

A FAREWELL TO HARMS: PRESUMING IRREPARABLE INJURY IN CONSTITUTIONAL LITIGATION

Anthony DiSarro[†]

Although irreparable injury is an essential element to obtaining injunctive relief, most federal circuit courts have held that irreparable injury should be presumed in constitutional cases.¹ Thus, the ability of a plaintiff to secure an injunction against a claimed violation of the Constitution frequently turns on whether she has made a sufficient showing of probability of success on the merits of her constitutional claim.² The Supreme Court has disapproved of the practice of presuming irreparable harm for federal statutory claims but has not addressed it for constitutional claims.³ A few circuit courts, sensing that the Court will not endorse a blanket presumption, have opted to limit the presumption to certain constitutional claims.⁴

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

[†] Adjunct Professor of Law, New York Law School; formerly, a litigation partner for fifteen years at the New York Office of an Am Law 100 firm; B.A. 1983, State University of New York at Albany; J.D. 1986, New York Law School; LLM 2011, Columbia University School of Law. I am grateful to Columbia Law Professor Bert Huang for his input to this article.

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

² The type of showing on the merits that is required for a preliminary injunction is not uniform among or even within the federal circuits. Some decisions imply that a showing higher than a 51% chance of success is required. *E.g.*, *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 n.3 (1st Cir. 2002) (requiring a “strong showing” of likelihood of success). Other courts have implied that a showing well below 50% will suffice. *E.g.*, *Roland Machinery Corp. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984) (plaintiff must show that she has “a better than negligible chance” of succeeding in order to obtain a preliminary injunction). *See generally* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Standard*, 22-3 THE REVIEW OF LITIGATION 495, 501 (2003), available at http://www.ilnd.uscourts.gov/Judge/DENLOW/md_pim2.pdf (discussing the various iterations).

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

³ *EBay Inc. v. MercExchange, LLC.*, 547 U.S. 388 (2006); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010). *See infra* text accompanying notes 82-94.

⁴ *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299-304 (D.C. Cir. 2006); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir. 2003). *See infra* text accompanying notes 95-102.

Conclusive presumptions can be justified on the ground that they save judicial time and resources by eliminating needless litigation over matters that are incontrovertible or self-evident, but the existence and extent of harm from constitutional infractions is not a no-brainer, not even for purposes of standing to sue.⁵ It is also difficult to see how a presumption of irreparable harm will save a significant amount of time or resources. In cases where irreparable injury is both substantial and apparent, a presumption would appear to be unnecessary since proof of the injury can quickly and easily be demonstrated.

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

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

Although the presumption of irreparable harm has been applied to applications for permanent injunctions as well as preliminary ones, this article will focus on the appropriateness of the presumption in connection with preliminary injunctions. Much like civil litigation in general, substantially all constitutional tort cases settle prior to a final determination of the merits.⁶ Thus, while the permanent injunction is relatively infrequent, the preliminary injunction has become, much like class certification, a “momentous” pre-trial ruling that “[w]ith vanishingly rare exception, . . . sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.”⁷ The recognition that a preliminary

⁵ Indeed, much of the doctrine of constitutional standing is devoted to determining not simply whether an individual has been injured by a constitutional violation, but whether the injury affects the plaintiff “in a personal and individual way”, *Arizona Christian School Tuition Org. v. Winn*, 563 U. S. ____ , Case No. 09–987, Slip Op. at 5 (Apr. 4, 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)), or is simply the “generalized interest of all citizens in constitutional governance.” *Id.* at 6 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208, 217 (1974)).

⁶ Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 661-62 & n.9 (2006) (observing that the vast majority--i.e., in excess of 95%--of Section 1983 and *Bivens* cases are disposed of prior to trial); *see also* <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx>.

⁷ Richard A. Nagarita, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Scholars have recognized the significant effect that preliminary injunction rulings have on settlement of litigation. See Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 573 (2001) (noting that plaintiffs often seek preliminary injunctions to pressure defendants to settle cases). A defendant who has been preliminarily enjoined has an increased incentive to settle: To avoid the risk of being held in contempt for having violated the injunction. See Anthony DiSarro, *Six Decrees of Separation: Consent Orders and Settlement Agreements in Federal Civil Litigation*, 60 AM. L. REV. 276, 284 (2010).

injunction decision is, again like class certification, “no mere . . . procedural ruling” is reflected in the fact that Congress has expressly authorized interlocutory appeals from these pre-trial determinations.⁸

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

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

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

In Part III, I analyze the implications of eliminating the presumption and discuss the significant adjudicative benefits that such a change would produce. I also discuss the need for a revised approach to attorneys’ fees-shifting so that the declaratory judgment will have equal status in the remedial hierarchy as the injunction. Finally, in part IV, I consider theoretical justifications for making injunctions more accessible in constitutional cases and conclude that those justifications do not justify the presumption.

I. THE DEVELOPMENT OF THE IRREPARABILITY ELEMENT

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

A. Pre-Revolutionary English Practice

The injunction, and equity practice in general, arose because English law courts rigidly adhered to a writ system, whereby a plaintiff could assert a claim only for specific, pre-existing

⁸ Nagarita, *supra* note 6, at 98-99. Like a class certification determination, a preliminary injunction ruling is the basis for an interlocutory appeal in federal practice. 28 U.S.C. § 1292 (a) (1).

writs, such as trespass or nuisance.⁹ When a plaintiff could not fit his claim within the narrow requirements of a writ, he would petition the King’s chancellor for relief.¹⁰

As the number of these petitions grew, the chancery came to function much like a court.¹¹ Over time, common law courts sought to protect their jurisdictional terrain from encroachments by chancery courts and forced equity courts to decline jurisdiction where the claimant had an adequate remedy in the law courts.¹² The injunction evolved as a tool for equity courts to restrain conduct that was adjudged to be unlawful, provided a plaintiff could show irreparable injury—an injury which the common law could not adequately address.¹³

B. Post-Separation Federal Practice

The irreparability requirement was included in the Judiciary Act of 1789, which was enacted by the First Congress and also authorized the creation of separate federal law and equity courts.¹⁴ Section 16 of the Act, providing that actions in equity could not proceed if there was a “plain, adequate and complete” remedy at law, was specifically intended to incorporate the pre-revolutionary English standard.¹⁵

The adequate remedy rule was applied in one of the Supreme Court’s most noteworthy decisions of the Marshall Court Era: *Osborn v. Bank of the United States*.¹⁶ The Supreme Court upheld an injunction that restrained a state official from taxing, in a repeated and confiscatory manner, a federal bank with the “avowed purpose of expelling the Bank from the State.”¹⁷ Chief Justice Marshall rejected the argument that the federal bank had an adequate remedy at law in the form of a trespass action for damages, reasoning that the bank sought protection, “not from the casual trespass of an individual . . . , but from the total destruction of its franchise, [and] of its chartered privileges”.¹⁸

Although early federal courts recognized the importance of the injunction as a remedial device to prevent irretrievable and inestimable losses, they were cognizant of the potential

⁹ Owen Fiss, INJUNCTIONS 10 (1972); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Standard*, 22-3 THE REVIEW OF LITIGATION 495, 501 (2003), available at http://www.ilnd.uscourts.gov/Judge/DENLOW/md_pim2.pdf.

¹⁰ Robert S. Thompson & John A. Sebert, Jr., REMEDIES: DAMAGES, EQUITY AND RESTITUTION, § 3.01, at 221 (2d ed. 1989); Susan H. Black, *A New Look at Preliminary Injunctions: Can Principles From the Past Offer Any Guidelines to Decisionmakers in the Future?* 36 ALA. L. REV. 1, 3-4 (1984).

¹¹ Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990); see Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 739 (1973).

¹² Laycock, *supra* note 4, at 699-700; Black, *supra* note 3, at 4; *Development of the Law—Injunction*, 78 HARV. L. REV. 997, 997 (1965).

¹³ John Leubsdorf, *The Standard For Preliminary Injunctions*, 91 HARV. L. REV. 525, 536-37 (1978); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 128 (2001); see William W. Kerr, INJUNCTIONS IN EQUITY 199, 295 (1867).

¹⁴ 1 Stat. 78.

¹⁵ *Harrison v. Rowan*, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819) (Washington, J.); see also *Mayer v. Foulkrod*, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (“The only inquiry here must be, what are the principles, usages, and rules of courts of equity, as distinguished from courts of common law, and ‘defined in that country, from which we derive our knowledge of those principles.’”) (*quoting Robinson v. Campbell*, 3 Wheat. [16 U. S.] 212).

¹⁶ 22 U.S. 738 (1824).

¹⁷ *Id.* at 840.

¹⁸ *Id.* at 841-46.

overreaching nature of the remedy. As Supreme Court Justice Joseph Story, perhaps the most authoritative commentator on equity jurisprudence in the early days of the Republic, noted in his treatise, equity courts should exercise “extreme caution” when considering injunctions, and that they should be issued “only in very limited clear cases.”¹⁹ He cited with approval the following language from an 1830 circuit court opinion by Supreme Court Justice Henry Baldwin:

There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity that ought never to be extended, unless to cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages.²⁰

The Supreme Court emphasized the rigorous nature of the irreparable injury standard in its seminal 1908 ruling in *Ex Parte Young*.²¹ Deflecting concerns that permitting private litigants to obtain injunctions against state officials for their allegedly unconstitutional conduct would bring forth a “great flood of litigation,” the Court expressed confidence that federal court judges would limit issuance of the remedy to situations where a state official’s action produces “great and irreparable injury” to the complainants.²²

C. Twentieth Century Federal Practice

With the promulgation of the Federal Rules of Civil Procedure in 1938, the federal equity and law courts were merged.²³ The irreparable injury requirement, though its original purpose was to maintain the distinction between law and equity courts, did not fade away. It had come to fulfill other important functions.

First, the requirement serves to prevent erosion of a civil litigant’s right to a jury trial, which was enshrined in the Seventh Amendment.²⁴ Supreme Court Justices, in early circuit court rulings, declared that the term “common law” in the Seventh Amendment’s text refers to the common law of England and that civil jury rights should be determined based on the distinction between law and equity as reflected in English law.²⁵ Thus, if a particular cause of

¹⁹ Joseph Story, EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 959b at 172 (11th ed. 1873).

²⁰ *Id.* at 172 n.1 (citing *Bonaparte v. Camden & Amboy Railroad Co.*, 3 F. Cas. (Baldw. 205) 821, 827 (C.C.D.N.J. 1830)). The same standard was applied by the Supreme Court in its 1847 decision in *Truly v. Wanzer*, 46 U.S. 141 (1847).

²¹ 209 U.S. 123 (1908).

²² *Id.* at 166-67; *Massachusetts State Grange v. Benton*, 272 U. S. 525, 528 (1926) (“no injunction ought to issue ... unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury”); *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919). Most state courts applied the same standard. James L. High, A TREATISE ON THE LAW OF INJUNCTIONS § 22, at 20 (4th ed. 1905).

²³ Thompson & Sebert, *supra* note 3, § 3.01, at 223 (2d ed. 1989).

²⁴ The Seventh Amendment’s Trial by Jury Clause provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...” U.S. CONST., amend. 7.

²⁵ *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J); *Bains v. The James and Catherine*, 2 F. Cas. 410, 418 (C.C.D. Pa 1832) (Baldwin, J.); see *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830) (“By common law, they meant ... suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered”).

action is analogous to a legal claim in 18th Century English practice, then it should be tried before a jury in federal court.²⁶ If, on the other hand, a claim is similar to what was traditionally an equitable claim, then no jury trial right would exist.²⁷ The legal or equitable nature of the remedy sought is of particular importance in the analysis.²⁸ Thus, by constraining the availability of the equitable injunctive remedy, the irreparable harm rule serves to preserve civil jury trial rights.

Second, the substantive principles of equity applied by the English chancery courts, including the irreparable injury requirement, define the contours of the equity jurisdiction conferred by Congress to the federal courts in the Judiciary Act of 1789.²⁹ Those principles are also incorporated into Federal Rule of Civil Procedure 65, which authorizes federal courts to grant injunctions in federal cases.³⁰ Thus, although the present Supreme Court remains bitterly divided over whether the particular forms of equitable relief that are available are limited to those used by 18th Century English chancery courts,³¹ all of the Justices are in agreement that the substantive principles of equity are constrained by 18th Century English equity practice.³²

Third, the Supreme Court has determined that where a federal statute specifically provides for the issuance of injunctive relief, a federal court should nevertheless apply, absent a

²⁶ For instance, the Supreme Court has held that a jury should determine both liability and damages in a copyright infringement action because such tasks were performed by juries in 18th English practice. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353-55 (1998); see *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42 (1989) (statutory cause of action by a bankruptcy trustee to recover a fraudulent conveyance was analogous to the 18th Century English common law actions for trover and money had and received and thus should be tried before a jury).

²⁷ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 379-84 (1996) (construction of the patent claim should not be relegated to a jury); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567-69 (1990) (claim that a labor union breached its duty of fair representation was analogous an English equitable claim for breach of fiduciary duty against a trustee).

²⁸ *Compare Ross v. Bernhard*, 396 U.S. 531, 537 (1970) (treble damages is a remedy at law and is triable by jury), with *Tull v. United States*, 481 U.S. 412, 422-25 (1987) (equitable remedy of disgorgement is not triable before a jury).

²⁹ Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZAGA L. REV. __ (2011). The Judiciary Act, which conferred jurisdiction to federal courts to adjudicate "suits...in equity," § 11, 1 Stat. 78, was construed as having adopted the substantive principles of equity that were "administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939).

³⁰ FED. R. CIV. P. 65. The rule contains no substantive elements and merely specifies procedural requirements for the granting of injunctive relief. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U. S. 308, 318-19 (1999); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2941, p. 31 (2d ed.1995) ("[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.").

³¹ *Grupo Mexicano*, 527 U. S. at 322 (a federal court lacks the equitable power to issue a pre-judgment asset freeze order because such a remedy had "never been available before" in equity); *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-15 (2002) (plaintiff's claim for restitution was not typically available in equity and thus could not be asserted under statute limiting remedies to equitable ones).

³² *Grupo Mexicano*, 527 U. S. at 336 (Ginsburg, J., dissenting) ("From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England; we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.")

clear indication to the contrary from Congress, the traditional substantive prerequisites for obtaining injunctive relief.³³ The Court has explained that the irreparable injury prerequisite to injunctive relief:

reflect[s] a “practice with a background of several hundred years of history,” a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles.³⁴

Fourth, the irreparable injury requirement establishes a bias in favor of legal remedies, as opposed to equitable relief, in the interests of judicial efficiency and fairness.³⁵ It protects defendants from the “exaggerated harm” that an injunction frequently imposes when the decree’s language restrains activity beyond that which is alleged to be unlawful, or where its imprecision forces a defendant to choose between foregoing potentially permissible conduct and facing a civil contempt motion.³⁶ Injunctions, moreover, impose significant burdens on courts by requiring them to participate in the crafting of the decree and to entertain applications to enforce or modify it.³⁷ The irreparable injury standard also prevents courts from considering harms that are distant or conjectural,³⁸ or that are insubstantial, such a plaintiff’s psychic dissatisfaction with the defendant’s non-compliance with the law.³⁹

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

D. Injunctive Relief for Constitutional Claims

Under the Supreme Court’s equitable jurisprudence, the fact that the plaintiff’s claim is grounded in the Constitution, as opposed to a federal statute or common law, does not relieve her from having to demonstrate irreparable injury. Indeed, many of the earliest injunction cases involve constitutional claims and emphasize the necessity of irreparable injury. *Osborn* involved

³³ *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). Congress is free to depart from established equitable principles but the departure must be explicitly authorized in the statutory text. *Id.* at 314.

³⁴ *Id.* at 313 (quoting *Hecht Co. v. Bowles*, *supra*, at 329); *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 541-44 (1987) (applying the same approach in the preliminary injunction context).

³⁵ Gene Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 392-97 (1983); Edward Yorio, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS §§ 2.1, 2.3, 23.1-23.4. (1989); Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 355-58 (1981).

³⁶ Shreve, *supra* note 28, at 389; DiSarro, *supra* note 6, at 284; see *Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).

³⁷ Shreve, *supra* note 28, at 389-90; DiSarro, *supra* note 6, at 317-22.

³⁸ *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919) (injunction must be shown to be necessary to prevent “great and irreparable injury”); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500 (1924) (injury must be “actual and immanent”); *Fenner v. Boykin*, 271 U.S. 240, 244 (1926) (requiring showing of “extraordinary circumstances, where the danger of irreparable loss is both great and immediate”).

³⁹ See *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900) (“it is familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling”); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 561, 14 L. Ed. 249 (1851); *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*, 2 Black 545, 551, 17 L. Ed. 333 (1862); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935).

a challenge to the constitutionality of a state statute under the Supremacy Clause⁴⁰ and *Ex Parte Young* presented an attack on state railway rates that were alleged to be confiscatory in violation of the Due Process Clause of the 14th Amendment.⁴¹ The federalism-based abstention doctrine of *Younger v. Harris* is also predicated on the principle of irreparable injury; specifically, because an individual can raise a constitutional challenge to a state statute as a defense to a pending state criminal proceeding, he will not suffer irreparable injury and cannot enjoin the state prosecution.⁴²

Several principles can be divined from the Supreme Court's jurisprudence in this area. First, when a government rule, policy or conduct is alleged to infringe a constitutionally-protected expressive right, the plaintiff can demonstrate the requisite irreparable injury by showing that she and others must forego exercising that right.⁴³ This showing usually necessitating a showing that the government rule, practice or action had a chilling effect on the exercise of that right.⁴⁴

Second, a plaintiff seeking an *ex ante* determination of constitutionality, but who cannot demonstrate irreparable injury, is not without a remedy. As the Supreme Court stated in *Steffel v. Thompson*, the remedy of a declaratory judgment is available to plaintiffs who cannot establish irreparable injury but who wish to present federal constitutional challenges to a government rule or policy before acting.⁴⁵ Indeed, the *Steffel* Court noted that Congress specifically enacted the

⁴⁰ 22 U.S. at 867-86 (“the Court adheres to its decision in the case of *M’Culloch* against *The State of Maryland*, and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void.”)

⁴¹ 209 U.S. at 143-44.

⁴² 401 U.S.37 (1971).

⁴³ *Dombroski v. Pfister*, 380 U.S. 479, 485-86 (1965) (facts “suggest[ing] that a substantial loss or impairment of freedoms of expression will occur ... clearly show irreparable injury”); *Steffel v. Thompson*, 415 U.S. 452, 463 n. 12 (1974) (“a showing of irreparable injury might be made in a case where ... an individual demonstrates that he will be required to forgo constitutionally protected activity in order to avoid arrest”).

⁴⁴ *Dombroski*, 380 U.S. at 490 (finding that appellants' “offers of proof outlin[ing] the chilling effect on free expression” adequate to “establish the threat of irreparable injury required by traditional doctrines of equity”); *Laird v. Tatum*, 408 U.S. 1, 8 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm”); see also *Younger v. Harris*, 401 U.S. 37 (1971) (“Where a statute does not directly abridge free speech, but--while regulating a subject within the State's power--tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.”).

⁴⁵ 415 U.S. 452, 463 n. 12 (1974) (Congress enacted the Declaratory Judgment Act to address complaints voiced by plaintiffs who were dissatisfied with this existing method of testing the constitutionality of state action, which “placed upon them the burden of demonstrating the traditional prerequisites to equitable relief--most importantly, irreparable injury”); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.”)

Declaratory Judgment Act to provide redress to plaintiffs who could not qualify for injunctive relief and to provide courts with an alternative to the intrusive effects of an injunction.⁴⁶

Third, a plaintiff seeking preliminary injunctive relief must make a greater showing than that which would be sufficient to obtain a permanent injunction following a trial.⁴⁷ That is, the plaintiff must demonstrate that corrective action after trial will not suffice.⁴⁸ On this point, the Supreme Court's decision in *Sampson v. Murray*,⁴⁹ though not a constitutional case, is instructive.⁵⁰ *Sampson* emphasizes that, with respect to preliminary injunction motions, courts must consider whether much or all of the irreparable injury that is likely to occur can be addressed through a permanent injunction after liability is determined. As the Court explained:

“The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.”⁵¹

This principle has significant implications in constitutional cases. Federal Rule of Civil Procedure 65(a) (2) permits a district court to order a full trial on the merits in lieu of resolving a preliminary injunction motion.⁵² The modern trend in federal civil litigation is for preliminary injunction motions to involve expedited discovery and lengthy evidentiary hearings at which live witnesses appear and are cross-examined. The enormous time and effort expended on these proceedings should prompt courts to seriously consider whether it might make more sense to simply try the case.⁵³ If the case can be tried to final judgment without requiring a significant

⁴⁶ See 28 U.S.C. § 2201 (1994). The doctrine of state sovereign immunity enshrined in the Eleventh Amendment and elsewhere in the structure of the Constitution does not bar actions against state officers for injunctive or declaratory relief. See *Alden v. Maine*, 527 U.S. 706, 757 (1999).

⁴⁷ *Doran*, 422 U.S. at 931 (respondents were entitled to preliminary relief because they would not last until they obtained a final judgment).

⁴⁸ This is the clear import of the Court's ruling in *Doran*. If the loss of constitutionally protected rights sufficed to demonstrate irreparable injury for purposes of preliminary injunctive relief, there would have been no need for the Court to rely upon the potential of bankruptcy as support for the relief in that case.

⁴⁹ 415 U.S. 61, 90 (1974).

⁵⁰ The *Sampson* decision has been followed in cases that did involve constitutional claims. See *Acierno v. New Castle County*, 40 F.3d 645 (3d Cir. 1994).

⁵¹ 415 U.S. at 90; accord *Acierno*, 40 F.3d at 653 (to show irreparable harm for purposes of obtaining preliminary injunctive relief, “a plaintiff must ‘demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.’”) (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir.1989)).

⁵² A court can utilize this procedure, even absent consent of the parties, so long as the court provides “clear and unambiguous notice [of its intended action] either before the hearing commences or at a time which will afford the parties a full opportunity to present their respective cases.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

⁵³ Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Standard*, 22-3 THE REVIEW OF LITIGATION 495, 501 (2003), available at http://www.ilnd.uscourts.gov/Judge/DENLOW/md_pim2.pdf.

additional expenditure of time or resources, then trial should be the preferred method of adjudication.⁵⁴

Presuming irreparable harm does not eliminate the need for prolonged evidentiary hearings. In most instances, evidentiary hearings are held to assist the court in resolving complex factual questions concerning the merits and potential defenses to the claims. Presuming irreparable harm, if anything, tends to increase a court's desire to hold these hearings because now the likelihood of the merits is the determinative issue. Issuance of the injunction hinges on the court's resolution of this question and the court will strive to do all it can to ensure that it renders a correct decision on it.

If the constitutional question can be decided without the need for any fact-finding, such as where the facts are stipulated to by the parties or where there is no genuine dispute as to the material facts, the court can convert the preliminary injunction motion into one for summary judgment.⁵⁵ This procedure, too, will permit the court fully to resolve the constitutional question and to enter final judgment.

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

Lastly, the Court has imposed a standing limitation on claims for injunctive relief in constitutional cases.⁵⁶ The Supreme Court held that a plaintiff is precluded from seeking

⁵⁴ In *Branti v. Finkel*, 445 U.S. 507 (1980), a case involving claims that government employees were going to be terminated due to their political beliefs in violation of the First Amendment, the district court held a plenary trial of the case on an application for a preliminary injunction. Following a trial lasting several days, he found in favor of plaintiffs and entered final judgment, permanent enjoining the defendants from terminating plaintiffs due to their political affiliation. *Id.* at 508-09 & n.2.

⁵⁵ *Air Line Pilots Assoc. v. Alaska Airlines, Inc.*, 898 F.2d 1393, (9th Cir. 1990) (district court can convert a motion for a preliminary injunction into a motion for summary judgment provided that it notifies the parties of its intention and permits them to submit evidence); *see Athenaco, Ltd v. Cox*, 335 F.Supp.2d 773, 779 (E.D. Mich. 2004) (converting motion for preliminary injunction into a motion for summary judgment); *North Dakota Family Alliance v. Bader*, 361 F.Supp.2d 1021, 1030 (D.N.D. 2005) (same); *see also PDK Labs Inc. v. Ashcroft*, 338 F.Supp.2d 1, 6 (D.D.C. 2004) (granting summary judgment based on preliminary injunction motion).

⁵⁶ *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In *Lyons*, an alleged victim of an illegal police chokehold lacked standing to seek injunctive relief barring use of the chokehold because there was "no more than conjecture" that he would be subjected to that chokehold if he were ever arrested in the future. *Id.* at 108. The standing doctrine pronounced in that case has been a frequent target of scholarly criticism. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 Colum. L. Rev. 1384 (2000) (None of the plaintiffs in *Brown v. Board of Education*, *Hutto v. Finney*, *Roe v. Wade*, or *Regents of the University of California v. Bakke*, would "have been able to scale the equitable standing bar erected in *Lyons*"); Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute's Misuse of Lyons' "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J. 837 (2010).

injunctive relief against constitutional injury unless she can show to a “substantial certainty” that she will likely suffer the same harm in the future.⁵⁷

The affects of the *Lyons* standing rule on a plaintiff’s ability to obtain injunctive relief in constitutional cases has been exaggerated.⁵⁸ *Lyons* can be easy to distinguish because it involved a single claimant and no established policy or custom.⁵⁹ Courts have held that *Lyons* does not apply where there is a realistic threat of future harm arising from an official policy or practice,⁶⁰ or a credible threat of future injury to a class of individuals.⁶¹

II. THE PRESUMPTION OF IRREPARABLE HARM

Over the past few decades, federal circuit courts have stated that irreparable injury may be presumed in cases involving an alleged violation of a constitutional right.⁶² Some circuit courts have limited the presumption to the First Amendment context,⁶³ while others have

⁵⁷ *Lyons*, 461 U.S. at 105-106 (past injuries supply a predicate for compensatory damages, but not for prospective equitable relief); *Deshawn E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (plaintiff seeking injunctive relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future); see also *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *Shain v. Ellison*, 356 F.3d 211 (2d Cir. 2004).

⁵⁸ See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1399 n.57 (2000) (suggesting that *Lyons* has had a significant impact on efforts to obtain injunctive relief in civil rights cases because the author sheppardized *Lyons* and counted 42 cases in which courts distinguished the case, and 1158 cases in which courts applied the *Lyons* equitable standing bar to deny standing).

⁵⁹ 461 U.S. 109-11.

⁶⁰ *Kolender v. Lawson*, 461 U.S. 352, 352 (1983); *Honig v. Doe*, 484 U.S. 305, 320-22 (1988); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994); *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985); *Deshawn E. v. Safir*, 156 F. 3d 340, 344 (2d Cir. 1998).

⁶¹ *Deshawn E. v. Safir*, 156 F. 3d 340, 344 (2d Cir. 1998) (class of minors demonstrated a sufficient likelihood of future harm at the hands of New York’s police department); *Nicacio v. INS*, 768 F.2d 1133, 1136-37 (9th Cir.1985), amended, 797 F.2d 700, 702 (9th Cir.1985) (finding plaintiffs in class action suit had standing to seek prospective relief); *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1992) (class action alleging that deputy sheriffs abused the minority citizens).

⁶² *Pacific Frontier, Inc. v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (“We therefore assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of their commercial speech rights.”); *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005); *Joelner v. Village of Washington Park*, 378 F.3d 613 (7th Cir. 2004); *Newsom v. Albemarle Co. Sch. Bd.*, 354 F.3d 249, 254 (4th Cir. 2003); *Brown v. California Dep’t of Trans.*, 321 F.3d 1217, 1225 (9th Cir. 2003); *Tenaflly Eruv Assoc., Inc. v. Borough of Tenaflly*, 309 F.3d 144, 178 (3d Cir. 2002) (“Limitations on the free exercise of religion inflict irreparable injury”); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002); *Siegel v. LePore*, 234 F.3d 1163, 1168 (11th Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999); *Miss. Women’s Med. Clinic v. McMillan*, 866 F.2d 788, 795 (5th Cir. 1989); see also 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2948, at 440 (1973) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”)

⁶³ See, e.g., *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm) (citations omitted); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299-304 (D.C. Cir. 2006) (citing cases).

employed the presumption for all constitutional claims.⁶⁴ Only the First Circuit has declined to use a presumption.⁶⁵

A. Saving Time or Avoiding Difficult Questions?

Use of a presumption of irreparable harm was not unique to constitutional claims. Although the Supreme Court never sanctioned use of a presumption, federal circuit courts established a practice of presuming irreparable harm in a variety of contexts, including intellectual property infringement, environmental litigation, antitrust/dealer termination cases, and false advertising.⁶⁶ The surface rationale for the presumption is judicial economy. Courts, based on their experience, identified these types of cases as the most likely to present situations where damages are not an adequate remedy. If an injunction is the only appropriate remedy, why waste time on irreparable injury? Instead, courts can focus all their attention on whether plaintiff can make a sufficient showing of potential success on the merits so as to justify provisional relief.

Probing a bit deeper, however, reveals two further rationales. In the intellectual property arena, courts reasoned that the owner's statutory right to exclude mandated an entitlement to an injunction as opposed to damages.⁶⁷ In the fields of environmental law or false advertising, courts seem more inclined to presume irreparable injury because of the difficulties associated with proving injury.⁶⁸ Presuming irreparable harm lets courts off the hook; there is no need to explain precisely how the plaintiff has been injured and why that injury is irreparable through damages. Constitutional tort cases tend to have more in common with these cases than with exclusionary rights cases. How precisely is a plaintiff harmed by observing a religious symbol

⁶⁴ *Overstreet v. Lexington Fayette Urban Co. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights."); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (alleged violation of their Fourth Amendment rights); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (a violation of privacy constitutes an irreparable harm); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (eighth and fourteenth amendment rights against cruel and unusual punishment).

⁶⁵ *Public Service Co. v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (alleged denial of procedural due process, without more, does not automatically trigger a finding of irreparable harm); *Rushia v. Town of Ashburnham*, 701 F.2d 7, 10 (1st Cir.1983) ("the fact that [plaintiff] is asserting First Amendment rights does not automatically require a finding of irreparable injury").

⁶⁶ See *Zino Davidoff, S.A. v. CVS Corp.*, 571 F.3d 238, 246 (2d Cir. 2009) (trademark infringement); *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 161-62 (2d Cir. 2007) (false advertising); *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1155-56 (9th Cir. 2006) (copyright infringement); *Menominee Rubber Co. v. Gould, Inc.*, 657 F.2d 164, 167 (7th Cir.1981) (antitrust violations); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) (violation of an environmental regulation); *Baker v. Buckeye Cellulose Corporation*, 856 F.2d 167, 170 (11th Cir. 1988) (employment discrimination).

⁶⁷ *Amazon.com, Inc., v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (patent); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246-47 (Fed. Cir. 1989) (patent); *Zino Davidoff, S.A. v. CVS Corp.*, 571 F.3d 238, 246 (2d Cir. 2009) (trademark); *Tally-Ho, Inc. v. Coast Community Coll. Dist.*, 889 F.2d 1018, 1029 (11th Cir. 1989) (trademark); *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008) (copyright); *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1155-56 (9th Cir. 2006) (copyright).

⁶⁸ *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988); see also *Time Warner*, 497 F.3d at 161 ("it is virtually impossible to prove that so much of one's sales will be lost or that one's goodwill will be damaged as a direct result of a competitor's advertisement") (quoting *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 316 (2d Cir. 1982)); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) ("Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action").

on public property, having to wait until a certain time to make a speech, or being briefly detained at a traffic stop by police officers?

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

The presumption of irreparable harm is incapable to adapting itself to varying facts and circumstances. It is not simply the type of evidentiary presumption authorized under the Federal Rules of Evidence.⁶⁹ Those presumptions merely shift the burden of production (*i.e.*, of going forward with evidence) from the plaintiff to the defendant.⁷⁰ They do not affect the ultimate burden of persuasion, which remains with the plaintiff, and indeed, if evidence that counters the presumption is introduced, the presumption dissipates.⁷¹ By contrast, presumptions of irreparable harm are irrebuttable; they conclusively remove an issue from the case.⁷²

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

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

⁶⁹ FED. R. EVID. 301.

⁷⁰ Of course, an evidentiary presumption can shift a burden of production from a defendant to a plaintiff where the defendant originally bears that burden, such as with regard to an affirmative defense.

⁷¹ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993).

⁷² *Salinger v. Colting*, 607 F.3d 68, 77-78 (2d Cir. 2010).

B. Shaky Legal Basis for the Presumption

Courts employing the presumption in constitutional cases have not engaged in a lengthy elaboration of the reasons for its use. They have simply cited to the Supreme Court's decision in *Elrod v. Burns*⁷³ as grounds for the presumption.

Elrod involved Republican employees of a county sheriff's department that were being terminated by the newly-elected Democratic sheriff.⁷⁴ The employees filed suit, alleging that they were being discharged solely for their political beliefs in violation of the First Amendment, and promptly moved for a preliminary injunction. The district court denied the motion and dismissed the action, claiming that plaintiffs failed to state a claim upon which relief could be granted.⁷⁵ The court of appeals reversed, finding that a cognizable claim had been stated and that the employees were entitled to preliminary injunctive relief.⁷⁶

The Supreme Court granted certiorari on the issue of whether the plaintiffs had stated a cognizable First Amendment claim.⁷⁷ A plurality consisting of Justices Brennan, White, and Marshall, with Justice Brennan writing, concluded that patronage dismissals are unconstitutional under the First Amendment and that plaintiffs had therefore stated a claim.⁷⁸ The plurality went further and declared that interlocutory injunctive relief was warranted, because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁷⁹

Justices Stewart and Blackmun refused to join in “the plurality's wide ranging opinion” and concurred only in the judgment that the plaintiffs had adequately stated a claim.⁸⁰ Because the plurality's discussion of irreparable harm did not enjoy support from a majority of Justices, nor was it the narrowest opinion that supported the result in the case, it is not binding precedent.⁸¹ Furthermore, because the sole issue before the Court was whether a claim was

⁷³ *Elrod*, 427 U.S. at 350 (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). As the District of Columbia Circuit recognized in *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299-304 (D.C. Cir. 2006), federal courts employing the presumption have cited “*Elrod* only in passing, devoid of any analysis of its particular context.”

⁷⁴ *Id.* at 350

⁷⁵ *Id.*

⁷⁶ 509 F.2d 1133 (7th Cir. 1975).

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

⁷⁸ *Id.* at 373.

⁷⁹ *Id.* at 373-74 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

⁸⁰ *Id.* at 375 (Stewart, J., concurring in the judgment). Three Justices dissented, and one took no part in the case.

⁸¹ *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299-304 (D.C. Cir. 2006) (recognizing that *Elrod* is not binding precedent); see *Marks v. United States*, 430 U.S. 188 (1977); *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion).

stated, and not the propriety of the grant of interlocutory injunctive relief, the plurality's voluntary remarks regarding irreparable injury were *obiter dicta*.

Even if the *Elrod* plurality's remarks are limited to the employment context, they do not correctly describe the law. In *Sampson*, the Supreme Court held that a government employee alleging wrongful termination does not suffer irreparable injury where she can obtain reinstatement and back pay at the conclusion of the case.⁸² This same reasoning has been applied in cases involving the termination of government employment due to constitutionally protected activity.⁸³ As the Second Circuit has explained, any chilling effect on an employee's exercise of First Amendment rights is produced by the threat of a permanent loss of a job; allowing the employee to retain her position pending resolution of the case cannot "abate that effect."⁸⁴ The *Elrod* plurality's statement that irreparable injury necessarily exists in an employment termination context is erroneous.

Outside the employment context, the *Elrod* remarks are also inaccurate. If the loss of a First Amendment right were sufficient to constitute irreparable injury, there would be no *Younger* abstention doctrine.⁸⁵ Under that doctrine, because an individual has an adequate opportunity to present a federal constitutional challenge in a state judicial or administrative enforcement proceeding, then she will not be irreparably injured by an alleged deprivation of her First Amendment rights.⁸⁶ If the loss of First Amendment rights, for even minimal periods of time, automatically constituted irreparable harm, the ability eventually to secure vindication of the right through the state or agency proceeding would be immaterial. Similarly, if deprivation of an expressive right itself were *per se* irreparable harm, then there would be no reason for the Court in *Doran* to have analyzed the potential consequences on the plaintiff's business from a compelled cessation of the expressive activity. Yet the Court noted that potential bankruptcy could result if the plaintiff's bar could not feature topless dancing.⁸⁷

C. Theoretical Justifications for Presumptive Remedies

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

⁸² 415 U.S. at 90.

⁸³ E.g., *Savage v. Gorski*, 850 F.2d 64, 67-68 (2d Cir. 1988); *American Postal Workers Union v. United States Postal Serv.*, 766 F.2d 715, 722 (2d Cir.1985), *cert. denied*, 475 U.S. 1046 (1986).

⁸⁴ *American Postal Workers Union*, 766 F.2d at 722 ("[W]e fail to understand how a chilling of the right to speak or associate could logically be thawed by the entry of an interim injunction, since the theoretical chilling of protected speech ... stems not from the interim discharge but from the threat of permanent discharge, which is not vitiated by an interim injunction".)

⁸⁵ *Younger v. Harris*, 401 U.S. 37 (1971) (federal court should abstain from interfering with a pending state criminal proceeding where the defendant can lodge his federal constitutional claim as a defense to prosecution).

⁸⁶ *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (*Younger* abstention applied to state civil enforcement proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (*Younger* abstention applied to private civil contempt proceeding); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (*Younger* doctrine applied to state administrative proceeding that is judicial in nature).

⁸⁷ *Doran*, 422 U.S. at 931 (respondents demonstrated that "absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief...")

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

1. Closing the Remedial Gap

First, there is the contention that remedies should become more accessible so that each and every violation of a constitutional right can be redressed with a remedy.⁸⁸ When remedies are unavailable, the argument goes, courts will be prone to avoid recognizing constitutional rights.⁸⁹ The existence of a right for which there is no remedy “create[s] cognitive dissonance for many judges.”⁹⁰ Consequently, remedies should be plentiful and freely attainable so that courts will be inclined to expand the scope of rights protected by the Constitution.

Even scholars who believe that expansion of constitutional rights is a good thing, however, recognize that there need not be a remedy for every single constitutional violation. It is sufficient that there simply be “a general structure of constitutional remedies adequate to keep government within the bounds of law.”⁹¹ That is, so long as governments can potentially be subject to remedies, they will be incentivized to comply with their constitutional obligations. Excessively potent remedies will encourage litigiousness and risk making the “business of government” unduly difficult as public officials become paralyzed by the fear of liability.⁹² A rights-remedies gap in constitutional torts moreover, may be beneficial because it would facilitate the growth of constitutional law by reducing the costs associated with innovation.⁹³ Requiring that there be a remedy for every constitutional violation may actually discourage courts from innovating in the area of constitutional rights because they will fear that, by

⁸⁸ Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998) (arguing that remedial law “needs to systematically favor the plaintiff, in order to compensate for the systematic under-enforcement of constitutional rights”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) (noting the structural interest in providing constitutional remedies that are designed not simply to redress individual wrongs but to furnish incentives for officials generally to respect constitutional norms).

⁸⁹ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 878-93 (1999) (“Rights are often shaped by the nature of the remedy that will follow if the right is violated”); Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 55 (1979) (noting that judges tend will to distort the true meaning of constitutional rights by tailoring them to fit what effective remedies are available).

⁹⁰ Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 704 (2009).

⁹¹ Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (recognizing that constitutional remedies is inevitably “a jurisprudence of deficiency” between “declaring a right and implementing a remedy”).

⁹² Peter H. Schuck, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 59-81 (1983).

⁹³ John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89-90 (1999). While Jeffries was addressing money damage awards, scholars have recognized that structural injunctions have their own “enormous difficulties and costs.” Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 416-17 (2000).

expanding the scope of constitutional rights, they will be increasing the costs of good government.⁹⁴

The fear of an ever-widening remedial gap has repeatedly failed to persuade the Court to create new remedies, or to lower the bar for existing ones. The Court has limited damages recoverable from a constitutional violation to actual losses,⁹⁵ and has prohibited damages awards predicated on the inherent value of constitutional rights.⁹⁶ The Court has also declined to afford remedies for third-party harms (such as those experienced by potential listeners of speech that is unconstitutionally suppressed),⁹⁷ or for the psychic injuries experienced by those who observe unconstitutional conduct.⁹⁸ Indeed, just last term, the Court refused to lower the standard of municipal liability under Section 1983 simply because an injunctive remedy was being sought.⁹⁹

2. *The Constitutional Damages Deficiency*

Second, it is asserted that injunctions are an essential constitutional remedy because damages awards lack a true deterrent effect.¹⁰⁰ Governments do not care about paying damages awards because they use the taxpayers' money.¹⁰¹ Even if they do care, traditional compensatory damages for constitutional torts are too difficult to obtain in light of existing immunity

⁹⁴ As Levinson posits, the Supreme Court distinction between unlawful *de jure* segregation and non-actionable *de facto* segregation was driven as much by remedial considerations as by substantive doctrine. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 875-78 (1999). He makes the same point with respect to prison reform litigation. *Id.* at 878-82 (arguing that the complications of implementing prison reform remedies influenced the way the Court interpreted the Eighth Amendment).

⁹⁵ *Carey v Phipps*, 435 US 247, 257-59 (1978) (limiting recovery under Section 1983 to compensation for actual losses).

⁹⁶ *Memphis Comm. Sch. Dist. v Stachura*, 477 US 299, 305-10 (1986) (rejecting a claim that recovery should be available under Section 1983 for the abstract value of a constitutional right that has been violated).

⁹⁷ Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000).

⁹⁸ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (plaintiff cannot sue if she has suffered no injury as a result of the alleged constitutional infraction, "other than the psychological consequence presumably produced by observation of conduct with which one disagrees."); see also Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom From Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115, 158-59 (2008) (visual or aural exposure to a constitutional wrong, such as observing at a courthouse patently unfair trials, blatant acts of racial discrimination, or cruel and unusual punishments, does not constitute a cognizable injury).

⁹⁹ *Los Angeles Co. v. Humphries*, 562 U.S. ___, ___ S. Ct. __ (2010) (the requirement of municipal fault enunciated in *Monell* applies not just to damages claims but to claims for injunctive relief as well).

¹⁰⁰ Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 416-17 (2000) (suggesting that courts should rely more heavily on injunctions because they represent the "the best hope for preventing constitutional violations"); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 876 (2001) (structural reform injunctions are a "uniquely appropriate remedial regime" for constitutional wrongs).

¹⁰¹ Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 416-17 (2000) (constitutional violations cannot be deterred by a damages remedy "where a majority is willing to bear the costs of paying compensation or where a powerful interest group benefits from the unconstitutional activity.")

doctrines.¹⁰² When damages are finally awarded, they are usually so skimpy, they do not justify the bringing of suit.¹⁰³

These arguments, too, have not fared well. The Court rejected them in considering whether extra-compensatory damages should be available,¹⁰⁴ or punitive damages in appropriate cases against municipalities.¹⁰⁵ The Court has also rebuffed them when being asked to imply new private rights of action for constitutional wrongs.¹⁰⁶

Many scholars now recognize that damages awards do serve a systemic deterrent function.¹⁰⁷ Indeed, many a court has expressed the view that even a nominal damages award can prompt a municipality to change its policies.¹⁰⁸ Indeed, as even a cursory review of annual reports prepared and distributed by municipal law departments reveals, municipalities measure themselves by the success rate in Section 1983 litigation and the aggregate amount of damages awarded against their agents.¹⁰⁹ Federal case management statistics indicate that over the past four years, the total number of federal civil rights actions has represented a steady ten to twenty percent share of the entire federal civil docket, which certainly does not suggest that there is any growing or serious deficiency when it comes to civil enforcement of constitutional rights.¹¹⁰

¹⁰² Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998); Akhil Reed Amar, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 42 (1997).

¹⁰³ Akhil Reed Amar, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 42-43 (1997) (injuries from violations of the Fourth Amendment are mostly dignitary and out-of-pocket losses are “small or non-existent”).

¹⁰⁴ *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986).

¹⁰⁵ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

¹⁰⁶ *Correction Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Schweiker v. Chilicky*, 487 U.S. 412, 425-27 (1988); *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

¹⁰⁷ Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) (“Though a damages award does not require discontinuation of such practices, it exerts significant pressure on government and its officials to respect constitutional bounds”); *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980) (discussing the deterrent effect of imposing § 1983 damages liability on municipalities). Akhil Reed Amar has advocated that damages be the primary means of redressing constitutional violations and that they can be a sufficient deterrent to unconstitutional conduct provided that judicially-created immunities be abolished. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512-17 (1987).

¹⁰⁸ *Amato v. City of Saratoga Springs*, 170 F. 3d 311, 317-18 (2d Cir. 1999) (nominal damage award “could encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and the citizenry to the issue”); *Cadiz v. Kruger*, 2007 WL 4293976 at *10 (N.D. Ill. Nov. 29, 2007) (a nominal damages verdict against the city that misconduct stemmed from unconstitutional municipal policies, practices or customs could provide a greater incentive for change than a damages award against individual officers that the City could dismiss as the product of aberrational conduct by rogue employees).

¹⁰⁹ City of Chicago Law Department statistics available at http://www.cityofchicago.org/content/dam/city/depts/dol/JudgementAndSettlementRequests/2010_expenditures_through_12312010.pdf; New York City Corporation Counsel reports available at <http://www.nyc.gov/html/law/downloads/pdf/2010AR.pdf>; Los Angeles City Law Department news releases available at <http://atty.lacity.org/NEWS/index.htm>.

¹¹⁰ Data available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02ASep10.pdf>

3. Prophylaxis

Third, injunctions, it is said, are the desideratum because they provide the court with an opportunity to impose prophylactic measures. In addition to directing the cessation of unconstitutional conduct (or mandating the performance of constitutionally required conduct), the injunctive decree can compel the undertaking of additional steps that supposedly will provide a level of assurance that the proscribed conduct will not be repeated. The imposition of prophylaxis is a means of insuring that a remedy will be effective and will produce socially-desirable conduct.¹¹¹

Prophylactic injunctions, however, tend to over-penalize the defendant, and are difficult to reconcile with the doctrine of judicial restraint.¹¹² Courts have become wary of entering injunctions that go beyond addressing the specific wrongdoing.¹¹³ Supreme Court justices have flatly declared that federal courts lack the constitutional competence to impose prophylactic measures.¹¹⁴ Structural injunctions, where federal judges manage complex institutions, such as police departments, prisons, or hospitals, are contrary to the Framers' design for a limited federal equity power.¹¹⁵ They contravene separation of powers principles embedded in the Constitution by requiring judges to play an administrative role akin to executive officials.¹¹⁶

Congress has entered the fray by enacting the Prison Litigation Reform Act ("PLRA"),¹¹⁷ which is intended to prevent excessive federal court interference into the operations and administration of state and municipal detention facilities.¹¹⁸ Congress determined that, contrary

¹¹¹ Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 677-80 (1983) (prophylactic decree reduces the risk that the remedy will turn out to be ineffective or that the defendant will evade or misinterpret its remedial duties); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 330 (2004) (prophylactic relief sweeps broadly to include legal conduct and such breadth is the core of its effectiveness).

¹¹² David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 629-30 (1988) ("Without principles to guide the exercise of equitable discretion, the judge acts as a policy maker in framing the remedy, which throws into question the legitimacy of the judicial power to grant [prophylactic remedies]."); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996) (arguing that prophylactic injunctions violate principles of judicial restraint).

¹¹³ *Rizzo v. Goode*, 423 U.S. 362 (1976) (invalidating injunctive relief that included prophylactic measures); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution"); *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001) (overturning prophylactic relief); see also *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997) (equitable remediation "must be tailored to the violation, [and] not used to launch federal courts on ambitious schemes of social engineering"); *Newman v. Alabama*, 559 F.2d 283, 287 (5th Cir. 1977) ("injunctive remedy must be designed to accomplish [the goal of eradicating cruel and unusual punishment], not to exercise judicial power for the attainment of what we as individuals might like to see accomplished in the way of ideal prison conditions.").

¹¹⁴ *Dickerson v. United States*, 530 U.S. 428, 446, 461, 465 (2000) (Scalia, J., dissenting) (criticizing the "use of any form of prophylaxis in constitutionalism as incongruent with constitutional values"); *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) ("I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.").

¹¹⁵ *Missouri v. Jenkins*, 515 U.S. at 126-31 (Thomas, J., concurring);

¹¹⁶ *Brown v. Plata*, Slip Op. at 6-7 (Scalia, J., dissenting).

¹¹⁷ 18 U.S.C. § 3626

¹¹⁸ *Rowe v. Jones*, 483 F.3d 791, 794-95 (11th Cir. 2007).

to principles of federalism and comity, federal courts were frequently enforcing requirements for operation of state and municipal prisons that went beyond what was required to comply with federal law.¹¹⁹ The PLRA thus provides for the termination of federal court injunctions or consent decrees that cannot be supported by findings that “the relief is narrowly drawn, extends no farther than necessary to correct the violation of the federal right and is the least intrusive means necessary to correct the violation of the federal right.”¹²⁰

The injunction is becoming a less potent tool in the judicial arsenal.

III. ELIMINATING THE PRESUMPTION

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

In *EBay Inc. v. MercExchange, LLC*,¹²¹ the Supreme Court held that the Federal Circuit’s practice of presuming irreparable injury in patent infringement cases was improper.¹²² The Court’s decision was unanimous and simple: The long-standing tradition of equity practice requires that a court assess separately each of four factors to determine whether to grant injunctive relief, including irreparable injury.¹²³ Courts should not presume that element even if, in their experience, it is virtually certain to be present.

In his concurring opinion, Chief Justice Roberts remarked that he did not expect the Court’s ruling to have a significant impact on patent cases.¹²⁴ He explained that federal courts had developed the presumption for categories of cases where irreparable injury usually existed.¹²⁵ Nevertheless, the Chief Justice recognized that the law of equity is trans-substantive,¹²⁶ and thus should apply to all categories of cases. Absent an indication by Congress that a different standard apply, courts should adhere to the traditional four factor test.¹²⁷

¹¹⁹ *Benjamin v. Jacobson*, 172 F.3d 144, 158-60 (2d Cir. 1999) (*en banc*).

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

¹²¹ 547 U.S. 388 (2006).

¹²² 401 F.3d 1323, 1338-39 (Fed. Cir. 2005), *rev’d*, 547 U.S. 388 (2006). The Court rejected the assertion that the right of exclusion inherent in a patent justifies a statutory right to enjoin future infringements. 547 U.S. at 392.

¹²³ *Id.* at 391. Though the case involved a permanent injunction, courts have read *eBay* as precluding presumptions of irreparable harm for preliminary injunctions in patent cases. *E.g.*, *Aurora World, Inc. v. Ty Inc.*, 2009 WL 6617192, at *37 (C.D. Cal. Dec. 15, 2009); *Tiber Labors, LLC v. Hawthron Pharm., Inc.*, 527 F. Supp. 2d 1373, 1380 (N.D. Ga. 2007); *Sun Optics, Inc. v. FGX Int’l, Inc.*, 2007 WL 2228569, at *1 (D. Del. Aug. 2, 2007).

¹²⁴ *Id.* at 395 (Roberts, C.J., concurring) (the long tradition of awarding injunction in cases involving patent infringement was “not surprising”).

¹²⁵ In making this observation, he uttered the line made famous by Oliver Wendall Holmes that “[a] page of history is worth a volume of logic.” *Id.* at 395 (Roberts, C.J., concurring) (*quoting New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)). Justices Scalia and Ginsburg joined in the Chief Justice’s concurring opinion.

¹²⁶ David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 631-32 (1988) (noting the tendency among courts to “compartmentalize” when determining the suitability of injunctive relief and thus to disregard the “trans-substantive” nature of equity law).

¹²⁷ As the Supreme Court has repeatedly declared, “a major departure from the long tradition of equity practice should not be lightly implied.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

As Justice Kennedy noted in his concurring opinion, courts should always exercise their deliberative faculties, and not simply rely upon history or past experience.¹²⁸

Federal courts have applied *eBay*'s teaching to other areas of the law and have discontinued the practice of presuming irreparable harm in copyright cases,¹²⁹ trademark and false advertising cases,¹³⁰ and environmental cases.¹³¹ Indeed, the Second Circuit has gone so far as to suggest that *eBay*'s reasoning should apply to all types of cases:

[N]othing in the text or the logic of *eBay* suggests that its rule is limited to patent cases.... Therefore, although today we are not called upon to extend *eBay* beyond the context of copyright cases, we see no reason that *eBay* would not apply with equal force to an injunction in *any* type of case.¹³²

Clearly, the recent trend is against presumptions of irreparable harm for federal statutory claims. It is hard to see why a contrary rule should apply for constitutional claims. Historically, the irreparable injury requirement was applied consistently to both constitutional and non-constitutional claims. Concerns about the erosion of jury trial rights from injunctive relief becoming more accessible would also apply to constitutional claims.

More importantly, the analytical framework in *eBay* and other statutory cases involving the substantive requirements for obtaining an injunction is grounded in the notion that Congress understood at the time of enactment that irreparable injury was a prerequisite to attaining such relief.¹³³ Although rights predicated on the Constitution are not conferred by Congress, the remedies available to enforce those rights are the product of a statutory grant. Section 1983 provides that governmental entities and agents "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."¹³⁴ If the assumption is that Congress intended to incorporate the traditional requirements of equity jurisprudence into statutes that expressly provide for an equitable remedy, then a similar assumption should apply to Section

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

¹²⁹ *Salinger v. Colting*, 607 F.3d 68, 77-78 (2d Cir. 2010); *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1323 (11th Cir. 2008); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007).

¹³⁰ *North Amer. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir. 2008); *accord Paulsson v. Geophysical Serv., Inc. v. Sigmar*, 529 F.3d 303, 312 (5th Cir. 2008) (intimating that *eBay* bars the presumption in trademark cases); *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1137-38 (9th Cir. 2006) (applying *eBay* four factor test in trademark case).

¹³¹ *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (observing that presumed injunctions are improper in environmental cases).

¹³² *Salinger*, 607 F.3d at 77-78 & n. 7.

¹³³ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313 (1982) (the irreparable injury requirement reflects a "practice of which Congress is assuredly well aware"); *Winter v. National Resources Defense Council*, 555 U.S. 7 (2008) (Congress did not intend for a preliminary injunction to be issued based on a possibility of irreparable harm); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (courts should not presume that an injunction is the proper remedy for a statutory violation).

¹³⁴ 42 U.S.C. § 1983.

1983. Indeed, the Court has previously declared that nothing in the express provision of an equitable remedy in the text of §1983 should be construed to suggest that the plaintiff seeking an injunctive remedy should face a lower standard than one seeking damages.¹³⁵

B. Circuit Courts Rethink the Wisdom of the Presumption

Federal circuit courts have begun to retreat from a blanket presumption of irreparable harm in constitutional cases. The Second Circuit has held that the presumption should be limited to cases where “a plaintiff alleges injury from a rule or regulation that directly limits speech” involving a direct infringement of First Amendment rights.¹³⁶ In other situations, where it is “not clear that a particular statute, policy, or practice will have any actual adverse effect on protected First Amendment liberties,” the moving party has to demonstrate “some likelihood of a chilling effect on their rights.”¹³⁷

This approach, while more sophisticated than using a blanket presumption, is still unsatisfactory. The Supreme Court has, in the Free Exercise Clause context, sought to distinguish between laws that are aimed at religious expression and laws that are not but nonetheless affect religious expression.¹³⁸ It has not, however, attached significance to the distinction elsewhere in the First Amendment.¹³⁹ The Second Circuit, moreover, has not applied the distinction in a consistent or sensible manner. For instance, the court has held that laws requiring artists to obtain licenses or permits to exhibit their work directly affect expressive rights and thus qualify for the presumption,¹⁴⁰ while a regulation mandating that police officers inform the department of their intention to speak publicly about department policy, and provide a summary of the speech, did not directly affect speech.¹⁴¹

¹³⁵ *Los Angeles Co. v. Humphries*, 562 U.S. ___, __ S.Ct. __ (2010) (“Nothing in the text of §1983 suggests that the causation requirement contained in the statute should change with the form of relief sought.”)

¹³⁶ *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir. 2003) (“In contrast, in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech”, the presumption should not apply and the “plaintiff must establish a causal link between the injunction sought and the alleged injury”); *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (“Even when a complaint alleges First Amendment injuries, however, our case law suggests that at least in circumstances in which a plaintiff does not allege injury from a rule or regulation that directly limits speech, irreparable harm is not presumed and must still be shown.”)

¹³⁷ *Id.* at 349; *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir.1989) (“[T]he assertion of First Amendment rights does not automatically require a finding of irreparable injury Rather the plaintiffs must show ‘a chilling effect on free expression.’”) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487(1965)); cf. *Laird v. Tatum*, 408 U.S. 1, 13-14 & n. 7 (1972).

¹³⁸ *Employment Division v. Smith*, 494 U.S. 872 (1990) (strict scrutiny standard applies only to laws that directly burden religion, not laws of general application that happen to affect religious practices). *Smith*’s holding has been partially abrogated by statute, 42 U.S.C. §§ 2000bb-1. See *City of Bourne v. Flores*, 521 U.S. 507 (1997).

¹³⁹ Justice Scalia has opined that general laws regulating conduct that happen to affect expression should not be subject to heightened scrutiny, but none of the other Justices has agreed with his approach. See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991).

¹⁴⁰ *Tunick v. Safir*, 209 F.3d 67, 69-70 (2d Cir. 2000); *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996).

¹⁴¹ *Latino Officers Ass’n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999); see *Charette v. Town of Oyster Bay*, 159 F.3d 749 (2d Cir. 1998) (zoning regulation that required closure of topless bar did not directly affect speech); see also *Amandola v. Town of Babylon*, 251 F.3d 339, 343 (2d Cir. 2001) (*per curiam*) (“We must perforce acknowledge that this Court has not spoken with a single voice on the issue of whether irreparable harm may be presumed with respect to complaints alleging the abridgement of First Amendment rights.”)

The primary benefit from application of a presumption is to conserve the courts' and parties' resources from litigating issues that are incontrovertible. Limiting the presumption to ill-defined categories of constitutional infringements will likely not serve this purpose. The parties will likely spend as much, if not more, time and effort fighting over whether the policy or action directly infringes expressive rights, and thus qualifies for the presumption, or does so only indirectly, and thus does not, than if they were simply required to demonstrate irreparable harm.¹⁴²

The District of Columbia Circuit has also sought to limit the presumption.¹⁴³ It explained that a presumption of irreparable harm should be reserved for situations where "the allegedly impermissible government action would chill" constitutionally protected behavior.¹⁴⁴ This approach is also flawed. First, the court acknowledged that its "chilling" test made no sense in the context of Establishment Clause claims because those claims implicate expressive activity on the part of the government, not private parties. Second, the only reason why the D. C. Circuit sought to rely upon a presumption is because it improperly concluded that only proof of a tangible intangible injury could satisfy the irreparable injury element.¹⁴⁵ The court's view that irreparable harm cannot encompass intangible harm is contrary to well-settled jurisprudence.¹⁴⁶

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

Particularly noticeable is a recent Ninth Circuit opinion reviewing a preliminary injunction in a First Amendment case.¹⁴⁷ The court vacated the injunction on the grounds that the district court erred in concluding that the plaintiff was likely to succeed on a First Amendment Claim, and thus did not have to consider whether the irreparable injury existed. Nevertheless, the court commented that the district court's analysis on the issue was deficient

¹⁴² An affidavit or declaration from the plaintiff can often supply the needed proof. *Dombroski v. Pfister*, 380 U.S. 479, 485-86 (1965) ("Appellants' ... offers of proof outline the chilling effect on free expression...threatened in this case.").

¹⁴³ *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299-304 (D.C. Cir. 2006)

¹⁴⁴ *Id.* at 304.

¹⁴⁵ *Id.* at 299 ("Having failed to assert a tangible injury that constitutes irreparable harm, Appellants are left to argue that the Navy's alleged violation of the Establishment Clause per se constitutes irreparable harm.").

¹⁴⁶ Indeed, in one of the most notable findings of irreparable injury in the history of American jurisprudence, a unanimous Supreme Court made unmistakably clear that it encompasses intangible harm:

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

Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954).

¹⁴⁷ *Doe v. Reed*, 586 F.3d 671(9th Cir. 2009).

because it rested on presumptions rather than actual fact-findings.¹⁴⁸ Courts are heading in the right direction.

C. The Fate of Presumed Damages in Constitutional Litigation

Judicial reluctance to presume irreparable harm in constitutional cases would be consistent with a similar reticence to presume damages in those cases.

1. *The Court's Presumed Damages Cases*

In *Carey v. Phipus*, the Supreme Court addressed the argument that because compensatory damages are so difficult to prove for some constitutional violations, such as a violation of procedural due process rights where the underlying deprivation was nevertheless justified, a court should presume damages.¹⁴⁹ The plaintiff sought to rely upon the concept of presumed damages, which had been developed under the common law of defamation in several states to ensure that victims of slander or libel would have a remedy since injury to reputation was often difficult to prove.¹⁵⁰ The Court rejected the argument, noting that a person who is denied procedural due process can suffer mental and emotional distress, which can be proven and for which recovery could be obtained.¹⁵¹ Consequently, there was no need to presume damages to compensate an injured plaintiff.¹⁵²

The Court acknowledged that compensating for injury was not the exclusive purpose of a monetary remedy and that it also aimed to deter the commission of wrongful acts. It reasoned, however, that the importance of constitutional rights does not warrant the creation of a “deterrent more formidable than that inherent” in a traditional award of compensatory damages.¹⁵³ Where a plaintiff cannot prove injury, she is entitled to an award of nominal damages, which emphasizes the “importance to organized society that [constitutional] rights be scrupulously observed.”¹⁵⁴ The Court further noted that punitive damages and the potential of awarding attorneys fees to a prevailing plaintiff served to deter government officials from disregarding constitutional rights.¹⁵⁵

¹⁴⁸ *Id.* at 681 n.14 (noting that the district court's analysis “relied on presumptions, rather than findings of fact”).

¹⁴⁹ 435 U.S. 247, 248 (1978).

¹⁵⁰ *Gertz v. Welch*, 418 U.S. 323, 349 (1974).

¹⁵¹ 435 U.S. at 263-64.

¹⁵² *Id.* at 264 (“[N]either the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”)

¹⁵³ *Id.* at 256-57.

¹⁵⁴ *Id.* at 266.

¹⁵⁵ *Id.* at 257 n.11. At the time the Court decided *Carey*, most federal circuit courts had held that punitive damages could be obtained against government officials, at least where they acted with a malicious intention of depriving the plaintiff of his constitutional rights. *Id.* (citing cases). The Court eventually clarified that punitive damages could be assessed against government officials, *Smith v. Wade*, 461 U.S. 30 (1983), but not against governmental entities themselves. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981). As for attorneys' fees, 42 U.S.C. § 1988 makes a defendant potentially liable for a prevailing plaintiff's attorney's fees in Section 1983 litigation. See *supra* text accompanying notes .

Some federal courts limited *Carey*'s holding to procedural due process violation,¹⁵⁶ but the Supreme Court, in *Memphis Community Sch. Dist. v. Stachura*, confirmed that *Carey*'s reasoning applied as well to substantive constitutional rights, such as those protected under the First Amendment.¹⁵⁷ The Court reasoned that the importance of a constitutional right does not warrant a departure from the traditional rule that compensatory damages can only be awarded where the plaintiff can prove that she sustained an injury from the deprivation of a constitutional right.¹⁵⁸ Although the Court would not rule out the possibility that presumed damages might be appropriate in some circumstances, it did indicate that they should be used only where compensatory damages were unavailable and never as a means to augment a potential compensatory damages recovery.¹⁵⁹ Because virtually all constitutional infraction will produce some type of mental or emotional injury, federal courts have almost uniformly refused to award presumed damages in constitutional litigation.¹⁶⁰

2. Seventh Amendment Concerns

The track record of presumed damages presents an interesting parallel in the constitutional law context to presumed injunctions. A significant concern with respect to presumed damages is its impact on Seventh Amendment rights. A defendant (and plaintiff) has a Seventh Amendment right to have a jury determine both the fact and the extent of any damages.¹⁶¹ The existence of injury and the measure of damages are matters that are subject to the prohibitions of the Re-examination Clause of that Amendment.¹⁶²

These constitutional guarantees lean heavily against judicial encroachment on the jury's prerogative to determine damages through the imposition of a presumed damages mandate. When presumed damages are ordered, the court instructs the jury that some amount of damages

¹⁵⁶ *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391 (10th Cir. 1985); *Herrera v. Valentine*, 653 F.2d 1220, 1227-1229 (8th Cir. 1981); *Konczak v. Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

¹⁵⁷ 477 U.S. 299, 309-10 (1986).

¹⁵⁸ *Id.* at 307-11.

¹⁵⁹ *Stachura*, 477 U.S. at 311 n.14 (noting that there may be occasions where "some form of presumed damages may possibly be appropriate," those damages can only be "a substitute, not a supplement", for compensatory damages).

¹⁶⁰ *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228, 234-35 (1st Cir. 2006) (no presumed damages for victim of racial and religious discrimination); *Randall v. Prince George's Co.*, 302 F.3d 188, 207-09 (4th Cir. 2002) (no presumed damages for unlawful seizure); *Norwood v. Bain*, 143 F.3d 843, 855-56 (4th Cir. 1998) (illegal search), panel opinion adopted *en banc*, 166 F.3d 243 (4th Cir.) (*en banc*), *cert. denied*, 119 S. Ct. 2342 (1999); *Baumgartner v. Secretary, U.S. Dep't of Housing & Urban Devel.*, 960 F.2d 572, 581-83 (6th Cir. 1992) (gender discrimination in housing); *Horina v. City of Granite*, 538 F.3d 624, 637-38 (7th Cir. 2008) (First Amendment right to distribute handbills); *Lewis v. Harrison Sch. Dist.*, 805 F.2d 310, 317-318 (8th Cir. 1987) (violation of free speech rights); *Phillips v. Hust*, 477 F.3d 1070, 1080-81 (9th Cir. 2007) (prisoner's First Amendment right of access to the courts); *Searles v. Van Bebber*, 251 F.3d 869, 875-79 (10th Cir. 2001) (free exercise rights); *Slicker v. Jackson*, 215 F.3d 1225, 1229-32 (11th Cir. 2000) (excessive force claim under 4th and 14th Amendments); *Kelly v. Curtis*, 215 F.3d 1544, 1557 (11th Cir. 1994) (false arrest, malicious prosecution, and illegal detention claims).

¹⁶¹ *Curtis v. Loether*, 415 U.S. 189 (1974) (Seventh Amendment guarantees right to a jury trial to determine statutory damages under the housing discrimination provisions of the Civil Rights Act of 1968); *Feltner v. Columbia Pictures Tel., Inc.*, 523 U.S. 340, 353-55 (1998) (statutory damages for copyright infringement).

¹⁶² *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001); *see, e.g., St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648 (1915). The Re-examination Clause provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST., amend. 7.

must be awarded to the plaintiff.¹⁶³ The defendant is essentially deprived of its right to have the jury exercise its discretion to deny awarding any damages for the wrongdoing.¹⁶⁴ And, where a jury declines to award damages, and the trial court or an appellate court decides that presumed damages should be awarded, it is essentially re-examining the jury's findings on injury (or lack thereof) and impermissibly augmenting a jury verdict of no damages (or nominal damages of one dollar).¹⁶⁵

Presuming the appropriateness of injunctive relief also raises Seventh Amendment concerns. A plaintiff that cannot prove irreparable injury should be relegated to a claim for money damages or declaratory relief, which can also trigger jury trial rights.¹⁶⁶ Consequently, when irreparable injury is presumed in a situation where the plaintiff is unable to demonstrate such harm, then the defendant is being deprived of her right to a jury trial on the underlying claim. That is why the Court is consistently reluctant to expand the scope of its equity jurisdiction—it leads to an erosion of the Seventh Amendment's guarantees.¹⁶⁷

3. The Reinvigorated Compensatory Damages Remedy

Furthermore, the Court was not convinced that the presumed damages were needed to overcome any insurmountable difficulties in recovering for intangible harms. If anything, since the *Carey* and *Stachura* decisions, the ability to obtain compensatory damages for mental and emotional harms has become easier. Over the course of the past two decades, federal courts have become more accepting of psychic injuries resulting from unconstitutional conduct and have relaxed the evidentiary requirements for proving damages for such injuries. The days when federal courts insisted that a plaintiff prove emotional injury or mental anguish through expert

¹⁶³ *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004) (jury should have been instructed to award damages for the loss of liberty occasioned by an unlawful detention).

¹⁶⁴ A jury is obligated to follow the law and thus where there is no serious dispute that a defendant's actions caused an objectively determinable injury to the plaintiff, a jury cannot refuse to award damages to that plaintiff. See *Haywood v. Koehler*, 78 F.3d 101, 104 (2d Cir. 1996) (appellate court can determine whether plaintiff in constitutional tort case is "entitled to some compensatory damages as a matter of law"); *Atkins v. New York City*, 143 F.3d 100, 104 (2d Cir. 1998) (if it is "clear from the undisputed evidence" that the plaintiff sustained an injury that was caused by unconstitutional conduct, then "the jury's failure to award some compensatory damages should be set aside and a new trial ordered"); *Westcott v. Crinklaw*, 133 F.3d 658, 661 (8th Cir. 1998). However, where the sole injury is an emotional or other intangible harm, such as mental anguish, most courts have held that a jury is not required to award damages because it is always permitted to disbelieve the subjective claims of a litigant. See *Kerman* 374 F.3d at 123-24 ("As to whether [plaintiff] experienced mental suffering or psychological injury, the jury was not required to credit [his] subjective representations or the testimony of [his] brother or of his psychiatrist"); *Robinson v. Cattaraugus County*, 147 F.3d 153, 160 (2d Cir. 1998) (the fact that the jury credited plaintiffs' account on liability "did not require it to believe plaintiffs' evidence as to either the fact or the extent of their emotional suffering"); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 314 (2d Cir. 1999) (a jury can legitimately refuse to award damages for intangible harms which are dependent on the victim's credibility).

¹⁶⁵ *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935); see *Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir. 1990) ("the order of an *additur* by a federal court violates the seventh amendment"); *Gibeau v. Nellis*, 18 F.3d 107, 111 (2d Cir. 1994) (a federal court's increase of a jury award would constitute impermissible *additur*); *Campos-Orrego v. Rivera*, 175 F.3d 89, 97 (1st Cir. 1999) ("[T]he Seventh Amendment flatly prohibits federal courts from augmenting jury verdicts"); *Robinson v. Cattaraugus Co.*, 147 F.3d 153, 162 (2d Cir. 1998) ("the Seventh Amendment generally prohibits a court from augmenting a jury's award of damages").

¹⁶⁶ *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

¹⁶⁷ See *infra* text accompanying notes 20-28.

medical testimony or other corroboration, such as psychiatric treatment,¹⁶⁸ are gone. Most federal courts today will permit an emotional distress damages awards to be based solely on the uncorroborated testimony of the plaintiff.¹⁶⁹

Courts have also been willing to expand the types of afflictions that will qualify for cognizable intangible harm. Federal courts were initially reticent to recognize and permit redress for intangible harms that were viewed as not objectively determinable or that produced no medically-detectable physical manifestations.¹⁷⁰ Courts eventually accepted a variety of ailments that were entirely subjective and indeterminate.¹⁷¹ Many of these afflictions, such as loss of appetite, crying, loneliness or sleeplessness, can be proved simply through the testimony of the plaintiff or a family member.

An accessible compensatory damages remedy for intangible harm not only further undercuts the rationale for presuming damages, it impacts the wisdom of presuming irreparable harm. Presuming irreparable injury arguably still makes sense where it can easily be proven and courts can avoid expending time and resources confirming the obvious. It makes less sense in

¹⁶⁸ Compare *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 204-05 (1st Cir.1987) (affirming emotional damage award of \$123,000 based on plaintiff's testimony and testimony from psychiatrist); *Cowan v. Prudential Ins. Co. of America*, 852 F.2d 688, 690-91 (2d Cir.1988) (affirming emotional damage award based on corroborating testimony); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir.1986) (same) with *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1265 (10th Cir.1995) (vacating emotional damage award as excessive when it was based solely on the testimony of the plaintiff); *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121 (3d Cir.1988), cert. denied, 492 U.S. 905 (1989) (reversing an emotional distress award based on the lack of corroborating evidence); *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1259 (6th Cir.1985), cert. denied, 475 U.S. 1015 (1986) (reversing an emotional damage award and remanding with instructions to award nominal damages because plaintiff offered only his own testimony); *Vance v. Southern Bell Tel. & Teleg. Co.*, 863 F.2d 1503, (11th Cir.1989), cert. denied, 513 U.S. 1155 (1995) (jury award for emotional distress was grossly excessive when based solely on plaintiff's testimony).

¹⁶⁹ *Migis v. Pearle Vision, Inc.* 135 F. 3d 1041, 1047 (5th Cir. 1998); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9th Cir. 2003) (“[plaintiff’s] testimony alone is enough to substantiate the jury’s award of emotional distress damages”); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 513 (9th Cir. 2000) (upholding a \$1,000,000 compensatory emotional distress damage award based on testimony of plaintiff); *Randall v. Prince George’s Co.*, 302 F.3d 188, 208-09 (4th Cir. 2002) (“We have recognized, in the § 1983 context, that a “plaintiff’s testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation.”); *Oden v. Oktibbeha Co.*, 246 F.3d 458, 470 (5th Cir. 2001).

¹⁷⁰ *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 939-40 (5th Cir.1996) (rejecting, as a matter of law, compensatory damages claim predicated on “feelings of low self-esteem” and “inferiority” and commenting that “[h]urt feelings, anger and frustration are part of life”); *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996) (“Not only is emotional distress fraught with vagueness and speculation, it is easily susceptible to fictitious and trivial claims”). The Equal Employment Opportunity Commission had emphasized the importance of a physical manifestation of harm, such as “ulcers, gastrointestinal disorders, [or] hair loss” to obtain compensatory damages for intangible injuries from actionable discrimination under Title VII or Section 1981. EEOC POLICY GUIDANCE NO. 915.002 § II(A)(2), at 10-12 (July 14, 1992) (“The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations”).

¹⁷¹ Plaintiffs have been able to recover for a variety of mental and emotional conditions and afflictions, such as humiliation, inadequacy, loss of self-esteem, anxiety, loneliness, sleeplessness, loss of appetite, crying, or headaches. Michelle Cucuzza, *Evaluating Emotional Distress Damage Awards To Promote Settlement Of Employment Discrimination Claims In The Second Circuit*, 65 BROOK. L. REV. 393, 417 (1999); see also Robert S. Mantell, *The Range of Emotional Distress Compensable Under Anti-Discriminations Laws*, (concentration deficiency, confusion, loss of enjoyment of life, hopelessness, trust issues, and weight loss or gain) available at <http://www.theemploymentlawyers.com/Articles/Emotional%20distress%20damages.htm>

those instances where courts have presumed irreparable injury because they fear that damages cannot be shown or will be too difficult to prove. If compensatory damages for intangible harms are more attainable, courts should be less inclined to find that damages are an inadequate remedy.¹⁷²

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

IV. IMPLICATIONS OF ELIMINATING THE PRESUMPTION

Eliminating a presumption of irreparable harm in constitutional cases should not have a significant impact on the granting of permanent injunctive relief. As with patent cases, the presumption arose only because courts frequently observed that the abridgement of a constitutional right could not be redressed through an award of monetary damages. Those observations will not decrease simply because the presumption is eliminated. It is therefore likely that, in many constitutional cases, the plaintiff will still be entitled to injunctive relief, even where she must establish irreparable injury.

There will, however, certainly be some cases where elimination of the presumption will lead to a denial of injunctive relief. This may occur in cases involving loss of employment, as in *Sampson*, or where the plaintiff cannot establish the requisite chilling effect.¹⁷³ Injunctions may also be unavailable in situations where the plaintiff is essentially requesting that a defendant be prohibited from taking action that would violate the constitution. As explained in Judge Tjoflat's well-reasoned concurring opinion in *Chandler v. James*,¹⁷⁴ where a defendant is restrained from acting in derogation of constitutional rights, instead of required to take action to avoid violating such rights, the sole means for enforcing the injunction will be to impose a flat monetary sanction. A coercive sanction, a monetary assessment that accumulates until the action is completed, cannot be used in that situation.¹⁷⁵ Judge Tjoflat reasoned that the granting of an injunction where a coercive sanction cannot be used is inappropriate.¹⁷⁶

¹⁷² Of course, damages are an adequate remedy for a constitutional wrong only where they can be awarded. If damages are precluded by doctrines of state sovereign immunity, *Edelman v. Jordan*, 415 U.S. 651 (1974), or official immunity, *O'Bert v. Vargo*, 331 F.3d 29, 36 (2d Cir. 2003), then the remedy cannot be deemed adequate for purposes of denying injunctive relief.

¹⁷³ See *infra* text accompanying note 90.

¹⁷⁴ 180 F.3d 1254, 1266-74 (11th Cir. 1999) (Tjoflat, J., concurring).

¹⁷⁵ *Id.* at 1267-68 (Tjoflat, J., concurring); see *id.* at 1269 (“Coercive sanctions, however, are not available, because the act to be prevented by the injunction has already occurred—in other words, there is no way to purge the contempt.”)

¹⁷⁶ In his view, remedying the violation of an injunction with a flat monetary penalty is tantamount to awarding damages where a court previously held damages were not an adequate remedy. *Id.* at 1270 (Tjoflat, J., concurring)

A. The Declaration as an Alternative Remedy

Some judges have gone so far as to opine that certain constitutional violations are so inconsequential that they do not merit any remedy. In a recent decision by the Second Circuit holding that First Amendment rights were violated in connection with a dispute over a student-run newspaper at a city university, Chief Judge Dennis Jacobs described the case as “about nothing” and a “silly thing” that should not “occupy the mind of a person who has anything consequential to do”.¹⁷⁷ Another circuit judge vented in a case involving an Establishment Clause claim by a high school student based on a religious painting on a public school wall:

“[T]his picture does implicate an “establishment”-but not one of religion. What is established is a class of “eggshell” plaintiffs of a delicacy never before known to the law.”¹⁷⁸

On these occasions, judges are prone to cry out for a “*de minimis*” or “harmless error” rule, whereby constitutional infractions that produce no real injury are disregarded.¹⁷⁹ These protestations are entirely misguided.

As noted above, the remedy of a declaratory judgment is available to plaintiffs who cannot establish irreparable injury. The central point of *Steffel*, a First Amendment case, was that the declaratory judgment could provide redress to plaintiffs who cannot qualify for injunctive relief.¹⁸⁰ If all constitutional violations automatically give rise to a presumption of irreparable injury, then the *Steffel* decision is incomprehensible.

A declaration provides a plaintiff with the same advantage that an injunction provides: an *ex ante* declaration of the rights of the parties.¹⁸¹ The judicial declaration may not always be as effective as an injunction, since it is not a coercive edict.¹⁸² A state or local government that ignores a declaratory judgment is not acting contrary to a court order, as it would be in the case of an injunction.¹⁸³ Nevertheless, the Court observed in *Steffel* that, while a state or local

(“injunctions that are enforceable only through a flat monetary sanction will provide relief to a plaintiff that is “duplicative of the relief available through an action for damages.”)

¹⁷⁷ *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, J., dissenting). Though he filed a dissenting opinion, Chief Judge Jacobs acknowledged that he had not even bothered to read the majority decision. *Id.*

¹⁷⁸ *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 684 (6th Cir. 1994) (Guy, J., concurring).

¹⁷⁹ *Riley v. Dorton*, 115 F.3d 1159, 1166 (4th Cir. 1997) (applying a *de minimis* rule excusing batteries that produce no serious injuries) (*en banc*), *abrogated by Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010) (*per curiam*); *Mount Healthy Sch. Dist. v. Doyle*, 429 U.S. 274 (1977) (essentially applying a harmless error rule by giving the school the opportunity to show that it would not have rehired plaintiff even had it not considered his constitutionally protected conduct).

¹⁸⁰ See *infra* at text accompanying notes 38-40.

¹⁸¹ *Chandler v. James*, 180 F.3d 1254, 1271 n.12 (11th Cir. 1999) (Tjoflat, J., concurring).

¹⁸² In the post-*Brown* school desegregation cases, for instance, declaratory relief surely would not have sufficed; indeed, injunctive relief failed in that situation. *Griffin v. County Sch. Bd. of Prince Edward Co.*, 377 U.S. 218 (1964) (noting that ten years after the Court had ordered the school board to admit students on a racially non-discriminatory basis, it had not done a thing).

¹⁸³ *Chandler v. James*, 180 F.3d 1254, 1271 n.12 (11th Cir. 1999) (Tjoflat, J., concurring).

government may not be obliged, under pain of contempt, to honor a federal court declaration, it would likely do so in any event.¹⁸⁴

Indeed, a declaratory judgment has preclusive effect in future litigation between the parties with respect to the matter declared.¹⁸⁵ If a federal court declares a state law unconstitutional, that determination will be binding on the state in future litigation.¹⁸⁶ For this reason, the declaration can be quite effective in causing the cessation of unconstitutional conduct.¹⁸⁷ It is less intrusive than the injunction, avoiding federalism and separation of powers concerns.¹⁸⁸ There is no danger that a declaration will contain invasive prophylaxis or deter lawful conduct due to a defendant's desire to avoid a contempt hearing.¹⁸⁹

More importantly, a declaratory judgment action that is fully litigated to final judgment does not bar a plaintiff from being a subsequent action for coercive relief based on the declaration.¹⁹⁰ The general rule that a plaintiff must assert all possible claims in a proceeding or else be barred by *res judicata* does not apply to declaratory judgment actions.¹⁹¹ Thus, a plaintiff confronted with an intransigent defendant that refuses to honor a declaration can bring a second action for injunctive relief (or damages).¹⁹² In short, if a plaintiff can obtain injunctive relief to halt unconstitutional behavior if a declaration ultimately fails to effect that change.

¹⁸⁴ *Steffel*, 415 U.S. at 469-70 (“[A] federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute.”)

¹⁸⁵ *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190 (2d Cir. 2010) (the preclusive effect of a declaratory judgment action is limited to the matters actually declared in the action); Restatement (Second) of Judgments § 33; see also 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4446, at 313 (2d ed. 2002).

¹⁸⁶ *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971) (noting that a declaratory judgment of unconstitutionality has the same practical impact as a formal injunction in light of its *res judicata* effect); see also *In re Nassau Cty. Strip Search Cases*, 2010 WL 3781573 at *1 (E.D.N.Y. Sept. 22, 2010) (analyzing potential *collateral estoppel* consequences of a judicial declaration of unconstitutionality).

¹⁸⁷ For example, a federal district court held that a blanket policy of a suburban county in New York to strip search misdemeanor detainees violated the Fourth Amendment and issued a declaration to that effect. See *Shain v. Ellison*, 53 F.Supp.2d 564 (E.D.N.Y. 1999), *aff'd*, 273 F.3d 56 (2d Cir. 2001). Although the Second Circuit refused to permit the entry of an injunction in that case, *Shain v. Ellison*, 356 F.3d 211 (2d Cir. 2004), the county abandoned the strip search policy based on the district court's declaration. The case is now proceeding as a class action for damages. *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006); see also *In re Nassau Cty. Strip Search Cases*, 2010 WL 3781573 at *1 (E.D.N.Y. Sept. 22, 2010).

¹⁸⁸ *Steffel v. Thompson*, 415 U.S. at 469-70; *Levin v. Harleston*, 966 F.2d 85, 91 (2d Cir. 1992) (noting declaratory judgment is an effective remedy for plaintiff in First Amendment case who cannot establish irreparable injury).

¹⁸⁹ *Chandler v. James*, 180 F.3d 1254, 1271 n.12 (11th Cir. 1999) (Tjoflat, J., concurring).

¹⁹⁰ *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992) (upon obtaining a declaratory judgment, a plaintiff may continue to pursue further declaratory or coercive relief in subsequent litigation); accord *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190 (2d Cir. 2010).

¹⁹¹ See *Harborside*, 959 F.2d at 372; *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546 (D.C. Cir.), *cert. den.*, 488 U.S. 849 (1988); *Smith v. City of Chicago*, 820 F.2d 916, 919 (7th Cir. 1987); *Minneapolis Auto Parts Co. v. City of Minneapolis*, 739 F.2d 408, 410 (8th Cir. 1984); see also RESTATEMENT (SECOND) OF JUDGMENTS § 33, Comment c (1982).

¹⁹² *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971) (noting that a declaratory judgment of unconstitutionality can be followed by a subsequent coercive injunction).

B. Interlocutory Injunctions and Constitutional Determinations

The most significant consequence from eliminating a presumption of irreparable harm should occur in the preliminary injunction context. At present, courts employ the presumption in connection with requests for preliminary injunctive relief. There is some surface logic to this approach. It is reasonable to conclude that if a harm is irreparable, it will remain so during the proceeding as well as after it concludes. The critical phrase in the *Elrod* plurality's rule, "for even minimal periods of time," suggests that all constitutional harm is irreparable for preliminary injunctive relief purposes.

As demonstrated above, however, the irreparable harm analysis for preliminary injunctions differs from the post-judgment analysis because it must include some consideration of the effectiveness of a post-judgment injunctive remedy, as well as a sense of how quickly and efficiently the court and the parties can get to a post-judgment environment.¹⁹³ When courts reflexively presume irreparable injury and proceed with deciding constitutional claims in the context of a preliminary injunction motion, the legal system and public interest are both disserved.

A final judgment following a trial or summary judgment produces a definitive holding on the constitutionality of challenged conduct, as opposed to a ruling on a preliminary injunction motion, which is only a tentative ruling that conduct is likely or possibly unconstitutional.¹⁹⁴ As the Supreme Court has recognized, it is not accurate to refer to constitutional determinations on preliminary injunction motions as "holdings" since nothing is definitively decided in that regard.¹⁹⁵ Even where, when deciding a preliminary injunction motion, a court uses language suggesting that it is making a definitive and final determination of constitutionality, the ruling will still be considered provisional because "any conclusions reached at the preliminary injunction stage are subject to revision."¹⁹⁶

Final determinations, following trial or via summary judgment, would not only produce more definitive determinations on questions of constitutional law,¹⁹⁷ they would also facilitate a more satisfactory appellate process. Appeals from final judgments are subject to the traditional

¹⁹³ See *infra* text accompanying notes 46-49.

¹⁹⁴ *University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981) (suggestion that a ruling on a preliminary injunction motion is tantamount to a decision on the underlying merits fails, "because it improperly equates 'likelihood of success' with 'success'").

¹⁹⁵ *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305 (1985) ("the court's opinion and order are cast in terms of a 'preliminary injunction' the court only states that there is a 'high likelihood of success' on the merits of appellees' claims, and does not specifically state that the fee limitation provision is unconstitutional."); *McLucas v. DeChamplain*, 421 U.S. 21, 30 (1975) ("in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally 'hold' the article unconstitutional").

¹⁹⁶ *Walters*, 473 U.S. at 317 (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

¹⁹⁷ Indeed, far from constituting binding authority in other cases, legal conclusions made by a court in resolving a preliminary injunction motion are not even deemed binding on the parties to the case in question. *Camenisch*, 451 U.S. at 395 ("the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits").

standards of clearly erroneous for facts and de novo review for legal conclusions.¹⁹⁸ In contrast, appeals from interlocutory injunction rulings are subject to the far more deferential abuse of discretion standard.¹⁹⁹

Even where the parties are willing to accept an imperfect form of judicial determination, why should courts encourage the determination of constitutional issues of significant public import through an adjudicative technique that is more prone to error and less final than a trial? As the Court has acknowledged, the foundation for an assessment of constitutionality made in connection with a preliminary injunction motion “will be more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court.”²⁰⁰ The inadequate nature of this procedure can be eliminated by a court exercising its prerogative to advance a trial of the merits or to convert a preliminary injunction motion into one for summary judgment.²⁰¹ Adjudicating the entire case on an expedited basis gives the plaintiff the opportunity for prompt redress of any irreparable harm, while protecting the public’s right to a definitive determination.

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

4. *The Declaratory Judgment/Injunction Distinction*

A declaratory judgment is not a true alternative for plaintiffs who cannot establish irreparable harm if it is treated by courts as an empty remedy. The Supreme Court has subordinated the declaration to the injunction for purposes of awarding attorneys’ fees. As a consequence, civil rights plaintiffs are incentivized to pursue injunctions instead of declaratory judgments, and courts, desirous that plaintiffs’ lawyers get paid, are more prone to grant the former in preference to the latter.

Courts in a Section 1983 cases are statutorily authorized to require a defendant to pay the attorneys’ fees incurred by the plaintiff where the plaintiff is the “prevailing party.”²⁰² The

¹⁹⁸ *United States v. United States Gypsum Co.*, 333 U.S. 364 (U.S. 1948) (facts reviewed under “clearly erroneous” standard); *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (de novo review of conclusions of law).

¹⁹⁹ *Doran*, 422 U.S. at 931-32 (“But while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion.”); *see also McCreary Co. v. ACLU*, 545 U.S. 844, 867 (2005) (Establishment Clause claim adjudicated on preliminary injunction motion under likelihood of prevailing standard at district court and abuse of discretion standard on appeal); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (free speech claim).

²⁰⁰ *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (noting that, with respect to a First Amendment claim, “the preliminary injunction hearing was necessarily hasty and abbreviated” and, not surprisingly, produced an erroneous conclusion).

²⁰¹ In many instances, a case can be tried in the time period it takes to determine a preliminary injunction motion that requires an evidentiary hearing. *Denlow*, *supra* note 12, at 533-34 (“in most situations it would be more efficient to consolidate the trial on the merits with the motion for a preliminary injunction under Rule 65(a) (2)”). Nevertheless, the fact remains that many district judges like preliminary injunction motions, because it allows them to conduct evidentiary hearings, to decide complex constitutional questions based on what is “likely,” and to have a more deferential form of appellate scrutiny.

²⁰² 42 U.S.C. § 1988. Other civil rights statutes have similar provisions. See 42 U.S.C. § 2000e-5(k) (Title VII); 42 U.S.C. § 1973l(e) (Voting Rights Act); 29 U.S.C. § 216 (b) (fee shifting provision incorporated into the Age Discrimination in Employment Act); 42 U.S.C. § 3613(c)(2) (Fair Housing Act); 42 U.S.C. § 12205 (Americans

Supreme Court has repeatedly held that the “touchstone of the prevailing party inquiry” is whether there has been a “material alteration” of the behavior of the defendant towards the plaintiff that is the product of a court order, and not a voluntary decision.²⁰³ A declaratory judgment constitutes a court order and thus should plainly qualify a basis for conferring prevailing party status on a plaintiff. Unfortunately, however, the Supreme Court has cast significant doubt on whether a declaratory judgment suffices for this purpose.

In *Hewitt v. Helms*, the Supreme Court held that a judicial finding of a due process violation that was tantamount to a declaratory judgment could not support an attorneys’ fees award unless the plaintiff could make a further showing that the declaration, and not some other factor, caused the defendant to alter its behavior towards the plaintiff.²⁰⁴ The Court reiterated this point in *Rhodes v. Stewart*, sustaining a denial of fees to plaintiffs who obtained a declaratory judgment that their First Amendment rights had been violated, but who failed to show that the judgment affected “the behavior of the defendant toward the plaintiff.”²⁰⁵

These rulings have influenced federal circuit courts to deny prevailing party status to plaintiffs who have obtained only declaratory relief, except where the plaintiff can make an additional showing that the declaration was a primary factor that caused a material change in the defendant’s behavior.²⁰⁶ These cases surely do not cause plaintiffs’ civil rights attorneys to view declaratory judgments in a positive light.

In contrast, the securing of an injunction, even one obtained consensually via a stipulated settlement, has repeatedly been held to constitute a sound basis upon which to award fees.²⁰⁷

With Disabilities Act). Courts have interpreted these nearly-identically worded provisions consistently. *Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

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

²⁰³ *Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, 532 U.S. 598, 604 & n. 7 (2001) (a consent decree, but not a settlement agreement, can confer prevailing party status); see *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (emphasizing the need for a court-ordered change); *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (absent a direct benefit, the plaintiff achieves only a symbolic victory, which § 1988(b) does not compensate); see also *Maher v. Gagne*, 448 U.S. 122, 128-30 (1980); *Texas Teachers Assoc. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-93 (1989).

²⁰⁴ 482 U.S. 755, 761 (1987).

²⁰⁵ 488 U.S. 1, 4 (1988).

²⁰⁶ *Compare Brister v. Faulkner*, 214 F.3d 675, 687 (5th Cir. 2000) (plaintiffs who obtained a declaratory judgment that a policy was unconstitutional, were not prevailing parties because that judgment did nothing to alter the legal relationship between these parties); *Bonner v. Guccione*, 178 F.3d 581, 594 (2d Cir. 1999) (jury’s finding of sexual harassment is of no more legal consequence than a declaratory judgment to that effect and does support award of attorneys’ fees); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 847 (11th Cir.1991) (same) with *Owner-Operator Independent Drivers Assoc., Inc. v. Bissell*, 210 F.3d 595, 599 n.1 (6th Cir. 2000) (fees awarded where declaratory judgment forced defendant to resign and caused a restructuring of state agency).

²⁰⁷ *National Black Police Ass’n v. District of Columbia Bd.*, 168 F.3d 525,527-29 (D.C. Cir. 1999) (plaintiffs, who obtained an injunction, had prevailing party status because the injunction altered the legal relationship between the parties). In *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health*, 532 U.S. 598, 604 (2001), the Supreme Court held that a consent decree, because it effects a court-ordered change in the legal relationship of the

Courts have emphasized that an injunction specifically requires the defendant to alter its behavior towards plaintiff.²⁰⁸ Indeed, most circuit courts have held that the granting of a preliminary injunction, even though it does not represent a definitive ruling on the merits and does not even constitute law of the case for purposes of further proceedings in the action, will confer prevailing party status on a plaintiff.²⁰⁹ These courts have reasoned that the issuance of an injunction removes any doubt as to why the defendant changed his behavior: The defendant was compelled to do so by a coercive injunctive decree enforceable under pain of contempt.²¹⁰ Accordingly, once a preliminary injunction is granted, a plaintiff is well-positioned to recover attorneys' fees, as the only thing she needs to fear is if it is "reversed, dissolved, or otherwise undone by the final decision in the same case."²¹¹ This clearly incentivizes civil rights plaintiffs not merely to seek injunctions, but to seek such relief preliminarily so they can lock-in their entitlement to fees subject only to forfeiture in the event they lose at trial.

5. Nominal Damages and Fees Shifting

The influence that judicial pronouncements on prevailing party status have on the pursuit and awarding of remedies is further evidenced by fee-shifting decisions concerning awards of nominal damages. As previously explained, federal courts have almost uniformly held that plaintiffs who are unable to prove actual damages from a constitutional violation are limited to an award of nominal damages.²¹² The qualifier "almost uniformly held" must be used because the Second Circuit has seemingly bucked this trend and has authorized—indeed, directed—lower courts to award presumed damages to plaintiffs who successfully prove that they are victims of certain constitutional violations.²¹³

parties, can confer prevailing party status, but that an ordinary settlement agreement does not. See also *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002); *Truesdell v. Philadelphia Housing Auth.*, 290 F.3d 159, 165 (3d Cir. 2002).

²⁰⁸ *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003); *Oil, Chem. & Atomic Workers Int'l Union v. Department of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002); *Carbonell v. Immigration & Naturalization Serv.*, 429 F.3d 894, 901 (9th Cir. 2005) (stipulated injunction contained in a court order).

²⁰⁹ *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, (9th Cir. 2007) (a party has "prevailed...when it has obtained a preliminary injunction"); *Dahlem v. Bd. Of Educ.*, 901 F.2d 1508, 1512 (10th Cir. 1990); *Grano v. Barry*, 783 F.2d 1104, 1109 (D.C. Cir. 1986); *Virginia Society for Human Life v. Caldwell*, 187 F.3d 633 (table), 1999 WL 598846 at *11 (4th Cir. Aug. 10, 1999) (*per curiam*) ("a plaintiff that has received a preliminary injunction against the defendant's alleged unlawful conduct may obtain prevailing party status under 42 U.S.C. § 1988 without obtaining a favorable final judgment following a full trial on the merits of its claim."); *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (*en banc*) ("[W]hen a plaintiff is successful in obtaining a preliminary injunction based on its probability of success, the defendant's voluntary cessation of *unlawful* conduct need not deprive the plaintiff of prevailing status."); *Haley v. Pataki*, 106 F.3d 478, 483-84 (2d Cir. 1997); see also *Maloney v. Marietta*, 822 F.2d 1023, 1024 (11th Cir. 1987); *Taylor v. Ft. Lauderdale*, 810 F. 2d 1551, 1558 (11th Cir. 1987); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980).

²¹⁰ *McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010); *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006); see *Young v. City of Chicago*, 202 F.3d 1000, 1000 (7th Cir.2000) (awarding fees to protestors who obtained preliminary injunction); *Watson v. County of Riverside*, 300 F.3d 1092, 1095-96 (9th Cir. 2002) (same); *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003) (same).

²¹¹ *Sole v. Wyner*, 551 U.S. 74, 86 (2007) (Section 1988 requires lasting relief, not temporary, "fleeting success").

²¹² See *infra* text accompanying note 100.

²¹³ *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004) (presumed damages are appropriate for cases involving "loss of liberty," such as false arrest and unlawful detention).

Significantly, the Supreme Court ruled in *Farrar v. Hobby* that nominal damages cannot ordinarily support a basis for fees-shifting. The Court held that a plaintiff who is awarded nominal damages is technically a prevailing party, but that the “*de minimis*” nature of a nominal damages award should prompt the court to deny fees.²¹⁴ Justice O'Connor filed a concurring opinion, adding that fees should be awarded in nominal damages cases where the legal issue decided was “significant” or where the decision “accomplished some public goal.”²¹⁵

Most of the federal circuit courts since *Farrar* was decided have awarded attorneys fees in cases involving nominal damages recoveries either by distinguishing *Farrar* on its facts (*i.e.*, the plaintiff in *Farrar* sought \$17 million in damages and received only \$1) or by citing to Justice O'Connor's concurring opinion.²¹⁶ The Second Circuit, however, has remained faithful to the majority holding in *Farrar* and has held that a nominal damages award will produce no fee shifting.²¹⁷ The fact that the Second Circuit denies attorneys' fees for nominal damages awards and has authorized that presumed damages be awarded in lieu of nominal damages cannot simply be dismissed as coincidental. Here, too, the recognition of a presumed remedy may have been influenced by a plaintiff's ability to recover attorneys' fees.

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

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

²¹⁴ *Id.* at 115.

²¹⁵ *Id.* at 121-22 (O'Connor, J., concurring). She opined that, even considering these indicia of success, *Farrar*'s victory was *de minimis*. *Id.* at 122.

²¹⁶ *Jama v. Esmor Corr. Servs. Inc.*, 577 F.3d 169, 176 (3d Cir. 2009) (“we find no case in which a court of appeals has interpreted *Farrar* to require the automatic denial of fees that Appellants seek when only nominal damages are awarded”); *Mercer v. Duke University*, 401 F.3d 199, 206-09 (4th Cir. 2005) (plaintiff who obtained only nominal damages was awarded \$350,000 in attorney fees because the legal issue was significant and the litigation served a public purpose); *Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 121 (1st Cir. 2004) (municipal employees awarded only nominal damages but were awarded fees); *Cummings v. Connell*, 402 F.3d 936, 947 (9th Cir.2005); *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997); *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 731 (7th Cir. 1995); *Jones v. Lockhart*, 29 F.3d 422, 423-24 (8th Cir. 1994); *Milton v. Des Moines, Iowa*, 47 F.3d 944, 946 (8th Cir. 1995); *Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir. 1996); *Murray v. City of Onawa*, 323 F.3d 616, 619 (8th Cir. 2003); *Brandau v. Kansas*, 168 F.3d 1179, 1182 (10th Cir.1999); *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996); *Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996); *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1336 (4th Cir. 1996).

²¹⁷ See *Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996) (“*Farrar* indicates that the award of fees in ... a case [involving a nominal damages recovery] will be rare.”); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 n.5 (2d Cir. 1999) (nominal damage award can be grounds for denying an attorney's fee award); *Husain v. Springer*, 494 F.3d 108, 135 n.17 (2d Cir. 2007) (noting effect of counsel's concession that the only relief that will be sought is nominal damages on his ability to recover attorneys fees).

seek injunctions instead of declarations because the former will better position the plaintiff for fees-shifting.

CONCLUSION

Requiring proof of irreparable harm should have little impact in cases where the injury is apparent and incontrovertible. But it will be significant in those cases where the existence or extent of injury, let alone one that can fairly be classified as irreparable, are questionable. Courts will have to consider a variety of factors to determine whether permanent or provisional injunctive relief is appropriate: The nature of the right in question; the context in which the right is impacted; the severity of any deprivation; the burdens placed on the exercise of the right; the importance of a timely exercise of the right; the adverse consequences beyond deprivation that will result. Courts will have to ensure that they don't effectively give governments a license to violate constitutional guarantees by making injunctions too difficult to obtain. At the same time, injunctions should not be so easy to get that constitutional questions are always resolved through preliminary injunction rulings.