EQUITABLE REGULATORY BALANCING

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Abstract: What happened to balancing the equities? According to the standard formulation, courts must weigh competing interests when determining whether to grant preliminary relief in litigation. That is in addition to considering the plaintiff's likelihood of success on the merits and assertions of irreparable harm. But in regulatory cases, where preliminary relief is increasingly salient in the national political sphere, courts have turned away from equitable balancing. Today, preliminary-relief determinations in these cases are almost entirely about the merits. Courts, including the Supreme Court, simply declare that the interests are "very weighty" on both sides and thus decline to engage in the time-honored tradition of equitable balancing that defined the task of courts at the preliminary stage when Congress enacted the Administrative Procedure Act. But equitable balancing is possible—and the Supreme Court's recent turn in administrative law jurisprudence can light the way forward. When considering the government's interest preliminarily in a regulatory case, courts should disfavor novel regulation, elevate federalism, respect the President's interest in internal executive branch management, and take account of the scope of the requested remedy. The government's interest is not the same in every case, and applying these four principles will help courts move past "very weighty" and get down to brass tacks when balancing the equities. A return to equitable balancing in regulatory cases can have several positive implications: disciplining remedial practice, promoting interbranch harmony, alleviating the Supreme Court's emergency docket, clarifying the role of amicus-brief filers, and ameliorating other issues at the preliminary-relief stage.

INTRODUCTION

Do courts act in the public interest when they halt government regulation? The question seems shot through with politics. And in an era in which the Supreme Court emphasizes the importance of adjudicating public law disputes without consideration of practical consequences,[1] the question appears irrele-

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[1] *See, e.g.*, Trump v. CASA, Inc., 606 U.S. 831, 835 (2025) ("[A]s with most questions of law, the policy pros and cons are beside the point."); Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 823 (2024) (asserting that policy concerns about the Supreme Court's interpretation of a statute cannot trump the text of a given law); Bostock v. Clayton County, 590 U.S. 644, 680 (2020) (explaining that "a suggestion [that a court] should proceed without the law's guidance to do as [it thinks] best" is "an invitation no court should ever take up"); *see also* United States v. Rahimi, 602 U.S. 680, 714 (2024) (Kavanaugh, J., concurring) ("In justiciable cases, this Court determines whether

vant. Indeed, the idea of "balancing the equities" and determining the "public interest" in regulatory cases may be uncomfortable to some judges—it suggests the possibility of requiring courts to do more than determine the legal merits of a given claim against the government.[2]

But balancing the equities and considering the interests of the public are necessary tasks for courts at the preliminary relief stage. That is because the Supreme Court has instructed courts to consider four factors when considering whether to issue preliminary relief: (1) a party's likelihood of success on the merits of its claim, (2) the irreparable harm that would result from the failure to issue the injunction, (3) the balance of the equities associated with granting the requested relief, and (4) the public interest.[3] The factors come from federal courts' attempted distillation of common factors associated with the issuance of this type of relief in the old courts of equity. And when the government is the party opposing a request for a stay (a type of preliminary relief), the third and fourth factors merge.[4]

Yet the balancing of the equities and the public interest determination have fallen by the wayside in regulatory cases. Today, regrettably, "there is usually no balancing."[5] In some cases, courts have imported their likelihood-of-success-on-the-merits analysis into the balancing—for example, some judges have discounted the government's (or the public's) interest in the enforcement of unlawful regulations (a consideration that depends on the court's view of the merits of the dispute).[6] In other cases, jurists declare that the interests

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a democratically enacted law or other government action infringes on individual rights guaranteed by the Constitution. When performing that Article III duty, the Court does not implement its own policy judgments about, for example, free speech or gun regulation. Rather, the Court interprets and applies the Constitution by examining text, pre-ratification and post-ratification history, and precedent."); *see also* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1332 (2023) ("If your complaint about a method of interpretation is that even properly applied, it led to a result you dislike in a particular case, you are thinking about things in the wrong order. That is not how law works."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) ("As one cynic has said, with five votes anything is possible. But when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation.").

[2] *See* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 489 (2010) (criticizing the practice of equitable balancing in statutory cases as serving "to aggrandize judicial power by authorizing judges to resolve cases by comparing the relative importance of policies established by the political branches").

[3] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). *Winter* involved a requested preliminary injunction, and the Court modified the *Winter* standard slightly for adjudication of a stay application. *See* Nken v. Holder, 556 U.S. 418, 434 (2009) (substituting the "balance of the equities" inquiry with a determination "whether issuance of the stay will substantially injure the other parties interested in the proceeding").

[4] *Nken*, 556 U.S. at 435.

[5] Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809, 831 (2025).

[6] *E.g.*, Texas v. U.S. Dep't of Homeland Sec., 123 F.4th 186, 213 (5th Cir. 2024); Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994, at *7 (11th Cir. Aug. 22, 2024).

are weighty on both sides and proceed instead to the merits. This latter phenomenon has featured prominently in Supreme Court cases in recent years.[7] Without question, adjudicating the merits of a legal dispute is more comfortable terrain for many judges. Deciding such questions is the bread and butter of judicial decision-making, whereas balancing equities and interests seems to call for a more freewheeling approach. Moreover, an aversion to balancing has made an appearance in other areas of law as well—such as the Dormant Commerce Clause, the Second Amendment, antitrust, and perhaps even statutory interpretation.[8]

But the balancing of the equities and the public interest determination are important parts of the court's role when a plaintiff seeks a preliminary injunction or a stay against an agency action. When challenging agency actions under the Administrative Procedure Act (APA),[9] those who will be harmed by agency action often need relief immediately. Otherwise, the harm that they suffer will be irreparable. But reaching a final determination in regulatory litigation takes time. Thus, litigants in APA cases often start out by requesting either a preliminary injunction or a stay (or both)—temporary, equitable remedies that effectively prevent the defendant federal agency or official from enforcing the allegedly unlawful regulation.[10] And adjudication of these requested remedies, the Supreme Court has held, requires consideration of factors other than the likely outcome on the merits of the case.[11] In particular, the Court has instructed courts to consider the equities associated with the granting of preliminary relief.[12]

The availability of preliminary relief in regulatory cases has become one of the defining legal issues of our time. The granting or denying of preliminary relief in APA cases combines two of today's most controversial legal issues: the availability of "vacatur" under the APA and, to the extent that a case reaches the Supreme Court, the appropriateness of the Court resolving major national regulatory issues on its "emergency" docket.[13] The upshot is that these re-

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[7] *See, e.g.*, Ohio v. EPA, 603 U.S. 279, 291 (2024); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 120 (2022) (per curiam); Biden v. Missouri, 595 U.S. 87, 95–96 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 765–66 (2021) (per curiam).

[8] *See supra* notes 124–127 and accompanying text.

[9] *See* 5 U.S.C. § 702.

[10] F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1066–67 (2021).

[11] *See* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008) (setting forth the test for preliminary injunctions).

[12] *Id.*

[13] In *Trump v. CASA, Inc.*, the Supreme Court determined that the Judiciary Act of 1789 likely does not authorize courts to grant universal injunctions. *See* 606 U.S. 831, 856 (2025). But the Court noted explicitly that its opinion did not resolve "the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action." *Id.* at 847 n.10; *see also id.* at 869 (Kavanaugh, J., concurring) ("[I]n cases under the Administrative Procedure Act, plaintiffs may ask a court to preliminarily 'set aside' a new agency rule."); *cf.* Christopher J. Walker, *What* Trump v.

quests for preliminary relief—a preliminary injunction or a stay—repeatedly thrust the judiciary into hot-button political controversies on expedited timelines, requiring courts to issue consequential, wide-ranging decisions with very little time (and a scant record upon which) to evaluate the case.

Neither the preliminary injunction nor the stay is a final remedy; it merely freezes the status quo to preserve the court's ability to afford meaningful relief to the plaintiff.[14] Yet, for better or for worse, these temporary remedies themselves can have a substantial effect on agency behavior and telegraph the likely outcome of the litigation. Because of the expedited timeline on which courts decide whether to grant them, preliminary injunctions and stays offer the prospect of fast relief. And the issuance of a preliminary injunction in an APA case can disrupt an important national regulatory program. Thus, litigation at this preliminary stage in APA cases has become a way to obtain expeditious, meaningful results in high-stakes, often politically sensitive cases involving federal regulation. This process is now happening regularly without meaningful equitable balancing.

Balancing the equities, however, is not only necessary but also possible to do in regulatory cases. A judicial reluctance to balancing the equities contravenes the established framework for adjudicating requests for quick, equitable relief. And it exerts serious pressure on the adjudication of the other factors, centering the merits inquiry and complicating evaluation of the plaintiff's (or petitioner's) claims of irreparable harm. But the Supreme Court's recent turn in administrative law shows that courts need not fear equitable balancing.[15] Rather, the Court has provided guidance for equitable balancing by issuing key rulings cautioning against expansive assertions of agency regulatory authority, elevating federalism, and respecting the President's power of internal management of the executive branch. Additionally, the Court has signaled possible skepticism about the propriety of "vacatur," i.e., full invalidation of agency action, under the APA—this skepticism is also relevant to the balancing inquiry.

CASA *Means for the Future of Universal Relief in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (June 29, 2025), https://www.yalejreg.com/nc/what-trump-v-casa-means-for-the-future-of-universal-relief-in-administrative-law/ [perma.cc/FT6K-AVSL] (noting that even after *CASA*, "[t]he conventional—though now-contested—understanding of 'set aside' [in Section 706 of the APA] is that the APA authorizes 'universal vacatur' of agency rules and other actions"). Moreover, the Court's use of the emergency docket—or "shadow docket," as some have called it—has generated negative reactions. *See generally, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (using the term "shadow docket"); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (same).

[14] *See* Bray, *supra* note 5, at 841 ("The preliminary injunction preserves the status quo in order to protect the efficacy of the court's remedial options." (emphasis omitted)).

[15] *See* Michael Morelli, *Courts, Competence, and Competition: Brewing Tensions Between Administrative, Antitrust, and Securities Law*, 64 B.C. L. REV. 1615, 1620 (2023) (noting the Supreme Court's recent foray into administrative law).

These rulings can help to define the federal government's interests and the public interest when courts engage in equitable balancing. True, the federal government has an interest in enforcing the law. But that interest is reduced when the federal government makes a newfound claim of regulatory authority. Moreover, the public interest favors respect for state authority in a given area—even when states are not themselves parties to a regulatory challenge. The Supreme Court's recent decisions in 2023, in *West Virginia v. EPA*, and in 2024, in *Sackett v. EPA*, suggest as much.[16] Additionally, the federal government has a heightened Interest in both the internal management of the executive branch and the continued operation of national regulatory programs. Here, the Court's opinions in 2020, in *Seila Law LLC v. CFPB*, and in 2024, in *Trump v. United States*, establish an abiding presidential interest in the ability to superintend the government.[17] And the ongoing disagreement among the Justices about the availability of universal relief in regulatory cases, against the backdrop of the Supreme Court's recent decision in 2025, in *Trump v. CASA, Inc.*, suggests that courts should be vigilant about the scope of remedies at the preliminary relief stage in agency cases.[18]

This Article proceeds in three parts. Part I provides an overview of preliminary relief—with a focus on tensions that have cropped up in APA cases.[19] Preliminary injunctions have a rich history, and the Supreme Court has attempted to distill the considerations historically associated with this equitable relief into a four-factor test for modern courts to apply: (1) likelihood of success on the merits, (2) irreparable harm, (3) balance of the equities, and (4) public interest.[20] That four-factor test is sometimes a three-factor inquiry in regulatory cases, as the third and fourth factor merge when the government is on the other side of the request for preliminary relief.[21] These factors have vexed courts in regulatory cases. The difficulty with balancing has complicated the application of the remainder of the framework. This Part interrogates the

[16] *See generally* Sackett v. EPA, 598 U.S. 651 (2023) (environmental regulations); West Virginia v. EPA, 597 U.S. 697 (2022) (same).

[17] *See* Trump v. United States, 603 U.S. 593, 613–14 (2024) ("[I]f a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, 'the independence of the Executive Branch' may be significantly undermined." (quoting Trump v. Vance, 591 U.S. 786, 800 (2020)); Seila L. LLC v. CFPB, 591 U.S. 197, 214 (2020) ("The President's removal power has long been confirmed by history and precedent.").

[18] *Compare* Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 826 (2024) (Kavanaugh, J., concurring) ("[T]he APA authorizes vacatur of agency rules."), *with* United States v. Texas, 599 U.S. 670, 696 (2023) (Gorsuch, J., concurring) (stating that the Court must understand the phrase "set aside" to determine what remedies are authorized under the APA).

[19] *See infra* notes 34–160 and accompanying text.

[20] *See infra* notes 38–78 and accompanying text.

[21] *See infra* notes 79–101 and accompanying text.

broader judicial aversion to balancing and the impact of this aversion in regulatory cases involving requests for preliminary equitable relief.[22]

Part II applies the lessons of the Supreme Court's recent administrative law decisions to the task of balancing the equities in APA cases.[23] The Supreme Court has established a distinctive administrative law jurisprudence in recent years. In general, the Court has doubted novel assertions of regulatory authority by federal administrative agencies.[24] And it has taken a stand for federalism, resisting agency attempts to run roughshod over state prerogatives.[25] These decisions suggest both that the federal government's interest in enforcing the law is diminished when an agency makes a new claim of authority, and that the public has an interest in federalism. Other decisions have affirmed the President's broad powers to superintend the executive branch. These decisions indicate that the federal government—or, perhaps more precisely, the President—has a particular interest in internal executive branch management.[26] Finally, this Part surveys the debate about the availability of "vacatur" under the APA and concludes that the disagreement among the Justices at least suggests that the government has a strong equitable interest when a plaintiff seeks vacatur of an agency action.[27]

Part III considers the possible implications of a return to equitable balancing in regulatory cases.[28] Revitalized equitable balancing could have a bevy of positive effects. This Part catalogs five of them. *First*, recognizing the government's strong interest in cases involving requests for preliminary vacatur will have the effect of confining this muscular remedy to the cases in which it is most needed.[29] *Second*, respect for core executive functions—and greater caution in granting preliminary relief in cases involving such functions—is likely to promote interbranch harmony.[30] *Third*, incorporating the lessons of recent Supreme Court administrative law decisions into equitable balancing should tamp down the need for the Court to intervene so frequently on the emergency docket in regulatory cases.[31] *Fourth*, more serious attention to the balancing of the equities (and, in particular, the public interest) in these cases can clarify the role of third parties that file amicus briefs.[32] *Fifth*, revitalizing equitable balancing could move courts away from the problem of over-

[22] *See infra* notes 102–160 and accompanying text.
[23] *See infra* notes 161–283 and accompanying text.
[24] *See infra* notes 167–184 and accompanying text.
[25] *See infra* notes 185–214 and accompanying text.
[26] *See infra* notes 215–245 and accompanying text.
[27] *See infra* notes 246–275 and accompanying text.
[28] *See infra* notes 284–328 and accompanying text.
[29] *See infra* notes 289–292 and accompanying text.
[30] *See infra* notes 293–302 and accompanying text.
[31] *See infra* notes 303–306 and accompanying text.
[32] *See infra* notes 307–319 and accompanying text.

indexing on the merits at the preliminary stage and might even allow courts to take a closer look at assertions of irreparable harm.[33]

I. The Rise and Fall of the Regulatory Balancing Inquiry

Because the process of litigation is slow, a court needs to ensure that its remedial options will be effective when a case reaches final judgment. One such tool that courts developed is the preliminary injunction—a means of preserving the status quo while the litigation proceeds.[34] Accordingly, a preliminary injunction is not a final determination on the merits of a case. Rather, courts considering whether to grant preliminary injunctions typically consider four factors: (1) likelihood of success on the merits, (2) irreparable harm, (3) the balance of the equities, and (4) the public interest. Courts have developed this framework over time.[35]

In APA cases, courts evaluate these factors at the preliminary relief stage.[36] The APA incorporated traditional principles of equity. And courts have granted different kinds of equitable remedies in APA cases—preliminary injunctions (pursuant to the Federal Rules of Civil Procedure) and stays (pursuant to a provision of the APA).[37] But the analysis is largely the same. Applying the equity-grounded preliminary-relief framework, however, has proven difficult in practice. The key culprit is the requirement that courts balance the equities associated with the requested relief. Courts have struggled to do interest balancing when the case arises under the APA, highlighting the particular difficulty of the task when the question boils down to the propriety of a national regulatory scheme. That is consistent with a seeming unwillingness, on the part of courts, to engage in balancing in other areas.

A lack of robust equitable balancing has had two unfortunate consequences. First, the likelihood-of-success-on-the-merits inquiry has drawn criticism for having a "lock-in" effect, whereby judges will be hesitant—at a later stage—to second-guess their preliminary conclusions about the merits. That is because, in the absence of strong equitable balancing, preliminary-relief determinations have become so merits focused. And the centrality of the merits determination in these cases has led to difficult questions about the precedential effect of rulings on preliminary relief. Second, jurists have disagreed about the threshold for irreparable harm, with a particular focus on whether harm must be "great" to qualify—without much judicial appetite for instead incorporating the magnitude of the harm into the balancing of the equities.

[33] *See infra* notes 320–328 and accompanying text.

[34] Hessick & Morley, *supra* note 10, at 1066–67.

[35] *E.g.*, Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008).

[36] *E.g.*, Nken v. Holder, 556 U.S. 418, 425–26 (2009).

[37] *See* Trump v. CASA, Inc., 606 U.S. 831, 861–62 (2025) (granting a preliminary injunction); Ohio v. EPA, 603 U.S. 279, 299–300 (2024) (granting stay).

A. Tracing the History of the Preliminary Injunction

The preliminary injunction is a concept with which the Framers were familiar.[38] The idea dates to the old divide between law and equity in the English courts.[39] As the remedial practice in the courts of law became sclerotic, the crown developed a new type of court—the court of equity—that offered more expansive remedies in private disputes.[40] Although the "injunction" (a remedy in which a court would order a defendant to do—or not to do—something) did not originate in the court of equity, the use of injunctive relief to effectuate a final judgment matured in this setting.[41] Additionally, the court of equity used injunctions for a separate purpose: preserving its remedial options at the outset of a case. This preliminary, or interlocutory, injunction would preserve the status quo to prevent the plaintiff from incurring an injury that money damages—the ordinary remedy in the law courts—could not redress.[42] The standard for issuing a preliminary injunction differed based on the type of dispute at issue before the court.[43] In general, however, the court of equity cared more about reaching the just result than it cared about strict adherence to established legal doctrines and judicial precedents. In adjudicating disputes in equity, then, the court balanced the interests associated with the issuance of an injunction.[44]

In medieval England, courts of law adjudicated disputes in a rigid, inflexible setting. In these cases, one needed to seek a "writ" appropriate to the particulars of his dispute.[45] Put simply, the writ constituted "written instructions from the king's officials ordering the defendant to appear," but the courts of law standardized the writs and plaintiffs sometimes found it hard to find writs that corresponded with their specific causes of action.[46] Moreover, one scholar asserts that these courts became "confined to the method of granting relief by the award of damages after an injury had been suffered," such that "preventive or special relief was not available from the common law courts."[47] Another scholar does note that courts of law furnished equitable remedies in some cases.[48] And yet, either way, the failure of the law courts to provide such writs

[38] Jack Thorlin, *Constitutional Hardball and Nationwide Preliminary Injunctions*, 18 DUKE J. CONST. L. & PUB. POL'Y 1, 13 (2023).

[39] *Id.* at 7.

[40] *Id.* at 12.

[41] *See id.* at 9 (explaining that preliminary injunctions began with the Norman Conquest in the eleventh century).

[42] *Id.* at 12.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 11.

[46] *Id.*

[47] Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 36 (1951).

[48] *See* David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 544–50 (1986) (listing, as examples, the writs of prohibition and estrepement).

frustrated plaintiffs, who appealed to a higher authority for relief: the King (through his secretary, the Chancellor).[49]

In contrast to the ordinary practice in the law courts, in which the courts "focused more often on the strict letter of the law, [and] less often on equitable considerations,"[50] plaintiffs petitioned the King in equity to "do good and dispense justice."[51] The Chancellor formalized this system in the late 1300s by creating a new type of court: the Court of Chancery.[52] The court, whose "new, special exercise of judicial power was the meliorative (equitable) side, employed to effect justice where the 'law' side could not or would not do so," fashioned remedies to afford meaningful relief.[53] And in dispensing these remedies, the Chancellor "was extremely flexible, not fettered by definite rules or bound by precedent."[54] Chancery would eventually reach "full stature, and bec[o]me the 'Court of Equity.'"[55] That coincided with the rapid growth of Chancery, whose "popularity among litigants" resulted from "the fact that Chancery met a conspicuous need": the law courts suffered from numerous defects, both procedurally and substantively, and plaintiffs yearned for equity.[56]

The key remedy available to plaintiffs in the court of equity was the injunction. An injunction "is a judicial order commanding a person to take, or refrain from taking, a particular action."[57] Yet litigation—then as now—could be time consuming. And in many cases, an injunction issued at the end of the litigation would not be meaningful if a court failed to take some step to ensure that the requested "injunctive relief . . . was to be of any use."[58] John Leubsdorf reports three kinds of cases in which plaintiffs would request preliminary (or "interlocutory") relief in Chancery: (1) injunctions restraining proceedings in other courts, i.e., law or ecclesiastical courts; (2) injunctions pending final decisions in equity; and (3) injunctions protecting rights at law.[59] As Leubsdorf observes, that third category of cases was the only one that

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[49] Oleck, *supra* note 47, at 36.

[50] Raack, *supra* note 48, at 551.

[51] Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 501 (2003).

[52] *See* Oleck, *supra* note 47, at 36 (asserting that the Court of Chancery had been established by 1377, when Richard the Second came into power); *see also* Raack, *supra* note 48, at 550 ("Chancery did not become an adjudicatory body until about 1380-1400; it existed before then but did not function as a court.").

[53] Oleck, *supra* note 47, at 36.

[54] Raack, *supra* note 48, at 554.

[55] Oleck, *supra* note 47, at 35.

[56] Raack, *supra* note 48, at 554–55.

[57] Hessick & Morley, *supra* note 10, at 1066.

[58] John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 528 (1978).

[59] *Id.* at 528–29.

"raised problems calling for the kind of analysis we now apply."[60] Given the division between the law and equity courts, Chancery needed to predict how the merits would shake out when a plaintiff requested preliminary equitable relief while prosecuting a case in the law courts. This task, Leubsdorf notes, was beset by "the awkwardness of protecting common law rights in a court unqualified to declare whether the rights existed."[61]

Chancery had a few ways to deal with the problem. Instead of focusing solely on the merits, courts of equity eventually came to acknowledge that "where the merits were in doubt, interlocutory relief would turn on the balance of convenience"[62]—this was, as a later case would illustrate, an inquiry into whether the requested relief would yield an "injury out of all proportion to the benefit the complainant would derive therefrom."[63] The Chancellor also "connect[ed] a requirement of irreparable injury with preliminary injunctions" because "equity had no ground for intervention unless the damage remedy was inadequate."[64] The two were related—as Leubsdorf points out, "[t]he balancing of conveniences as a standard for injunctive relief emerged as an important aspect of the new concern with irreparable injury" such that "balancing developed into a tool for close analysis of the equities in each case."[65] These considerations comported with equity's overarching interest in deciding cases "as justice required."[66]

Jared Goldstein doubts that equitable balancing has a long and established pedigree in equity. He traces the doctrine's first appearance to 1868 and contends that it "developed for a specific reason: to expand judicial discretion to protect industrial defendants against injunctions in nuisance actions brought by property owners complaining of pollution."[67] In so doing, Goldstein disagrees with the Supreme Court's statement in 1944, in *Hecht Co. v. Bowles*, that equitable balancing reflected "the requirements of equity practice with a background of several hundred years of history."[68] Still, Goldstein allows that "by the 1930s, equitable balancing had become a relatively accepted practice," and that "[b]y 1943 equitable balancing had become entrenched as a factor for deciding injunctions."[69]

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[60] *Id.* at 528.

[61] *Id.* at 532.

[62] *Id.* at 533.

[63] Comment, *Injunction—Nuisance—Balance of Convenience*, 37 YALE L.J. 96, 97 (1927) (discussing Judge Learned Hand's opinion in *Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927)).

[64] Leubsdorf, *supra* note 58, at 530.

[65] *Id.* at 534.

[66] Taylor Payne, *Now Is the* Winter *of Ginsburg's Dissent*, 13 TENN. J.L. & POL'Y 15, 22–23 (2018).

[67] Goldstein, *supra* note 2, at 491.

[68] 321 U.S. 321, 329 (1944).

[69] Goldstein, *supra* note 2, at 504–05.

In the United States, Congress eschewed the division between the law and equity courts; instead, it "organized only one system of courts in which might be tried cases at law, and cases in equity, according as the same judge happened to be playing the role of common law judge, or of chancellor."[70] Still, however, "the declaration at law, and the bill in equity retained their distinct names and characteristics, and the case had to be one in law *or* in equity."[71] Later, in 1938, the Federal Rules of Civil Procedure (FRCP) merged law and equity.[72] That meant that legal actions and equitable actions did not need to be brought as separate suits; rather, "henceforth there would be only 'one form of action to be known as a civil action.'"[73] Rule 65 of the FRCP set out a process for the issuance of preliminary injunctions.[74] Yet the Rule did not—and still does not—provide a general standard for the issuance of the injunction, instead continuing "equity's tradition of delegating the decision to grant or deny injunctive relief to the court's discretion."[75] Thus, courts continued to develop the standard through caselaw. That was perhaps inconsistent with the history of equity; Leubsdorf points out that early cases and treatises spoke of these injunctions in particular contexts ("injunctions against waste, patent infringement, and so forth") rather than articulating a general standard.[76]

Nevertheless, modern courts have attempted to shift to a one-size-fits-all, rule-oriented approach in these cases. Today, when a party moves under Rule 65 for a preliminary injunction, the court's analysis of the issue is largely the same—whether the case involves alleged patent infringement by a corporation or purportedly unlawful agency action by the U.S. Department of Labor. In 2008, in *Winter v. Natural Resources Defense Council* (NRDC), a case involving a challenge to agency action (litigated under the National Environmental Policy Act), the Supreme Court confirmed the general applicability of the standard for granting a preliminary injunction.[77] Here, it confirmed the applicability of equitable balancing and public interest considerations. The Court held that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,

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[70] Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283, 284 (1928).

[71] *Id.* at 284–85.

[72] Aaron-Andrew P. Bruhl, *Law and Equity on Appeal*, 124 COLUM. L. REV. 2307, 2312 (2024).

[73] *Id.* (quoting FED. R. CIV. P. 1, 2 (1938) (second set of internal quotation marks omitted)).

[74] FED. R. CIV. P. 65.

[75] KIRSTIN STOLL-DEBELL, NANCY L. DEMPSEY & BRADFORD E. DEMPSEY, INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 5 (2009).

[76] Leubsdorf, *supra* note 58, at 528.

[77] *See* 555 U.S. 7, 20–22 (2008) (reviewing the test for granting a preliminary injunction).

and that an injunction is in the public interest."[78] Today, courts apply this four-factor test in APA cases.

B. In Search of Preliminary Relief in Regulatory Cases

Congress enacted the APA in 1946.[79] The law set out "the default rules for agency action and judicial review thereof."[80] Section 706 of the APA instructs courts reviewing agency action to "hold unlawful and set aside agency action . . . found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity."[81] It also commands courts to "compel agency action unlawfully withheld or unreasonably delayed."[82] So long as no "special statutory review proceeding relevant to the subject matter" exists, a litigant may bring an "action for judicial review" under the APA "against the United States, the agency by its official title, or the appropriate officer."[83] The law does not expressly disavow the availability of a preliminary injunction under Rule 65 of the FRCP when a litigant seeks to have a court either set aside or compel agency action. Yet it does provide for "[r]elief pending review"—under Section 705:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.[84]

Section 705 "countenances both 'stays' of administrative action and 'injunctions' running against administrative agencies."[85] A stay differs from a preliminary injunction; in this context, a stay operates on the agency action itself, whereas a preliminary injunction operates on the agency officials (or the agency itself) undertaking the relevant action.[86] For the adjudication of requests for stays, the Supreme Court in 2009—in *Nken v. Holder*—held that courts should apply a framework similar to the one that they apply when litigants seek pre-

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[78] *Id.* at 20.

[79] Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 633 (2017).

[80] *Id.*

[81] 5 U.S.C. § 706(2)(A)–(B).

[82] *Id.* § 706(1).

[83] *Id.* § 703.

[84] *Id.* § 705.

[85] Note, *Halting Administrative Action in the Supreme Court*, 137 HARV. L. REV. 2016, 2018 (2024).

[86] *See id.* at 2017–18 (distinguishing the two concepts).

liminary injunctions.[87] Like with preliminary injunctions, courts balance the equities when deciding whether to grant stays.[88] Additionally, the remedial language in Section 705 differs from the "set aside" language in Section 706, which has been the subject of important academic debate as to the scope of the remedy that it authorizes.[89]

Courts in APA cases have balanced equities and considered the public interest when determining whether to issue a preliminary injunction or a stay. As Mila Sohoni writes, "the APA subsumed an extant body of law concerning judicial review largely derived from suits for equitable relief against official action."[90] Thus, for all of his doubts about the historical roots of equitable balancing, even Goldstein allows that "it may be plausible to construe the APA to call for equitable balancing."[91] He reaches this conclusion "[b]ecause the APA was enacted in 1946, after equitable balancing had become accepted as a factor for issuing injunctions in common law actions."[92] No surprise, then, that courts in APA cases have long balanced the equities and looked to the public interest at the preliminary relief stage.

Sometimes, the balancing has looked uncomfortably like judicial policymaking. To take one example, the D.C. Circuit Court of Appeals in 1980, in *National Association of Farmworkers Organizations v. Marshall*, considered the public interest when adjudicating a request for a preliminary injunction against a regulation involving child-labor waivers for work on farms.[93] The court inquired into "the proper balance between the economic burdens to growers denied waivers . . . and the irreparable harm to children exposed to pesticides and chemicals through employment allowed waivers," concluding that "the balance must be struck in favor of the protection of children."[94] Consider also a case brought by certain fishermen seeking preliminarily to enjoin the U.S. Army Corps of Engineers from spraying herbicide on flowers in a river. There, the U.S. District Court for the Middle District of Florida—in the 1972 case of *Lee v. Resor*—determined that the government's interests in managing the river (and the potential economic burden on the public from the re-

[87] *See* 556 U.S. 418, 425–26 (2009) (requiring consideration of the following "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies'" (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987))).

[88] *See id.* (setting forth the test that accounts for potential harm to the parties).

[89] *See infra* notes 246–275 and accompanying text.

[90] Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1141 (2020).

[91] Goldstein, *supra* note 2, at 516 n.131.

[92] *Id.*

[93] 628 F.2d 604, 616 (D.C. Cir. 1980).

[94] *Id.*

quested injunction) outweighed the fishermen's economic, aesthetic, and ecological interests.[95]

Winter v. NRDC demonstrated the Supreme Court's approach, as of 2008, to equitable balancing in regulatory cases. In the district court, plaintiffs had sought—and obtained—a preliminary injunction that imposed restrictions on the Navy's use of sonar technology for integrated training exercises off the coast of Southern California.[96] The plaintiffs were concerned with the impact of the sonar technology on marine mammals.[97] The Court reversed the issuance of the injunction.[98] In the Court's view, even if the plaintiffs had shown an irreparable injury, "any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors," notwithstanding the plaintiffs' possible showing of likelihood of success on the merits.[99] The plaintiffs' assertion of "harm to an unknown number of the marine mammals that they study and observe" could not overcome the costs of "forcing the Navy to deploy an inadequately trained antisubmarine force" (potentially "jeopardize[ing] the safety of the fleet") and "[t]he public interest in conducting training exercises with active sonar under realistic conditions."[100] In reviewing the judgment below, the Court criticized the district court for "assessing the balance of equities and the public interest . . . in only a cursory fashion," noting that "[t]he court's entire discussion of these factors consisted of one (albeit lengthy) sentence."[101]

C. Beyond Equitable Balancing in Regulatory Cases

Seventeen years later, *Winter*'s insistence on assessing the equities and public interest seems at odds with recent trends at the Supreme Court. Preliminary relief in regulatory cases has become a defining feature of the modern political system. Yet courts, including the Supreme Court, are backing away from equitable balancing when considering requests for such relief—focusing more and more on the likelihood-of-success-on-the-merits inquiry. That is consistent with developments in other areas of law, and it seems to track with the rise of a consequences-neutral approach to the job of judging. But equitable balancing is an integral part of the process of determining whether to grant preliminary relief in APA cases. And the move away from equitable balancing has created or exacerbated problems with other aspects of the analysis.

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[95] *See* 348 F. Supp. 389, 393 (M.D. Fla. 1972) (denying the preliminary injunction on this basis).
[96] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 16–17 (2008).
[97] *See id.* at 12 (overviewing the plaintiffs' complaint).
[98] *See id.* at 23 (denying the requested injunction).
[99] *Id.* at 23–24.
[100] *Id.* at 26. Notably, the Court stated that "military interests do not always trump other considerations." *Id.*
[101] *Id.*

In recent years, the issue of preliminary relief in APA cases has taken on intense political significance.[102] Requests for preliminary injunctions occur against the backdrop of politics. Of course, a litigant must establish Article III standing to bring its individual claim against the government, and remedies cannot go beyond that which is necessary to afford complete relief to the plaintiff in a case.[103] But no one can deny that, in many cases, these preliminary injunctions or stays have the added benefit (for political opponents of the administration in power) of frustrating key presidential policy initiatives. That is especially true when the litigant requests the invalidation of an agency's regulatory program—even if that relief is temporary. Depending on the timing, the granting of a preliminary injunction in an APA case could undermine a regulatory program's momentum, pause the implementation of the program long enough to allow intervening events to scuttle it, or otherwise prevent the administration from getting a win.[104]

Despite the growing significance of preliminary injunctions and stays in APA cases, courts have shied away from equitable balancing and public-interest consideration. Two strands of jurisprudence illustrate the point. For one, several courts in regulatory cases have determined that the equities favor the challenger because "[t]here is generally no public interest in the perpetuation of unlawful agency action."[105] Commentators have criticized this line of reasoning, contending that it is necessarily "circular" because it depends on the unlawfulness of the agency action—the very merits question at issue in the case.[106] In *League of Women Voters of the United States v. Newby*, for example, the D.C. Circuit in 2016 based its public-interest analysis on the fact that the

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[102] *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 171 (2023) ("[T]he shifts in preliminary injunction practice are pushing the courts further toward hasty, relatively fact-free resolution of major questions of public law."); *cf. id.* at 169 (stating that "the national injunction [became] central to our nation's political life" in 2014).

[103] *See generally* Trump v. CASA, Inc., 606 U.S. 831 (2025) (granting partial stays only to plaintiffs that have standing); Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) (denying relief since plaintiffs were unable to meet their burden in showing they had Article III standing).

[104] *Cf.* Labrador v. Poe, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring in the grant of stay) ("[T]he interim status of the law—that is, whether the law is enforceable during the several years while the parties wait for a final merits ruling—*itself* raises a separate question of extraordinary significance to the parties and the American people."); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 828 (2021) ("By all appearances, we are in a new era of litigation, in which securing emergency interim relief can sometimes be as important as, if not more important than, an eventual victory on the merits.").

[105] League of Women Voters of the U.S. v. Newby, 838 F.3d 1, 12 (D.C. Cir. 2016); *accord* California v. U.S. Dep't of Educ., 132 F.4th 92, 100 (1st Cir. 2025); Texas v. Biden, 10 F.4th 538, 559–60 (5th Cir. 2021); Washington v. Reno, 35 F.3d 1093, 1103 (6th Cir. 1994) (determining that a great public interest exists "in having governmental agencies abide by the federal laws that govern their existence and operations").

[106] Sean H. Donahue & Megan M. Herzog, *The Bonfire of the Equities: Judicial Stays of Federal Environmental Regulations*, 62 HARV. J. ON LEGIS. 1, 27 (2024).

appellants in that case had an "extremely high likelihood of success on the merits," which served as "a strong indicator that a preliminary injunction would serve the public interest."[107] These opinions thus engage in equitable balancing and public-interest determination that is inseparable from the merits inquiry.

The other, perhaps more troubling, practice has taken hold at the Supreme Court. Hints of this approach could be seen in 2021, when the Court vacated a district court's stay of its own judgment in a case involving the pandemic-era eviction moratorium imposed by the Centers for Disease Control and Prevention.[108] Sounding a bit like the courts that engage in merits-driven equitable balancing, the Court acknowledged that although "the public has a strong interest in combating the spread of the COVID-19 Delta variant[,] . . . . our system does not permit agencies to act unlawfully even in pursuit of desirable ends."[109] Then, appearing to punt entirely, the Court stated that "[i]t is up to *Congress*, not the CDC, to decide whether the public interest merits further action here."[110] The next year, the Court in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration* (*NFIB v. OSHA*) stated plainly that "[t]he equities do not justify withholding interim relief" in a case about the Labor Department's vaccine mandate.[111] The Court observed that the mandate would force plaintiff states and employers "to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs," whereas "the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations."[112] But after laying out these competing interests, the Court stated: "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes."[113] In a separate case involving a requested stay about a different vaccine mandate (decided on the same day as *NFIB v. OSHA*), the Court appeared not even to balance the equities, consider the public interest, or discuss irreparable harm—seeming to focus entirely on the merits.[114]

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[107] *League of Women Voters*, 838 F.3d at 12; *see also* California v. U.S. Dep't of Educ., 132 F.4th at 100 ("[G]iven our conclusions about the Department's failure to show a likelihood of success on the merits, its assertion that the public interest aligns with its interests in a stay are unavailing." (citing *League of Women Voters*, 838 F.3d at 12)).

[108] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021) (per curiam) (suggesting that the agencies would not prevail on the merits).

[109] *Id.*

[110] *Id.* (emphasis added).

[111] 595 U.S. 109, 120 (2022) (per curiam).

[112] *Id.*

[113] *Id.*

[114] *See* Biden v. Missouri, 595 U.S. 87, 96–98 (2022) (focusing its analysis on whether the rule was arbitrary and capricious).

Perhaps the most striking statement about equitable balancing in regulatory litigation came in *Ohio v. EPA*—decided by the Supreme Court in 2024.[115] The question before the Court centered on a stay application that states and industry groups filed in connection with an environmental regulatory action undertaken by the EPA.[116] The Court acknowledged the need to balance the equities and consider the public interest, but it determined that "[w]hen States and other parties seek to stay the enforcement of a federal regulation against them, often 'the harms and equities [will be] very weighty on both sides.'"[117] Thus, the Court wrote, "[b]ecause each side has strong arguments about the harms they face and equities involved, [the] resolution of these stay requests ultimately turns on the merits and the question who is likely to prevail at the end of this litigation."[118] Instead of balancing the equities, the Court declared that both sides had "strong arguments" and proceeded to the merits.[119] More recently, the Court in *CASA*, while evaluating stay applications challenging the power of courts to issue universal injunctions, spent a substantial portion of its opinion discussing likelihood of success on the merits and irreparable harm.[120] By contrast, the Court dedicated merely one sentence (two independent clauses, connected by a colon) to the balance of the equities[121]—indeed, one might say that the Court's "entire discussion of [the equities] consisted of one (albeit lengthy) sentence."[122] As Sam Bray has written, "there is usually no balancing" at the preliminary-relief stage anymore; in public law cases, Bray observes, the "injunction test . . . is almost entirely about the merits."[123]

What is going on here? If equitable balancing is truly falling out of favor, two other developments may help to offer some explanation. First, "balancing" is falling out of favor across the board—impacting a variety of doctrines. In the context of the Dormant Commerce Clause, Justices have expressed that balancing "incommensurable" goods is "a task no court is equipped to undertake," doubting that a court can "compare or weigh economic costs (to some) against noneconomic benefits (to others)."[124] Second Amendment jurispru-

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[115] 603 U.S. 279, 299 (2024).

[116] *Id.* at 290.

[117] *Id.* at 291 (quoting Labrador v. Poe, 144 S. Ct. 921, 929 (2024)) (Kavanaugh, J., concurring in the grant of stay) (alteration in original).

[118] *Id.* at 292.

[119] *Id.*

[120] *See* 606 U.S. 831, 841–47 (2025) (analyzing success on the merits); *id.* at 859–61 (irreparable harm).

[121] *See id.* at 861 ("And the balance of equities does not counsel against awarding the Government interim relief: Partial stays will cause no harm to respondents because they will remain protected by the preliminary injunctions to the extent necessary and appropriate to afford them complete relief.").

[122] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 26 (2008).

[123] Bray, *supra* note 5, at 830–31.

[124] Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 381–82 (2023) (opinion of Gorsuch, J., joined by Thomas and Barrett, JJ.); *see also id.* at 393 (Barrett, J., concurring in part) ("[T]o weigh

dence has also come to embody what Will Baude calls a "fear of balancing," as the Justices in the majority in the 2024 case of *United States v. Rahimi* "expressed a shared desire to turn away from judicial 'balancing' of interests in adjudicating constitutional rights in favor of founding-era understandings."[125] Similarly, antitrust law has seen the Court move away from a balancing of "harms and benefits of individual conduct," which some have understood to be "at the heart of the rule of reason" analysis in Sherman Act cases—here, the Court has instead favored a burden-shifting inquiry.[126] An aversion to balancing has even started to make its way into statutory interpretation.[127]

Second, equitable balancing and public-interest consideration seem (at first blush) to be at odds with prevailing modern conceptions of the judicial role. Goldstein is one of the leading critics of equitable balancing. He "argues that balancing the equities in statutory cases violates separation-of-powers principles."[128] Goldstein contrasts the usual approaches of leading formalist jurists—like Chief Justice Roberts and Justices Scalia, Thomas, and Alito—with what he describes as the "assertion of naked judicial authority to choose among competing federal policies" that is inherent in equitable balancing.[129] He recounts *Winter* as "pitting trivial recreational interests against the paramount needs of national security," leading the Court to "the unsurprising conclusion that national security is more important than whale watching."[130] Yet, as Goldstein observes, choosing between the two interests appears contrary to certain Justices' aversion to "any judicial policymaking role."[131] And since Goldstein published his Article in 2010, that aversion has become an unques-

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benefits and burdens, it is axiomatic that both must be judicially cognizable and comparable."); *accord* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 354–55 (2008).

[125] William Baude, *Fear of Balancing*, 2024 SUP. CT. REV. 169, 169. Some scholars have rejected balancing altogether in constitutional cases. *See, e.g.*, Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFFS. (2019), [perma.cc/G698-96AD] (arguing that this approach "ought to be abandoned"). *But see* Sherif Girgis, *Unfinished Liberties, Inevitable Balancing*, 125 COLUM. L. REV. 531, 534 (2025) (contending that balancing tests are inevitable).

[126] Michael A. Carrier & Mark A. Lemley, *Rule or Reason? The Role of Balancing in Antitrust Law*, 100 NOTRE DAME L. REV. REFLECTION 139, 139–40 (2025), https://scholarship.law.nd.edu/ndlr_online/vol100/iss3/1/ [perma.cc/BV3D-ZBP3]; *see also* Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018) ("To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies."). Notably, *American Express* did not necessarily state that the burden-shifting framework is the correct one to apply; the Court said only that "the *parties* agree that" the framework applies. 585 U.S. at 541 (emphasis added).

[127] *Cf.* Rudisill v. McDonough, 601 U.S. 294, 317–18 (2024) (Kavanaugh, J., concurring) (expressing discomfort with the application of the veterans canon of statutory interpretation, by which courts construe "benefits statutes in favor of" veterans, because the canon's application would require courts to usurp the "hard choices with painful tradeoffs" that Congress makes in the spending process, asserting that "[j]udges have no principled way to make those choices or weigh those tradeoffs").

[128] Goldstein, *supra* note 2, at 516.

[129] *Id.* at 517–18.

[130] *Id.* at 486, 488.

[131] *Id.* at 518.

tioned norm. Today, Supreme Court opinions frequently remind readers that "with most questions of law, the policy pros and cons are beside the point."[132] That view is ascendant at the Court.[133] The Court has explained that the judges should not "pick and choose among competing policy arguments . . . along the way to selecting whatever outcome seems to us most congenial, efficient, or fair"—an exercise, the Court stated, of "freewheeling judicial policymaking."[134] In statutory cases, the Court has framed interest-balancing as the role of Congress.[135] What, then, of equitable balancing?

The Court still includes equitable balancing and public-interest determination in its articulated standard for whether to grant a preliminary injunction or a stay.[136] And, to be fair, the Court has engaged in limited balancing in some recent emergency docket decisions.[137] Whether Goldstein is correct that equitable balancing and public-interest consideration do not have an extensive historical pedigree—an assertion that runs contrary to the Court's understanding[138]—is irrelevant. The APA authorizes injunctive relief, and it was enacted against the backdrop of a prevailing understanding of equity that incorporated balancing, as Goldstein himself acknowledges.[139] Thus, engaging in equitable balancing and considering the public interest at the preliminary stage in APA cases serves as a way for courts to act as "the faithful agents of Congress"—a norm that Justice Barrett championed when she was still a law professor.[140]

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[132] Trump v. CASA, Inc., 606 U.S. 831, 856 (2025).

[133] *See, e.g.*, Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 823 (2024) (noting that policy concerns does not warrant a departure from a statute's language) United States v. Rahimi, 602 U.S. 680, 736 (2024) (Kavanaugh, J., concurring) (commenting that the Court focuses primarily on the relevant law's history, without accounting for the impact on modern-day society); Bostock v. Clayton County, 590 U.S. 644, 680 (2020) (emphasizing the importance of the statute, even with weighty policy concerns). *But see* Anita Krishnakumar, *Practical Consequences in Statutory Interpretation*, 139 HARV. L. REV. 679, 682 (2026).

[134] Pereida v. Wilkinson, 592 U.S. 224, 241 (2021).

[135] *See, e.g.*, Bartenwerfer v. Buckley, 598 U.S. 69, 72 (2023) ("The Bankruptcy Code strikes a balance between the interests of insolvent debtors and their creditors.").

[136] *E.g.*, Ohio v. EPA, 603 U.S. 279, 291 (2024); Starbucks Corp. v. McKinney, 602 U.S. 339, 346 (2024).

[137] *See, e.g.*, Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025) ("The stay . . . reflects our judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty."); Dep't of Educ. v. California, 604 U.S. 650, 652 (2025) (appearing to balance parties' assertions of irreparable harm in connection with disbursement of federal grant money).

[138] *See Starbucks*, 602 U.S. at 346 (describing balancing and public-interest determination as reflective of "a 'practice with a background of several hundred years of history'" (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944))); *see also* David Schoenbrod, *The Immortality of Equitable Balancing*, 96 VA. L. REV. IN BRIEF 17, 24–25 (2010), https://virginialawreview.org/wp-content/uploads/2020/12/schoenbrod.pdf [perma.cc/X5JL-WQHK] (expressing some skepticism about Goldstein's reading of the history).

[139] *See* Goldstein, *supra* note 2, at 516 n.131 (pointing out that Congress may have considered that courts would engage in equitable balancing).

[140] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010).

Balancing also might help to focus courts on doing what is "just and proper" at the preliminary relief stage, consistent with the history of equity.[141]

Additionally, the decline of balancing has created some issues with other factors of the analysis. Recall that courts must also consider, at the preliminary-relief stage, a party's likelihood of success on the merits and whether a party has established that irreparable harm would result in the absence of preliminary relief. As to the first, the potential "lock-in" effect of judicial determinations of a party's likelihood of success on the merits has concerned courts and scholars. And as to the second, courts appear to be uncomfortable with recognizing "irreparable harm" when a litigant's asserted injury is small, despite the fact that the magnitude of the harm may be better accounted for in the balance of the equities.

Beginning with the "lock-in" effect, Kevin Lynch has suggested that the likelihood-of-success inquiry presents issues because the process "require[s] judges to assess the merits of a case at an early stage and then revisit the merits later."[142] Thus, a district court or appellate court reviewing—at the merits stage—its likelihood-of-success-on-the-merits determination might be put into the awkward position of pointing out the flaws in its own initial legal analysis of the question before the court. True, the Supreme Court has emphasized the substantial difference between analyzing "[t]he propriety of preliminary relief and resolution of the merits."[143] And a judge might even end up changing her mind for an entirely unremarkable reason—e.g., further development of the factual record undermining an assumption upon which the initial determination rested. Still, the adjudication of a preliminary injunction motion usually results in a written opinion in which the judge takes a position (albeit tentative) on the merits. As Judge Bibas has explained in a panel opinion, "forecasting the merits risks prejudging them" by potentially "freezing first impressions in place."[144] Lynch describes this hypothesis as "lock-in theory."[145] This problem

[141] *See Starbucks*, 602 U.S. at 346–47 (commenting that courts consider what is "just and proper" when determining whether to grant equitable relief).

[142] Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 779 (2014).

[143] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 n.10 (2007); *see also* Rodriguez v. Molina, 608 F. Supp. 3d 791, 801 (S.D. Iowa 2022) ("The analysis of Petitioner's likelihood of success on the merits for the purposes of a preliminary injunction is not a final determination on the merits."); *cf.* Lackey v. Stinnie, 604 U.S. 192, 201 (2025) ("Because preliminary injunctions do not conclusively resolve the rights of parties on the merits, they do not confer prevailing party status.").

[144] Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 200 (3d Cir. 2024); *see id.* ("[F]lexibility becomes harder when an impression solidifies into a preliminary ruling."); Lynch, *supra* note 142, at 806 ("[A] judge's easiest option is to conform to the earlier ruling.").

[145] Lynch, *supra* note 142, at 806. Lynch posits that the lock-in effect might be especially salient in cases in which preliminary injunctions are denied. *See id.* at 805, 805 n.141 (writing that a lock-in effect is less serious in cases where preliminary injunctions have been granted). In a related context, Justice Kavanaugh has lamented that "[a] written opinion by. . . [the Supreme] Court assessing likelihood of success on the merits at a preliminary stage can create a lock-in effect because of the opin-

is not limited to regulatory cases, amid a broader "merits-centric turn in the federal courts' analysis of preliminary injunctions."[146] But one does not need to take a large logical leap to see that the "lock-in theory" might be especially salient in the context of high-stakes APA litigation that captures public attention at every stage of the case.

Furthermore, an overarching focus on the merits in these cases has raised questions about the precedential effects of decisions about preliminary injunctions and stays. Two examples from October Term 2024 are illustrative. First, the Supreme Court granted a stay of a district court's ruling in a case involving President Trump's removal of certain board members on commissions that Congress designed to be independent—thereby allowing President Trump to effectuate the removals.[147] The Court stated only "that the Government is *likely* to show that both the [National Labor Relations Board] and [Merit Systems Protection Board] exercise considerable executive power," and it deferred the ultimate question of whether the President's Article II powers supersede the statutory removal protections that Congress afforded to the members of both boards.[148] Yet the Court's analysis focused largely on the merits, with only a few words about the other stay factors. Justice Kagan's dissent then lamented that the majority was using the emergency docket "to overrule or revise" the Court's landmark precedent from 1935 in *Humphrey's Executor v. United States* (a case that featured prominently in the briefing).[149] Second, in *CASA*, the Court granted the government's stay applications in a case involving universal injunctions issued against President Trump's "birthright citizenship" executive order.[150] The Court reasoned only that "[t]hese injunctions . . . *likely* exceed the equitable authority that Congress has granted to federal courts."[151] The Court's opinion did not go further than determining that the government *likely* had the better argument as to the appropriate scope of injunctive remedies. But its analysis of the merits was lengthy, and its discussion of the other

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ion's potential vertical precedential effect (*de jure* or *de facto*)." Labrador v. Poe, 144 S. Ct. 921, 933–34 (2024) (Kavanaugh, J., concurring in the grant of stay). As Justice Kavanaugh explains, these opinions might "predetermine the case's outcome in the proceedings in the lower courts and hamper percolation across other lower courts on the underlying merits question." *Id.* at 934; *see also* Donahue & Herzog, *supra* note 106, at 5 n.24 ("[R]ecently, the Court has appeared to treat as precedential the analysis of likely merits success in certain of its decisions granting emergency relief by citing those orders in subsequent decisions in other cases, including merits-docket opinions (particularly as to the major questions doctrine)."). And Judge Bibas has observed that "[e]ven if judges keep an open mind, the parties and the public may see their tentative forecasts as the writing on the wall." *Del. State Sportsmen's Ass'n*, 108 F.4th at 200.

146 Bray, *supra* note 5, at 834.

147 *See* Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025) (granting the stay).

148 *Id.* (emphasis added).

149 *Id.* at 1418 (Kagan, J., dissenting from the grant of the application for stay).

150 *See* Trump v. CASA, Inc., 606 U.S. 831, 837–38 (2025) (granting the stay).

151 *Id.* at 837 (emphasis added).

stay factors was scant. Thus, when Justice Kavanaugh concurred to observe that "[u]nder the Court's holding . . . , district courts issuing injunctions under the authority afforded by the Judiciary Act of 1789 may award only plaintiff-specific relief,"[152] his separate opinion presupposed that the Court reached some sort of "holding" about the limits of equity's reach at the preliminary-relief stage.[153] Moreover, several lower courts have treated Supreme Court stay decisions as precedential.[154] And the Court itself recently explained that although its "interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases."[155]

Moving on to the issue of irreparable harm, courts are engaged in a robust discussion about what constitutes an injury in regulatory cases. Some courts doubt that compliance costs are irreparable harm in every instance. *A.O. Smith Corp. v. FTC*,[156] a Third Circuit Court of Appeals decision from 1976, is one of the leading modern cases on the issue. There, the court took the position that "[a]ny time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."[157] Instead, the court required "that the threatened injury must be, in some way, 'peculiar,'" giving such examples as inability "to meet . . . debts as they come due," necessitation of "significant changes in a company's operations," and permanent injury to "the corporation's reputation, or its goodwill."[158] Other courts have echoed the Third Circuit's skepticism.[159] By contrast,

[152] *Id.* at 868 (Kavanaugh, J., concurring).

[153] He was not alone. On X, right after *CASA* came down, Orin Kerr asked: "So when the U.S. Supreme Court rules in the preliminary injunction stage that a party is 'likely' to prevail on the merits, that's pretty much just a merits ruling, right? I mean, it's the Supreme Court ruling, there's not a lot of speculation about what happens later." Orin Kerr (@OrinKerr), X (June 27, 2025, 3:23 PM), https://x.com/orinkerr/status/1938679517649740059 [perma.cc/3S66-HYC3]. Jack Goldsmith replied that the answer was "complicated" and directed Kerr to an article by Judge McFadden and Vetan Kapoor, which argued that "when the Court grants a stay application, the decision should be considered authoritative when it is clear that a majority of the Court has expressed a view on the merits of the movant's case." Jack Goldsmith (@jacklgoldsmith), X (June 27, 2025, 5:30 PM), https://x.com/jacklgoldsmith/status/1938711657296916882 [perma.cc/6ZDE-JVCZ]; McFadden & Kapoor, *supra* note 104, at 853.

[154] *See* McFadden & Kapoor, *supra* note 104, at 860–61 (overviewing cases from the Fourth, Seventh, and Eleventh Circuits); *cf.* 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.5 (3d ed. 2025) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . does become the law of the case for further proceedings in the trial court on remand and in any subsequent appeal.").

[155] Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025).

[156] 530 F.2d 515 (3d Cir. 1976).

[157] *Id.* at 527.

[158] *Id.* at 527–28 (citing Gause v. Perkins, 56 N.C. (3 Jones Eq.) 177, 179 (1857)). To be sure, Judge Adams cautioned in a concurrence that he did not agree with "fashion[ing] a general rule—applicable to other factual situations—for determining whether the cost of compliance would inflict irreparable injury." *Id.* at 529 (Adams, J., concurring).

the Sixth Circuit Court of Appeals, in the 2023 case of *Kentucky v. Biden*, has explicitly disagreed with the Third Circuit's *A.O. Smith Corp.* decision, as well as similar decisions, stating that other-than-extraordinary compliance costs can be irreparable because "the peculiarity and size of a harm affects its weight in the equitable balance, not whether it should enter the calculus at all."[160]

II. REVITALIZING EQUITABLE REGULATORY BALANCING

Balancing the equities in regulatory cases is not an impossible task. The Supreme Court's recent turn in administrative law jurisprudence lights the way toward several principles that courts can apply when engaging in this balancing exercise. These principles are not exhaustive; different cases present different challenges, and this Article lays out a series of considerations that can be adapted—and supplemented—depending on the facts and legal issues in a given dispute. But these principles can help to facilitate the resurrection of true equitable balancing in regulatory cases. At issue is the question of the government's (and the public's) interest in the agency action at issue. Of course, as the Court noted in *Ohio v. EPA*, the interests will often be "very weighty" on both sides in regulatory cases.[161] But some interests are less weighty than others. And understanding when a court may be able to discount an asserted government interest—or when a court should be more solicitous of such an interest—can help jurists stuck in the "very weighty on both sides" trap.[162]

This Article distills four key lessons from recent administrative law cases that are relevant to the balance of the equities. First, although the government has an interest in enforcing its laws, it has a lesser interest in enforcing novel regulations.[163] That is especially true for those regulations that rely on expansive, surprising interpretations of an underlying statute. Second, the public maintains an interest in federalism, and courts should account for federalism

[159] *E.g.*, Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 115 (2d Cir. 2005); Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980). Citing *A.O. Smith Corp.*, the Seventh Circuit adopted the rule that "the threatened injury must be, in some way, 'peculiar,'" yet the court determined that an association of hospitals had not made the required showing when it alleged that certain challenged "regulations may force member hospitals to rearrange [their] medical staffs and organizational policies, will cause the abandonment of hospitals' sound fiscal policies, will result in a loss of revenues to the hospitals, will limit allowable credit, and that the administrative costs of compliance with the regulations will be high." *Am. Hosp. Ass'n*, 625 F.2d at 1331; *cf.* New York v. U.S. Dep't of Educ., 477 F. Supp. 3d 279, 303 (S.D.N.Y. 2020) (contrasting "ordinary compliance costs" with "cases where . . . compliance costs are extensive and atypical, often with significant harm to persons or entities who are adversely affected by the new government regulation," and giving the example of irreparable injury from an immigration regulation).

[160] Kentucky v. Biden, 57 F.4th 545, 556 (6th Cir. 2023).

[161] 603 U.S. 279, 291 (2024).

[162] *Id.* at 291 (quoting Labrador v. Poe, 144 S. Ct. 921, 930 (2024)) (Kavanaugh, J., concurring in the grant of stay).

[163] *See infra* notes 167–184 and accompanying text.

when federal regulation displaces state law—even when a state is not a party to a litigation.[164] Third, courts should afford the greatest weight to the executive branch's interest when a litigant challenges the President's internal management of the executive branch.[165] Fourth, courts should scrutinize the requested remedy and be the most cautious about vacating rules at the preliminary stage, given that the putative harm to the government would be greater than plaintiff-specific relief would inflict.[166]

A. A Reduced Government Interest in Novel Regulations

If regulatory authority lies dormant for many years, then perhaps the government's interest in that authority is not as pressing. Of course, the federal government has a substantial interest in enforcing the law. And in the regulatory context, this interest is often two-fold. For one, the government maintains a general interest—as a sovereign—in the perpetuation of its legal framework.[167] Additionally, the government often is able to point to beneficial ends that it can achieve through the operation of particular regulations.[168] Yet the government's interest in regulation is not uniform across the board. Recent caselaw casts doubt on the government's interest in a specific kind of regulation: unheralded assertions of federal authority. In *West Virginia v. EPA* and other opinions, the Supreme Court has warned that courts should be skeptical when an agency discovers a new power in an old statute. True, these decisions largely set forth principles of statutory interpretation. But they also suggest that novelty is itself relevant to the task of equitable balancing.

The Court in *West Virginia v. EPA* recognized the existence of the "major questions doctrine," a principle of statutory interpretation that counsels against novel agency assertions of transformative regulatory authority.[169] In *West Vir-*

[164] *See infra* notes 185–214 and accompanying text.

[165] *See infra* notes 215–245 and accompanying text.

[166] *See infra* notes 246–275 and accompanying text.

[167] In *CASA*, the Court cited Chief Justice Roberts' in-chambers opinion in *Maryland v. King* for the proposition that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury"—appearing to apply this rationale to the federal government. Trump v. CASA, Inc., 606 U.S. 831, 861 (2025) (quoting Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)); *cf.* United States v. Texas, 144 S. Ct. 797, 799 (2024) (Barrett, J., concurring) (acknowledging the federal government's argument that it might experience injury to "its sovereign interest in enforcing federal law"); Barber v. Bryant, 193 F. Supp. 3d 677, 723 (S.D. Miss. 2016) (observing, in the context of a state law, that "[t]he government certainly has a powerful interest in enforcing its laws"), *rev'd on other grounds*, 860 F.3d 345 (5th Cir. 2017).

[168] *See, e.g.*, Ohio v. EPA, 603 U.S. 279, 291 (2024) (recognizing a "very weighty" federal interest in "the air-quality benefits" that a federal environmental implementation plan would offer "downwind States"); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 120 (2022) (per curiam) ("For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations.").

[169] 597 U.S. 697, 724 (2022).

ginia v. EPA, the Court reviewed the EPA's Clean Power Plan rule. The rule purported to effectuate Section 111(d) of the Clean Air Act, which granted authority to the Environmental Protection Agency (EPA) to implement a plan for establishing certain "standards of performance" (defined as the "best system of emission reduction") for certain existing sources of air pollutants.[170] The EPA interpreted this provision to allow it "to substantially restructure the American energy market" by requiring coal-fired power plants to transfer their generation of power to cleaner sources—as opposed to requiring them to burn coal more efficiently.[171] Despite the Clean Air Act's enactment in 1970, using Section 111(d) to shift generation to new power sources constituted an "unheralded" assertion of transformative regulatory authority by the EPA.[172] The Court rejected the agency's interpretation, explaining that courts should hesitate when an agency has "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"[173] The Court reasoned that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [courts] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[174]

West Virginia v. EPA and other major questions cases are especially concerned with novelty. *West Virginia v. EPA* was one of four Supreme Court cases from 2021 and 2022 that Mila Sohoni has called the "major questions quartet."[175] The other cases in the quartet—*National Federation of Independent Business* (NFIB) *v. Department of Labor, Occupational Safety and Health Administration* (OSHA), *Biden v. Missouri*, and *Alabama Ass'n of Realtors v. Department of Health & Human Services*—were all emergency docket cases involving requested stays, whereas *West Virginia v. EPA* reached the Court on the merits docket.[176] The Court in *West Virginia v. EPA* emphasized that the EPA had never before asserted the authority that it had claimed in the Clean Power Plan.[177] Similarly, in 2022, the Court in *NFIB v. OSHA* keyed in on the fact that "OSHA, in its half century of existence, ha[d] never before adopted a broad

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[170] 42 U.S.C. § 7411(a), (d).

[171] *West Virginia v. EPA*, 597 U.S. at 712–14, 724.

[172] *Id.* at 710, 724.

[173] *Id.* at 724 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[174] *Id.* at 723 (quoting *Util. Air*, 573 U.S. at 324).

[175] Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262 (2022).

[176] Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 919–22 (2024) (noting that the first three cases were on the emergency docket); *id.* at 928 (commenting that *West Virginia v. EPA* was considered on the merits).

[177] *See, e.g.*, *West Virginia v. EPA*, 597 U.S. at 724 (determining that the EPA's assertion of power was "unheralded," describing the EPA as locating a "newfound power," and noting that the statutory provision at issue "had rarely been used in the preceding decades").

public health regulation of [the] kind" at issue in the case.[178] And in 2021, in *Alabama Ass'n of Realtors*, the Court explained that the Center for Disease Control and Prevention's (CDC) "claim of expansive authority" to establish an eviction moratorium (during the COVID-19 pandemic) was "unprecedented"—as the Court pointed out, "[s]ince th[e relevant statutory] provision's enactment in 1944, no regulation premised on it [had] even begun to approach the size or scope of the eviction moratorium."[179] The Court's doubts about "unprecedented" agency actions indicate that agencies must tread carefully when claiming novel authorities.

But novelty is relevant to more than statutory interpretation; it can suggest a diminished government interest, at the preliminary relief stage, in enforcing a regulation. At this stage, the question for a court is only whether to press *pause* on the agency's desired course of action while the court reaches its final disposition—not to make a conclusive determination about the merits. So, suppose that an agency cites a statute from the 1970s to make an "unprecedented" claim of authority that it had never made over the course of the agency's half-century of existence. If the government has waited that long to claim the authority, then making the agency wait a bit longer—while litigation plays out—merely recognizes the government's own apparent lack of interest in the asserted power. Novel claims of regulatory power stand in contrast to regulations based on well-grounded statutory authorities, even if such regulations might nevertheless exceed those authorities. To put that observation in equitable-balancing terms, the government has a lesser interest in enforcing regulations based on unprecedented interpretations of statutes. If the government lets an authority lay dormant, that longstanding dormancy might offer clues about the government's interest in the authority.

The presumption is rebuttable. One could envision, for example, the government invoking an emergency authority that has not yet been asserted because the emergency conditions envisioned by the enacting Congress had not previously materialized.[180] A more difficult situation arises when a claim of authority is unprecedented because the problem is one that Congress did not envision when enacting the relevant statute. Jody Freeman and David Spence have argued that in light of technological changes, agencies often deal with

[178] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 119 (2022) (per curiam).

[179] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 765 (2021) (per curiam).

[180] Imagine that Congress enacts a statute authorizing a military draft and empowers the Secretary of Defense to prescribe certain regulations to govern draft eligibility in the event of a war. If the United States does not enter into war for the first 50 years after the law's enactment, then Defense Department regulations issued when the country goes to war for the first time after the statute's passage would not suggest a reduced government interest. Rather, the rarity of the statutorily contemplated trigger scenario (in this case, war) would explain the unprecedentedness of the regulations.

new problems by relying on old statutes.[181] But this sort of situation could cut either way. True, a court might discount the novelty of an agency's interpretation because the situation is itself novel. But at the same time, a court could conclude that the government has a lesser interest in dealing with a problem that the people's elected representatives in Congress did not explicitly envision the agency addressing. Freeman and Spence blame "congressional dysfunction,"[182] but congressional inaction could instead reflect a policy choice by Congress to take a lighter-touch approach to regulation of a given technology or practice.[183] Finally, taking account of novelty in equitable balancing is consistent with the longstanding rule that "[t]he failure of the executive branch to enforce a law does not result in its modification or repeal."[184] Rather, the idea is that novelty is indicative of the government's *interest* in an asserted authority.

B. A Reduced Government Interest in Undermining Federalism (and a Strong Public Interest in Favor of Federalism)

Equitable balancing in regulatory cases should take account of federalism, even if states are not parties. Concurring in the 1995 case of *United States Term Limits v. Thornton*, Justice Kennedy observed that "[t]he Framers split the atom of sovereignty."[185] As Justice Kennedy saw it, "the genius of their idea [was] that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[186] The Tenth Amendment to the Constitution enshrines this understanding, providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[187] Yes, the Constitution's Supremacy Clause declares that federal laws "shall be the supreme Law of the Land" in comparison to state laws.[188] But a reverence for federalism—"a system in which . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the State"[189]—suffuses American law.

The Supreme Court has centered federalism when deciding regulatory cases. In 2023, in *Sackett v. EPA*, another statutory interpretation case involv-

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[181] *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) (introducing this argument).

[182] *Id.*

[183] *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708–09 (1997) (noting that the purposes of bicameralism may play a role).

[184] District of Columbia v. John R. Thompson Co., 346 U.S. 100, 113–14 (1953).

[185] 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[186] *Id.*

[187] U.S. CONST. amend. X.

[188] *Id.* art. VI, cl. 2.

[189] Younger v. Harris, 401 U.S. 37, 44 (1971).

ing the regulatory state, the Court cited federalism when rejecting an EPA interpretation of the Clean Water Act.[190] The EPA had adopted an expansive understanding of the "waters" covered by the Act, but the Court took a narrower approach.[191] In explaining its reasoning, the Court stated that "[r]egulation of land and water use lies at the core of traditional state authority," and "[a]n overly broad interpretation of the CWA's reach would impinge on this authority."[192] The Court also turned away—in a case involving the proper allocation of jurisdiction over federal land between the Agriculture and Interior Departments—an interpretation of federal law that would have turned a substantial number of "privately owned and state-owned lands . . . [into] lands in the National Park System."[193] The Court declared that its "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power . . . ."[194] Federalism has played a role in emergency docket cases, too. The Court in *Alabama Ass'n of Realtors* took particular issue with the fact that the CDC's eviction moratorium "intrude[d] into an area that is the particular domain of state law: the landlord-tenant relationship."[195] And Chief Justice Roberts, in an in-chambers opinion issued in 2012, asserted that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[196]

In the context of Article III standing,[197] courts have adopted more lenient rules when a state is the plaintiff. Perhaps the high watermark of this approach came in 2007, in *Massachusetts v. EPA*, when the Supreme Court determined that "Massachusetts' stake in protecting its quasi-sovereign interests" entitled

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[190] *See* 598 U.S. 651, 683 (2023) (holding that states exercise the primary control in this area).

[191] *Id.* at 678.

[192] *Id.* at 679–80.

[193] U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. 604, 621 (2020).

[194] *Id.* at 621–22; *see also* Bond v. United States, 572 U.S. 844, 858 (2014) (urging the principle's application when construing federal statutes that touch on "areas of traditional state responsibility").

[195] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (per curiam).

[196] Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also* Tennessee v. U.S. Dep't of Educ., 104 F.4th 577, 613 (6th Cir. 2024) (describing "[i]nvasions of state sovereignty" as "irreparable harm" (quoting Kentucky v. Biden, 23 F.4th 585, 611 n.19 (6th Cir. 2022)); Texas v. EPA, 829 F.3d 405, 434 (5th Cir. 2016) ("[T]he institutional injury to Texas from the inversion of the federalism principles enshrined in the Clean Air Act may constitute irreparable injury.").

[197] The Supreme Court has interpreted Article III of the Constitution to require "adverse parties with personal interest in the matter" for a case to fall within the jurisdiction of the federal courts. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). In practice, "to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

the Commonwealth "to special solicitude in . . . [the Court's] standing analysis."[198] The Court has recognized two types of quasi-sovereign interests: "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system."[199] That is to say nothing of the fact that "[s]tates have a sovereign interest to sue the United States when a federal regulation purports to preempt state law."[200] True, the Court has cut back on state standing doctrine—or, at least, has tried to bring it in line with ordinary principles of Article III standing—in recent years.[201] But respect for "sovereign" or "quasi-sovereign" interests remains a mainstay in Article III standing jurisprudence when a state is a plaintiff.[202]

But even if a state is not a party to a given litigation, states retain an interest in the federal-state balance of power, and federalism remains a meaningful backdrop. That is important when considering the balance of the equities in regulatory cases. In ratifying the Constitution, the states relinquished some powers to the national government—e.g., endowing Congress with "the power to enact bankruptcy legislation" in such a way that would "subordinate state sovereignty, albeit within a limited sphere."[203] Yet the states explicitly retained power over certain areas,[204] and they have taken on the primary regulatory role in a variety of domains.[205] Thus, the national government's interest in a given regulation is comparatively lesser when a federal agency "intrudes into an area that is the particular domain of state law" than when such an agency takes action in an area of core federal authority.[206]

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[198] 549 U.S. 497, 520 (2007).

[199] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

[200] *Kentucky v. Biden*, 23 F.4th at 598.

[201] *See* Katherine Mims Crocker, *Not-So-Special Solicitude*, 109 MINN. L. REV. 815, 819–20 (2024) (discussing October Term 2022 at the Supreme Court).

[202] *See, e.g.*, West Virginia v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1136 (11th Cir. 2023); Texas v. United States, 50 F.4th 498, 515 (5th Cir. 2022); *Kentucky v. Biden*, 23 F.4th at 598.

[203] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 377 (2006).

[204] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[205] *See, e.g.*, Singh v. Duane Morris LLP, 538 F.3d 334, 339 (5th Cir. 2008) ("Legal malpractice has traditionally been the domain of state law, and federal law rarely interferes with the power of state authorities to regulate the practice of law."); Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of the Treasury, 392 F. Supp. 3d 22, 43 (D.D.C. 2019), *aff'd*, 966 F.3d 782 (D.C. Cir. 2020) (describing states as "the primary regulators of insurance").

[206] *Compare, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (per curiam) (landlord-tenant relationships), *and* Sackett v. EPA, 598 U.S. 651, 679 (2023) (land and water use regulation), *with* Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 581 (2017) (national security), *and* Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1023 (9th Cir. 2013) (immigration).

Winter is justifiable on this basis. The Supreme Court's conclusion was not as simple as "national security is more important than whale watching," as Goldstein suggests.[207] Rather, the Court appropriately recognized that national security is one of the federal government's most important interests. That is not to say, as the Court appropriately caveated, that "military interests . . . always trump other considerations, and [the Court has] not held that they do."[208] Indeed, the Court has held in other contexts that military interests can be overcome by other interests,[209] and the Constitution itself enshrines a right against the quartering of soldiers in one's house during peacetime.[210] Yet *Winter*, instead of demonstrating judicial policymaking, indicates an approach to equitable balancing that sees certain interests as greater than others and approaches the task accordingly.

Moreover, determining the public interest means taking account of federalism. If a lawsuit concerns the federal government's attempt to aggrandize its own powers at the expense of state authority, then a court should consider the consequent harm that states would suffer from such aggrandizement—even if the states are not involved in the litigation.[211] And the public has at least some interest in the states serving as "laborator[ies]" of democracy, allowing for experimentation with different policies;[212] expansive conceptions of federal authority would circumvent these experiments.[213]

A long history of state regulation (or conscious non-regulation) in a particular domain might also be relevant to equitable balancing in that it provides a backstop legal framework over the course of a litigation. For example: If a court is determining whether to stay a new federal regulatory program that establishes new rules of tort law, then the fact that states have developed a robust tort-law system could assuage concerns about temporarily blocking the federal

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[207] Goldstein, *supra* note 2, at 486.

[208] Winter v. Nat. Res. Def. Council, 555 U.S. 7, 26 (2008).

[209] *See generally, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (protections of habeas corpus petitions); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (liberty interests); N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (First Amendment freedom of the press); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (separation of powers); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (civil court system); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (President cannot disobey legitimate law made by Congress).

[210] U.S. CONST. amend. III.

[211] *Cf.* Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (describing the "irreparable injury" that befalls a state when it is "enjoined by a court from effectuating statutes enacted by representatives of its people").

[212] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (writing that, if its citizens choose, states can experiment with different economic and social policies); *see also* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (recognizing the states' "role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

[213] *Cf.* Bray, *supra* note 5, at 830 n.141 ("[T]he government's interest should not be confused with the public interest.").

regulation. That is because the extant state law would remain in place—and continue to govern—for the duration of the preliminary injunction or the stay. In this way, a court could consider the federal interest with reference to the Fifth Circuit Court of Appeals' observation that "the Federal Government often has an interest in allowing parallel state regulation."[214]

C. A Heightened Government Interest in Internal Management of the Executive Branch

The unitary executive theory is ascendant at the Supreme Court, and the Court's jurisprudence has established that the President has a substantial interest in managing the internal affairs of the executive branch. That matters for equitable balancing. When weighing the interests in an administrative law case, a court should be exceedingly cautious when a litigant requests that the court interfere with the unitary executive branch. In recent years, the path of the Supreme Court's jurisprudence has tended toward a robust understanding of presidential power to superintend the executive branch. Cases involving the president's authority to remove purportedly "independent" executive branch officials—like *Seila Law*—demonstrate the point.[215] Accordingly, the Court's theory of Article II of the Constitution indicates that Alexander Hamilton's view in Federalist No. 70 of a "vigorous executive" has won the day, at least in the context of overseeing the executive branch.[216] The President has a strong interest in that internal management function.

The Supreme Court has admonished the federal judiciary: "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"[217] In practice, that has meant a string of rulings recognizing an expansive presidential power to remove executive branch officials. In 2010, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court held that "dual for-cause limitations on the removal of [Public Company Accounting Oversight] Board members contravene the Constitution's separation of powers."[218] The problem was that Congress had given good-cause protection from presidential removal both to the Board members *and*, the Court assumed, to the officials tasked with

[214] Zyla Life Scis., L.L.C. v. Wells Pharma of Hous., L.L.C., 134 F.4th 326, 333 (5th Cir. 2025); *see also id.* at 334 ("The Federal Government has limited resources. Thus, it often welcomes state aid in enforcing shared legal norms.").

[215] *See generally* Seila L. LLC v. CFPB, 591 U.S. 197 (2020) (establishing when Congress can limit a president's removal powers).

[216] *See id.* at 223 (citing The Federalist No. 70 in support of the proposition that the Framers believed it was essential to "secure the authority of the Executive"); *see also* THE FEDERALIST No. 70 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (arguing in favor of "a vigorous Executive").

[217] *Seila L.*, 591 U.S. at 203 (quoting U.S. CONST. art. II, § 1, cl. 1: *id.* § 3.).

[218] 561 U.S. 477, 492 (2010).

determining whether good cause existed for such removal (commissioners of the Securities and Exchange Commission).[219] More recently, in *Seila Law*, the Court held that the structure of the Consumer Financial Protection Bureau—which endowed the Bureau's director with for-cause removal protection—violated Article II of the Constitution.[220] And in 2021, in *Collins v. Yellen*, the Court said the same about the Federal Housing Finance Agency and its individual director.[221]

Following this line of cases, the Court in 2024, in *Trump v. United States*, recognized so strong an interest in "[t]he President's 'management of the Executive Branch'" that it observed that "the President's power to remove 'executive officers of the United States whom he has appointed' may not be . . . reviewed by the courts."[222] That led the Court to conclude that President Trump was "absolutely immune from prosecution" for threatening to remove the Acting Attorney General for resisting the President's requests to investigate purported election fraud following the 2020 presidential election.[223] Meanwhile, scholarly debate rages on about whether the Court's conception of the presidential removal power is correct.[224]

Collins also saw the Court recognize an important limit on removal power litigation—grounded partly in a respect for the President's exclusive interest in superintending the executive branch. The dispute in *Collins* centered on a private litigant's request to invalidate agency action taken by a head of a federal

[219] *See id.* at 495–96. The notion that SEC commissioners enjoy for-cause removal protection is "not obvious," however. *See id.* at 545–46 (Breyer, J., dissenting) (criticizing the Court for assuming "without deciding that the SEC Commissioners themselves are removable only 'for cause'"); Jameson M. Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, YALE J. ON REGUL.: NOTICE & COMMENT (June 24, 2022), https://www.yalejreg.com/nc/sec-for-cause-removal-protection/ [perma.cc/B96Q-SPNN] (articulating why the view that SEC commissioners can only be removed for cause "lacks any clear statutory basis"). One commentator has criticized the *Free Enterprise Fund* Court for allowing the litigants to stipulate to the existence of for-cause removal protections for SEC commissioners. *See* Jack Ferguson, *Stipulations of Law and Agency Independence*, 2024 PEPP. L. REV. 92, 121 (calling the rule established in *Free Enterprise Fund* "weird").

[220] *Seila L.*, 591 U.S. at 204–05.

[221] *See* 594 U.S. 220, 250 (2021) (describing *Seila Law* as "all but dispositive").

[222] 603 U.S. 593, 620–21 (2024) (first quoting Myers v. United States, 272 U.S. 52, 106, 176 (1926); and then quoting Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982)).

[223] *Id.*

[224] *Compare* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (arguing that the President can remove executive officials at will without congressional limits), *with* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023), https://harvardlawreview.org/forum/vol-136/removal-rehashed/ [perma.cc/7VRY-6RRV] (asserting that Bamzai and Prakash fall short in their arguments); *see also* Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME L. REV. 213, 218 (2024) (commenting that both *Free Enterprise Fund* and *Seila Law* have erroneously attributed this unbridled removal power to the British Crown).

agency who was protected by a purportedly unconstitutional statutory removal protection.[225] The private litigant's argument was that the unconstitutionality of the agency's structure required invalidation of the agency action.[226]The Court rejected this argument and instead required the private litigant to show that the unconstitutional provision inflicted "compensable harm."[227] The mere existence of an unconstitutional removal provision was not enough to establish the invalidity of the agency action. Rather, for a private plaintiff to vindicate the President's removal power and obtain invalidation, the Court suggested that the plaintiff would need to demonstrate that the removal provision had interfered with *the President's* desire to remove the official.[228]

In a concurrence, Justice Thomas rejected the argument that "if the President . . . *misunderstood* the circumstances under which [he] could have removed the Director, then that creates a defect in authority"; rather, Justice Thomas opined, "[t]he Constitution does not transform unfamiliarity with the Vesting Clause into a legal violation when an executive officer acts with authority."[229] But the flipside of Justice Thomas's argument is that the President may have known about the removal protection's unconstitutionality but nevertheless been satisfied with an agency official's conduct in office. The Court's opinion in *Collins* leaves the decision to the President. And practically, the Court's rule made it harder for private plaintiffs to bring these sorts of lawsuits.[230] These suits are now making their way through the federal courts in a separate context that *Collins* seemed to favor: fired agency officials suing the President himself for a decision that he made.[231]

But even if the Court goes so far as to declare—in a dispute between the President and a removed official—that the President can fire all executive branch officials at will, future disputes involving the President's internal-management power are likely to arise. One such example involves ongoing debates about the President's power to direct executive branch officials to take certain actions. As recently as 2021, Cass Sunstein and Adrian Vermeule noted

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[225] *Collins*, 594 U.S. at 227.

[226] *Id.* at 257.

[227] *Id.* at 259.

[228] *See id.* at 259–60 ("Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.").

[229] *Id.* at 268–69 (Thomas, J., concurring) (alteration in original).

[230] *See* Eli Nachmany, *Remedies and Incentives in Presidential Removal Cases*, 133 YALE L.J.F. 305, 308–09 (2023), https://yalelawjournal.org/essay/remedies-and-incentives-in-presidential-removal-cases [perma.cc/UD9Z-KXLS] (noting that this has resulted from the difficulty of obtaining relief).

[231] *See, e.g.*, Trump v. Slaughter, No. 25-332 (U.S.) (FTC official); Harris v. Bessent, No. 25-5037 (D.C. Cir.) (Member of the Merit Systems Protection Board); Wilcox v. Trump, No. 25-5057 (D.C. Cir.) (Member of the National Labor Relations Board).

"the continuing debate" about whether the President possesses a "*directive power*" whereby he "can order an agency head, in particular cases, to act or to refrain from acting" when Congress has committed the action to the discretion of the agency head (and, implicitly, not the President).[232] Additionally, drawing perhaps on the D.C. Circuit Court of Appeals' 2012 decision in *Sherley v. Sebelius*, which determined that an agency had not acted arbitrarily by "disregard[ing]" certain comments on an agency action that contravened a presidential directive in an executive order,[233] President Trump ordered the Department of Energy to repeal a regulation pertaining to water pressure in showerheads and declared that "[n]otice and comment is unnecessary because [the President is] ordering the repeal."[234] These and other such exercises of presidential power could come before courts in the future; if they do, the President's strong interest in managing the executive branch will be central to the equitable balancing inquiry.

The Court's handling of a request for emergency relief in *Trump v. Wilcox* indicates that courts should take seriously—at the preliminary relief stage—the President's interest in managing the executive branch.[235] The case arose out of President Trump's removal of NLRB member Gwynne Wilcox. After the President attempted to remove Wilcox, she filed a lawsuit in federal district court in Washington, D.C., citing a statutory removal protection.[236] The district judge granted Wilcox's motion for summary judgment, ordered her reinstatement, and denied the government defendants' motion for a stay of the ruling pending

[232] Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority Over Independent Agencies*, 109 GEO. L.J. 637, 657 (2021) (alteration in original). Judges Ginsburg and Menashi have observed that "[t]he theory of the unitary executive focuses upon the extent to which [the Vesting Clause of Article II] . . . protects the President's authority to appoint, *direct*, and remove officers within the executive branch." Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254 (2010) (emphasis added).

[233] 689 F.3d 776, 785 (D.C. Cir. 2012).

[234] Exec. Order No. 14264, 90 Fed. Reg. 15619 (Apr. 9, 2025). Scholars are divided on how aggressively to read *Sherley*. *Compare* Adam White, *The D.C. Circuit's "Trump Card" for Executive Orders*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 13, 2017), https://www.yalejreg.com/nc/the-d-c-circuits-trump-card-for-executive-orders/ [perma.cc/VX3T-VUD5] (arguing that *Sherley* opens the door for the President to issue executive orders on regulatory policy), *with* Nicholas Bagley, Sherley *You're Joking*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 22, 2017), https://www.yalejreg.com/nc/sherley-youre-joking/ [perma.cc/7BNZ-JF27] (disagreeing with White and arguing that *Sherley*'s poor legal reasoning means its holding will not have great effect in the future). *Cf.* Note, *Administrative Law—APA Review—Ninth Circuit Holds Agency Action Directed by Executive Order Arbitrary and Capricious*—Nebraska v. Su*, 121 F.4th 1 (9th Cir. 2024)*, 138 HARV. L. REV. 2151, 2156 (2025) (expressing concern that an expansive reading of *Sherley* might render "APA review toothless in cases where an agency acts according to a presidential command").

[235] The author notes that he represented a client as amicus curiae at the D.C. Circuit and at the Supreme Court in *Wilcox*.

[236] *See* Complaint at 1, Wilcox v. Trump, 775 F. Supp. 3d 215 (D.D.C. 2025) (No. 1:25-cv-334) (full complaint), *rev'd sub nom.*, Harris v. Bessent, 160 F.4th 1235 (D.C. Cir. 2025).

appeal.[237] At that point, Wilcox held her seat only by virtue of a district court injunction—and in contravention of the President's wishes. The President appealed to the D.C. Circuit and filed an emergency motion to stay the district court's order while the appeal played out.[238] A panel of the D.C. Circuit granted that stay,[239] but the en banc court vacated the stay shortly thereafter (thereby requiring Wilcox's reinstatement).[240] For those keeping score at home: Within a span of two months, Wilcox was fired, un-fired, fired, and un-fired again. At this point, the Supreme Court stepped in. On the day that the government's application to reinstate the stay was docketed in the Supreme Court, Chief Justice Roberts entered an administrative stay of the district court's order while the Court considered the government's stay application.[241] The Court then sat on the application for six weeks—what one scholar reported was the "second-longest" amount of time for an administrative stay that he could find since the early 2010s[242]—and ultimately granted the stay.[243] Content to let the appellate process play out but perhaps wary of further oscillation in the day-to-day operations of the Board, the Court specified that the district court's judgment was stayed pending both the D.C. Circuit's judgment on the merits *and* the disposition of a petition for a writ of certiorari at the Supreme Court.[244]

The Supreme Court's approach to the *Wilcox* case signaled a particular sensitivity—at the preliminary relief stage—for the President's interest in internal management of the executive branch. In a later case raising a similar issue, the Solicitor General urged the Court to take the same approach as in *Wilcox* and put a stop to "the untenable chaos" caused by what the government described as a "court-ordered takeover of" another agency through judicially

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[237] *See* Order Denying Defendants' Motion for Stay, Wilcox v. Trump, 775 F. Supp. 3d 215 (D.D.C. 2025) (No. 1:25-cv-334) (full order); *Wilcox*, 775 F. Supp. at 240 (granting summary judgment in favor of the plaintiff). The court determined that "Defendants do not describe any cognizable harm they will experience without a stay, let alone an irreparable one . . . . Plaintiff and the public, on the other hand, experience harm every day that she is not able to fulfill her statutory role and the NLRB is thus unable to function." Order, *supra*, at 3 (internal citations omitted). In support of the idea that the President suffered *no* cognizable harm from a removed official continuing to serve in the government under the auspices of a district court injunction, the court stated that "the President can exercise control over the NLRB in ways other than removing" Wilcox. *Id.*

[238] Emergency Motion for a Stay Pending Appeal, Wilcox v. Trump, No. 25-5057 (D.C. Cir. Mar. 11, 2025); Defendant's Notice of Appeal, *Wilcox*, 775 F. Supp. 3d 215 (No. 1:25-cv-334).

[239] Harris v. Bessent, No. 25-5057, 2025 WL 980278, at *1 (D.C. Cir. Mar. 28, 2025). Each member of the panel issued a lengthy opinion explaining her or his vote. *See generally id.* (setting forth the judges' reasoning).

[240] *See* Harris v. Bessent, No. 25-5057, 2025 WL 1021435, at *1 (D.C. Cir. Apr. 7, 2025) (vacating the stay).

[241] Steve Vladeck, *Living by the Ipse Dixit*, ONE FIRST (May 26, 2025), https://www.stevevladeck.com/p/153-living-by-the-ipse-dixit [perma.cc/SW8W-7WH3].

[242] *Id.*

[243] Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025).

[244] *See id.* (noting a desire "to avoid the disruptive effect of the repeated removal and reinstatement of officers").

ordered reinstatement.[245] The Court in *Wilcox* was especially attuned to the prospect of such chaos. Accordingly, the Court's order provided that even if the D.C. Circuit (either the panel or the en banc court) affirmed the judgment of the district court on the merits, the Supreme Court would have an opportunity to weigh in before the federal judiciary interfered again with the President's management of the NLRB.

D. A Heightened Government Interest in Cases Seeking Vacatur

Courts should also be cautious about issuing universal remedies at the preliminary relief stage in regulatory cases. Scholars and jurists are divided on the answer to the question whether the APA authorizes courts to invalidate, i.e., vacate, agency action—as opposed to merely setting it aside as to individual plaintiffs.[246] The Supreme Court's recent decision in *CASA* further indicates some skepticism about universal remedies, but the Court explicitly declined to pass on the APA question in its ruling.[247] Regardless of the correct interpretation of the APA, however, the ongoing debate and the opinion in *CASA* are relevant to the task of balancing the equities in regulatory cases. When a plaintiff seeks to vacate (even preliminarily) a national regulatory program across the board, the plaintiff is requesting a remedy that is potentially more disruptive to the government's interests than would be setting aside the remedy as to the individual plaintiff. Granted, a universal remedy is sometimes necessary to provide full relief a party in a regulatory case, and anything less than universal relief might be impracticable in some cases. But when courts balance the equities at the preliminary stage in agency cases, the scope of the requested relief is at least worth considering.[248]

The availability of universal relief under the APA is one of the most salient debates in administrative law today. The debate has both a statutory and a constitutional component. As to the statute, Section 706 of the APA empowers courts to "hold unlawful and *set aside* agency action . . . ."[249] Some, like Justice Kavanaugh, have taken the position that "set aside" means vacate, "in much the same way that an appellate court vacates the judgment of a trial

[245] Application to Stay the Judgment of the United States District Court for the District of Maryland and Request for Administrative Stay at 4, Trump v. Boyle, 145 S. Ct. 2653 (2025) (No. 25A11).

[246] *See infra* notes 250–258 and accompanying text.

[247] *See* Trump v. CASA, Inc., 606 U.S. 831, 847 n.10 (2025) ("Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action.").

[248] *See* M. Devon Moore, Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 960 (2019) (describing "the scope of injunctive relief" as a relevant consideration for judges "ruling on a motion for a preliminary injunction").

[249] 5 U.S.C. § 706(2) (emphasis added).

court."[250] Multiple scholars agree.[251] But others, like Justice Gorsuch, have suggested that courts instead interpret the term "set aside" to instruct "courts about when they must disregard agency action in the process of deciding a case."[252] Justice Gorsuch's position has scholarly support, too.[253] Additionally, the question whether vacatur is unconstitutional under Article III is unresolved.[254] The debates carry on.

Justice Gorsuch has contended, however, that even if the APA *authorizes* vacatur, "a district court should 'think twice—and perhaps twice again—before granting' such sweeping relief."[255] Justice Gorsuch listed several reasons: "[V]acatur can stymie the orderly review of important questions, lead to forum shopping, render meaningless rules about joinder and class actions, and facilitate efforts to evade the APA's normal rulemaking processes."[256] Moreover, he observed, "[v]acatur can also sweep up nonparties who may not wish to receive the benefit of the court's decision."[257] And he pointed out that vacatur "strains our separation of powers" by "exaggerat[ing] the role of the Judiciary in our constitutional order" and "allowing individual judges to act more like a legislature by decreeing the rights and duties of people nationwide."[258]

In *CASA*, the Supreme Court addressed a related question: whether universal relief is available under the Judiciary Act of 1789.[259] The Court discussed—at length—its reasons for doubting the availability of such a remedy in cases arising out of that statute. The Court's opinion rested squarely on the law, but it also acknowledged the weighty policy considerations on both sides. On one side, the Court explained, proponents of universal relief "argue that a

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[250] Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 830 (2024) (Kavanaugh, J., concurring).

[251] *See* Sohoni, *supra* note 90, at 1129 (writing that the proper interpretation of the APA is to authorize vacatur); Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2007 (2023) ("[T]he APA must be read to authorize across-the-board nullification of rules in at least some circumstances.").

[252] United States v. Texas, 599 U.S. 670, 699 (2023) (Gorsuch, J., concurring in the judgment).

[253] *See* John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119, 120 (2023), https://www.yalejreg.com/wp-content/uploads/Harrison.-Vacatur-Under-the-APA-FINAL-Publication-Version.pdf [perma.cc/46VD-JC48] (overviewing arguments against the interpretation of "set aside" as "vacatur"); Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2040 (2023) (believing that the term "set aside" applies to individual plaintiffs, rather than vacatur).

[254] *See* Kathryn Kimball Mizelle, *To Vacate or Not to Vacate: Some (Still) Unanswered Questions in the APA Vacatur Debate*, 38 HARV. J.L. & PUB. POL'Y PER CURIAM, Sep. 14, 2023, at 1, 19, https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/09/Mizelle-Vacatur-vf2.pdf [perma.cc/6R88-FAAV] (attempting to answer that question).

[255] *United States v. Texas*, 599 U.S. at 702 (quoting Arizona v. Biden, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring)).

[256] *Id.* at 703.

[257] *Id.*

[258] *Id.*

[259] Trump v. CASA, Inc., 606 U.S. 831, 839 (2025).

universal injunction is sometimes the only practical way to quickly protect groups from unlawful government action," "that universal injunctions are an appropriate remedy to preserve equal treatment among individuals when the Executive Branch adopts a facially unlawful policy," and "that forcing plaintiffs to proceed on an individual basis can result in confusion or piecemeal litigation that imposes unnecessary costs on courts and others."[260] On the other side, however, the Court acknowledged a series of countervailing policy concerns raised by the government. One of those concerns got to the heart of the government's interests in cases involving requests for universal injunctions. As the Court recounted the government's submission, "universal injunctions operate asymmetrically: A plaintiff must win just one suit to secure sweeping relief. But to fend off such an injunction, the Government must win everywhere."[261]

Because Section 705 of the APA—the provision governing preliminary relief—does not use the "set aside" language, the debate about the meaning of Section 706 is perhaps not directly applicable (to say nothing of *CASA*). The provision empowers courts, "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury," to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[262] Although the Article III issue lurks in the background,[263] Section 705 is perhaps another duck-rabbit illusion in the APA, allowing for two possible interpretations.[264] On one reading, "all necessary and appropriate process" is expansive, and it allows for wide-ranging relief including temporary invalidation or postponement of an agency action's effective date. On another reading, however, the phrases "postpone the effective date" and "preserve status or rights" must be understood in light of the presumption of confining the remedy to the party before the court. Yet even this interpretation might require universal relief in some cases—in particular, those cases in which only a universal remedy will preserve a party's "status or rights."

Nevertheless, the debate about the availability of vacatur under Section 706 of the APA, combined with the Court's discussion of universal relief in

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[260] *Id.* at 854–55.

[261] *Id.* at 855.

[262] 5 U.S.C. § 705.

[263] The Court in *CASA* noted that its "decision rests solely on the statutory authority that federal courts possess under the Judiciary Act of 1789," thereby "express[ing] no view on the Government's argument that Article III forecloses universal relief." 606 U.S. at 841 n.4.

[264] *Cf.* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1652 (2019) (describing Section 706's command that the reviewing court shall decide "*all* relevant questions of law" as having "something in common with the duck-rabbit illusion, a famous drawing that from a certain point of view looks like a duck, and from another like a rabbit"). For a helpful analysis of Section 705's language, see generally Frank Chang, *The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529 (2017).

CASA, suggests that the scope of the requested preliminary relief in regulatory cases is relevant to the balancing of the equities. Alongside his legal objections to the availability of vacatur under the APA, Justice Gorsuch implored courts to be careful about vacating agency action because vacatur can aggrandize judicial power at the expense of executive power. The potential threat to the separation of powers indicates a heightened government interest for the purposes of equitable balancing. Furthermore, the Court in *CASA* noted the government's argument about the asymmetry inherent in the practice of granting nationwide injunctions, suggesting that vacatur might be unfair to the government (even if authorized) in certain cases as well. These considerations speak directly to the interests of the government in equitable balancing.

Of course, universal relief might be practically or formally necessary to provide complete relief in some regulatory cases. One potential example of practically necessary vacatur is Judge Mizelle's vacatur of the CDC's "mask mandate," pursuant to which the CDC mandated that travelers wear masks on airplanes, trains, and other transportation to slow the spread of COVID-19.[265] Judge Mizelle explained that "[t]he difficulty of distinguishing the named Plaintiffs from millions of other travelers—both for government actors and the myriad of private companies, individuals, and local governments bound to enforce the Mandate with 'best efforts'—almost ensures that a limited remedy would be no remedy at all."[266] Meanwhile, an example of formally necessary vacatur can be found in the Court's recent 2025 opinion in *Diamond Alternative Energy, LLC v. EPA*. There, the Supreme Court confronted a case involving a lawsuit by fuel producers who sought invalidation of an EPA waiver that allowed California to enact strict emissions standards for auto manufacturers.[267] The emissions standards regulated the manufacturers, not the fuel producers, but the fuel producers' theory of injury was that the emissions standards would reduce the demand for their fuel.[268] The Court assumed that invalidation of the waiver was an available remedy and held that this remedy would redress the fuel producers' asserted injury (thus satisfying the requirements of Article III standing).[269] *Diamond Alternative Energy* presents a difficult fact pattern for advocates of a more limited reading of the term "set aside"; the fuel producers, as unregulated third parties that are not regulatory beneficiaries of

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[265] *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1176 (M.D. Fla. 2022) (vacating Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Regis. 8025 (Feb. 3, 2021)), *vacated and dismissed as moot on other grounds sub nom.* Health Freedom Def. Fund v. President of the U.S., 71 F.4th 888 (11th Cir. 2023).

[266] *Id.* at 1177.

[267] *See* 606 U.S. 100, 107–08 (2025) (overviewing the fuel producers' claims).

[268] *See id.* (citing an analyst for American Fuel & Petrochemical Manufacturers).

[269] *See id.* at 113, 114 n.3 (holding that "the fuel producers have standing to sue" and using "the term 'invalidated' as shorthand to describe the result from setting aside EPA's approval of the California regulations").

the challenged agency action,[270] needed invalidation of the waiver to obtain complete relief.[271] Thus, the fact that a plaintiff has requested invalidation of an agency action does not mean that the government should necessarily prevail in the equitable balancing.

Moreover, as the Court mentioned in *CASA*, some policy arguments might counsel in favor of universal relief. But two of the arguments that the Court discussed—that this remedy is practically necessary "to quickly protect groups from unlawful government action" and that this remedy facilitates "equal treatment among individuals when the Executive Branch adopts a facially unlawful policy"[272]—both depend on a threshold determination that the agency action is actually unlawful. And the third argument—"that forcing plaintiffs to proceed on an individual basis can result in confusion or piecemeal litigation that imposes unnecessary costs on courts and others"—is inherent to our system of judicial review.[273] Will Baude and Sam Bray have lauded the Supreme Court's restoration of "the centrality of remedies specific to the parties" over the last several years.[274] And, relatedly, the Court in 2025, in *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, had no problem with the possibility of "inter-circuit disagreement . . . creat[ing] a circuit split" that the Supreme Court could resolve, describing this "ordinary system of judicial review" as "commonplace."[275]

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[270] In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, Justice Kavanaugh noted that the case also presented a fact pattern in which vacatur was necessary. As Justice Kavanaugh explained:

> Corner Post challenged an agency rule that regulates the fees that banks may charge. But Corner Post is not a bank regulated by the rule. Rather, it is a business that must pay the fees charged by the banks who are regulated by the rule. Corner Post complains that the agency rule allows banks to charge fees that are unreasonably high.

603 U.S. 799, 826 (2024) (Kavanaugh, J., concurring). But John Harrison has written that vacatur for a regulatory beneficiary like Corner Post might not actually make sense. *See* John Harrison, *Agency Action, Agency Failure to Act, and Universal Relief in* Corner Post v. Board of Governors of the Federal Reserve System, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 25, 2024), https://www.yalejreg.com/nc/agency-action-agency-failure-to-act-and-universal-relief-in-corner-post-v-board-of-governors-of-the-federal-reserve-system-by-john-harrison/ [perma.cc/PC6X-XZ3Y] (commenting that, often times, vacatur is unnecessary for a party to obtain relief). The fuel producers, by contrast, are not regulatory beneficiaries; rather, they "might be considered an object of the California regulations because the regulations explicitly seek to restrict the use of gasoline and other liquid fuels in automobiles." *Diamond Alt. Energy*, 606 U.S. at 114–15.

[271] *See* Eli Nachmany, *Vacatur as Complete Relief*, 2024–2025 CATO SUP. CT. REV. 77, 86. One might reply that the APA simply does not contemplate such suits. This Article takes no position on the question.

[272] Trump v. CASA, Inc., 606 U.S. 831, 854–55 (2025).

[273] *Id.* at 855.

[274] Baude & Bray, *supra* note 102, at 178.

[275] 606 U.S. 146, 166 (2025). *But see* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976) (citing "the desirability of avoiding piecemeal litigation" as a factor to be con-

At bottom, a request for temporary vacatur of an agency action indicates that the government might have an especially heightened interest at the preliminary relief stage. This kind of judicial invalidation of agency action—even on an interim basis—could prevent the operation of a national regulatory program. In general, the government has a greater interest in the perpetuation of such a program than it does in taking individual enforcement actions. Vacatur may be necessary in some cases, however, and some policy arguments counsel in favor of the remedy. The fact that a litigant has asked for vacatur at the preliminary relief stage does not mean that the government's interests must prevail in the equitable balancing. But the scope of the requested remedy should be a consideration in the balance, and vacatur is strong medicine.

* * *

This Part has drawn out some situations in which the federal government's interests—for purposes of balancing the equities in regulatory cases—might be stronger or weaker. To put it in terms that a presidential power enthusiast might appreciate, this Part suggests something of a *Youngstown* framework for equitable balancing in agency cases. In 1952, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court upheld an injunction against President Truman's seizure of steel mills during the Korean War.[276] Justice Jackson penned a now-famous concurrence in which he set forth a tripartite, "somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers . . . ."[277] First, Justice Jackson opined that the President's "authority is at its maximum" when he "acts pursuant to an express or implied authorization of Congress . . . ."[278] Second, he stated that "there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain"; this zone encompasses situations in which "the President acts in absence of either a congressional grant or denial of authority . . . ."[279] Third, he determined that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."[280]

This Part lays out a similar taxonomy. For the purposes of equitable balancing in administrative law cases: When the President engages in internal management of the executive branch, his interest "is at its maximum."[281] By

sidered "[i]n assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction").

[276] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) (holding that the "seizure order cannot stand").

[277] *Id.* at 635 (Jackson, J., concurring).

[278] *Id.*

[279] *Id.* at 637.

[280] *Id.*

[281] *Id.* at 635.

contrast, when an agency issues a novel regulation or takes an action that undermines federalism, the federal government's interest "is at its lowest ebb." Finally, the scope of the requested remedy creates a "zone of twilight" within which a court should inquire into how the remedy might impact the government's interests.

Additionally, these considerations are distinct from the merits of a given case, and they are not analogous to "substantive canons" of statutory interpretation.[282] Rather, they are lessons—distilled from recent trends in Supreme Court caselaw—that can help a court better "exercise its equitable discretion in like cases."[283] Indeed, the federal government might issue a novel regulation or disrupt the federal-state balance of power yet nevertheless prevail on the merits. Or the President might go too far in asserting his power to superintend the executive branch. Instead, the point is that the government's interest is not the same at the preliminary-relief stage in every regulatory case. The context matters. And the application of certain principles can help a court better carry out the task of equitable balancing.

III. IMPLICATIONS

Courts should incorporate the principles set forth in Part II when engaging in equitable balancing in regulatory cases. A revitalized balancing of the equities, drawing on lessons learned from the Supreme Court's recent turn in administrative law jurisprudence, could have a bevy of positive implications. This Part considers five such potential impacts. First, taking serious account of the requested remedy can confine vacatur to those cases in which it is most necessary.[284] Second, a thoughtful approach to the government's interests can promote harmony between the judicial and executive branch.[285] Third, picking up on signals from the Supreme Court's recent administrative law jurisprudence can make the Court's task of managing the emergency docket easier.[286] Fourth, robust equitable balancing in regulatory cases can carve out a meaningful role for third parties to participate as amicus curiae.[287] Fifth, emphasizing equitable balancing in opinions at the preliminary-relief stage can mollify other problems that plague the current legal framework for granting such relief—such

[282] For an overview of substantive canons, see generally Barrett, *supra* note 140. These canons—or rules—of statutory interpretation come in two forms: "rule[s] of thumb for choosing between equally plausible interpretations of ambiguous text" or rules that "permi[t] a court to forgo a statute's most natural interpretation in favor of a less plausible one more protective of a particular value." *Id.* at 109–10.

[283] *Cf.* Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025) (writing that Supreme Court interim orders do not definitively rule on a case's merits, but are informative for other courts).

[284] *See infra* notes 289–292 and accompanying text.

[285] *See infra* notes 293–302 and accompanying text.

[286] *See infra* notes 303–306 and accompanying text.

[287] *See infra* notes 307–319 and accompanying text.

as the "lock-in" effect of preliminary merits determinations and open questions about taking account of compliance costs as irreparable harm.[288]

A. Confining Vacatur

Vacatur can be quite disruptive. And as jurists and scholars debate whether Section 706 authorizes such a remedy, courts might consider confining preliminary vacatur to those cases in which it is most necessary. Considering the impacts of vacatur in equitable balancing will bring remedial discipline to the process of regulatory litigation at the preliminary-relief stage. Moreover, such an approach to vacatur can alter the incentives for litigants by encouraging plaintiffs at the preliminary stage to ask for the maximum amount of relief that they need—and no more.

Preliminary vacatur is not necessary in every case.[289] And, in practice, an approach to equitable balancing that disfavors preliminary vacatur is likely to reduce the number of cases in which courts will grant the remedy. That is a good thing. Bray has written that "if government officers are permitted to enforce [a] norm against nonplaintiffs during the duration of [a] legal challenge, the democratic cost from a preliminary injunction is sharply reduced."[290] Confining preliminary vacatur is not the same thing as eliminating it, and the balance of the equities may well favor the issuance of a wide-reaching remedy in disputes that require it.[291] But the approach outlined in Part II would formalize the addition of an input into the process that considers whether the muscular remedy of vacatur is appropriate in a given case. [292]

Judicial attention to the scope of the remedy at the preliminary-relief stage also would incentivize litigants to request the least-disruptive remedy necessary.

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[288] *See infra* notes 320–328 and accompanying text.

[289] Because this Article is focused on issues of preliminary relief in regulatory cases, it brackets the question whether Section 706 of the APA *requires*, as opposed to merely authorizes, vacatur. *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1176 (M.D. Fla. 2022) (noting that "[s]ome judges even reason that the APA mandates vacatur and permits of no other, lesser remedy"), *vacated and dismissed as moot on other grounds sub nom.*, Health Freedom Def. Fund v. President of the U.S., 71 F.4th 888 (11th Cir. 2023). For an example of this argument, see, e.g., *Checkosky v. SEC*, 23 F.3d 452, 492 (D.C. Cir. 1994) (Randolph, J., separate opinion) ("[O]ur decisions uniformly—and quite firmly—hold that § 706[] requires us to vacate . . . ."), *superseded on other grounds*, Marrie v. SEC, 374 F.3d 1196 (D.C. Cir. 2004).

[290] Bray, *supra* note 5, at 866; *see also id.* ("In addition, there is a likely reduction in error costs because courts can replace judicial prediction and intuition with democratic experimentation, so later decisions can be made with an actual record of the new legal norm's consequences, whether good or bad."); *cf.* Boomer v. Atl. Cement Co., 26 N.Y.2d 219, 222–24 (1970) (determining that a damages remedy for individual property owner plaintiffs, as opposed to a permanent injunction preventing a cement plant's operation, was appropriate in a nuisance action given the "large disparity in economic consequences of the nuisance and of the injunction").

[291] *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1100–01 (2018) (suggesting that vacatur in certain APA case might indeed be in the public interest).

[292] *See supra* notes 161–283 and accompanying text.

In strategic ideological litigation, an entity might benefit equally from universal preliminary vacatur and a strictly plaintiff-protective remedy. But if faced with the prospect of a more rigorous balancing of the equities, a plaintiff might be more reluctant to request vacatur at the preliminary-relief stage. On the flip side, a plaintiff may cite a request for a more circumscribed remedy as a reason for a court to balance the equities in the *plaintiff's* favor—suggesting that taking the remedy into account can impact the equitable balancing in either direction.

B. Promoting Interbranch Harmony

Although the relationship between the executive branch and the judicial branch has become increasingly strained over the last several years, applying the approach outlined in Part II can alleviate some of the tension. Both President Biden and President Trump have found themselves at odds with the judicial branch. President Biden issued a statement that was critical of a "single federal district judge" who ruled against the federal government in regulatory litigation;[293] established a commission focused on Supreme Court reform;[294] and said—during a campaign rally—that although the Court had "block[ed]" his attempt to forgive student loan debt, it would not "stop" him.[295] Meanwhile, President Trump has taken umbrage with—in his words—"Radical Left Judges" who have frustrated his agenda;[296] called for certain district judges to be impeached;[297] and even lamented that his administration was "being stymied at every turn by . . . the Supreme Court."[298] There is a better way.

To start, remedies matter. The Court's decision in *CASA, Inc. v. Trump*, which is likely to reduce the number of universal injunctions issued by district court judges, should help to improve interbranch relations. Confining vacatur at the preliminary-relief stage in regulatory cases can help the cause along further. When a district court pokes a hole in a national regulatory program by preventing its application to one (or a group of) plaintiffs, the ruling is undoubtedly significant, but perhaps not enough to merit the President's atten-

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[293] Press Release, Joe Biden, White House, Statement from President Joe Biden on Decision in *Alliance for Hippocratic Medicine v. FDA* (Apr. 7, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/04/07/statement-from-president-joe-biden-on-decision-in-alliance-for-hippocratic-medicine-v-fda/ [perma.cc/EX8Y-28UY].

[294] Exec. Order No. 14023, 86 Fed. Reg. 19569 (Apr. 14, 2021).

[295] *Remarks by President Biden at a Campaign Event: Las Vegas, NV*, WHITE HOUSE: ARCHIVES (Feb. 4, 2024), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/02/04/remarks-by-president-biden-at-a-campaign-event-las-vegas-nv/ [perma.cc/GXM3-QD72].

[296] Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Mar. 30, 2025, 9:53 AM), https://truthsocial.com/@realDonaldTrump/posts/114251714651932084 [perma.cc/QKN3-QB96].

[297] Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Mar. 18, 2025, 9:05 AM), https://truthsocial.com/@realDonaldTrump/posts/114183576937425149 [perma.cc/T5R8-FNPT].

[298] Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Apr. 21, 2025, 5:08 PM), https://truthsocial.com/@realDonaldTrump/posts/114377993807616549 [perma.cc/FMP7-ZSWW]. President Trump softened the criticism by noting in his post that he has "such great respect for" the Court. *Id.*

tion. By contrast, when "a single federal district judge" knocks out—even temporarily—a presidential policy initiative across the board (often just days or weeks after the initiative is finalized), the ruling rises to the level of presidential concern. Minimizing the number of such rulings should promote interbranch comity.

Alongside universal relief, the issuance of remedies that interfere with the President's internal management of the executive branch is especially likely to provoke presidential annoyance. The executive branch might chafe at a judge standing between the President and his subordinates or attempting to micromanage the day-to-day operations of a federal agency. The appellate process further complicates the problem; the Supreme Court might take a different view than did the en banc appeals court, which might have taken a different view than did the appellate panel, which might have taken a different view than did the district court judge. All the while, as the *Trump v. Wilcox* litigation demonstrated, the President's ability to superintend a federal agency might depend on the stage of the litigation—and oscillate back and forth multiple times in a short span. This oscillation could be particularly frustrating to the chief executive in light of the relatively short amount of time that a presidential term lasts. Thus, if courts take special account of the President's interest in internal management of the executive branch, then they can ensure that interference with such management is reserved for the most important instances of malfeasance.[299]

Finally, an approach of disfavoring novel regulations and elevating federalism would keep courts on solid footing. When a presidential administration adopts a novel approach to regulation, judicial rejection of that approach often does not come as a surprise. To take one example, consider the attempt by President Biden's Secretary of Education to use a provision in the HEROES Act to create "a novel and fundamentally different [student] loan forgiveness program" than had ever been previously established.[300] The Court blocked the Biden Administration's loan-forgiveness initiative, but in so doing, it cited a statement by one of President Biden's top congressional allies—Speaker of the House Nancy Pelosi, a fellow Democrat—in which Speaker Pelosi had taken the position that the President did not have the claimed authority.[301] Yes, Presi-

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[299] *Cf.* Z. Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 YALE L.J. 2360, 2400 (2023) ("[C]ourts deploy their limited capital in [the separation-of-powers] context only where circumstances warrant it, and that usually includes some incursion on judicial power that is distinct from the separation-of-powers issue directly before the deciding court."); Ginsburg & Menashi, *supra* note 232, at 254 (describing the understanding inherent in the unitary executive theory "that the other branches [will] be confined to their own respective spheres" vis-à-vis exercises of presidential "authority to appoint, direct, and remove officers within the executive branch").

[300] Biden v. Nebraska, 600 U.S. 477, 496 (2023).

[301] *Id.* at 504 ("People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to

dent Biden grumbled about the ruling, but in the end, he pivoted to other ways of attempting to effectuate his desired policy instead of lingering on his administration's creative-but-rejected interpretation.[302] Executive branch lawyers are on notice that novel regulations are riskier. Moreover, emphasizing federalism in equitable balancing allows courts to bolster their decisions with the strength of another institution—the states—when ruling against the executive branch.

C. Reducing Pressure on the Emergency Docket

In recent years, the emergency docket has exploded at the Supreme Court; clear-headed equitable balancing can help get it under control. Justice Kavanaugh has noted "the ubiquitous preliminary litigation over new federal statutes and executive actions," which has required the Supreme Court to act "as the ultimate decider of the interim legal status of major new federal statutes and executive actions" once these cases make their way (quickly) through the appellate process.[303] This sort of litigation "'tend[s] to force judges into making rushed, high-stakes, low-information decisions' at all levels."[304] But if lower courts incorporate the Supreme Court's recent signals in administrative law jurisprudence into their adjudication of regulatory cases at the preliminary stage, then they can lessen the Court's burden by obviating the need for exacting review at the Court.

Part of the reason for the increase in emergency docket activity is that the Supreme Court feels the need to act on so many emergency applications. The Court is supreme over all other federal courts; thus, when "the federal courts intervene (or refuse to intervene) in the implementation of nationally important federal . . . policies when litigants request it," the losing litigant is likely to press its case up to the Supreme Court.[305] Of course, as Garrett West observes, "[t]he Court could adopt a rule denying all emergency applications," consider-

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be an act of Congress." (quoting Press Conference, Nancy Pelosi, Office of the Speaker of the House (July 28, 2021)).

[302] *See* Alexandra Hutzler, *Biden Outlines 'New Path' to Provide Student Loan Relief After Supreme Court Rejection*, ABC NEWS (June 30, 2023), https://abcnews.go.com/Politics/biden-fight-after-scotus-rejects-student-loan-forgiveness/story?id=100541687 [perma.cc/BN4M-XBZ6] ("'This new path is legally sound,' the president said. 'It's going to take longer. And in my view, it's the best path that remains to student debt relief to as many borrowers as possible as quickly as possible.'").

[303] Trump v. CASA, Inc., 606 U.S. 831, 869–70 (2025) (Kavanaugh, J., concurring).

[304] Labrador v. Poe, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring in the grant of stay) (quoting Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay)); *cf.* TikTok Inc. v. Garland, 604 U.S. 56, 81 (2025) (Gorsuch, J., concurring in the judgment) ("We have had a fortnight to resolve, finally and on the merits, a major First Amendment dispute affecting more than 170 million Americans. Briefing finished on January 3, argument took place on January 10, and our opinions issue on January 17, 2025. Given those conditions, I can sketch out only a few, and admittedly tentative, observations.").

[305] E. Garrett West, *Taming the Shadow Docket*, 112 VA. L. REV. (forthcoming 2026) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5329091 [perma.cc/777M-DFX4].

ing its stingy practice with other cases (including its regular denial of "thousands of petitions for certiorari on its discretionary docket").[306] Even an uptick in summary denials of such applications would help to ease the Court's burden. Yet the Court feels that it needs to intervene via the emergency docket—and correct the work of the lower courts—on a regular basis.

If lower courts shift to an equitable-balancing approach that incorporates the Supreme Court's most recent administrative law pronouncements, however, then the Court may be more comfortable denying emergency applications without comment. That would ease the Court's workload and reserve emergency intervention for times when it is most warranted. Disfavoring novel regulations, elevating federalism, respecting presidential authority over the executive branch, and exercising caution when vacating agency action—these principles follow directly from the Court's recent administrative law jurisprudence. If lower courts infuse their equitable balancing with the lessons to be learned from the Court's cases, then their decisions will be likely to meet with more acceptance at the Court.

D. Clarifying the Role of Amici

Not all amicus briefs are helpful. The Seventh Circuit has noted "that too many *amicus* briefs do not even pretend to offer value and instead merely repeat (literally or through conspicuous paraphrasing) a party's position."[307] As "merits-centrism" envelops the preliminary-relief inquiry in regulatory cases,[308] however, parties that want to file amicus briefs may feel as though their best value add is to reinforce a principal party's merits arguments. That is unfortunate because equitable balancing is the perfect vehicle for amicus briefs from other interested parties to help a court understand how preliminary relief will affect others. A stronger focus on equitable balancing can raise the salience of amicus practice in regulatory cases, giving amicus filers a clear path to influencing the outcome.

When considering whether to grant preliminary relief in agency cases, courts consider the public interest.[309] Non-parties have a tremendous amount to

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[306] *Id.* at 13.

[307] Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 976 F.3d 761, 763 (7th Cir. 2020). *But cf.* Clarence Thomas & John Malcolm, *Joseph Story Distinguished Lecture: A Conversation with Clarence Thomas*, HERITAGE FOUND. (Nov. 22, 2017) (delivered Oct. 26, 2016), at 11–12, https://www.heritage.org/sites/default/files/2017-11/HL1282.pdf [perma.cc/B7PB-FFZ9] (statement of Thomas, J.) (noting that certain briefs—including those authored by the ACLU, the federal government, and the states—are helpful to read and recounting how, in one case, a brief in support of neither party by electrical engineers "explaining an electrical grid" was "just excellent").

[308] Bray, *supra* note 5, at 826.

[309] *See* Nken v. Holder, 556 U.S. 418, 426 (2009) (setting forth the test for a preliminary injunction, which considers whether the injunction benefits the public); Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008) (same).

add to courts' inquiry into this element of the test. To take one example, states are frequent amicus filers in cases that implicate their interests, even if they are not themselves parties.[310] An explicit focus on federalism in equitable balancing—both in terms of undermining the federal government's interest and framing the public interest—could clarify the task for states filing amici. Instead of solely looking for ways to help courts with carrying out the likelihood-of-success-on-the-merits inquiry, states can home in on the balancing of the equities and lay out their interests for the court to take into account. To be sure, a good amicus brief from a state may be able to influence courts on both the merits and the equitable balancing; federalism also factors into statutory interpretation,[311] and states are well positioned to remind courts to apply the federalism canon. Yet equitable balancing in particular presents a promising opportunity for states to exert outsized influence on the process.

That is true for other parties as well, but equitable balancing must be a meaningful part of the framework if amici are going to feel comfortable focusing their energy on it. Consider, for example, the EPA waiver at issue in *Diamond Alternative Energy, LLC v. EPA*, but suppose instead that the auto manufacturers (instead of the fuel producers) had challenged the waiver and requested preliminary relief. The fuel producers could have filed an amicus brief to inform the court that the waiver (and the resulting California regulations) would upset their settled expectations about the market for fuel. An environmental organization could have filed an amicus brief about the air quality benefits of the California regulations. And California itself could have filed an amicus brief to point out that the EPA's waiver advances federalism by allowing the state to develop its own environmental regulatory framework.[312] True, balancing these interests may seem difficult, but such is the task of a court issuing an equitable remedy at the preliminary stage in a regulatory case. These potential amici, however, must feel as though equitable balancing matters in these cases before focusing their briefs on the equities. Otherwise, they are missing an opportunity to help the court with a dispositive merits inquiry.

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[310] *See generally* Brief of Amici Curiae South Carolina et al. in Support of Applicants, Trump v. J.G.G., 604 U.S. 670 (2025) (No. 24A931) (interest in protecting citizens from gang violence); Brief of Amici Curiae Florida and 19 Other States in Support of the Secretary's Application to Vacate the Order of the United States District Court, Bessent v. Dellinger, 145 S. Ct. 515 (2025) (No. 24A790) (interest in the federal government recognizing constitutional limits on its power); Brief of Commonwealth of Pennsylvania & Pennsylvania Department of State as Amici Curiae in Opposition to the Emergency Application for Stay, Republican Nat'l Comm. v. Genser, 145 S. Ct. 9 (2024) (No. 24A408) (interest in their state elections).

[311] *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (noting the importance of deciphering congressional intent before upsetting the balance of state and federal power).

[312] Indeed, California intervened in *Diamond Alternative Energy* and raised the standing argument that won in the D.C. Circuit before losing at the Supreme Court. *See* Diamond Alt. Energy, LLC v. EPA, 606 U.S. 100, 108–09 (2025).

Another possibility comes from executive branch officials educating courts about the internal operations of agencies to highlight the President's interests. Former Transportation Department Inspector General Eric Soskin filed such a brief in *Storch v. Hegseth*, a 2025 U.S. District Court for the District of Columbia case involving a collection of Inspectors General (IGs) suing President Trump and various department heads over their purportedly unlawful firings.[313] Like he did to the plaintiffs in the case, "President Trump removed IG Soskin from office on January 24, 2025, as part of a nearly across-the-board removal of then-serving presidentially appointed Inspectors General."[314] Yet Soskin, unlike the plaintiffs, did not challenge his removal; instead, he filed an amicus brief in support of the President. Soskin's brief was helpful in describing the role of the IG, bolstering the argument for a heightened presidential interest in the freedom to remove these appointees. Soskin shared with the court that "during his tenure, [he] concluded that, as IG, he served as a principal officer of the United States" and noted that "[i]n his experience, this status is essential to the effective functioning of IGs as independent, objective oversight officials with credibility and stature in the agencies they serve."[315] In advancing this interpretation, Soskin offered a view that was contrary to that of the plaintiffs, who had argued that they were "properly classified as federal employees . . . ."[316] The distinction was important; if IGs are principal officers, then the President likely has unfettered power under the Constitution to remove them.[317] As part of his submission to the court, Soskin described the plaintiffs' argument as having the potential to reduce "the stature of IGs that allows them to command respect on par with, or near-par with, the agency heads themselves"—emphasizing the importance of his own ability during his tenure "to stand in the room with a Cabinet Secretary—an individual who may be a household name in America—with the prestige to protect the [Office of Inspector General's] independence by saying 'no.'"[318] Soskin asserted that he did not understand himself to be accountable to the head of the agency in

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[313] *See* Brief for Amicus Curiae Hon. Eric J. Soskin, Former Inspector General of the Department of Transportation in Support of Defendants, Storch v. Hegseth, No. 1:25-cv-415 (D.D.C. Feb. 21, 2025), ECF No. 29 Ex. 1 [hereinafter Soskin Amicus Brief]; Storch v. Hegseth, No. 25-cv-415, 2025 WL 2758238, at *2 (D.D.C. Sep. 24, 2025) (overviewing the issue in the case).

[314] Soskin Amicus Brief, *supra* note 313, at 4.

[315] *Id.* at 3.

[316] Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, and Memorandum in Support of Same at 15, Storch v. Hegseth, No. 1:25-cv-415 (D.D.C. Feb. 14, 2025).

[317] *See* Seila L. LLC v. CFPB, 591 U.S. 197, 238 (2020) (holding there are no limitations on the removal authority of the President for "principal officers who, acting alone, wield significant executive power"); *cf.* Ari Spitzer, *The Constitutionality of For-Cause Removal Protections for Inspectors General*, 45 HARV. J.L. & PUB. POL'Y 1057, 1059 (2022) (determining that IGs are *inferior* officers (as opposed to principal officers) yet nevertheless concluding that their "duties are sufficiently broad such that Congress cannot constitutionally insulate them from the President's removal power").

[318] Soskin Amicus Brief, *supra* note 313, at 3–4.

which he served; rather, he saw himself as accountable to the President.[319] This observation supported the conclusion that the President has a strong interest in managing IGs directly.

E. Alleviating Other Issues with the Preliminary Relief Framework

The standard formulation of the preliminary-injunction framework has four elements, not one.[320] Balancing the equities and determining the public interest are important aspects of the inquiry. But as balancing falls out of favor, courts are focusing increasingly on the merits in these cases—leading to a "lock-in" effect and creating some confusion about the precedential value of the opinions of appellate courts in these cases. Moreover, meaningful equitable balancing can help courts account for compliance costs from putatively unlawful government regulation (a kind of irreparable harm) at the preliminary-relief stage, whether big or small.

Courts are facing two separate but related issues with the merits inquiry at the preliminary-relief stage. For judges who focus their preliminary-relief determinations nearly exclusively on the merits, the "lock-in" effect of their merits-centric adjudication can impact further proceedings. Also, the precedential effect of merits-focused determinations on preliminary relief is uncertain. But both of these issues follow from weakened equitable balancing. Ramping up equitable balancing can clarify the multi-faceted nature of these preliminary determinations. Judges need not dedicate the bulk of their analysis to the question whether the plaintiff is likely to succeed on the merits. Rather, a judge could limit the merits analysis to doing just enough to determine whether the plaintiff is indeed *likely* to succeed on the merits, then pivot to rigorous inquiry into irreparable harm and the balance of the equities.[321] Moreover, a judge could emphasize the uncertainty about the merits and note explicitly that the analysis might change with further briefing or that the analysis is non-precedential.[322]

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[319] *Id.* at 2–3.

[320] *See, e.g.*, Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008) (reciting the test).

[321] *Cf.* Thorlin, *supra* note 38, at 53 ("To make the balance of equities prong meaningful, judges should have to engage in an actual analysis of specific equities of the parties, including the federal government.").

[322] *See, e.g.*, Cayuga Indian Nation of N.Y. v. Seneca County, 978 F.3d 829, 834 (2d Cir. 2020) ("We long ago observed that, '[o]rdinarily, findings of fact and conclusions of law made in a preliminary injunction proceeding do not preclude reexamination of the merits at a subsequent trial.' This is because a preliminary injunction order is, by its very nature, 'tentative.' To secure preliminary injunctive relief, a plaintiff must show 'a likelihood of success on the merits'—it need not achieve '*actual* success.'" (first quoting Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998); then quoting Goodheart Clothing Co. v. Laura Goodman Enters., Inc., 962 F.2d 268, 274 (2d Cir. 1992); and then quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987)); Gooch v. Life Invs. Ins. Co. of Am., 672 F.3d 402, 433 (6th Cir. 2012) ("We . . . adhere to the well-established principle that a preliminary injunction makes a prediction about the merits ruling and is not itself a merits ruling.").

If courts shift back to considering each factor of the analysis strongly, then the irreparable harm inquiry will become more robust, too. In regulatory cases, courts consider unrecoverable compliance costs to be irreparable harm.[323] The circuits are divided, however, on the question whether compliance costs must be substantial to qualify as irreparable harm.[324] Some courts, like the Third Circuit Court of Appeals, require that the asserted irreparable harm be so great as to be "peculiar."[325] Other courts, like the Sixth Circuit Court of Appeals, contend that "the peculiarity and size of a harm affects its weight in the equitable balance, not whether it should enter the calculus at all."[326] The Sixth Circuit's position seems closer to that of Justice Scalia's 1994 concurrence in *Thunder Basin Coal Co. v. Reich*, which the Supreme Court recently quoted approvingly in *Ohio v. EPA*.[327] In that concurrence, Justice Scalia took the position that "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."[328] But if equitable balancing is not a meaningful component of the judicial process at the preliminary-relief stage, then the Sixth Circuit's approach might seem untenable. Thus, revitalizing the equitable-balancing inquiry can help courts better account for the magnitude of asserted compliance costs in

[323] *See* Ohio v. EPA, 603 U.S. 279, 291–92 (2024) (acknowledging the cost of complying with regulations while the litigation continued); *see also* Wages & White Lion Invs., L.L.C. v. FDA, 16 F.4th 1130, 1142 (5th Cir. 2021) (describing such compliance costs as unrecoverable, and thus irreparable, because the government enjoys sovereign immunity); *accord* Kentucky v. Biden, 57 F.4th 545, 556 (6th Cir. 2023); Georgia v. President of the U.S., 46 F.4th 1283, 1302 (11th Cir. 2022).

[324] That is not the only circuit split involving the irreparable-harm element of the test for preliminary injunctions. *See, e.g.*, Jasmine Hinkey, Comment, *Equitable Standards for Equitable Relief: Bridging the Circuit Split on Irreparable Second Amendment Harm*, 98 TEMP. L. REV. ONLINE 1, 16–22 (2025), https://www.templelawreview.org/lawreview/assets/uploads/2025/12/Hinkey_Volume-98-Online.pdf [perma.cc/FEY9-LUX5] (cataloging circuit split on whether to presume that Second Amendment harms are irreparable).

[325] *See* A.O. Smith Corp. v. FTC, 530 F.2d 515, 527–28 (3d Cir. 1976) ("[C]ourts ought to harken to the basic principle of equity that the threatened injury must be, in some way, 'peculiar'." ((citing Gause v. Perkins, 56 N.C. (3 Jones Eq.) 177, 179 (1857)); *see also* Cardinal Health, Inc. v. Holder, 846 F. Supp. 2d 203, 212 (D.D.C. 2012) (determining that a business had "not shown unrecoverable economic loss of the magnitude necessary to constitute irreparable harm"). *But cf.* Salt Pond Assocs. v. U.S. Army Corps of Eng'rs, 815 F. Supp. 766, 785 (D. Del. 1993) (applying *A.O. Smith Corp.* to conclude that a party's compliance costs were "'peculiar' in that they [were] not generally compensable," based on the fact that "unlike a dispute between private commercial litigants, the Plaintiff has no means of recovering for its economic damages because the Government retains sovereign immunity for its conduct").

[326] *Kentucky v. Biden*, 57 F.4th at 556.

[327] *See Ohio v. EPA*, 603 U.S. at 291–92 (quoting Thunder Basin Coal v. Reich, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and concurring in judgment) for the proposition that incurring costs to comply with regulations while awaiting the outcome of litigation are "nonrecoverable").

[328] *Thunder Basin Coal Co.*, 510 U.S. at 220–21 (Scalia, J., concurring in part and concurring in judgment).

the equitable balance—instead of engaging in gatekeeping about whether the costs qualify as irreparable harm at all.

Conclusion

At the preliminary-relief stage in high-stakes regulatory cases, equitable balancing is needed now more than perhaps ever. But it has faded from view. In the place of equitable balancing, courts are becoming increasingly focused on the merits—reaching tentative conclusions about difficult administrative law issues on an expedited timeline. That is due in part to the difficulty of balancing seemingly incommensurable interests that are "very weighty" on both sides. Yet courts need not shy away from the task. Trends in administrative law jurisprudence at the Supreme Court can point the way toward a new paradigm of equitable balancing in regulatory cases at the preliminary-relief stage.

This Article outlines four considerations for courts. First, courts should be wary about allowing novel regulations to proceed; it is better to keep the status quo in place while thinking through the agency's unheralded legal position. Second, courts should center federalism in the equitable balance even when states are not parties to the litigation. Third, courts should take serious account of the President's interest in internal management of the executive branch—a core function of the President's powers. Fourth, courts should consider how the requested remedy will impact the government's interests when determining whether to grant preliminary relief.

This Article's proposals could have at least five positive implications. First, confining preliminary vacatur of agency action would reserve this wide-reaching remedy for the times when it is most needed. Second, incorporating the Supreme Court's recent administrative law jurisprudence into equitable balancing could promote harmonious interbranch relations. Third, lower courts following cues from the Supreme Court should help alleviate the Court's tremendous emergency docket burden. Fourth, revitalizing equitable balancing could clarify the role of amicus brief filers at the preliminary-relief stage and offer them real opportunities to add value. And fifth, this Article's prescriptions can alleviate the hydraulic pressures that have negatively impacted other aspects of the framework governing the adjudication of requests for preliminary relief.