges the flexibility necessary, but in a way that restrains judges' discretion, forcing them to honor the choices that the legislature did make.[136]

Moreover, both Plater's and Chayes's approaches would put the judge in a difficult personal position. The judge in street clothes is in principle an equal of the parties. What justifies the power of the judge in robes is that the judge speaks the

133. *See supra* text accompanying notes 57-73.

134. *See* Plater, *supra* note 22, at 583-88; *see also* Farber, *supra* note 11, at 543.

135. *See* 437 U.S. 153, 158-59 (1978). TVA had a far better chance than most defendants to get legislative attention because TVA is a large and cohesive organization; TVA is a public authority whose operation impacts upon the public in many states in which TVA works closely with the congressional delegations; the public, not the shareholders, would bear any loss of the large investment sunk in the dam; the snail darter had no public appeal other than as a symbol; and the case had become an example across the nation of excessive environmental regulation, *see id.* at 159.

136. Professor Daniel Farber has argued that balancing the equities is inappropriate for some categories of statutes, such as environmental statutes, because Congress has already balanced the competing interests. *See* Farber, *supra* note 11, at 543-44. Even in that area, however, Congress will have balanced some but not necessarily all the factors that may arise. For instance, under the Clean Water Act, the EPA must account for the feasibility of compliance in setting effluent standards, 33 U.S.C. § 1314(b) (1982), but a polluter may not have to comply with these standards if it can demonstrate that it confronts a problem in compliance that the EPA did not consider. *See* E.I. Du Pont De Nemours & Co. v. Train, 430 U.S. 112, 128 (1977) (finding that statute authorizing creation of guidelines must allow for variations in individual plants).

law. Regarding findings of liability, judges can readily respond to a defendant's rebuke "how dare you find me liable," with "the law made you liable."[137] This answer is inadequate, however, when the defendant challenges the judge's authority to issue an injunction because the judge must exercise discretion in shaping the injunction to fit the case.[138] Relative to the finding of liability, the injunction therefore looks more like personal opinion than impersonal law.[139] By requiring the judge to end the statutory violation regardless of the consequences, Plater's approach would subject the judge to personal criticism by taking away the judge's flexibility to mitigate the consequences. Similarly, by turning the judge into a policy maker, Chayes's approach fails to offer constraints to both legitimate the exercise of equitable discretion and allow the judge to cast at least some of the blame for the injunction's consequences onto the law.[140]

2. Consistency with Principles of Statutory Construction

The Supreme Court maintains that Congress can provide in a statute's text that courts must enforce the statute's rule

137. Most cases, viewed in the context of precedent, are clear, although scholastic preoccupation with unclear cases tends to obscure this point. As to the more difficult cases, judges claim to tackle them as matters of interpretation rather than personal opinion. *See* R. DWORKIN, *supra* note 8, at 88. Professor Dworkin has argued that accepting this claim is not unsophisticated. *Id.*

138. Even if the judge decides that the violation must end, the injunction will have to state the terms on which this will happen. For example, if the judge in United States v. Board of Trustees, 531 F. Supp. 267 (S.D. Fla. 1981), had ordered the college to restore the filled wetland, *see supra* note 89, the order would have had to indicate what would have constituted adequate restoration and the date by which the college buildings would have had to be torn down and the restoration work finished. *See* 531 F. Supp. at 274-75 (stating that court has authority to require complete restoration of the land).

139. Indeed, as Professor Fiss wrote, the injunction's

> issuance or enforcement . . . becomes an expression of a person, as much as it is an expression of an office, and represents a striking instance of the personification of the law—when we speak of the decisional authority in the injunctive process we often talk not of *the law* or even of *the court*, but of Judge Johnson or Judge Garrity.

O. FISS, *supra* note 131, at 28 (emphasis in original).

140. The proposed principle does create problems of its own for judges by requiring them to make difficult decisions, but these administrative costs are justified by the more efficient pursuit of goals of the law of liability through balancing the equities. Moreover, Plater's approach to statutory cases, *see supra* text accompanying notes 57-73, would in many cases multiply the difficult decisions because its harshness would provoke many defendants to use every opportunity to test the court's and plaintiff's resolve.

strictly, without balancing the equities.[141] Because regulatory statutes usually do not contain such express provisions, the debate centers on what meaning to give Congress's silence. Plater's approach and the proposed principle are essentially competing rules of statutory construction, one reading the silence against balancing in statutory cases and the other in its favor. In *Hecht*, however, the Court said that absent an express statement to the contrary, judges should use the same equitable discretion in statutory cases that they employ in common law and constitutional cases.[142] Indeed, judges should not interpret Congress's silence against discretion to balance equities because the reasons for such discretion in common law cases pertain fully in statutory cases as well.[143]

Plater argues, however, that the Court's statement in *Hecht* regarding balancing is dicta and that Congress has grown to depend upon courts refusing to balance the equities in statutory cases.[144] Yet, courts *do* balance the equities in statutory cases,[145] and Congress has generally declined to ban the practice such that balancing in statutory cases has become a "background value" that legislation incorporates.[146]

3. Avoiding Unconstitutional Delegations of Legislative Power

Whether Congress grants judges the power to balance equities expressly or through silence, Congress's reliance on judges to mold injunctive relief raises the question of whether such grants should be considered unconstitutional delegations of leg-

141. *See, e.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944). This conclusion seems sound as long as the legislative decision does not somehow undermine the article III role of courts, *see* U.S. CONST. art. III, such as by requiring courts to issue unmanageable injunctions that prevent the conduct of essential judicial business, or run afoul of some more specific constitutional prohibition, such as the due process clause. *See* U.S. CONST. amend. V.

142. 321 U.S. at 330. This conclusion fits courts' general willingness to import common law doctrines into statutory settings even when the statute is silent on the question of whether the common law doctrine applies. *See, e.g.*, Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945) (applying unclean hands doctrine in patent case).

143. See *supra* text accompanying notes 133-40.

144. *See* Plater, *supra* note 22, at 553-54.

145. See *supra* text accompanying notes 85-98.

146. Professors Richard Stewart and Cass Sunstein have argued that the question of whether Congress intended to allow an implied private cause of action should be analyzed in terms of a set of practices that have become background values to legislative decisions. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1200 (1982).

islative powers that violate separation of powers principles.[147] The delegation doctrine has its textual home in article I of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in" the legislative process.[148] Although the judicial discretion involved in the principle proposed for guiding courts in fashioning injunctive relief could be justified by calling it an exercise of judicial power under article III,[149] that justification depends on label rather than substance.[150] Indeed, a judicial decision to allow a violation to continue might also be called a legislative rather than a judicial function. Congressional reliance on judges to balance equities, however, does not violate the delegation doctrine because of

147. This Author has argued elsewhere that the delegation doctrine ought to be taken seriously. Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1224-27 (1985). Scholars and courts also have begun to scrutinize the legitimacy of long-standing practices that raise separation of powers issues. *See, e.g., A Symposium on Administrative Law: The Uneasy Constitutional Status of Administrative Agencies*, 36 AM. U.L. REV. 277 (1987).

148. U.S. CONST. art. I, § 1.

149. *Id.* at art. III, § 1.

150. Justice Stevens in his dissent in *Weinberger v. Romero-Barcelo* criticized the majority for just this sort of decision by label. *See* 456 U.S. 305, 330 (1982). He commented that the majority

> refused to allow federal judges to supplement [the Clean Water Act] by enjoining a nuisance, whereas in this case the question is whether a federal judge may create a loophole in the [statutory] scheme by refusing to enjoin a violation. Why a different standard should be used to define the scope of judicial discretion in these two situations is not explained.

Id. at 330-31. He contrasted the *Weinberger* Court's refusal to read the Clean Water Act as implicitly preempting equitable discretion with another decision of the Court, *City of Milwaukee v. Illinois*, in which the Court read the same statute as implicitly preempting the common law of interstate pollution, 451 U.S. 304, 317-19 (1981). *See Weinberger*, 456 U.S. at 330-31. The Court in *City of Milwaukee* reasoned that separation of powers concerns should prompt courts to interpret statutes to avoid courts "develop[ing] national policy" except when Congress clearly failed to deal with an issue that state law cannot adequately resolve. *See* 451 U.S. at 313-14. In contrast, the Court in *Weinberger* argued that a proper understanding of the relationship between the courts and Congress should prompt courts to interpret statutes to permit judicial discretion to balance the equities, unless Congress has clearly indicated to the contrary. *See* 456 U.S. at 320.

The *Weinberger* majority, however, failed to explain why separation of powers should lead to a seemingly opposite result in *City of Milwaukee*. This Article provides a justification by outlining some differences between establishing generally applicable rules of conduct, which the Court in *City of Milwaukee* refused to do, *see* 451 U.S. at 312-13, and granting exceptions from such rules, which the Court in *Weinberger* did do, *see* 456 U.S. at 316-18, and by showing that these differences are critical to the purposes of the delegation doctrine.

critical differences between administrative lawmaking, which involves laying down generally applicable rules of conduct, and formulating injunctive relief under the proposed principle, which involves granting exceptions to such rules of conduct.

First, administrative lawmaking differs from formulating injunctive relief in that executive rules can have a scope much broader than judicial injunctions. A court issuing an injunction may bind only the parties and those acting on their behalf,[151] whereas an executive promulgating a rule controls the conduct of all who come within the rule's terms. Moreover, balancing the equities under the proposed principle limits the judge's discretion in deciding what conduct an injunction can reach. Unlike an executive establishing a rule of conduct, a judge formulating an injunction can reduce but not add to the defendant's obligations.[152] Injunctions that deviate from the statutory rule to reduce the defendant's obligations will be rare because they are permitted only if a factor not reflected in the statute's formulation exists and such deviation comports with statutory goals.

Second, although judges and executives both inquire into the relationship between the proposed conduct and the relevant goals, this inquiry involves important differences between the role of a judge determining the scope of an injunction and that of an executive establishing a rule of conduct. Executives, for example, make a much broader goals-related inquiry than judges. The executive considers the relationship between the rule and the relevant policy goals under all of the general factual instances in which it will apply—a quintessential legislative function. The judge, on the other hand, examines the relationship between the injunction and the statutory goals under the single set of facts before the court—a quintessential judicial function. Additionally, executives also have more discretion to prioritize between competing goals. Statutory rules often guide the judge regarding the relative priority of competing goals, whereas delegations of legislative power to executives typically do not lay down rules of conduct and therefore leave the priority among competing policy goals to administrative discretion.

As a result of these differences between drafting an injunction under the proposed principle and establishing a general

151. FED. R. CIV. P. 65(d).

152. This assertion is the primary topic of Part III, *see infra* text accompanying notes 214-300.

rule of conduct, decisions about the scope of injunctions do not undercut the constitutional purposes of the delegation doctrine. Justice Harlan has stated that the delegation doctrine serves two functions critical to maintaining the separation of powers mandated by the Constitution.[153] First, delegation ensures that "the fundamental policy decisions in our society" are made by a body immediately accountable to the public rather than an unaccountable, appointed official.[154] Second, "it prevents judicial review from becoming [a meaningless exercise] by providing the courts with some measure against which to judge the official action that has been challenged."[155]

Regarding the delegation doctrine's accountability purpose, judicial decision making about the scope of injunctions does not shield legislators from electoral responsibility the way that delegation to an agency does. In delegating to an agency, Congress establishes goals and commands an agency to lay down rules to achieve them. In doing so, Congress will take credit for achieving the goals, but the agency will receive the blame for the rules' inevitable costs because it is the agency, not Congress, which announces the restrictions. In contrast, when Congress promulgates rules of conduct, it cannot escape electoral accountability on the pretense that courts really issue the rules—injunctions—that restrict conduct and impose costs. Moreover, as a practical matter, voters will blame the legislature for the rules' costs because under the principle proposed for fashioning injunctive relief, judges will rarely issue injunctions that deviate from the legislated rule. Moreover, the plaintiffs may be able to seek damages rather than injunctive relief because the statute may create a private cause of action or set the stage for common law liability.

Although legislators remain accountable, the approach proposed for fashioning injunctive relief would give judges, who are not politically accountable, the power to make the policy decision to deviate from a statutory rule. The proposed principle does, however, provide articulated standards for issuing injunctions that constrain judges' conduct far more than Congress restrains agencies' conduct in promulgating rules of conduct. Moreover, injunctions formulated under the proposed principles are of limited scope, affecting only the parties and their

153. *See* Arizona v. California, 373 U.S. 546, 626 (1963) (dissenting) (footnote omitted).

154. *Id.*

155. *Id.*

immediate representatives and reaching only a limited range of conduct. Judicial decisions about injunctions, therefore, generally do not compromise the delegation doctrine's purpose of ensuring that only bodies accountable to the people make fundamental policy decisions.

The second purpose of the delegation doctrine, to provide a meaningful measure for judicial review of official action to ensure compliance with the legislative will, is sometimes undercut by rules promulgated by administrative agencies.[156] Requiring the government to regulate on the basis of decisions reached in the legislative process serves the fundamental purpose of protecting the public and individual rights from the power of special interest groups.[157] The Constitution's framers made it difficult for factions to use government power by allowing the exercise of legislative power only when the House, the Senate, and the President concur or when the House and the Senate vote to override a presidential veto. To further frustrate factional power, the framers required different constituencies to select the members of those political institutions and gave the members different tenures of office.[158] When Congress delegates lawmaking power to the executive it eliminates these protections because it gives legislative power to an individual or an agency that tends to represent only a fraction of the interests represented in the legislative process.[159] Rules promulgated by the executive, therefore, do not satisfy the requirement that all coercive governmental action pass through the legislative process's protective filter.[160]

In contrast, judicial decisions regarding the scope of injunctions do not undercut the delegation doctrine's requirement that rules promulgated by bodies unaccountable to the public pass through the legislative filter to ensure against government by faction. First, the very unaccountability of judges—their independence from the political process—insulates them from the influence of factions. Consequently, the fundamental interest

156. Interestingly, the Supreme Court has upheld delegations to administrative agencies that undercut this purpose. *See* Schoenbrod, *supra* note 147, at 1239-43.

157. *Id.* at 1283-89; Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355, 371-81 (1987) [hereinafter Schoenbrod, *Separation of Powers*].

158. Schoenbrod, *Separation of Powers*, *supra* note 157, at 372-73. Indeed, the framers thought that factions would have to face each other in Congress and thus would frustrate each others' selfish agendas. *Id.* at 373-75.

159. *Id.* at 374-75.

160. *See supra* text accompanying note 148.

underlying the doctrine's judicial review requirement, protecting the rights of individuals from the power of special interest groups, is not compromised. Second, the principle proposed for fashioning injunctive relief requires that judges do *no more* than aim to put the statute's beneficiaries in their rightful position. The judge can waive legislative requirements but may not—unlike an administrative agency—impose new obligations. The judge can thus, at most, only enforce whatever coercive government action that the legislative process already justified.

The distinction between imposing new obligations and waiving existing ones, however, has had a checkered history as a rationale for arguing that waivers are not unconstitutional delegations of legislative authority.[161] Whether or not courts would use the imposition–waiver distinction to uphold some grants of powers in other contexts,[162] it does make sense as a rationale for upholding judicial discretion to balance equities because the legislature cannot easily disguise judicial impositions as judicial waivers. The legislature could not enact a statute and rely on courts not to enforce it except in rare cases, because balancing the equities under the proposed principles leads to the opposite result: it allows judges to waive the statutory rule only in exceptional cases. Thus, the legislature will have to take the responsibility for the rule of liability that it has enacted.

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161. The imposition–waiver dichotomy has been used to strike down statutes that empower property owners in a neighborhood to impose zoning restrictions as a delegation of legislative power, while at the same time to uphold statutes that allow property owners to waive the application of a zoning requirement. *See* S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 282-83 (2d ed. 1977). A legislature could, however, grant essentially the same power to the property owners in either form. For instance, instead of authorizing neighborhoods to impose a prohibition on apartment buildings, the legislature could ban apartment buildings and give neighborhoods the power to waive that ban. The imposition–waiver distinction probably made more sense when it arose towards the beginning of the century, *see* Washington *ex. rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928); Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1916); Eubank v. City of Richmond, 226 U.S. 137, 144-45 (1912), because courts could probably strike down the blanket ban on apartment houses, which provided the pretext for the waiver, under the less deferential standards for judicial review of legislation that prevailed at the time.

162. The Court in City of Eastlake v. Forest City Enters., 426 U.S. 668, 677-78 (1976), cited with seeming approval *Roberge*, *Cusack*, and *Eubank*, *see supra* note 161. On the other hand, Justice Rehnquist in *Larkin v. Grendel's Den* made essentially an imposition–waiver argument that garnered no support from the other Justices. 459 U.S. 116, 127-29 (1982) (dissenting).

E. APPLICATION OF THE PROPOSED PRINCIPLE TO CONSTITUTIONAL AND COMMON LAW CASES

1. Suitability to the Judicial Role in Constitutional and Common Law Cases

The proposed principle suits the role of judges deciding cases based on statutory rules of liability.[163] To make that principle applicable to constitutional and common law cases as well as statutory cases, it must be rephrased in general terms:

> The injunction should require the defendant to achieve the plaintiff's rightful position unless (a) different relief is consistent with the goals of the violated rule and (b) the case involves a factor justifying departure from the rule that was not reflected in its formulation, but the injunction may never aim to achieve more than the plaintiff's rightful position.

Proponents of the policy-making approach to balancing the equities cannot reject such limitations on judges' discretion to formulate injunctive relief in nonstatutory cases on the basis that constitutions and common law precedents rarely specify a remedy[164] because most statutes also do not delineate specific remedies.[165] Plater does, however, try to justify permitting broad discretion to grant injunctions in constitutional and common law cases while denying it in statutory cases on the basis that constitutions and the common law provide rules of liability in terms more open textured[166] than do statutory rules of liability.[167] Plater argues that because judges have more discretion in determining the scope of liability in constitutional and common law cases than in statutory cases, they should similarly

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163. *See supra* notes 99-127 and accompanying text.

164. For example, the fifth amendment provides only that "just compensation" is the remedy for the taking of private property for a public purpose. *See* U.S. CONST. amend. V. Judges must determine on a case-by-case basis *what* just compensation means. Most other constitutional provisions say nothing about remedies for their breach.

165. The proposed approach for guiding judges in formulating injunctive relief would *not* apply to statutes that mandate a remedy because a legislatively mandated remedy takes precedence over any judicial balancing of the equities. *See supra* note 99.

166. The common law is even more open textured than constitutions in that no written text other than precedent speaks to liability or remedy. Although some scholars characterize common law as judge-made law, *see* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 191 (1954) (conceding that nonstatutory law is judge-made law), more sophisticated accounts describe it as an articulation of community custom, *see, e.g.*, J. CARTER, LAW: ITS ORIGIN GROWTH AND FUNCTION 191-93 (1907) (arguing that judges find rather than make law, even in novel cases, by fitting facts into categories determined by custom).

167. Plater, *supra* note 22, at 531 n.26.

have more freedom in fashioning injunctive relief in such cases.[168] In determining liability under statutes, common law, and constitutions, however, Professor Ronald Dworkin asserts that judges should interpret the law rather than make policy decisions.[169] As a result, liability in those cases arguably is not a product of discretion,[170] and therefore there is no discretion in determining liability to independently justify discretion in fashioning relief.

If judges disagree with Dworkin and believe that they should make policy decisions in constitutional and common law cases, judges should nevertheless apply the proposed principle to guide the exercise of that discretion in formulating relief. There is no persuasive reason to use different standards when the relevant authority controlling liability is statutory as opposed to case law. If precedent—constitutional or common law—controls the liability decision in the case at hand, the judge's attitude toward that precedent in formulating relief should be just as respectful as it would be toward a controlling statute. As Professors Owen Fiss and Doug Rendleman suggest, it would be bizarre if judges had more freedom to undercut constitutional rights than statutory rights through remedial discretion.[171]

Even when precedent does not directly control the judge's liability decision and the judge can base the decision upon policy, the proposed principle should still apply at the remedy stage because it legitimizes the judge's exercise of discretion by providing articulated limits. After fixing the rule of liability, the judge may still not want to grant an injunction that achieves the plaintiff's rightful position. The proposed principle would justify such a result if a remedy less than the plaintiff's rightful position does not conflict with the goals of the rule of liability created by the judge and the case involves a factor not reflected in that rule. If these requirements are not

168. Plater presents his rule as constraining choices about injunctions only in statutory cases, while suggesting that courts should have broad discretion in constitutional cases because the law of liability in constitutional cases is judge-made. *See* Plater, *supra* note 22, at 531, n.26. The logic of his position suggests the same approach applies to common law cases. Plater also seeks to distinguish statutory from other cases in terms of notice, *id.*, but notice problems can arise in the statutory context.

169. *See* R. DWORKIN, *supra* note 8, at 338-40, 310-12, 379-99.

170. Dworkin denies that there is a right answer, but affirms that there is a correct approach. *Id.* at 257-58. That approach requires the judge to adopt the view that best fits previous decisions. *Id.* at 228-31, 254-58.

171. O. FISS & D. RENDLEMAN, *supra* note 11, at 175.

met and the judge denies full injunctive relief, the judge's decision ignores the policy concerns underlying the judge's own rule of liability. Candor as well as giving the public and the bar fair notice of the law's practical impact should compel the judge to restate the rule of liability based on an appropriate policy rationale rather than to grant relief contrary to the spirit of the judge's own rule of liability.

2. Consistency with the Actual Approach Used in Constitutional and Common Law Cases

In addition to being appropriate to the role of judges in constitutional and common law cases, the principle proposed for guiding judges in formulating injunctive relief seems to fit actual judicial behavior in such cases. For example, in *Brown v. Board of Education (Brown II)*,[172] the Court's order deviating from strict enforcement of the constitutional rule and the plaintiff's rightful position was consistent with constitutional goals and justified by the presence of factors not considered by the framers. After finding that discriminatory segregation existed in violation of the Constitution,[173] the Court required the defendants "to effectuate a transition to a racially nondiscriminatory school system" but allowed time for the transition in the famous "with all deliberate speed" formulation.[174] That approach, according to Professor Paul Gewirtz, was consistent with constitutional goals because in the context of school desegregation, those goals are multidimensional.[175] They include social concerns beyond ending unconstitutional practices, such as the education of all children, both black and white, during the transition period.[176]

The Court's order permitting the violation to continue while the defendants made the transition to compliance also was justified by factors not reflected in the constitutional rule of liability. The Court considered that requiring prompt compliance with the Constitution was administratively difficult and would interrupt the education of the children—factors not con-

172. 349 U.S. 294 (1955).

173. Brown v. Board of Educ. (*Brown I*), 347 U.S. 483, 495 (1954).

174. *Brown II*, 349 U.S. at 301 (remanding to district courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases").

175. Gewirtz, *supra* note 8, at 602.

176. *Id.* at 617-18.

sidered in formulating the Constitution's rule.[177] At the same time, the Court refused to consider factors antithetical to the plaintiffs' rights,[178] such as the desire to maintain the power to segregate, because the framers had already considered those factors in formulating the constitutional rule of liability.

The Supreme Court's opinion in *Lemon v. Kurtzman* (*Lemon II*)[179] also illustrates the implicit use of the proposed approach in constitutional case law. The Court had previously struck down a state statute that provided financial aid for secular courses taught in parochial schools because it unconstitutionally entangled church and state.[180] Nonetheless, the Supreme Court affirmed a district court order allowing payments to the schools for courses taught before the statute was found unconstitutional.[181] The majority sounded the ancient theme that equity courts "eschew rigid absolutes and look to practical realities and necessities inescapably involved in reconciling competing interests."[182] In reconciling those interests, the Court argued that the payment, as a one-time event, did not seriously compromise the constitutional interests involved in the separation of church and state because it did not give the state a continuing role in overseeing the church's educational process.[183] Moreover, the parochial schools had relied in good faith upon the statute in expending money before the statute was declared unconstitutional.[184] This reliance presented a special factor that justified departure from the plaintiff's rightful position. Thus, failing to achieve the plaintiff's rightful position was justified under the proposed principle.

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177. *Id.* at 606-08.

178. *Id.* As the Court in *Brown II* said: "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300.

179. 411 U.S. 192 (1973).

180. Lemon v. Kurtzman (*Lemon I*), 403 U.S. 602, 613-14 (1971).

181. *Lemon II*, 411 U.S. at 201.

182. *Id.*

183. *Id.* at 201-02.

184. *Id.* at 203-06. Three Justices joined in a vigorous dissent, questioning whether the schools reasonably doubted their liability and implicitly suggesting that, even if they did, payments were improper. *Id.* at 209-12 (Douglas, J., dissenting). Neither the majority nor the dissent set forth a coherent set of principles to guide judges in balancing the equities.

Both *Weinberger* and *Lemon II* involved basically the same special factor: reliance on an uncertain litigation position. *See Weinberger*, 456 U.S. 305, 320 (1982); *Lemon II*, 411 U.S. at 203-07. The *Lemon II* majority was not bothered that "constitutional attack on the [statute] was plain from the outset." 411 U.S. at 207. Rather, the majority asked whether there was uncertainty about the outcome. *Id.* at 205-06.

The proposed principle not only describes judges' approach in constitutional cases, but also that used by judges in leading common law cases. In *Boomer v. Atlantic Cement Co.*,[185] for example, the defendant was held liable for creating a nuisance but was nonetheless allowed to continue the violation as long as it made payments to the plaintiffs.[186] Although the cement company's monetary interest far exceeded the plaintiff's interest,[187] the judges performed more than a simple cost–benefit analysis.[188] In addition to costs, the judges apparently considered that the case presented factors not reflected in the rule of liability. The applicable nuisance law had accounted only for the impact on the plaintiffs.[189] Additional factors presented included that the factory had already been built, that the employees depended on the factory's continued operation for their jobs,[190] and that the cement company had a good faith argument, because of the uncertainty of nuisance law, that it was not a violator.[191]

185. 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). *See generally* Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law*, in FESTSCHRIFT (forthcoming) (reevaluating *Boomer* in new light).

186. 26 N.Y.2d at 222, 228, 257 N.E.2d at 871, 875, 309 N.Y.S.2d at 314, 319.

187. *Id.* at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

188. When scholars and students mischaracterize the Court's approach in *Boomer* as a simple cost–benefit analysis, the judges appear to be policy makers when they balance the equities.

189. *Boomer*, 26 N.Y.2d at 223, 257 N.E.2d at 871-72, 309 N.Y.S.2d at 315; *see also* J. DUKEMINIER & J. KRIER, PROPERTY 944 (1981) (noting that liability was imposed solely on basis of damage to plaintiff).

190. *See Boomer*, 26 N.Y.2d at 225 n.*, 257 N.E.2d at 873 n.*, 309 N.Y.S.2d at 319 n.*. Removing the nuisance thus presented a different question than if the prayer for relief had sought to prevent the nuisance from being constructed.

191. In contrast, in *Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927), the plaintiff had objected to the construction in advance and the defendant had promised to control the pollution. *Id.* at 736. When it did not, the court enforced the decree even though the costs of abatement far exceeded the benefit to plaintiff. *Id.* at 738-39.

Arguably, the cement company in *Boomer* lacked good faith because it could have attempted to buy before construction whatever rights, however ill-defined, its neighbors had to protection from the company's conduct. On the other hand, the neighbors could have sought an injunction before construction, thereby preventing the hardships upon which the cement company relied, such as dependence of employees on the existing plant for their jobs. *See supra* text accompanying notes 45-48. The cement company's greater knowledge as to the dimension of the problem may justify placing the burden on it. Ordinarily, shifting the burden to the property owner, however, requires enactment of a permit requirement. *See supra* note 82 (discussing Clean Water Act). The cement company would not act in good faith if it violated a permit requirement without a colorable claim that the requirement did not apply to the company. *See supra* text accompanying notes 75-83.

Moreover, the relief ordered was consistent with the goals of nuisance law. Those goals include, on an equal footing, promoting the productive uses of land while at the same time avoiding disruptive uses.[192] As Judge Hand stated in balancing the equities in another nuisance case, "[t]he very right on which the wronged party stands is a quantitative compromise between two conflicting interests."[193] In *Boomer* the defendant and the plaintiff were both using the land productively. Requiring the defendant to remove the nuisance, however, would have resulted in a $45 million loss, whereas allowing the nuisance to continue caused the plaintiffs only $185,000 in damages.[194] The court's decision to deny the injunction on grounds of undue hardship thus served the conflicting goals of nuisance law by preserving a use vastly more productive than the use harmed. Given that the remedy served the goals of nuisance law and that the case presented factors not accounted for by the rule of liability, a remedy achieving less than the plaintiff's rightful position was consistent with the proposed principle.

Because nuisance law has equal regard for competing goals, the judge in *Boomer* had considerable latitude to balance the equities to determine what relief would serve those goals. Unlike with nuisance law, however, when the applicable rules of liability do not attempt to weigh conflicting policy goals evenly but instead serve a predominant goal, the proposed principle allows the judge less latitude to deny relief based upon a balancing of the equities. Trespass law, for example, serves the predominant purpose of protecting property, and thus when the defendant unlawfully enters the plaintiff's property, the judge has little if any discretion to deny relief based on balancing: the purpose of the rule of liability is served by strictly enforcing the rule. Discussing this idea in the context of contract law, Professor Frederick Maitland states:

> We hear much less of [balancing the equities] when there is a contract, and the applicant is not bound to show that he has already suffered actual damage. When a man has definitely contracted not to do a certain thing, it is not for him to say that it will be greatly to his convenience, and not much to the inconvenience of the other party, that he should be allowed to do it.[195]

192. 4 RESTATEMENT (SECOND) OF TORTS § 826(a) (1979).

193. *Staso Milling*, 18 F.2d at 738.

194. *Boomer*, 26 N.Y.2d at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

195. F. MAITLAND, *supra* note 41, at 327-28. Professor Anthony Kronman argues similarly that judges are wrong not to honor contracts that call for specific performance rather than damage remedies. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 369-76 (1978). Maitland is talking about balancing

Thus in a contract case, once the court determines as an initial matter that the prerequisites to injunctive relief are satsified, in fashioning the relief the judge will rarely balance the equities to refuse relief unless the case presents a factor such as laches, estoppel, or mistake.[196]

An informative study by Professor M.T. Van Hecke demonstrates that, in practice, judges apply this concept that they have less room to balance equities in fashioning injunctive relief when the rule of liability has a predominant policy goal.[197] Van Hecke surveyed 112 cases in which the plaintiffs sought injunctions ordering the defendant to remove or remodel structures that violated covenants restricting building imposed in deeds or contracts.[198] Injunctions issued in seventy of these cases.[199] In the cases that did balance equities to deny injunctive relief, relative hardship alone never justified denying an injunction;[200] it had to be both extreme and coupled with some other factor such as laches, estoppel, or mistake.[201]

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the equities, a question that arises after the court determines that the remedy at law is inadequate.

196. *See infra* note 201 and accompanying text.

197. Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521, 531 (1954).

198. *Id.* at 528.

199. *Id.* In all the cases, the courts had determined that the restriction was still valid and that it had been violated. *Id.* at 521, 526-27.

200. *Id.* at 528. To the extent relative hardship counted, it helped defendants only when there was a large disparity between hardship to the defendant and hardship to the plaintiff, as in *Boomer*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). *See* Van Hecke, *supra* note 197, at 527-28.

201. *Id.* at 528-29. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963), seems contrary to the proposed principle and wrongly decided. In *Peevyhouse* a farmer allowed a coal company to mine coal only after obtaining a contractual promise to restore the land when finished. *Id.* at 111. When the coal company breached its promise, the farmer sued for the cost of specific performance. *Id.* The Oklahoma Supreme Court allowed damages based only on the considerably smaller estimate of the reduced value of the land. *Id.* at 114. That the suit was for monetary relief should not make a difference. *See* D. LAYCOCK, *supra* note 1, at 928 (asking whether result should not be same whether plaintiffs seek specific performance or damages for cost of completion). The coal company had explicitly accepted the inconvenience of which it later complained. *Peevyhouse*, 382 P.2d at 111. It could not claim therefore that laches, estoppel, or mistake changed the equities. To the contrary, the company probably never intended to perform. Laycock shows that courts differ in their treatment of cases like *Peevyhouse*. *See* D. LAYCOCK, *supra* note 1, at 927-29.

III. GRANTING MORE THAN THE PLAINTIFF'S RIGHTFUL POSITION

Part II of this Article explored when judges may issue an injunction that allows the defendant to achieve less than the plaintiff's rightful position under the doctrine of balancing the equities. This Part considers when judges may issue an injunction that requires more under the doctrine of tailoring the remedy.

At first blush tailoring the remedy appears to differ from balancing the equities. Tailoring requires that the remedy aim to achieve the plaintiff's rightful position, while balancing appears to allow remedies that differ from that position. As will be shown, however, a properly tailored injunction may sometimes contain terms that go beyond the plaintiff's rightful position to avoid falling short of it. The doctrines also seem different because tailoring appears to constrain the court's policy role while balancing the equities under the policy-making approach appears to allow wide-ranging policy choices. Balancing as properly understood under the proposed principle, however, constrains judicial policy making by requiring that injunctive relief comport with the legislature's goals and its decision regarding how to realize those goals. Under the tailoring doctrine, the same constraints limit when an injunction's terms may achieve more than the plaintiff's rightful position.

The doctrines do, however, differ in the context in which they are used.[202] Yet, even within a single context, judges sometimes slip from using the language of one doctrine to that of the other without acknowledging that they have taken up a new doctrine,[203] which suggests that the difference between the doctrines is only semantic—judges applying different labels to the same doctrine applied in different contexts.[204]

Because the doctrines differ only in semantics and not in

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202. Judges tend to invoke balancing the equities when they consider an injunction that achieves *less* than the plaintiff's rightful position, particularly in nuisance and environmental cases, *see, e.g.*, *Boomer*, 26 N.Y.2d at 225-26, 257 N.E.2d at 873, 309 N.Y.S.2d at 317, and tend to invoke tailoring the remedy when they consider an injunction that achieves *more* than that position, such as in recent civil rights cases, *see, e.g.*, Fiss, *supra* note 22, at 46-48.

203. D. DOBBS, *supra* note 3, at 52-55.

204. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."); Environmental Defense Fund v. Marsh, 651 F.2d 983, 1006 (5th Cir. 1981) ("The court should tailor its relief to fit each particular case, balancing the environmental concerns

substance, the same proposed principle should guide judges in deciding whether to grant more or less than the plaintiff's rightful position. The next section lays out the basic doctrine of tailoring the remedy. The following section considers competing approaches to the case law, and the final section analyzes which approach best serves the judicial role.

A. THE BASIC DOCTRINE: TAILORING THE REMEDY

The tailoring doctrine requires that the injunction fit the wrong or, in other words, aim to achieve the plaintiff's rightful position.[205] Accordingly, a preventive injunction should try to prevent repetitions of the wrong, and a reparative injunction should aim to put the plaintiff in the position that would have existed but for the wrong.[206]

Newman v. Alabama[207] illustrates the tailoring doctrine in both the preventive and reparative contexts. In *Newman* the court upheld an injunction's provisions designed to eliminate prison overcrowding that violated the eighth amendment.[208] Those preventive provisions attempted to ensure against repetitions of the wrong of overcrowding.[209] The court overturned other provisions aimed at rehabilitating prisoners because rehabilitation did not prevent the wrong of overcrowding and was not a constitutional right.[210] The court, however, upheld a provision requiring recreational programs to repair the effects of

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of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction.").

Cases described by some as instances in which the courts used balancing the equities to allow a violation to continue can be better understood as the courts tailoring the remedy to fit the violation. For instance, Professor Russ Winner uses balancing the equities to describe a court's decision not to set aside a lease sale of offshore oil drilling rights and enjoin further drilling, despite a violation of the NEPA. *See* Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. L. 477, 515-16 (1979) (citing Alaska v. Andrus, 580 F.2d 465 (D.C. Cir.), *vacated in part*, 439 U.S. 922 (1978)). The violation in *Andrus*, however, involved inadequate analysis of how best to protect the environment, which the court held could be resolved without prejudice after the sale. *See* 580 F.2d at 485. The court thus denied the injunction because it determined that relief narrower than enjoining the sale fit the wrong. *Id.*

205. *See* D. DOBBS, *supra* note 3, at 487; Fiss, *supra* note 22, at 46-50 (1979); Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 732-34 (1986); Gewirtz, *supra* note 8, at 589-91.

206. *See* O. FISS, *supra* note 131, at 8-12; Laycock, *supra* note 96, at 1073-75.

207. 559 F.2d 283 (5th Cir. 1977), *rev'd in part*, 438 U.S. 781 (1978).

208. *Id.* at 288.

209. *Id.*

210. *Id.* at 291.

prior wrongful overcrowding.[211] In the court's judgment, recreation rather than rehabilitation was the appropriate remedy for overcrowding because it presumably put the prisoners in the position they would have been in but for the overcrowding.[212]

Drafting preventive and reparative orders requires judges to make judgments about how to accomplish the plaintiff's rightful position. In drafting reparative injunctions, judges do not know with certainty what conditions would have prevailed but for the wrong or how to replicate them. Rather, the injunction frequently provides only a substitute to make up for the wrong, such as the recreational program in *Newman*. In drafting preventive injunctions, the wrong does not uniquely determine the injunction's provisions. Judges adjust the terms of preventive injunctions based on their perception of the defendant's predilection for illegal conduct. For example, if a large corporation violated a statute forbidding age, race, or religious discrimination by denying someone a job at a corporate branch office on the basis of age, the court might enjoin the defendant from discriminating against the plaintiff or any person, at that branch or at any location, and on the basis of age or any illegal purpose. The judge would likely narrow the injunction's scope if the prior discrimination stemmed from the branch manager's animus against older people instead of the company's policy to hire only middle-aged white men.[213]

B. CONTRASTING APPROACHES TO THE TAILORING DOCTRINE

1. The Policy-Making Approach

Professors Chayes and Fiss object to the tailoring doctrine on several grounds. First, they argue that the doctrine has led to wrong results in many cases.[214] Their discussion of these decisions, however, ends up criticizing how the Court defined the

211. The court stated that the provisions requiring recreational programs were not designed to serve any preventive purposes. *Id.* at 291 ("We do this simply because such facilities may play an important role in extirpating the effects of the conditions which undisputably prevailed in these prisons at the time the District Court entered its order.").

212. *See id.*

213. *See, e.g.*, Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 734 n.6 (5th Cir. 1977) ("[A]n injunction's scope should not exceed the likely scope of future violations.") (citing Hodgson v. Corning Glass Works, 474 F.2d 226, 236-37 (2d Cir. 1973); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 826-27 (5th Cir. 1972)).

214. *See* Chayes, *supra* note 51, at 45-52; Fiss, *supra* note 22, at 46-50.

plaintiff's rights,[215] how it conceived of the wrong committed,[216] or how it conceived of the plaintiff's rightful position in an unduly narrow way[217] rather than the Court's application of the tailoring doctrine. This criticism, therefore, really attacks the Court's conception of the rules of liability and not the substance of the tailoring doctrine.

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215. Chayes, *supra* note 51, at 45-52; Fiss, *supra* note 22, at 46-50.

216. They object to cases such as Bell v. Wolfish, 441 U.S. 520 (1979), Rizzo v. Goode, 423 U.S. 362 (1976), and Milliken v. Bradley, 418 U.S. 717 (1974). Chayes's misconception is clearest when he cites cases such as *Wolfish* as demonstrating the evils of the concept of fit. *See* Chayes, *supra* note 51, at 51. In fact, the Court in *Wolfish* never approached the issue of remedies, dismissing the claims at the liability stage. *See* 441 U.S. at 563.

The Court in *Rizzo* held that systemic remedies against police department violence were inappropriate under the tailoring doctrine because the Court conceived of the wrong as stemming from the acts of individual police officers rather than departmental policy. *See* 423 U.S. at 377. In other words, if departmental policy had caused the wrong, the propensity for future wrong would have been department-wide and the tailoring doctrine would not have stood in the way of a systemic remedy. *Id.*

In *Milliken* and other desegregation cases, Chayes and Fiss would have the Court's school segregation remedies aimed at de facto segregation because they view the fourteenth amendment as requiring an end to de facto as well as de jure segregation. *See* Chayes, *supra* note 51, at 45-52; Fiss, *supra* note 22, at 46-50; *see also* D. LAYCOCK, *supra* note 1, at 259-60 (1985) (explaining difference between de facto and de jure segregation in remedies context); Gewirtz, *supra* note 205, at 736-37 (discussing problems with view that Constitution mandates integration without regard for cause of nonintegration). *See generally* Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U.L. REV. 1 *passim* (1983) (analyzing busing remedy in racial discrimination cases). Thus, Chayes and Fiss object to the rules of liability adopted by the Court in the segregation cases, rather than to the tailoring doctrine itself.

217. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). In *Brinkman* the Court remanded the case to determine whether the school board had discriminated on the basis of race. *Id.* at 421. If so, the district court must, in constructing a remedy, "determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." *Id.* at 420. Under this concept of their rightful position, the plaintiffs arguably were entitled to an order halting the discriminatory practices. Such an order might have included the drawing of color-blind school attendance zones. Redrawing attendance lines could have resulted in near complete racial separation if the races already lived in separate neighborhoods. Unless past official discrimination had caused racial segregation by neighborhood, however, the plaintiffs could not have gotten the affirmative action of redrawing of school attendance lines to promote integration. Thus, if the board had already stopped discriminating, *Dayton*'s concept of the plaintiffs' rightful position might have produced for the plaintiffs no more than a piece of paper condemning past discrimination but requiring no official action to undo the impression that local officials condone segregation.

Attacking the substance of the tailoring doctrine, however, Chayes and Fiss also argue that the tailoring doctrine is too mechanistic because, as they understand it, it makes the injunction depend on one variable—the wrong committed.[218] As a result Chayes suggests that the tailoring doctrine prevents reparative orders because, in those injunctions, the remedy is not the exact reverse of the wrong and the doctrine seems to require that the remedy flow logically and directly from the wrong.[219] Yet the plaintiff's rightful position provides the model for the judge tailoring the injunction, and the rightful position concept includes undoing past wrongs as well as preventing future ones. Consequently, Chayes errs in suggesting that tailoring bars reparative injunctions.[220]

Fiss illustrates this criticism of the tailoring doctrine with a case in which a police department had violated the fourth amendment by searching homes in a minority neighborhood during a manhunt based on uncorroborated anonymous tips.[221] Although the court could have prevented repetitions of the wrong by requiring the police chief to either sanction officers for searching illegally or prohibit warrantless searches absent a hot pursuit justification, it chose instead to enjoin only searches based on uncorroborated anonymous tips.[222] All three potential remedies had the aim of preventing the wrong, but their scope

218. *See* Chayes, *supra* note 51, at 45-52; Fiss, *supra* note 22, at 46-50.

219. Chayes cites Milliken v. Bradley, 433 U.S. 267 (1977), as a rare instance of the Burger Court not applying the tailoring principle, *see* Chayes, *supra* note 51, at 49-50, perhaps because its application would have stood in the way of plainly appropriate relief. In *Milliken* the injunction, in addition to ordering an end to school segregation, directed the defendants to provide remedial education for those children who had been the victims of past school segregation. 433 U.S. at 286-88. For Chayes, tailoring would bar this provision because, as he understands the doctrine, the remedy must be logically and directly deduced from the wrong. *See* Chayes, *supra* note 51, at 45. Because the defendants did not become liable by illegally withholding remedial education, they cannot be required to provide it under the tailoring principle. Chayes, however, construes the tailoring principle as more limiting than necessary by failing to note that the remedial education was reparative and that reparative relief must, by its very nature, be in the way of substitution for what plaintiffs should have rightly had in the first place—nonseparate and equal education. There is no unique answer to what is an appropriate substitute for such education, but the tailoring doctrine does require the judge to find a substitute that compensates for the wrong that led to liability rather than some other wrong that has come to the judge's attention.

220. *See supra* note 219.

221. *See* Fiss, *supra* note 22, at 48 (discussing Lankford v. Gelston, 364 F.2d 197, 201 (4th Cir. 1966) (en banc)).

222. *Lankford*, 364 F.2d at 206.

differed—some prohibiting otherwise lawful conduct. According to Fiss, the judge's choice between remedies should depend on variables other than the wrong, such as whether the narrower remedy would achieve its aim[223] and the degree to which a broader remedy would intrude on local government.[224] Fiss argues that the tailoring doctrine is therefore deficient because it obscures the court's choices between remedies and because it rules out decrees that would prohibit lawful conduct to eliminate *un*lawful conduct.[225] Fiss's argument thus suggests that without principles to guide its application, the tailoring doctrine is no more than disguised policy making.

Abandoning the tailoring doctrine, however, is not a satisfactory alternative because doing so simply permits judges to engage openly in completely unconstrained policy making. Without tailoring, nothing stops the judge in Fiss's case from imposing an internal review procedure on the police department, regardless of any constitutional violation, simply out of a belief that such procedures are a good idea. Chayes's and Fiss's position that the tailoring doctrine should not depend on the wrong committed ignores courts' long-standing and appropriate concern with ensuring that injunctions aim to eradicate the legal wrong before the court rather than account for some other item on the social agenda. For example, when one business steals another's trade secrets regarding the design of a new, unmarketed product, the victim may not have the secrets' use enjoined beyond the time that it would take the thief to reverse engineer the product once it was introduced. A longer injunction period to implement the court's notions of, for example, fair competition, would punish the defendant and put the plaintiff in a better position than it would have been in without the theft.[226] Consequently, requiring courts to tailor remedies to the wrong committed seems desirable.

Chayes and Fiss also imply that the Supreme Court invented the tailoring doctrine to crimp civil rights litigation,[227]

223. Fiss, *supra* note 22, at 48.

224. *Id.* at 48-49.

225. *Id.* at 50 (discussing specific decree as to prison overcrowding). Decrees prohibiting lawful conduct in the process of stopping unlawful conduct are necessary in some circumstances. *See supra* notes 237-38 and accompanying text.

226. Winston Research Corp. v. Minnesota Mining & Mfg. Co., 350 F.2d 134, 142-44 (9th Cir. 1965). Laycock suggests that allowing a longer injunction is essentially punitive. *See* D. LAYCOCK, *supra* note 1, at 245-46 (1985).

227. *See* Chayes, *supra* note 51, at 45-52; Fiss, *supra* note 22, at 46-50.

but courts have in fact long applied the doctrine, whether or not labeled as such, in distinct areas of law to gear relief to the plaintiff's rightful position. For example, in administrative law, the opponent of an agency action who convinces a court that the agency based its decision upon improper grounds ordinarily cannot get the agency's decision reversed.[228] Rather, the court will *remand* the decision to the agency with instructions to make its decision upon a proper basis.[229] Tailoring requires a remand rather than a reversal because a remand puts the agency's opponent in the position it would have been in but for the improper decision. Reversing the agency's decision would put the agency's opponent in a position better than its rightful position.[230] Similarly, in labor law, a union that proves that an employer violated the National Labor Relations Act requirement to bargain in good faith cannot get an order to make the employer accept its bargaining position, but it can get an order

228. *See, e.g.*, Sierra Club v. United States Army Corps of Eng'rs, 772 F.2d 1043, 1052-56 (2d Cir. 1985) (remanding directly to Corps of Engineers); *see also* SEC v. Chenery Corp., 332 U.S. 194, 200 (1947) ("The administrative process had taken an erroneous rather than a final turn. Hence we carefully refrained from expressing any views as to the propriety of any order rooted in the proper and relevant considerations.").

229. *See Sierra Club*, 772 F.2d at 1056.

230. The remand concept applies in other areas of law under different labels. For example, a judge that has found that a state institution violates the Constitution will ordinarily begin the remedial process by ordering the defendants to propose a corrective plan rather than ordering specific corrective measures. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 687 & n.9 (1978) (dictum) (finding that corrections department had been given numerous opportunities to remedy prison conditions); Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973) (noting that state correctional facilities should have first opportunity to correct their errors); Dean v. Coughlin, 804 F.2d 207, 215 (2d Cir. 1986) (finding that court should have used prison officials' remedial plan as guide). The plaintiff gets no more than a remand in the first instance because plaintiff only has the right to require that the state political processes obey the Constitution, not to require that the question of corrective measures be removed to a presumably more sympathetic judicial forum. Professor Fletcher has shown how courts tend to be as unobtrusive as possible, consistent with the purpose of protecting the plaintiff's rights. *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 649-50 (1982) (noting that district court judges try to avoid exercising remedial discretion).

For a final example, a judge, upon finding that a state violates conditions attached to a federal grant, will ordinarily enjoin the state from spending the money except in compliance with the condition rather than order the state to comply with the condition. *See* Rosado v. Wyman, 397 U.S. 397, 420-23 (1970). The injunction must give the state a chance to decide whether it wants to return the grant rather than comply to avoid putting the plaintiff in a better than rightful position.

requiring the employer to bargain.[231] In effect the issue is remanded to the bargaining process, which achieves the plaintiff's rightful position.

Although tailoring generally aims to achieve the plaintiff's rightful position, courts occasionally depart from the tailoring doctrine by aiming to put the plaintiff in a better than rightful position. For example, the Fifth Circuit upheld an injunction that, in the court's own words, did "have a twist to it."[232] The defendants had violated an employment contract that required them to keep certain files belonging to the plaintiff confidential during the employment period.[233] The Fifth Circuit upheld the district court's order enjoining disclosure forever because the defendants' breach was blatant.[234] Professor Douglas Laycock argues that courts in such cases act as if they have a "roving commission to do good."[235] Although these cases[236] come from lower courts and are infrequent, their failure to justify their aberrant results provides an important reason for courts to articulate clearly a transsubstantive measure of injunctive relief to guide their application of the tailoring doctrine.

2. A More Compliant Approach

Courts say that an injunction may not aim to put the plaintiff in a better than rightful position. Yet sometimes they issue injunctions that prohibit the defendant from carrying on otherwise lawful conduct in a way that goes beyond the plaintiff's rightful position. The explanation for this apparent paradox lies in the distinction between an injunction's aims and its terms. The injunction's *aim* must be the plaintiff's rightful position, but to achieve that aim, its *terms* may impose conditions on the defendant that require actions going beyond the plaintiff's rightful position. Under the proposed principle, such terms would be appropriate when requiring more of the defendant serves the goals of the violated rule and the case involves a factor not reflected in the rule's formulation that justifies departing from it. For example, a court concerned

231. *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970) (holding that Board may require parties to bargain regarding union dues checkoff clause but cannot compel party to accept specific contractual provision).

232. Merrill, Lynch, Pierce, Fenner & Smith v. Stidham, 658 F.2d 1098, 1102 (5th Cir. 1981).

233. *Id.* at 1101.

234. *See id.* at 1102-03.

235. D. LAYCOCK, *supra* note 1, at 251.

236. For additional cases, see *id.* at 245, 251, 260.

about future unconstitutional searches and seizures could require new police procedures not constitutionally mandated if such procedures were necessary to ensure compliance with the Constitution. The injunction's terms, therefore, may have to go beyond the plaintiff's rightful position to avoid falling short of that position.

At least two situations demand injunctive relief imposing terms that overreach the plaintiff's rightful position to achieve that position. First, the injunction may have to prohibit lawful conduct to ensure that the court can effectively enforce the plaintiff's rightful position. An injunction ordering the defendant to cease trespassing on the plaintiff's land lends itself to easy enforcement. When the judge cannot easily demarcate a clear boundary between legal and illegal conduct, however, a resistant defendant could take advantage of that uncertainty to avoid meaningful preventive action.[237] To overcome such resistance, the injunction must specify precisely what the defendant can and cannot do. Thus, the injunction's goal of achieving compliance may justify terms that intrude upon matters that the law of liability, if it had never been breached, leaves entirely to the defendant's discretion.[238] Moreover, the defendant's resistance presents a factor not accounted for in formulating the law of liability.

Second, an injunction's terms may accomplish more than the plaintiff's rightful position when achieving exactly that position is impossible. In *McCarthy v. Briscoe*[239] the state of Texas had unconstitutionally prohibited candidates who had unsuccessfully bid for a party's presidential nomination from appearing on the election ballot.[240] Plaintiff McCarthy's rightful position was to have the same opportunity to appear on the ballot as anyone else.[241] To appear on the ballot, McCarthy

237. *See, e.g.*, Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429, 1434-38 (1978) (finding that inherent vagueness in defining command itself complicates enforcement of aspirational commands).

238. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 687 (1978). Similarly, in administrative law, a court will sometimes reverse the decision of a particularly resistant agency because it would "serve no useful purpose to ask the Commission to reconsider . . . . The administrative conduct reflected in this record is beyond repair." *See* Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969). On the other hand, enjoining lawful activity must be necessary to protect the plaintiff's rightful position. *See* Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983).

239. 429 U.S. 1317 (1976).

240. *Id.* at 1318.

241. *Id.* at 1323.

needed a large number of signatures but he had not gathered signatures because of Texas's bar against independent candidates, nor could he gather the necessary signatures before the state had to begin printing the ballots.[242] As a result the court could not put McCarthy in his rightful position. It either had to do *less*—allow Texas to leave him off the ballot—or *more*—put him on the ballot despite the lack of signatures.[243] The court ultimately ordered Texas to put McCarthy on the ballot because the signature requirement's purpose—to prevent a laundry list ballot of unknown candidates—was satisfied because McCarthy was a well-known candidate.[244] The result was further justified by McCarthy's having had insufficient time to collect the requisite signatures—a factor that the legislature had not considered in formulating its rule of liability.

To justify an injunction that has terms going beyond the plaintiff's rightful position, those terms must not only be necessary to prevent falling short of the plaintiff's rightful position, but also must be consistent with the purposes of the rule of liability. Indeed, the Supreme Court struck down an order requiring an employer to accede to the union's bargaining position when the employer would likely continue to fail to bargain in good faith.[245] Although the order was necessary to achieve an approximation of the plaintiff's rightful position, the Court considered the order inconsistent with Congress's goal of preserving freedom of contract.[246] In fashioning injunctive relief, a

242. *Id.* at 1318.

243. *Id.* at 1322.

244. *Id.* at 1323.

245. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 107-08 (1970); *supra* note 231 and accompanying text.

246. *Id.* at 108. If the Board did no more than order the employer to accede to bargain in good faith as the statute requires, *see* § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1982), the employer could evade this statutory requirement by doing no more than shamming good faith bargaining. So the Board ordered the employer to accede to the union's position, *see* 397 U.S. at 101, which may well have approximated what good faith bargaining would have produced. Even though such an order may have achieved the plaintiff's rightful position, the Supreme Court was concerned that the remedy ran counter to one of the Act's goals:

> The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

court would thus likely refuse to grant terms that overreach the rightful position if it deemed them inconsistent with the goals of the law of liability. Such a result would comport with the proposed principle which requires that injunctions always honor the rule of liability either by enforcing its rules or serving its purposes.

On the other hand, that an injunction would advance the goals of the statute does not, in itself, justify terms achieving more than the plaintiff's rightful position if doing so countermands a legislative choice as to how the statute's goals should be achieved. Recalling the snail darter hypothetical,[247] TVA had violated the Endangered Species Act by building a dam that threatened a critical habitat of the snail darter.[248] Barring use of the dam so as to prevent damage to the habitat, the injunction aimed to give the benefit of the rule of liability—that no federal agency shall damage a critical habitat—to what that statute protected, the snail darter.[249] The injunction could not, however, also require TVA to protect the snail darter from farmers' harmful practices because, although the Act's purpose is species preservation, its rule forbids damaging federal action but does not require federal agencies to prevent damage by private actors. To permit an injunction to do so would countermand a legislative choice as to how the goals should be achieved and thus be inconsistent with the principle proposed to guide judges in tailoring remedies.

Under the proposed principle, however, the judge might require TVA to prevent the harm done by the farmers on a reparative theory. Assume that TVA's dam had damaged one of the snail darter's critical habitats beyond repair and that the farmers are currently threatening another critical habitat upstream. The judge could not restore the snail darter to its original position because the dam has already destroyed a habitat. The judge could, however, order TVA to protect the upstream habitat as reparation by substituting it for the habitat TVA illegally destroyed.[250] This result satisfies the proposed principle's

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Id. at 108 (footnotes omitted) (citing 29 U.S.C. § 160(c)).

247. *See supra* text accompanying note 31.

248. *See* TVA v. Hill, 437 U.S. 153, 171 (1978), *supra* text accompanying notes 24-29.

249. Perhaps it would be more proper, although less accurate, to say that the injunction protected the interests in the species asserted by people with standing.

250. *See, e.g.*, Texas v. New Mexico, 107 S. Ct. 2279, 2283-84 (1987) (finding that Court not limited to ordering prospective relief, but may impose retroac-

requirement that an injunction aim for the plaintiff's rightful position because the new habitat substitutes for the old one. Even if the replacement habitat was somehow better than the one originally destroyed and the injunction therefore put the plaintiff in a better than rightful position, the result would be justified if it was impossible to craft terms to achieve more precisely the rightful position. Such an injunction would satisfy the proposed principle because it would serve the statute's goals and TVA's illegal destruction of the original habitat provides a factor not reflected in the rule's formulation that justifies departing from it.

C. DOES THE PROPOSED PRINCIPLE HELP DECIDE CASES?

The recent clash over judicially imposed[251] quotas under the federal employment discrimination laws[252] provides an interesting context in which to test the utility of the approach proposed to guide judicial application of the tailoring doctrine. The leading case, *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*,[253] involved a union continuing racial discrimination that a district court had previously held violated title

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tive remedies for past breaches); *see also supra* notes 86-89 and accompanying text (wetland cases).

251. Other cases have involved racial or gender preferences that were adopted by consent decree or outside the judicial context altogether. *See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 81-84 (1986) (discussing voluntary affirmative action plans undertaken by government bodies). In all these contexts, the Court has used the language of tailoring to evaluate racial or gender preferences. *See id.* at 83 (noting that Court sets remedies properly tailored to remedy past discrimination). Court-imposed injunctions relate to this Article because judicial power provides the exclusive basis for the decree.

Affirmative action adopted in the context of a consent decree, according to the majority in Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3072 (1986), should be treated differently from judicially imposed remedies. That case allowed judges to adopt consent decrees without regard to the statutory rule if the decrees advance the goals of the statute. *Id.* at 3077-78. This is troubling when the consent decree adversely affects third parties and circumvents the political accountability of defendants to those third parties.

252. Sullivan, *supra* note 251, brings together the cases through the end of the Supreme Court's 1985 term and provides a helpful analysis. The 1986 term's cases include United States v. Paradise, 107 S. Ct. 1053 (1987) and Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

253. 106 S. Ct. 3019 (1986). *Paradise* also dealt with court-imposed relief. *See* 107 S. Ct. at 1064 ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications to remedy unlawful treatment of racial or ethnic groups subject to discrimination.").

VII.[254] Title VII forbids employment decisions based upon race and other enumerated categories.[255] After the union had repeatedly disobeyed orders to cease further discrimination, the district court ordered it to bring its minority membership up to twenty-nine percent.[256] As such, the terms of the order overreached the statutory rule because, as all members of the Court agreed, racial imbalances within a work force do not violate title VII.[257]

Although they agreed that racial imbalance was not a violation, the Court's members disagreed on the remedy's appropriate scope under the tailoring doctrine for conduct that did violate the Act. Justice Brennan's plurality voted to affirm the district court's remedy requiring racial quotas.[258] Justice Rehnquist and Chief Justice Burger dissented, arguing that title VII expressly prohibited injunctions requiring racial preferences unless the plaintiffs were actual victims of past discrimina-

254. *Sheet Metal Workers'*, 106 S. Ct. at 3026 (discussing EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 401 F. Supp. 467, 487-88 (S.D.N.Y. 1975)).

255. Title VII of the Civil Rights Act of 1964 provides:

> (a) Employers. It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

256. *Sheet Metal Workers'*, 106 S. Ct. at 1027 (noting that nonwhite membership goal was "based on the percentage of nonwhites in the relevant labor pool in New York City") (citing *Local 638*, 401 F. Supp. at 488). The Reagan administration argued that relief other than an order to cease further violations should be available only to the direct victims of the defendants' discrimination. *See* N.Y. Times, July 3, 1986, at B9, col. 1. According to the Solicitor General, " 'race-conscious remedies which are not victim-specific are never permissible.' " *Id.* (quoting Charles Fried).

257. Writing for a plurality of four Justices, Justice Brennan found that the rule of liability

> stated expressly that the statute did not require an employer or labor union to adopt quotas or preferences simply because of a racial imbalance. However, while Congress strongly opposed the use of quotas or preferences merely to maintain racial balance, it gave no intimation as to whether such measures would be acceptable as *remedies* for Title VII violations.

106 S. Ct. at 3043-44 (emphasis in original) (footnote omitted).

258. *See id.* at 3054.

tion.[259] Rejecting Justice Rehnquist's reading of title VII, Justice Brennan suggested that judges should assume statutes do not limit their traditional equitable discretion to tailor remedies unless the statute expressly states otherwise.[260] Justices White and O'Connor, writing separate opinions, found the remedy overbroad.[261]

This splintering, however, was not over the applicability of the tailoring doctrine.[262] Indeed, Justice Brennan stated that a court must "take care to tailor its orders to fit the nature of the violation it seeks to correct."[263] Beyond invoking the doctrine

259. *Id.* at 3063. In other words Justice Rehnquist based his position on a statutory limit on relief rather than any generally applicable equitable principle such as the tailoring doctrine. Justice Rehnquist cited § 706(g) of title VII as the limiting provision. *Id.* Because few statutes speak to the scope of relief other than through the implications of their rules of liability, Justice Rehnquist's opinion is of little relevance to this Article. Although Justice Rehnquist and Chief Justice Burger did not reach the tailoring doctrine in the case, their views probably coincide with those of Justices O'Connor, *see id.* at 3057-62 (concurring in part and dissenting in part), and White, *see id.* at 3062-63 (dissenting).

260. *Id.* at 3044. Justice Brennan commented: "In the absence of any indication that Congress intended to limit a district court's remedial authority in a way which would frustrate the court's ability to enforce Title VII's mandate, we decline to fashion such a limitation ourselves." *Id.* Justice Powell, who supplied the fifth vote for affirmance, echoed Justice Brennan on this point. *See id.* at 3054 (concurring) (agreeing that title VII "does not limit a court in all cases to granting relief only to actual victims of discrimination"). Their position parallels the statement in *Hecht Co. v. Bowles* that statutes will not be read to take away courts' power to balance the equities without a clear statement. *See* 321 U.S. 321, 330 (1944); *supra* notes 109-11 and accompanying text.

261. *See* 106 S. Ct. at 3062-63 (White, J., dissenting), 3057-62 (O'Connor, J., concurring in part and dissenting in part). Justice White agreed with the plurality that § 706(g) did not rule out race-conscious remedies that benefit nonvictims. *See id.* at 3062 (noting that § 706(g) "does not bar relief for nonvictims in all circumstances").

Justice O'Connor stated that Justice Brennan's reading of the statute is contrary to Firefighters Local Union 1784 v. Scotts, 467 U.S. 561 (1984), but she made little more of that point. *See* 106 S. Ct. at 3057 (stating that § 706(g) discussion in *Scotts* was important to its holding, though technically dicta). Rather, she concentrated on what kind of remedy would be appropriate if the statute did not rule out race-conscious relief. *See id.* at 3060 (finding that permissible goal should require "only a good faith effort" by employer or union to come within range of racial hiring or membership goal).

262. Rather the division came over whether title VII inhibits the courts' traditional powers to tailor remedies and whether the district's court's remedy imposed a rigid or a flexible quota. *See, e.g., id.* at 3062 (White, J., dissenting) ("[C]ontrary to the Court's views, the cumulative effect of the revised affirmative action plan and the contempt judgments against the union established not just a minority membership goal but also a strict racial quota that the union was required to attain.").

263. *Id.* at 3050. Justice O'Connor expressed similar sentiments, *see id.* at

in general terms, however, the Justices said nothing about their understanding of the doctrine or how it guides judges in formulating injunctive relief. As with the balancing doctrine, the Court failed to articulate transsubstantive principles to guide its exercise of equitable discretion. Nonetheless, the positions taken by the Court's members regarding the injunction's appropriate scope under the tailoring doctrine, although varied, do evidence substantial implicit agreement as to what the tailoring doctrine means.

The Justices initially rejected two possible meanings of the tailoring doctrine.[264] First, they rejected the notion that the Court should tailor the remedy to the goal of the statute rather than its rule of liability. Because title VII seeks to achieve a racially balanced work force through a rule forbidding racial discrimination, a violation of that rule could trigger an order to achieve racial balance. Justice Brennan rejected such an approach, stating that "the Court should exercise its discretion with an eye towards Congress's concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force."[265]

Invoking general principles of equitable discretion and arguing that the Court must tailor the remedy to the violation,[266] Justice Brennan suggested that the remedy must aim to achieve the rightful position under the statutory *rule* even if that falls short of fully vindicating the statutory *goal*.[267] This result clearly comports with the proposed principle, which requires that injunctions honor not only the statutory goals, but also congressional choices about how to achieve those goals—statutory rules. Title VII's statutory rule prohibits discrimina-

3061 (quoting Justice Brennan), as did Justice Powell, *see id.* at 3055 (remedy must be narrowly tailored).

264. The Justices also rejected a third argument that under the tailoring doctrine the Court should limit relief to a reparative order in favor of actual victims and a preventive order that was not race-conscious. *See id.* at 3034-52.

265. *Id.* at 3050. Justice O'Connor chided Justice Brennan for cutting "the congressional rejection [of race-conscious remedies, which she finds that the statute itself expressly imposes] loose from any statutory moorings and mak[ing] this policy simply another factor that should inform the remedial discretion of district courts." *Id.* at 3059. In other words Justice O'Connor claimed that only statutory provisions limiting the Court's remedial power could justify Justice Brennan's rejection of racial balance as a proper injunctive goal—an argument Justice Brennan rejected, *see id.* at 3050. Justice O'Connor is wrong, but her error is understandable given the plurality's failure to flesh out its understanding of tailoring.

266. *Id.* at 3050.

267. *See supra* text accompanying note 265.

tion.[268] It does not require racial balance. Thus, an order requiring an employer to achieve a racial balance, although it may vindicate title VII's goals, would ignore Congress's chosen means—its rule against discrimination.

Second, the Justices unanimously rejected the union's argument that tailoring requires the Court to limit the relief to actual victims.[269] Such an approach would have allowed the Court to give actual victims jobs, back pay, and seniority—all reparative relief. It would have also permitted an order barring repeat discrimination against past victims—preventive relief. That approach, however, would have barred preventive relief for nonvictims such as an order not to discriminate against them. Under the proposed approach, the Court properly rejected this application of tailoring. Preventive relief for nonvictims aims to do no more than give the benefit of the rule of liability to those it protects, it serves the statutory goals, and it is difficult to imagine any factors that could excuse defendant's engaging in future violations against fresh victims.

Instead, seven Justices adopted a third approach to the application of tailoring under the facts of *Sheet Metal Workers'* that endorsed race-conscious preventive orders in at least some circumstances.[270] Justice Brennan sanctioned such orders when employers or unions repeatedly refused to comply with title VII, thus presenting a threat of continued resistance:

> Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.[271]

According to Justice Brennan, ordering the defendant to do

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268. *See supra* note 255.

269. *See* 106 S. Ct. at 3047-48. Justices Powell, White, and O'Connor did not raise any objection to an order to cease violations that benefited nonvictims. That was not a difficult decision because such relief is not race-conscious and it does no more than tell the defendant to obey the legislated rule of liability.

270. *See id.* at 3036 (Brennan, J., plurality opinion, joined by Justices Marshall, Blackmun, and Stevens); *id.* at 3054, 3056 (Powell, J., concurring in part); *id.* at 3060-62 (O'Connor, J., concurring in part and dissenting in part); *id.* at 1062 (White, J., dissenting).

271. *Id.* at 3036. Justice Powell concurred in the judgment on this theory and Justices White and O'Connor seemed to agree with this theory as a standard of equitable discretion. *See supra* note 270.

more than cease its violations—to achieve a particular level of minority representation in its work force—was necessary to achieve the plaintiff's rightful position.

Although the injunction's goal was to achieve the rightful position, its terms, if viewed as solely preventive in purpose, overreached that position. To be consistent with the proposed principle, this deviation must have served the statute's goals and the case must have presented a factor not considered by the legislature in formulating the statutory rule. Whether terms deviating from the plaintiff's rightful position served title VII's goals presents a difficult question. The various Justices disagreed over the nature of the deviation—whether the district court's remedy was flexible or mandatory—and over what goals the statute served.[272] On the one hand, Justices O'Connor and White apparently concluded that title VII sought to protect nonminorities from the adverse impact of racial preferences and interpreted the district court's remedy as imposing a rigid quota.[273] On the other hand, Justices Brennan and Powell concluded that the district court had not imposed a rigid quota[274] but did not decide whether Congress intended title VII to protect nonminorities from reverse discrimination.[275]

If Congress did intend the Act to protect nonminority job applicants from reverse discrimination, requiring a rigid quota for minority hiring would in fact undercut that goal if the quota exceeded minority representation among qualified applicants. In that situation, fulfilling a rigid quota would require hiring less qualified minority candidates over more qualified nonminority candidates.[276] Interpreting the remedy imposed as requiring flexible hiring goals rather than a rigid quota, however,

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272. *See supra* note 262.

273. *Sheet Metal Workers'*, 106 S. Ct. at 3059 (O'Connor, J., concurring in part and dissenting in part); *id.* at 3062-63 (White, J., dissenting).

274. *Id.* at 3051 (Brennan, J., plurality opinion); *id.* at 3057 n.4 (Powell, J., concurring in part). Justice Powell finds rigid quotas objectionable on equal protection grounds. *Id.* at 3055-57.

275. This oversight is unfortunate because resolution of that issue would let lower courts know what sort of quotas they may impose. The importance of this point would have been made manifest if Justice Brennan had explained what he meant by tailoring the remedy.

276. Both Justices O'Connor and White made this point. *See id.* at 3060 (O'Connor, J., concurring in part and dissenting in part) (arguing that rigid quota harms nonminority candidates); *id.* at 3062 (White, J., dissenting) (same). Justice O'Connor also suggested that the minority representation requirement goes to overall union membership rather than new union membership so that, absent a large turnover in membership, even a nondiscriminatory membership policy would not produce compliance with the quota. *Id.* at 3061.

would avoid the reverse discrimination problem and reconcile the injunction with the statutory goal of protecting minority and nonminority job applicants. Under this analysis, allowing the injunction's terms to overreach the plaintiff's rightful position served title VII's goals.

Additionally, the case presented a factor that justified terms going beyond the plaintiff's rightful position. The harm caused by the defendant's continued resistance created a circumstance not reflected in the rule of liability. Recognizing this factor, seven Justices implicitly agreed that proper application of the tailoring doctrine supported a reparative order for actual victims and a preventive order for nonvictims that included flexible, race-conscious goals to overcome the defendant's resistance[277]—a result justified under the proposed principle.

Justice Brennan, however, favored allowing race-conscious remedies for an additional reason. He held that race-conscious relief would be appropriate not only when the defendant presented a threat of continued resistance, but also when "necessary to dissipate the lingering effects of pervasive discrimination."[278] Dissipating discrimination's lingering effects, according to Brennan, includes overcoming the defendant's reputation for discrimination, which likely discourages applicants long after the defendant ceases its discrimination.[279] Justice Brennan also noted that because employers often base hiring decisions on social connections between present employees and job applicants, past discrimination could have lingering effects on the patterns of future hiring.[280] Race-conscious relief to address these lingering effects would be preventive because it would seek to ensure that the defendant provides equal employment opportunity for future job applicants.

Justice Brennan further indicated that race-conscious relief granted to remedy the lingering effects of discrimination also

277. *See supra* notes 270-71 and accompanying text.

278. *Sheet Metal Workers'*, 106 S. Ct. at 3034. Because the phrases "lingering effects" and "pervasive discrimination" are repeated in tandem later in Justice Brennan's opinion, *see id.* at 3050, he undoubtedly intended them to have distinct meanings.

279. *Id.* at 3036. Justice Brennan may indeed be defining dissipation of the "lingering effects of pervasive discrimination," *id.* at 3034, 3050, when he says: "[E]ven where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities. An employer's reputation for discrimination may discourage minorities from seeking available employment." *Id.* at 3036 (citations omitted).

280. *Id.* at 3051.

might require reparative measures.[281] He did not in fact explicitly limit the concept of dissipating the lingering effects of discrimination to the situations noted above. That concept could also include, for example, bringing minority representation in a defendant's work force up to the level that it would have been at but for the past discrimination—a reparative measure. Interestingly, the order upheld by Justice Brennan in *Sheet Metal Workers'* called for a given level of minority representation in the union's *total* membership rather than in its *new* membership from the date of the decree.[282] As such, the order seemed race conscious for distinctly reparative reasons. As Justice Brennan indicated, the quota upheld had a reparative as well as a preventive purpose: "[t]he purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination *and* to prevent discrimination in the future."[283]

Justice Brennan failed to show adequately that such reparative relief is consistent with any articulated version of the tailoring doctrine. Bringing minority representation in the defendant's work force up to the level it would have been at but for unlawful discrimination differs conceptually from requiring racial balance—a requirement the Court held the injunction could not impose.[284] The defendant may have lawfully excluded minorities before the law was passed, thereby reducing minority representation. Moreover, minority representation in the work force of an employer that had never discriminated may differ from minority representation in the relevant labor market because minorities may differ from others in job preferences and other ways.

Bringing minority representation in the defendant's work force up to the level that it would have been at but for unlawful discrimination also differs from providing reparative relief for past victims because some victims, if not most, will have lost interest in working for the defendant in the interim. In other words, reparative relief for actual victims plus preventive relief

281. *See id.* at 3049.

282. *See id.* at 3027 (describing district court's order). The injunction upheld in *United States v. Paradise* consisted of the same order. *See* 107 S. Ct. 1053, 1071 (1987); *infra* note 286.

283. *Id.* at 3049 (emphasis added). Justice Brennan may have been dropping hints for some future court regarding the use of quotas for reparative purposes while writing nothing sufficiently explicit to risk losing Justice Powell's vote in the case at hand.

284. *See supra* notes 265-67 and accompanying text.

is unlikely to achieve the level of minority representation that there would have been but for the violation. Consequently, increasing minority representation to the level it would have reached absent the violation would require the defendant to give nonvictim minorities a race-conscious preference over nonminorities.

Would such relief satisfy the proposed principle's requirement that the injunction may not aim to achieve more than the plaintiff's rightful position? If Congress sought to benefit not just individual victims of discrimination but also minority groups as a whole, a quota designed to bring the class up to the level it would have been at but for the violation would not accomplish more than the plaintiff's rightful position. If Congress meant to benefit individuals rather than groups, however, a quota to increase minority representation would go beyond the rightful position because it makes the defendant do more than the statutory rule requires.

Thus, the proposed principle requires a court to ask what interests the rule of liability was intended to protect. The Justices in *Sheet Metal Workers'*, however, failed to ask this question. Without even a glance at legislative intent, Justice Brennan simply asserted that providing relief "to the class as a whole rather than to individual members" was appropriate.[285] Other Justices give no clue as to their view of what Congress intended title VII to protect. The Court's failure to articulate its understanding of the tailoring doctrine resulted in its failure to address a pivotal question of interpretation—what interests Congress intended the law of liability to protect.

The analysis of *Sheet Metal Workers'* reveals several important points about the principle proposed to guide application of the tailoring doctrine. First, seven Justices took positions consistent with that approach, and none took a necessarily inconsistent position. Second, the seven Justices' failure to articulate what they meant by tailoring resulted in a failure to address key issues of statutory interpretation. Third, the lack of articulation results in insufficient guidance for lower courts deciding future title VII cases and, more generally, a continuing failure to develop transsubstantive principles to guide judges in fashioning injunctive relief.[286]

285. *Sheet Metal Workers'*, 106 S. Ct. at 3049.

286. These failures are perpetuated in the Court's 1987 decision in *Paradise*. *See* United States v. Paradise, 107 S. Ct. 1053, 1073 (1987). In *Paradise* the injunction aimed to achieve 25% minority representation, but Justice

D. WHICH APPROACH BEST FITS THE JUDICIAL ROLE?

The judge's need to justify the use of official power requires a definition of the circumstances in which a plaintiff receives *less* than the rightful position. A judge's need for justification also suggests that the injunction should not aim to make the defendant achieve *more* than that position because the violation legitimizes the injunction's intrusion on the private defendant's liberty or the governmental defendant's power. The violation, therefore, should act as a limit on the scope of the injunction's intrusion.

The proposed principle offers such a definition. That definition, however, does not inevitably yield a clearly right answer. Because Justices debate what tailoring means in individual cases, such as *Sheet Metal Workers'*, lower court judges can, in some cases, exploit this uncertainty to advance private policy objectives. Nonetheless, when scholars criticize the judiciary for decrees that interfere with private liberty or the power of the separate political branches, courts have successfully defended, arguing that the need to stop violations of the law justifies such intrusions.[287] A brief examination of the case law has suggested that courts do generally act consistently with this defense by tailoring their remedy to the violation, which brings their actions in accord with the proposed principle.[288]

Professors Chayes and Fiss, however, have a grander vision of the judge's role in society than the role the tailoring doctrine, as defined by the proposed principle, permits.[289] Fiss, for example, makes this view explicit in objecting that, if the tailoring doctrine limited courts' equitable discretion, judges could no longer "give meaning to our public values"[290] in the tradi-

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Brennan, writing the plurality opinion upholding the remedy, offered no justification for that goal. *See id.* at 1071-72. The injunction also required the defendant to hire minorities on a one-for-one basis until the 25% goal was reached. *Id.* at 1071. Justice O'Connor's dissent pointed out important inconsistencies in Justice Brennan's rationale for this one-for-one quota, *see id.* at 1080-81, which suggests that Justice Brennan may again be creating pretexts for racial balancing. *See supra* notes 282-83 and accompanying text.

287. *See, e.g.*, Fletcher, *supra* note 230, at 636-37 (arguing that trial court discretion is inevitably political but still legitimate because it is invoked to remedy injustices of other branches).

288. *See supra* notes 172-201 and accompanying text.

289. Chayes's view is implicit in his classic article, *The Role of the Judge in Public Law Litigation*. *See* Chayes, *supra* note 50 *passim*; Fiss, *supra* note 22 *passim*.

290. Fiss, *supra* note 22, at 52.

tion of *Brown II*.[291] Fiss correctly notes that courts do play an important role in the development of public values.[292] He also makes an important contribution in emphasizing that the declaration of rights in the process of finding liability has far different consequences for public values than the implementation of a remedy.[293] After all, talking about something is different from going through it.

Fiss and Chayes, however, assert that in their vision of the development of public values in the course of litigation, the standard of conduct required by an injunction becomes the norm under which courts judge the conduct of all persons.[294] Today's injunction becomes tomorrow's generally applicable rule of liability. This idea conflicts with the tailoring doctrine. A decree may command an employer to strive for a particular minority employment goal, but that does not make racial balance the new rule of liability. Because tailoring acts to limit the judge's role as unconstrained policy maker, Fiss views tailoring as a problem—it interferes with his vision of the courts' role in developing public values, which is to impose the values and command compliance with them.

Contrary to Fiss's and Chayes's view, judges help to change public values not by imposing them, but by teaching the people—that is, by education rather than inculcation.[295] For example, according to Professor Alexander Bickel's account of the

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291. 349 U.S. 294 (1955); *see supra* notes 172-78 and accompanying text.

292. Fiss, *supra* note 22, at 2.

293. *Id.* at 52.

294. Chayes, *supra* note 50, at 46-47; Fiss, *supra* note 22, at 52; *see also* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 637-46 (1981) (arguing that traditionally judges create normative criteria from complex remedies).

295. *See, e.g.*, Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 878-85 (1987). Consider, for example, the civil rights experience that Fiss invokes:

> What are the sources of fundamental change in our society? From what spring will justice roll down like water? That mighty stream of righteousness—how do we find it? Martin Luther King, Jr., . . . located that spring inside people: in their hearts, or souls, or whatever the organ is called that can override selfish calculation and act instead on love. His strategy called for conversion—if not of the policeman brandishing the club, then at least of the bystanders watching on TV. . . . Far more than he wanted the Voting Rights Act, far more than he wanted the freedom to eat at dimestore lunch counters, far more than he wanted black elected officials, King wanted the change of heart in individual Americans which would make those political developments possible.

Talk of the Town, Notes and Comments, NEW YORKER, Sept. 12, 1983, at 37 (on celebration of 20th anniversary of 1963 March on Washington).

battle over school desegregation, the Court's ruling did not make public values, but it did make the public feel the trespass of discrimination.[296] As a result it set the stage for people to adopt new values about the relationship between the races. Bickel shows how the Court's initial pronouncement in *Brown I* triggered Southern opposition, to which Northerners and Southern moderates reacted apathetically.[297] Emboldened by this apathy, the Southern opposition took to the streets, rioting in Little Rock and elsewhere.

> Compulsory segregation, like states' rights and like "The Southern Way of Life," is an abstraction and, to a good many people, a neutral or sympathetic one. These riots, which were brought instantly, dramatically, and literally home to the American people, showed what it means concretely. Here were grown men and women furiously confronting their enemy: two, three, a half dozen scrubbed, starched, scared, and incredibly brave colored children. The moral bankruptcy, the shame of the thing, was evident.[298]

The tailoring doctrine was central to this process. Once liability was established, the tailoring principle resulted in a command to cease violations and a remand to the defendant—school officials—to determine how they would end the segregation. In a broader sense, however, the remand was to the public's conscience. The courts had negated continuance of the violation, but, consistent with the remand concept,[299] left to others the affirmative question of how to live a life unblemished by this violation of the law. When the defendants or the public tried to avoid this struggle by continuing segregation, the tailoring doctrine resulted in increasingly intrusive decrees designed to make sure that the trespass could not continue.[300]

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296. A. BICKEL, *supra* note 7, at 244-72 (2d ed. 1986).

297. *See id.* at 254-66 (discussing reaction to school desegregation cases and eventual need for executive enforcement).

298. *Id* at 266-67.

299. *See supra* text accompanying note 229. In addition, courts emphasize damages as a form of relief, which of course leaves the defendants free to decide how to act in the future as long as they are willing to pay damages.

300. O. FISS, *supra* note 131, at 35-37. Similarly, in institutional reform cases in which the institution cannot overcome conditions that violate the Constitution because the state legislature has refused to appropriate the necessary funds, courts try to avoid using the supremacy clause to make the state provide the money or even deciding whether they could do so. *See, e.g.*, Welsch v. Likins, 550 F.2d 1122, 1131-32 (8th Cir. 1977) (finding that federal courts should try to avoid interfering with state budgeting process); Wyatt v. Anderholt, 503 F.2d 1305, 1316-19 (5th Cir. 1974) (same). Instead, courts put before the state legislature the conflict between their desire to incarcerate prisoners or the mentally ill and the constitutional objection to incarcerating people in poor conditions. If the government defendant still does not solve the problem, courts avoid ordering specific conduct, choosing instead to make it in-

The courts did not force new values on people but rather cast guilt upon old values and thus set the stage for people to create their own values. Fiss thus misconceives the role that courts play in developing public values and therefore errs in categorizing the tailoring doctrine as part of the problem rather than as part of the solution.

CONCLUSION

Just as judges must act on the basis of articulated principles when they determine liability, they must also do so when they fashion injunctive relief. Precedents on the measure of injunctive relief in various substantive areas of the law fail to provide the necessary principles because they show what prior courts *did* but do not explain *why* in transsubstantive terms. Although the basic doctrines of balancing the equities and tailoring the remedy are transsubstantive, they are confusing because they deal with one question—the measure of injunctive relief—in different and vague terms. The pure policy-making approach advocated by Chayes fails to define these doctrines because it, in essence, denies the need to subject decisions on the scope of injunctive relief to the restraints of judicial reasoning. Plater's refined policy-making approach denies judges the power to balance the equities in statutory cases, although judges should and do exercise such power.

This Article argues that the judicial role requires the restraint lacking in the pure policy-making approach and the flexibility in statutory cases denied in Plater's approach. The key task is to define the principle under which equity should honor the law, which the Article does: The injunction should require the defendant to achieve the plaintiff's rightful position unless (a) different relief is consistent with the goals of the violated rule *and* (b) the case involves a factor justifying departure from the rule that was not reflected in its formulation, but the injunction may never aim to achieve more than the plaintiff's rightful position.

The essence of this principle is that, in exercising their equitable discretion, judges must honor the decisions that the law has made as to both the ends—the goals of the law of liability—and the means—the modes designated by the law of liability to achieve its ends. Equitable discretion should kick in only when

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creasingly difficult to continue the trespass, such as by ordering or threatening to order inmates released.

the case presents issues as to the means that the law has left undecided, and even then it should remain controlled by the law's decisions as to ends. If so, the law truly is honored in the breach.

The proposed principle may seem so vague as to be unhelpful or so commonsensical as to be obvious, but it is neither. Although the principle, like most doctrines, fails to grind out uniquely right answers—that is, its application requires judgment as to which reasonable people could differ—it does pose the right questions. The principle does, moreover, help to distinguish seemingly conflicting cases. It also should prove helpful in appeals of injunctions. The standard of review is abuse of discretion,[301] which becomes a pretense for policy making in appellate litigation unless the appellate judges articulate what the trial judge's scope of discretion was in fashioning the injunction. *Sheet Metal Workers'* is a case in point; the Justices's arguments passed each other like the proverbial ships in the night.

The principle is also not obvious. Although an examination of the case law suggests that judges instinctively come out in ways consistent with the principle, they sometimes do not, as seen at points scattered throughout this Article. Moreover, thoughtful scholars, such as Chayes, Fiss, and Plater, come out with strikingly different formulations. The best evidence, however, is my own experience. After searching the literature and the case law years ago for a transsubstantive formulation of injunctive relief and coming up empty-handed, I decided that a clear statement of the measure of the injunction would save judges and lawyers much groping in the dark.

301. *See, e.g.*, United States v. W.T. Grant Co., 345 U.S. 629, 633-34 (1953) (noting that trial court has wide discretion to determine whether "some cognizable danger of recurrent violation" of statute exists and to issue injunctions accordingly).