
VIRGINIA LAW REVIEW

IN BRIEF

VOLUME 96

MAY 15, 2010

PAGES 17–25

RESPONSE

THE IMMORTALITY OF EQUITABLE BALANCING

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PROFESSOR Goldstein argues that courts should not weigh the burden on defendants in deciding whether to enjoin statutory violations. Such an undue hardship defense to a preventive injunction in statutory cases would, he reasons, allow courts to upend the policy choice that the legislature made in enacting the statute.¹

Goldstein sees this practice as a threat to legislative policy choices, because he views equitable discretion as giving judges open-ended discretion to reach whatever result makes sense to them.² He shares this premise with Professors Abram Chayes and Zygmunt Plater; Chayes, however, wanted courts to have broad discretion in formulating injunctions in public law cases while Plater, like Goldstein, seeks to deny discretion to allow violations to continue.³ Plater wrote over a quarter century ago. Goldstein makes a valuable contribution not only by dealing with subsequently decided cases, but also going back in time to challenge the Supreme Court's assumption that the courts have allowed an undue hardship defense for many centuries.

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¹ Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 Va. L. Rev. 486–90 (2010).

² *Id.* at 517–27.

³ Compare Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1292–94 (1976), with Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524, 527, 535, 590–92 (1982).

I disagree with their premise that equitable balancing inevitably gives judges open-ended discretion to reach whatever result makes sense to them. In an article published in 1988, I argued that judges in common law, constitutional, and statutory cases tend to honor the spirit of the rule of liability even when they, after balancing the equities, allow a violation of the letter of the law to continue. Because what they are doing is inadequately explained, however, I attempted to articulate a principle that “makes explicit what is implicit in the case law”:

The injunction should require the defendant to achieve the plaintiff’s rightful position unless (a) different relief is consistent with the goals of the violated rule and (b) the case involves a factor justifying departure from the rule that was not reflected in its formulation, but the injunction may never aim to achieve more than the plaintiff’s rightful position.⁴

This principle seeks to explain decisions on whether to grant an injunction and also how to draft it.

Such equitable discretion, I argued, does no violence to legislative policy choices. It honors those choices and operates instead on choices that the legislature did not anticipate. It also honors the legislature’s goals. There is much that legislatures cannot anticipate, because statutes apply in unexpected contexts, especially since they can stay in force for decades. I was unaware in 1988 that the principle that I was describing and my argument for it might be traced to Aristotle, who wrote that

[w]hen the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just⁵

⁴ David S. Schoenbrod, *The Measure of an Injunction: a Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 *Minn. L. Rev.* 627, 630, 664 (1988). My article focuses on the permanent injunction. In writing it, I was helped by John Leubsdorf’s article on preliminary injunctions, which made the point that courts must honor the law of liability in deciding whether to issue them. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 *Harv. L. Rev.* 525, 549–50 (1978).

⁵ Aristotle, *Nicomachean Ethics*, Book V, ch. 10 (W.D. Ross trans., Institute for Learning Technologies 1995), available at <http://classics.mit.edu/Aristotle/nicomachaen.mb.txt>.

Contrary to Goldstein, the undue hardship defense should normally be available in statutory cases. If the legislature nonetheless intends the statute to be enforced to the letter in all contexts, it can say so explicitly; if not, the statute implicitly condones principled equitable discretion, because this principle is part of the background understanding against which legislatures operate.⁶ Dan Dobbs has dubbed the foregoing the “Schoenbrod principle” (to the eternal gratification of my mother) and conceives of it as a principle of statutory interpretation.⁷

It is understandable that Goldstein sees the undue hardship defense as authorizing courts to upend legislative policy choices. He reads a leading statutory injunction case, *TVA v. Hill*,⁸ to reject equitable balancing for the reason that it would allow courts to nix legislative policy choices and reads another, *Weinberger v. Romero-Barcelo*,⁹ to nix a particular legislative policy choice. My 1988 article explains why I believe both readings are wrong.¹⁰

Goldstein also reads the Supreme Court’s 2008 decision in *Winter v. Natural Resources Defense Council* to similarly upend a legislative policy choice.¹¹ In *Winter*, environmental groups alleged that the Navy had violated the National Environmental Policy Act (“NEPA”) and other statutes by analyzing the impact of its use of sonar near California on whales and other marine mammals through an “environmental assessment” rather than through a full-fledged “environmental impact statement.” The groups sought and ultimately got from the district court and the Ninth Circuit a preliminary injunction limiting sonar use for training in certain areas. The Navy then prompted the President’s Council on Environmental Quality, the body that issues regulations under NEPA, to promulgate a regulation purporting to create an emergency exception. On this basis, the Navy moved the lower courts to lift the preliminary injunction, but the courts doubted the claimed emergency exception. The Supreme Court decided 5-4 that, even if plaintiffs were correct on the merits and it were a permanent injunction case, equitable balancing should have kept the lower courts from issuing the challenged portions

⁶ Schoenbrod, *supra* note 4, at 657–58.

⁷ Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution* § 2.10 (2d ed. 1993).

⁸ 437 U.S. 153 (1978).

⁹ 456 U.S. 305 (1982).

¹⁰ Compare Goldstein, *supra* note 1, at 508–512 (providing Goldstein’s interpretation of these two cases), with Schoenbrod, *supra* note 4, at 634–35, 648–52 (providing a contrary interpretation).

¹¹ 129 S. Ct. 365 (2008); see Goldstein, *supra* note 1, at 486–87.

of the injunction. This statement is the springboard for Goldstein's article.¹²

Goldstein claims that, against the Navy's interest in training sailors, the Court weighs not the potential harm to whales but rather the impact on activities of members of the environmental groups in watching and researching whales: "harm to the whales mattered only to the extent that it harmed the plaintiffs, because the balance of equities takes into account injuries to the parties, not to the environment."¹³ The assertion that the majority thus trivializes the goals of Congress does not square with my reading of the opinion. While there is some language that could be read that way in isolation, the opinion does discuss the factual disputes in terms of the impact on the whales rather than just the impact on plaintiffs' scientific and recreational interests, and speaks of "plaintiffs' *ecological*, scientific, and recreational interests in marine mammals."¹⁴ If Goldstein were correct that the Court was trivializing Congress's purposes in this way, it would be a potent point. To it, I would add that dictum in the Supreme Court's 1972 decision in *Sierra Club v. Morton* suggests quite a different approach: "the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate."¹⁵ It is in this mode, I think, that the majority opinion in *Winter*, right or wrong, was written.

The result in *Winter* might be explained on any or all of three bases. First, it may be, as Goldstein argues, that the majority disagrees with Congress's policy judgment. Second, it may be that the district court did a poor job of showing the basis for its decision in the record. This was the conclusion of not only the five-justice majority opinion but also the opinion by Justice Breyer joined by Justice Stevens, concurring in part and dissenting in part: "several features of this case lead me to conclude that the record, as now before us, lacks adequate support for [the contested portions of the] injunction."¹⁶ Third, it may be that the current Court is confused about equitable balancing. Confusion is not surprising,

¹² Goldstein, *supra* note 1, at 487.

¹³ *Id.* at 488–90, 514.

¹⁴ 129 S. Ct. at 377–78, 378–80, 382 (emphasis added).

¹⁵ 405 U.S. 727, 737 (1972). This case is not cited in *Winter*. The Goldstein article cites the case but not this passage or for this proposition.

¹⁶ 129 S. Ct. at 383.

because equitable balancing is applied in so many areas of substantive law and takes into account such a variety of considerations that it cannot be reduced to a list of discrete elements. Judges may well feel too pressed by the demands of their docket to make order of a doctrine applied in so many disparate settings. In contrast, law professors do have the time to do so and in that way can help the courts. This is a worthwhile endeavor, particularly when some judges contend that too little of what law professors do is of practical value to the bench.

Goldstein *might* reply that it is better to kill equitable balancing than criticize what he takes to be its misapplication, because result-oriented jurists will disregard the correction. But, if misapplication of a doctrine were reason enough to kill it, the law reports would be a killing field.

Even more important, jurists, whether result-oriented or not, are even less likely to mind advice to kill equitable balancing than to correct it. Professor Goldstein does not exempt from his death sentence equitable balancing in drafting injunctions,¹⁷ and it makes sense from his perspective that he does not. The drafting of injunctions, no less than the decision of whether to issue one at all, provides opportunity for unprincipled judges to upend legislative policy choices. For example, suppose that a polluter claims in good faith that it complies with regulatory requirements, but the court disagrees. A court on such facts is apt to tell the polluter to bring itself in compliance as soon as the court finds is practicable if the record shows that the pollution is doing no significant harm. An unprincipled judge could give the polluter more time than really necessary.

Goldstein, I take it, would argue that all statutory violations should be corrected immediately, even if that meant shutting down factories until the necessary pollution control equipment is installed. But, there would be no surer way of getting environmental statutes rolled back. Indeed, when President Ronald Reagan's first Environmental Protection Agency ("EPA") administrator called for enforcing a particular provision of the Clean Air Act to the letter, the *New York Times* editorial board accused her of trying to engineer a legislative revocation. And, consider the application of such a rule in cases finding that the EPA has not met statutory deadlines to issue regulations. Under Democratic and Republican ad-

¹⁷ Indeed, *Winter* itself could be conceived of as a decision on how to draft an injunction as opposed to whether to grant one at all because the Navy sought certiorari on only two of the six requirements of the district court's injunction.

ministrations, the EPA misses large numbers of such deadlines. It would upset other statutory priorities for a court to insist that the EPA devote all its resources to promulgate the regulation at issue in a particular case as soon as possible.¹⁸ Courts often grant more time in cases in which polluters violate standards and in which agencies miss deadlines.¹⁹

Equitable balancing must also still play a role in deciding the degree of prophylaxis in prophylactic injunctions and how completely a defendant must repair the ill effects of past violations.²⁰ I am unsure whether Goldstein would exempt these applications of equitable discretion from his death sentence. He does say that he would bar equitable balancing in preliminary injunction cases to enforce statutes.²¹ Yet, some such balancing seems inevitable when part of the test includes probability of success on the merits. This probability is used in considering the impact on the plaintiff of being right on the merits and getting no preliminary injunction and the impact on the defendant of being right on the merits and being subject to a preliminary injunction.

The fuzziness of the distinction between the applications of equitable discretion that Goldstein would bar and other applications is illustrated by *Hecht Co. v. Bowles*.²² This 1944 Supreme Court decision undid a lower court's injunction against a department store to stop violating wartime price control statutes. Goldstein writes that "the store had come into compliance [with the statute]" and "[t]he lower courts had concluded that an injunction was not necessary to ensure continued compliance . . ."²³ I too once pigeon-holed the case as denying the injunction because there would be no more violations. But, in teaching it over the years, I began to realize that the Court must have expected future violations. It notes that the statute and the regulations under it are so complex, and the department store so large, that the store had previously committed thousands of violations despite good faith efforts. As to future violations, what the Court actually says is this: "The District Court concluded that the issuance of an injunction would have 'no effect by way of insuring better compliance in the future' and would be 'unjust' to

¹⁸ See *Illinois v. Costle*, 12 Env't Rep. (BNA) 1597 (D.D.C. 1979).

¹⁹ Schoenbrod, *supra* note 4, at 642-43.

²⁰ *Id.* at 644, 685-90.

²¹ See Goldstein, *supra* note 1, at 487 n.7.

²² 321 U.S. 321 (1944).

²³ Goldstein, *supra* note 1, at 507.

petitioner and not ‘in the public interest.’”²⁴ The suggestion is not that the store would commit no more violations but rather that compliance would not be improved by an injunction. The flat claim that an injunction would have “no effect” is plainly an overstatement; compliance might well be improved if the court ordered periodic reports on compliance efforts and their success and the number of violations would be reduced if the court enjoined future violations. After all, the threat of contempt fines would prompt the store to throw even more resources at compliance. The “unjust” language is, I suppose, a reference to the opprobrium that would fall on the Hecht Company, the leading department store in the nation’s capital, if it were enjoined not to price gouge during a war in which many of the store’s customers had relatives who were being killed or injured in action. The Court goes to great length to paint the store as acting in good faith in order to save it from this injustice. Concern for such undue hardship—that seems like the fitting term to me—is foreign to Goldstein’s iron insistence that defendants be made to comply with statutes.

If one conceives of *Hecht* as in part an undue hardship case, it cuts strongly against Goldstein’s conclusion. Justice Douglas, who wrote the opinion, was fresh from his labors as a New Deal regulator. As such, he would be expected to be deferential to congressional intent, especially in empowering an agency to carry out the Emergency Price Control Act of 1942 during a real emergency, a war of doubtful outcome in which price gouging was seen as a threat to national security. Yet, the opinion is a paean for equitable discretion: “[t]he qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.”²⁵ Justice Douglas also writes of “the requirements of equity practice with a background of several hundred years of history” and concludes that courts should not read statutes to cut off their equitable discretion unless the legislature says so unequivocally.²⁶ So, unless one conceives of *Hecht* as being limited to cases where defendants will comply with statutes completely, it is a powerful reason to suppose that subsequently enacted statutes have acquiesced to equitable balancing. Of course, Goldstein does not read *Hecht* that way.

²⁴ *Hecht*, 321 U.S. at 326.

²⁵ *Id.* at 329–30.

²⁶ *Id.*

To the contrary, he sets out to “debunk the myth that equitable balancing is an ancient judicial practice.”²⁷ He traces the supposed myth to the Supreme Court’s 1982 decision in *Weinberger v. Romero-Barcelo*. His effort to debunk rests upon his contention that state nuisance cases did not discuss undue hardship until the end of the 1800s and federal statutory cases did not do so until 1982.²⁸ Yet, even putting *Hecht* to the side, federal statutory cases from the 1970s did countenance equitable balancing.²⁹ I have not looked for earlier cases.

I am not convinced by his analysis of nuisance cases that common law courts did not balance the equities early on. An undue hardship defense to an injunction in a nuisance case from many centuries ago would be unlikely to succeed for the same reason as it would be unlikely to succeed in an intentional trespass case. Principled balancing in cases of intentional trespass should always come out in favor of issuing the injunction. To deny it would be contrary to the goal of the law of trespass, which is to give every landowner absolute power to decide whether to convey title, except in the case of a taking for a public purpose. The neighbor who wants to encroach has the alternative of seeking to purchase title. In contrast, there are modern cases of buildings that are *unintentional* trespasses or violations of covenants or contracts, but which do not do great harm to the plaintiff and would be very expensive for the defendant to correct. In such cases, the courts sometimes deny an injunction and relegate the plaintiff to monetary damages.³⁰

A nuisance case may well have looked very much like an intentional trespass case to a court in a tradition-bound society many centuries ago. The boundaries of acceptable behavior back then would have been reasonably well defined by custom, and the person who wanted to deviate from custom had the alternative of buying the right from the neighboring landowner. Moreover, to the extent liability in nuisance is defined not just by custom but also by a weighing of the harm to the plaintiff against the burden on the defendant of avoiding the harm, the burden on defendant might have been adequately handled at the liability stage and so there may have been no need to discuss it at the remedy stage.

The industrial revolution necessarily put at least some sorts of nuisance in a different light. New technologies would bring conflicts with

²⁷ Goldstein, *supra* note 1, at 546.

²⁸ *Id.* at 490–508, 546.

²⁹ Schoenbrod, *supra* note 4, at 642–43.

³⁰ *Id.* at 669–70.

customs. What behavior would be illegal thus became less well defined. Because the impact from new industrial techniques would often be felt not just by one neighbor but rather by many, it became more difficult to buy rights in bilateral purchases. These changes made at least some more recent nuisance cases look less like intentional trespass cases and so, in terms of my principle, potential candidates for the success of an undue hardship case. Goldstein points to another explanation, which strikes me as both correct and not exclusive of mine: the growing power and importance of large industrial enterprises brought on by the industrial revolution.

Goldstein does make an important point in noting that the Supreme Court's sweeping pronouncement in *Weinberger* and, I would add, in *Hecht*, that undue hardship is a centuries-old doctrine, comes without adequate citation and deserves to be investigated. I would also add that we should not always expect to find the balancing filed under the same doctrinal rubrics and accomplished through the same devices that we find it today. That investigation, the unlikely pair of Aristotle and Justice Douglas suggest, will turn up some way to adjust the remedy for violations of flat rules to idiosyncratic situations. The equitable impulse must be even stronger now than several millennia or even several decades ago because statutes today are much longer, the subjects of regulation more complicated, and life is changing more quickly. Indeed, all nine justices in *Winter* support equitable balancing in statutory cases.³¹ Their differences are about how to do it.

If equitable balancing is officially killed, as Goldstein wants, the equitable impulse would sometimes come out in less open ways such as interpreting statutes to narrow rights, denying standing, or other rulings prerequisite to securing injunctive relief. Although the equitable impulse cannot be killed, it can be made to hide, and that is where it would be most prone to misbehave.

³¹ It is worth noting that principled equitable balancing is analogous to the doctrine found in *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 842–44 (1984). *Chevron* gives agencies latitude in implementing statutes as to issues to which the legislature has not spoken. Principled equitable balancing gives courts latitude in enforcing statutes as to issues to which the legislature has not spoken. Equitable balancing may well not require the legislature to speak quite so clearly as does the *Chevron* doctrine.