VIRGINIA LAW REVIEW

VOLUME 96 MAY 2010 NUMBER 3

ARTICLES

EQUITABLE BALANCING IN THE AGE OF STATUTES

Jared A. Goldstein[*]

INTRODUCTION.. 486
I. THE SUPRISINGLY SHORT HISTORY OF EQUITABLE BALANCING 490
- A. *The Recent Creation of the Ancient Doctrine of Equitable Balancing* 491
  - 1. *The Non-Balancing Past*.. 492
  - 2. *The Industrial Revolution and the Creation of Equitable Balancing*.. 496
  - 3. *Equitable Balancing Remained Controversial up to the Moment It Was Declared Long Established*........... 501
- B. *The Adoption of Equitable Balancing in Statutory Cases* 505
  - 1. *The Court's Rejection of Equitable Balancing When the Government Seeks an Injunction Against Private Parties* 506
  - 2. *The Court's Initial Rejection of Equitable Balancing in Statutory Cases* 508
  - 3. *The Court's Adoption and Application of Equitable Balancing in Statutory Cases*.. 510

[*] Associate Professor, Roger Williams University School of Law; Visiting Associate Professor, Department of Political Science, Brown University (2009–2010); J.D., University of Michigan, 1994. The author would like to thank Professors H. Tomas Gomez-Arostegui, Jonathan Gutoff, Diana Hassell, Peter Margulies, Colleen Murphy, and David Zlotnick for their comments on earlier drafts of this Article.

II. THE APPLICATION OF EQUITABLE BALANCING IN STATUTORY CONTEXTS CONFLICTS WITH SEPARATION-OF-POWERS PRINCIPLES 515
A. *The Application of Equitable Balancing in Statutory Contexts Involves Naked Policymaking Unrestrained by Law* 517
1. *Balancing the Equities in Statutory Cases Requires Courts to Choose Between Federal Policies*........ 520
2. *No Principles Guide Courts in Balancing the Equities in Statutory Cases* 523
B. *Equitable Balancing Allows Courts to Undermine Statutory Policies* 528
C. *The Application of Equitable Balancing in Statutory Contexts is Anomalous in Light of Other Principles of Statutory Construction* 536
III. INSTEAD OF EQUITABLE BALANCING, THE COURT SHOULD APPLY THE ESTABLISHED PRINCIPLES FOR RECONCILING APPARENTLY CONFLICTING STATUTES 539
CONCLUSION........ 546

INTRODUCTION

IN *Winter v. Natural Resources Defense Council*, the Supreme Court reached the unsurprising conclusion that national security is more important than whale watching.[1] What is surprising and should be deeply troubling is that the Court thought its job was to choose between the two. *Winter* arose when environmental groups sought an injunction to stop the Navy from using a mid-frequency sonar system in training exercises, arguing that this type of sonar harms whales and that the National Environmental Policy Act ("NEPA") requires the Navy to study the environmental impacts of the sonar system before using it.[2] The President, however, declared that emergency circumstances warranted relaxing NEPA's requirements.[3] The environmental plaintiffs countered that NEPA

[1] Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 382 (2008).
[2] Id. at 366–67.
[3] Brief for the Petitioners at 14–15, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008) (No. 07-1239).

contains no exception for emergencies.[4] As the case was presented to the Supreme Court, *Winter* posed a straightforward question of statutory interpretation: whether NEPA authorizes the President to exempt military activities from the requirement to issue an environmental impact statement.[5] The Court did not reach that question, however, ruling instead that the balance of equities would not support an injunction even if the Navy were in violation of NEPA.

For several decades the Court has held that violations of federal statutes can be enjoined only if an injunction is supported by the balance of equities, a test also known as the "balance of hardships," the "balance of interests," and the "balance of conveniences."[6] When courts balance the equities, they compare the hardship the plaintiff would face if an injunction were denied against the hardship the defendant would face if an injunction were granted.[7] In 1982, the Court established a presumption that statutes authorizing equitable relief should be read to call for equitable balancing, which the Court has declared to be an ancient judicial practice: "We are dealing here with the requirements of equity practice with a background of several hundred years of history."[8] As the Court understood the competing interests in *Winter*, the most serious harm that the plaintiffs might suffer from the denial of

[4] Brief for the Respondents at 30–35, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008) (No. 07-1239).

[5] Id.; Brief for the Petitioners, supra note 3, at 21–34.

[6] The balance of equities is one of four factors in the familiar test for obtaining an injunction, under which a plaintiff must demonstrate

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

[7] See Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) (stating that the balance of equities requires that a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief"). Although the standards for preliminary and permanent injunctive relief differ slightly, both require equitable balancing. See id. at 546 n.12. As a result, this Article addresses both preliminary and permanent injunctive relief equally and does not distinguish between the two.

[8] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 311, 320 (1982) (discussing the "traditional balancing of the parties' competing interests" and declaring that "a major departure from the long tradition of equity practice should not be lightly implied").

an injunction was that the sonar might hurt whales, which in turn might prevent the plaintiffs from going whale watching and making nature documentaries.[9] In contrast, an injunction might prevent the Navy from adequately training sailors in antisubmarine warfare, which could gravely undermine national security.[10] Seen this way, *Winter* is an easy case, pitting trivial recreational interests against the paramount needs of national security, and the Court did not hesitate to declare that the balance "does not strike us as a close question."[11]

This Article argues that the Court's experiment over the last several decades in applying equitable balancing in statutory cases should be abandoned because it conflicts with separation of powers principles. As Part I shows, the premise for applying equitable balancing in statutory cases—that equitable balancing is a longstanding factor for deciding whether to issue injunctions—is simply untrue. Balancing the equities is not a dusty doctrine discussed by Lord Edward Coke or set forth in the Commentaries of Sir William Blackstone or laid down by the Framers as a foundation of the Republic. Balancing the equities is a demonstrably modern practice. It first developed during the period of rapid industrialization following the Civil War, when some state courts sought a mechanism to protect industrial interests from injunctions in common law nuisance actions challenging air and water pollution. The courts that first developed equitable balancing presented it as an ancient practice, thereby justifying an expansion of judicial discretion to protect judicially favored policy interests, which in that era included a preference for industrial interests over the interests of small property owners. History is repeating itself because, in expanding the application of equitable balancing from the common law context in which it developed to the contexts of federal statutes, the Supreme Court has once again justified an expansion of judicial discretion by making the false claim that equitable balancing is an ancient judicial practice.

[9] The plaintiffs included members of the Natural Resources Defense Council who enjoyed whale watching and nature documentarian Jean-Michel Cousteau, son of famed oceanographer Jacques Cousteau. *Winter*, 129 S. Ct. at 371.

[10] Id. at 377–78.

[11] Id. at 378.

Part II argues that the mistaken notion that the issuance of injunctions has always depended on a balance of equities serves to obscure substantial separation-of-powers problems raised when courts balance the equities in statutory contexts. As Justice Felix Frankfurter observed, "'[b]alancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests."[12] Although the Court may believe that equitable balancing is simply what courts deciding injunctions have always done, the application of equitable balancing in statutory cases like *Winter* is remarkably new, and it serves to aggrandize judicial power by authorizing judges to resolve cases by comparing the relative importance of policies established by the political branches. *Winter* portrays the balance of equities as involving merely a comparison of the parties' interests, but those interests arise out of competing federal policies. On the one hand, the President, acting under both his constitutional and statutory authority, directed the Secretary of the Navy to provide adequate training for sailors.[13] On the other hand, Congress directed federal agencies to consider the potential environmental impacts of proposed actions.[14] Balancing the equities in *Winter* and other cases arising out of competing federal policies allows, if not requires, that judges pick which federal policy they consider most important, a task that is inconsistent with separation-of-powers principles.

As Part III argues, the Court does not need to develop an alternative to equitable balancing in statutory cases because it already has one. The Court has developed a set of principles for resolving apparent conflicts between statutes, and these principles establish neutral criteria for determining whether statutes can be reconciled and, if not, which statutory command should prevail.[15] When faced

[12] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609–10 (1952) (Frankfurter, J., concurring).

[13] See 10 U.S.C. § 5062(a) (2006) (directing that the Navy "shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea"); 10 U.S.C. § 5062(d) (2006) (directing that "[t]he Navy shall develop aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements").

[14] National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006).

[15] See Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); see also Watt v. Alaska,

with competing federal policy commands, like the conflict in *Winter* between the obligation to train sailors and to analyze the environmental impacts of proposed federal actions, courts should employ traditional tools of statutory construction to determine how Congress intended these competing policy commands to be reconciled. In contrast to equitable balancing, the principles for addressing apparent conflicts between statutes are straightforward, relatively neutral, and fairly mechanical, and they do not involve ad hoc judicial policymaking. As the Court has declared, when faced with apparently conflicting statutes, "courts are not at liberty to pick and choose among congressional enactments."[16] Yet choosing between conflicting statutory policies is exactly what the Court did in *Winter* and what equitable balancing requires.

I. THE SUPRISINGLY SHORT HISTORY OF EQUITABLE BALANCING

The development of equitable balancing illustrates the legal realist insight that judicial policy choices are often disguised as the inevitable application of longstanding principles.[17] Since 1982, the Supreme Court has held that federal courts can enjoin violations of federal statutes only if the balance of equities supports an injunction.[18] As the Court has repeatedly intoned, federal statutes authorizing injunctive relief should be read to require equitable balancing because "a major departure from the long tradition of equity practice should not be lightly implied."[19] As Section A demonstrates, equitable balancing is far from the ancient practice described by

451 U.S. 259, 267 (1981) (asserting that the courts should read federal statutes "to give effect to each if we can do so while preserving their sense and purpose").

[16] *Mancari*, 417 U.S. at 551.

[17] See Frederick Schauer, Defining Originalism, 19 Harv. J.L. & Pub. Pol'y 343, 345–46 (1996) ("[O]ne of the lessons of legal realism is a continuing skepticism about the tendency of legal actors, lawyers, judges, and legal scholars to disguise in the language of necessity what are in fact political, social, moral, economic, philosophical, or policy choices."); see also Guido Calabresi, A Common Law for the Age of Statutes 172–81 (1982) (discussing when subterfuges are preferable to candor); Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 12–15 (1910) (discussing the use of fictions in the common law, such as changing the meaning of terms rather than conceding that the rules had changed).

[18] See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312, 320 (1982); infra notes 102–13 and accompanying text.

[19] *Romero-Barcelo*, 456 U.S. at 320; see also eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

the Court. The doctrine was not applied by English equity courts and is not discussed in any of the classic treatises on equity jurisdiction. It made its first appearance in 1868.[20] The early cases adopting equitable balancing reveal that the doctrine 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. Judges believed that the harms from closing down factories generally outweighed the harms from allowing pollution to continue, and they fashioned equitable balancing as a doctrine to allow them to compare these costs. The courts that adopted equitable balancing pronounced it to be a longstanding judicial practice, but in fact there was no history of courts deciding whether to issue injunctions based on a comparison of costs and benefits. As Section B shows, the Supreme Court's late twentieth-century adoption of equitable balancing in statutory contexts followed a similar history. Like the nineteenth-century courts, the Supreme Court validated the adoption of balancing in deciding whether to enjoin violations of federal statutes on the ground that the doctrine was ancient, once again justifying an expansion of judicial discretion to determine whether injunctions are consistent with the Court's own assessments of competing policy interests.

A. The Recent Creation of the Ancient Doctrine of Equitable Balancing

As Professor Alex Aleinikoff has argued, the ubiquity of balancing tests in contemporary constitutional law has made it difficult to recognize that balancing is a modern phenomenon that represented a sharp break from the past and was highly controversial at its inception.[21] The same is true with regard to equitable balancing. As this Section shows, reports of the ancient birth of equitable balancing are greatly exaggerated.

[20] Richard's Appeal, 57 Pa. 105, 113–14 (1868); see infra notes 42–48 and accompanying text.

[21] See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 943–45 (1987).

1. The Non-Balancing Past

Equitable balancing is a late nineteenth-century creation.[22] English and American courts in the seventeenth, eighteenth, and early nineteenth centuries neither spoke of balancing the equities nor employed a balancing approach in deciding whether to grant injunctions. No mention of equitable balancing appears in any treatise on equity published during these eras. Although Lord Edward Coke, Sir William Blackstone, and Joseph Story discussed the availability of injunctions to restrain nuisances, trespasses, and other torts, among other causes of action, none of them suggested that courts of equity should undertake to balance the parties' competing interests before granting an injunction.[23] Nor is balancing mentioned in the treatises on equity and injunctions by Henry Maddock (1815), Robert Henley Eden (1822), or James Holcombe (1846).[24]

Of course, judicial balancing of competing interests in deciding whether to grant injunctions did not appear out of nowhere. Before courts began to balance the equities, they enjoyed considerable

[22] See Peter Charles Hoffer, The Law's Conscience: Equitable Constitutionalism in America 152 (1990) (concluding that the first American case applying equitable balancing is *Richard's Appeal*); Robert G. Bone, Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920, 59 S. Cal. L. Rev. 1101, 1159–60, 1178–79 & nn.191–93 (1986) (discussing the history of balancing in American nuisance law); John Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 534 n.58 (1978) (concluding that the balance of equities doctrine developed in British courts in the early nineteenth century for use in preliminary injunctions and was applied to permanent injunctions only at the end of the nineteenth century); see also Noga Morag-Levine, Chasing the Wind: Regulating Air Pollution in the Common Law State 86–102 (2003) (discussing the adoption of balancing by the Pennsylvania Supreme Court). But see George P. Smith II, Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence, 74 Neb. L. Rev. 658, 664, 690 (1995) (recognizing that *Richard's Appeal* is the first case employing equitable balancing but nonetheless maintaining that balancing "is to be found as an inherent part of the analytical process in all legal decisionmaking").

[23] 1 Edward Coke, Institutes of the Laws of England 24 (13th ed. 1788); 3 William Blackstone, Commentaries *201–06 (discussing ejectment, the injunctive remedy for trespass); id. at *220–22 (discussing injunction for nuisance); Joseph Story, Commentaries on Equity Pleadings (Boston, Little and Brown 6th ed. 1857).

[24] 1 Henry Maddock, A Treatise on the Principles and Practice of the High Court of Chancery (New York, Clayton and Kingsland 1817); Robert Henley Eden, A Treatise on the Law of Injunctions (London, J. Butterworth 1821); James P. Holcombe, An Introduction to Equity Jurisprudence (Cincinnati, Derby, Bradley & Co. 1846).

discretion to decide whether to grant equitable relief.[25] It was well-established that a defendant's liability did not make automatic the issuance of an injunction, which could be denied for a variety of reasons unrelated to the merits of a plaintiff's case, including the availability of adequate relief at law, unclean hands, laches, and various forms of estoppel.[26] These doctrines gave courts discretion to deny injunctions even when plaintiffs had meritorious claims, but they did not empower courts to employ balancing as a methodology for determining whether to grant an injunction. On the contrary, the courts uniformly rejected defendants' requests that courts balance the competing interests in determining either liability or remedy.

The longstanding rejection of balancing is clearest in nuisance cases, precisely the area in which the post-Civil War courts later adopted a balancing approach. As tort law developed through the mid-nineteenth century, abatement was ordinarily required whenever an ongoing activity constituted a nuisance, regardless of how profitable or important the nuisance-making activity was and regardless of how much more significant the tortious activity was relative to the injury.[27] In the seminal *William Aldred's Case*, re-

[25] See, e.g., 3 William Blackstone, Commentaries *220–21; Maddock, supra note 24, at 287 ("The court, it is said, has a discretion in such cases, and so it has; but it is not an arbitrary and capricious, but a regulated and judicial discretion; a discretion governed by established rules of equity."); 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I, at 168 (1895) ("[O]ur king's court is according to very ancient tradition a court that can do whatever equity may require.").

[26] These defenses derived from a relatively well-established set of maxims, which guided the court's discretion in issuing equitable relief. See Richard Francis, Maxims of Equity (London, J. Stephens 1726).

[27] See Annotation, Doctrine of Comparative Injury in Suit to Enjoin Nuisance, 31 L.R.A. 881, 888 (1911) ("[I]t is established by the weight of authority that where the existence of a nuisance is clearly shown, together with the fact that it is causing another material, substantial, and irreparable injury for which there is no adequate remedy at law, the injured person is primarily entitled, as a matter of right, to the issuance of an injunction enjoining or abating the nuisance, without reference to the comparative benefits conferred thereby, or the comparative injuries resulting therefrom; and in such cases the issuance of the injunction is not discretionary with the court."). As Professor Plater has explained, abatement orders and injunctions are overlapping but not identical orders, as abatement "is a functional term referring to the decision to restrict the defendant's activity," while injunctions are "remedial directives designed to implement the court's determinations on threshold questions, substantive liability,

ported by Lord Coke in 1611, a property owner complained that the "fetid and unwholesome stink" coming from a neighbor's hog farm amounted to a private nuisance.[28] The hog farmer asserted that the plaintiff was not entitled to a remedy because the hog farm was a very valuable operation, while the discomfort from the smell was minor.[29] The King's Bench rejected the argument that the court should compare the harms to the plaintiff resulting from the nuisance with the benefits that the defendant accrued from operating the hog farm; instead, the court applied the maxim *sic utere tuo ut alienum non laedas*, meaning "use your own (property) so as not to harm another."[30] *Aldred's Case* thus reflects the then-prevalent conception that property rights were absolute, which meant that a property owner's ability to obtain relief could not depend on balancing the harm to his property interests against the benefit the defendant obtained by causing that harm.[31]

Aldred's Case continued to express the governing principle through the time of Blackstone and until after the Civil War. As Lord Coke explained, the economic and social value of an activity does not establish a defense in a nuisance action: "[T]he building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters in the house, so that none can dwell there, an action lies for it."[32] The fact that polluting activity was "good and profitable" thus provided no basis for refusing to enjoin a nuisance. Writing at the end of the eighteenth century, Blackstone agreed that an actionable nuisance arose from activities that were harmful to the enjoyment of private property, whenever "one's neighbor sets up and exercises any offensive trade; as a tanner's, a tallowchandler's, or the like."[33] In these cases

and future conduct." Zygmunt J.B. Plater, Statutory Violations and Equitable Discretion, 70 Cal. L. Rev. 524, 540 (1982).

[28] William Aldred's Case, (1611) 77 Eng. Rep. 816 (K.B.).

[29] Id. at 817.

[30] Id. at 821.

[31] See Morag-Levine, supra note 22, at 40–47 (discussing *Aldred's Case*); Jeff L. Lewin, Boomer and the American Law of Nuisance: Past, Present, and Future, 54 Alb. L. Rev. 189, 195 n.30 (1990) (discussing the *sic utere* rule as an absolute liability standard); see also 3 William Blackstone, Commentaries *119 ("And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property.").

[32] *Aldred's Case*, 77 Eng. Rep. at 821.

[33] 3 William Blackstone, Commentaries *217.

and all other nuisance actions, the value and legality of the defendant's actions provided no defense: it was irrelevant to Blackstone that "these are lawful and necessary trades."[34]

Although *Aldred's Case* shows only that courts rejected a balancing approach in establishing liability for nuisances, rather than in addressing the standard for remedies, no case before 1868 suggests that balancing was any more appropriate in determining remedies than in establishing liability. Blackstone explained that property owners complaining of nuisances could obtain either damages or an abatement order, neither of which depended on balancing.[35] Blackstone further stated that a party operating a factory that emits pollution constituting a nuisance is under a legal obligation not merely to pay damages but to take action to cease creating the nuisance:

> "[I]f one erects a smelting house for lead so near the land of another, that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance . . . . [And] *it is incumbent on him to find some other place to do that act, where it will be less offensive*."[36]

Blackstone gives no suggestion that a tortfeasor's obligation to cease a tortious activity depended on a comparison between the degree of harm and the costs of abatement.[37]

To be sure, doctrines established before the development of equitable balancing gave courts limited authority to examine the costs of both granting and denying injunctions. For instance, nineteenth-century courts could, to a limited degree, examine the extent to which a plaintiff's injury would be alleviated by an injunction be-

---

[34] Id.

[35] Id. at *219–22.

[36] Id. at *217–18 (emphasis added); see also Morag-Levine, supra note 22, at 45–46.

[37] Reviewing the works of several legal historians, Professor Leslie Rosenthal concluded that the English courts "would almost invariably grant an injunction to restrain a continuing nuisance, and the courts became, and remain, reluctant to use anything other than injunctions in nuisance cases." Leslie Rosenthal, Economic Efficiency, Nuisance, and Sewage: New Lessons from *Attorney-General v. Council of the Borough of Birmingham*, 1858–1895, 36 J. Legal Stud. 27, 35 (2007) (citation omitted); id. at 33 ("Regarding the place of a social utility or balance-of-convenience defense for nuisance, traditionally, following *Aldred's Case* (77 Eng. Rep. 816 [1619]), the established general rule for nuisance has been that the utility or benefit from the actions causing the nuisance was no defense.").

cause equitable principles established that injunctions could not be issued for de minimis harms.[38] Likewise, when a plaintiff delayed bringing suit, and a defendant asserted the defense of laches, courts considered whether the delay had unreasonably caused the defendant prejudice, an examination that could encompass consideration of the costs that an injunction would impose on the defendant.[39] Such doctrines gave courts of equity limited authority to consider the benefits to the plaintiff from receiving an injunction, as well as the costs that an injunction would impose on defendants. Yet no doctrines allowed courts to *compare* the costs and benefits that would result from granting or withholding an injunction. While it may appear to be a small step to move from independently examining the costs and benefits that would result from granting or denying injunctions to *comparing* the costs and benefits in applying a balancing test, the movement to a balancing test represents a dramatic expansion of judicial power. As the next section shows, when courts embraced the authority to compare costs and benefits, they became empowered to consider whether, all things considered, granting an injunction would do more good than harm, a previously unknown judicial power.

2. The Industrial Revolution and the Creation of Equitable Balancing

Before the industrial revolution, nuisances tended to be caused by relatively small enterprises, and the parties on each side in nuisance actions—farmers, homeowners, and small industrial concerns—typically were of roughly equal economic size.[40] Over the course of the nineteenth century, however, as factories grew larger

[38] See, e.g., Walter v. Selfe, (1851) 64 Eng. Rep. 849, 852 (Ch.) ("[O]ught this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"); S.S. Peloubet, A Collection of Legal Maxims in Law and Equity ¶ 411, at 50 (New York, Diossy 1880) (citing the maxim *de minimis non curat lex*).

[39] See 2 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 419 (San Francisco, Bancroft-Whitney 5th ed. 1941).

[40] See Oliver Wendell Holmes, The Path of the Law, *in* Collected Legal Papers 183 (1920).

and more numerous, defendants in nuisance actions were often much more economically important than the plaintiffs, and courts began to question whether it made sense to shut down enterprises that made millions of dollars and employed thousands of employees in order to protect a few poor farmers.[41] No existing doctrine, however, authorized courts to deny an injunction based on the court's conclusion that the injunction would be economically inefficient. Equitable balancing developed to fill that need.

Richard's Appeal, decided by the Pennsylvania Supreme Court in 1868, is recognized as the first case in which a court balanced the equities to determine whether to grant an injunction.[42] In that case, a homeowner sought an injunction to stop an iron manufacturer from burning coal and discharging soot and smoke, which the plaintiff claimed made his house uninhabitable.[43] Agreeing that the air pollution constituted an ongoing nuisance, the court nonetheless ruled that an injunction should not be issued. As the court concluded, iron manufacturing was a lawful business and could not be conducted without burning coal and discharging smoke and soot.[44] The court explained that an injunction was a discretionary remedy, which should not be issued without comparing the benefits of the injunction against its costs: "It is elementary law, that in equity a decree is never of right, as a judgment at law is, but of grace. Hence the chancellor will consider whether he would not do a greater in-

[41] For instance, in *Crowder v. Tinkler*, (1816) 34 Eng. Rep. 645 (Ch.), Lord Chancellor Eldon signaled that courts should consider the economic and social consequences of issuing injunctions against large enterprises. Property owners had sought an injunction against the construction of a gunpowder mill, which they alleged would cause pollution that would damage their property. The court declared that, before issuing an injunction, courts should weigh the consequences: "[G]reat caution is required in granting an Injunction of this nature, where the effect will be to stop a large concern in a lucrative trade." Id. at 646. The court did not, however, purport to compare the benefits from the manufacturer of gunpowder against the costs to the plaintiffs of having the mill nearby.

[42] Richard's Appeal, 57 Pa. 105 (1868); see Hoffer, supra note 22, at 152 (describing *Richard's Appeal* as the first case to employ a balance of equities analysis); George P. Smith II & Griffin W. Fernandez, The Price of Beauty: An Economic Approach to Aesthetic Nuisance, 15 Harv. Envtl. L. Rev. 53, 60 (1991) (same); David E. Cole, Note, Judicial Discretion and the "Sunk Costs" Strategy of Government Agencies, 30 B.C. Envtl. Aff. L. Rev. 689, 716 (2003) (same).

[43] *Richard's Appeal*, 57 Pa. at 106.

[44] Id. at 111–12.

jury by enjoining than would result from refusing."[45] In considering whether ordering an injunction would "do a greater injury" than denying an injunction, the court noted that the iron works represented a $500,000 investment and employed over one thousand men, while the plaintiffs suffered only minor property damage. Injunction denied.[46]

In describing the balance of equities as "elementary law," *Richard's Appeal* suggests that the court was applying a well-established doctrine, but no previous cases can be identified in which judges openly engaged in such balancing.[47] One might suppose that, although the language of balancing was new, it nevertheless described existing equity practice; but, as discussed above, no doctrine allowed courts to compare the costs and benefits of granting an injunction. Certain doctrines like laches allowed courts to examine the costs that an injunction might impose on the defendant, while other doctrines, such as the de minimis doctrine, allowed courts to examine the benefits that an injunction would bring. Deciding whether the costs of granting an injunction outweighed the costs of denying it was unknown. Untroubled by the novelty of this methodology, several other courts in the late nineteenth century adopted balancing and likewise presented it as a longstanding equitable practice.[48]

Although the courts that first created and adopted equitable balancing presented it as a longstanding practice, they were refreshingly honest that the principal virtue of balancing was that it protected industry from injunctions for the mere inconveniences caused by pollution. For instance, in the 1886 case of *Pennsylvania Coal Co. v. Sanderson*, the Pennsylvania Supreme Court held that neither damages nor an injunction should be issued to abate water pollution from coal mining, explaining that "[t]o encourage the de-

[45] Id. at 113–14.

[46] Id. at 107, 114.

[47] As scholars have noted, the two cases cited by the court for the notion that balancing was elemental did not actually involve balancing. See Hoffer, supra note 22, at 152–53; Smith & Fernandez, supra note 42, at 57–60.

[48] For instance, in 1889 the Alabama Supreme Court described balancing as the rule that applies whenever injunctions are sought against nuisances, Clifton Iron Co. v. Dye, 6 So. 192, 193 (Ala. 1889), and in 1897 a federal circuit court described equitable balancing as "the recognized rule of the cases, both English and American, state and federal." R.R. & Tel. Cos. v. Bd. of Equalizers, 85 F. 302, 308 (C.C. Tenn. 1897).

velopment of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."[49] The "trifling inconveniences" from which plaintiffs sought relief included the claims that coal mining wastes had made the local stream unfit for domestic use and killed all the fish living in it.[50] The court did not deny that these "inconveniences" caused the plaintiffs cognizable injuries, nor that coal mining near the plaintiffs' homes constituted a nuisance. Instead, the court ruled that an injunction should not be issued because these injuries were insignificant compared to the benefits from coal mining.[51]

As it developed, equitable balancing empowered courts to undertake ad hoc cost-benefit analysis, as can be seen in *Madison v. Ducktown Sulphur, Copper & Iron Co.*, a 1904 Tennessee case that has become celebrated as a typical common law nuisance action employing equitable balancing.[52] The plaintiffs were farmers who complained that smoke from the defendant's open-air copper smelting operation destroyed the trees and crops on their property and made it difficult to live in their homes.[53] The court agreed that the smelting operation constituted a nuisance but held that the balance of equities did not support an injunction. On the one hand, an injunction would protect the plaintiffs' property, which was worth less than $1000. On the other hand, an injunction would cause significant economic disruption because it would destroy "property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises, that are engaged in work of very great importance, not only to their owners, but to the state, and to the whole country as well."[54] As the court saw it, the plaintiffs would suffer a small loss if an injunction were denied, while the defendants would

[49] Pa. Coal Co. v. Sanderson, 6 A. 453, 459 (Pa. 1886).

[50] Id. at 453, 454.

[51] Id. at 459, 465.

[52] Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 664–65 (Tenn. 1904). The case has become part of the environmental law canon and appears in several environmental casebooks, including David M. Driesen & Robert W. Adler, Environmental Law: A Conceptual and Pragmatic Approach 42–45 (2007); Robert W. Percival, et al., Environmental Regulation: Law, Science, and Policy 67–69 (6th ed. 2009); Zygmunt J.B. Plater et al., Environmental Law and Policy: Nature, Law, and Society 164 (4th ed. 2004).

[53] *Ducktown Sulphur*, 83 S.W. at 659.

[54] Id. at 666–67.

suffer a much larger loss, which in turn would cause ripple effects in the local, state, and national economies. In the absence of balancing, the court may have had no doctrinal basis to deny an injunction, but, once the costs and benefits of an injunction were openly weighed, the court's decision was easy: "We think there can be no doubt as to what the true answer to this question should be."[55]

It bears emphasis that, in the era in which equitable balancing developed, common law courts, not legislatures, were the primary institutions setting industrial regulations.[56] Equitable balancing gave courts an important mechanism for establishing industrial policies by allowing them to decide whether it would be efficient to order pollution controls by comparing the benefits of industrialization against the costs of pollution controls.[57] The courts made clear that in their view the balance ordinarily tipped heavily in favor of industry. In a memorable passage, a Pennsylvania court penned this ode to air pollution:

> While smoke per se is objectionable and adds nothing to the outer aesthetics of any community, it is not without its connotational beauty as it rises in clouds from smoke stacks of furnaces and ovens (and even gob fires) telling the world that the fires of prosperity are burning,—the fires that assure economic security to the workingman, as well as establish profitable returns on capital legitimately invested.[58]

The court declared that the costs of preventing air pollution were too high compared to the value of industry: "[W]e cannot give Mediterranean skies to the plaintiffs, when by doing so, we may send the workers and bread-winners of the community involved to the Black Sea of destitution."[59] As the Pennsylvania Supreme

---

[55] Id. at 666.

[56] See Frank Dobbin, Forging Industrial Policy: The United States, Britain, and France in the Railway Age 2 (1994).

[57] See Hoffer, supra note 22, at 157 (asserting that within decades after the creation of equitable balancing, the practice had become "an extensively researched and argued invitation to the chancellor to manage controversy over industrial pollution and waste disposal").

[58] Versailles Borough v. McKeesport Coal & Coke Co., 83 Pittsburgh Legal J. 379 (Pitt. Co. Ct. 1935).

[59] Id. at 394.

Court later declared, "one's bread is more important than landscape or clear skies."[60] After all, the court explained, "[w]ithout smoke, Pittsburgh would have remained a very pretty *village*."[61]

Once empowered to openly balance competing interests in the context of remedying industrial pollution, courts put the power to increasing use. Having gained a foothold in nuisance actions, equitable balancing began to be used in other causes of action, including trespass, contract, and copyright.[62] Courts also began to employ equitable balancing not merely to decide whether to issue an injunction, but in tailoring the remedy. For instance, under the guise of equitable balancing, some courts issued injunctions that required factories to employ the best available technologies for controlling pollution, striking a middle ground between ordering factories to shut down and allowing uncontrolled pollution.[63] Equitable balancing even crossed the line from being merely a remedial doctrine for determining whether to issue injunctions and began to be employed by some courts to determine nuisance liability itself.[64] The age of balancing had begun.

3. Equitable Balancing Remained Controversial up to the Moment It Was Declared Long Established

Notwithstanding the expressions by some nineteenth-century courts that equitable balancing was the accepted rule, the doctrine remained controversial at least into the 1930s.[65] An 1893 treatise on

---

[60] Waschak v. Moffat, 109 A.2d 310, 316 (Pa. 1954).

[61] Id.; cf. Griffin v. Southern Ry. Co., 64 S.E. 16, 17 (N.C. 1909) ("It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises, or the progress of works prosecuted apparently for the public good, as well as for private gain.").

[62] See Hoffer, supra note 22, at 154–57; W. Page Keeton, Notes on "Balancing the Equities," 18 Tex. L. Rev. 412, 412–13 (1940); Comment, Injunction-Nuisance-Balance of Convenience, 37 Yale L.J. 96, 100 nn.15–16 (1927) (collecting cases).

[63] See, e.g., Smith v. Staso Milling Co., 18 F.2d 736, 739 (2d Cir. 1927).

[64] Indeed, the Restatement (Second) of Torts endorses this approach. See Restatement (Second) of Torts § 826 (1977). Under this approach, courts balance the equities at both the liability and remedial stages.

[65] Bone, supra note 22, at 1178; Developments in the Law: Equity—1933, 47 Harv. L. Rev. 1174, 1197 n.192 (1934) (stating that "there is some conflict of opinion as to the acceptance of this relative interests doctrine" and citing conflicting cases and treatises). Zechariah Chafee, Jr., writing in 1930, criticized a treatise on equitable remedies because it "cites no cases rejecting the doctrine." Zechariah Chafee, Jr., Book

nuisance bluntly denied that courts ever engaged in balancing in determining whether to issue injunctions.[66] In 1919, the leading treatise on equitable remedies recognized that some courts had adopted a balancing approach but nonetheless declared that "[t]he weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction."[67] As late as 1929, balancing was described as the minority position.[68]

Courts rejected equitable balancing both for substantive and institutional reasons. The principal substantive objection to balancing was that it required courts to set a price on individual rights, most importantly property rights. As one treatise writer put it, "[r]ights are not to be measured, so it is said, by their money value, neither are wrongs to be tolerated because it may be much to the advantage of the wrongdoer."[69] To compare the costs of granting and denying an injunction, courts would have had to measure the

---

Review, 43 Harv. L. Rev. 840, 842 (1930) (reviewing Fred F. Lawrence, A Treatise on the Substantive Law of Equity Jurisprudence (1929)).

[66] 2 H.G. Wood, A Practical Treatise on the Law of Nuisances in their Various Forms; Including Remedies Therefor at Law and in Equity § 801, at 1176–77 (3d ed. 1893) ("Courts do not stop to balance conveniences; if a substantial legal right is invaded by the unlawful exercise of a trade or use of property by another, the smallness of the damage on the one side, or its magnitude on the other, is not a fact ordinarily of any special weight, but if the right and its violation are clear, an injunction will issue regardless of consequences.").

[67] 5 John Norton Pomeroy, Jr., Pomeroy's Equity Jurisprudence and Equitable Remedies § 1944, at 4416 (2d ed. 1919).

[68] Note, Nuisance—Absence of Negligence—Economic Unavoidability as Defense, 77 U. Pa. L. Rev. 550, 552 (1929). Even in jurisdictions that adopted balancing, many courts did so only for preliminary injunctions but not for permanent injunctions, while other courts, notably the United States Supreme Court, rejected balancing in cases involving government parties. See Georgia v. Tenn. Copper Co., 206 U.S. 230, 236–39 (1907), discussed infra notes 82–84 and accompanying text; George L. Clark, Equity: An Analysis and Discussion of Modern Equity Problems, with Notes on Illinois Cases § 212, at 275 (1920); 3 Thomas Atkins Street, Federal Equity Practice: A Treatise on the Pleadings Used and Practice Followed in Courts of the United States in the Exercise of Their Equity Jurisdiction § 2437, at 1418 (1909) ("The doctrine of the balance of convenience or injury, which often determines the granting or refusal of a preliminary injunction, has little or no application on final hearing.").

[69] Street, supra note 68, at 1418; Hulbert v. Cal. Portland Cement Co., 118 P. 928, 932 (Cal. 1911) ("There can be no balancing of conveniences when such balancing involves the preservation of an established right."); see also Bone, supra note 22, at 1178 (explaining that some nineteenth-century courts concluded that "an absolute right to injunctive relief followed automatically from the fact that defendant had invaded plaintiff's property right . . . since the value of plaintiff's property right could not be measured in monetary terms").

significance of harm to property rights imposed by a nuisance, but reducing property rights to an economic value conflicted with the understood nature of individual rights as nearly absolute trumps that could not be sacrificed in the name of efficiency.[70] As one court that rejected balancing put it, "every substantial, material right of person or property is entitled to protection against all the world."[71] As these courts understood it, balancing was inappropriate because it required courts to calculate the incalculable.

A related substantive objection was that, because equitable balancing required that property rights be monetized, balancing would treat some property rights as more important than others, unfairly favoring the rich and powerful over the poor and weak. In *Whalen v. Union Bag & Paper Co.*, the New York Court of Appeals granted an injunction shutting down the operation of a million-dollar pulp mill that polluted a stream and caused about one hundred dollars of damage to the plaintiff's property.[72] The court rejected a balancing approach because it would favor the wealthy:

> Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich.[73]

By some accounts, New York continues to reject the balance of equities doctrine.[74]

[70] See 1 William Blackstone, Commentaries *134 ("The third absolute right, inherent in every Englishman, is that of property . . ."); cf. Ronald Dworkin, Taking Rights Seriously 193–95 (1977) (discussing rights as "trumps"). But see Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 727 (1998).

[71] Woodruff v. N. Bloomfield Gravel Mining Co., 18 F. 753, 807 (C.C. Cal. 1884).

[72] Whalen v. Union Bag & Paper Co., 101 N.E. 805, 806 (N.Y. 1913).

[73] Id. at 806; cf. *Woodruff*, 18 F. at 807 ("If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few.").

[74] See, e.g., Boomer v. Atl. Cement Co., 257 N.E.2d 870, 872 (N.Y. 1970) (declaring that *Whalen*'s rejection of the balance of injuries "authoritatively states the rule in New York"). But see Daniel A. Farber, The Story of *Boomer*: Pollution and the Common Law, 32 Ecology L.Q. 113, 126 (2005) ("On a first reading of the opinion, *Boomer* appears to overrule the *Whalen* rule.").

In addition to these substantive objections, courts rejected balancing on the institutional ground that balancing was incompatible with the judicial role. Weighing the relative interests presented in a case was thought by some to be a legislative task and therefore beyond the power of the court. As one judge put it, "I am not sitting here as a committee of public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, not to Birmingham only, but to all England; that is not my function."[75] Courts thus declared that their job was simply to prevent the violation of rights, regardless of the consequences to the defendants or the public.[76] Even advocates of balancing sometimes described it as "legislative" in character.[77]

Notwithstanding these criticisms, by the 1930s, equitable balancing had become a relatively accepted practice. In 1939 the American Law Institute issued the first Restatement of Torts, which gave its partial imprimatur to equitable balancing, agreeing that the relative hardship of the parties resulting from granting or denying an injunction was an appropriate factor for courts to consider in deciding whether to issue an injunction.[78] By 1943 equitable balanc-

[75] *Woodruff*, 18 F. at 806 (quoting Attorney Gen. v. Council of Birmingham, 4 Kay & J. 539 (1858)).

[76] See id. at 806 ("We are simply to determine whether the complainant's rights have been infringed, and, if so, afford him such relief as the law entitles him to receive, whatever the consequence or inconvenience to the wrong-doers or to the general public may be."); Williams v. Haile Gold Mining Co., 66 S.E. 117, 118 (S.C. 1909) ("[T]he court could not have considered, in deciding whether to grant or refuse the injunction, the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream. That question would be pertinent only in an application addressed to the Legislature . . .").

[77] See Comment, Injunction—Nuisance—Balance of Convenience, 37 Yale L.J. 96, 100 (1927) (acknowledging the legislative nature of balancing but asserting that courts are "active, potent, and not undesirable lawmaker[s]"); cf. Benjamin N. Cardozo, The Nature of the Judicial Process, 113–14 (Yale University Press) (1921) (discussing the legislative aspect of judicial balancing of interests).

[78] Restatement of Torts § 941 (1939). The Restatement rejected as overly simplistic, however, what it termed the "balance of convenience" approach, under which courts simply considered the benefits and costs of granting or denying an injunction. Id. at cmt. a. ("The law does not grant an injunction merely because of the advantage which the plaintiff might reap from it, and it does not refuse an injunction merely because of the convenience which that refusal might afford the defendant."). Instead, the Restatement suggested that the balance of equities should also seek to weigh the parties' relative responsibility for the harm and the parties' good faith, among other factors. Id. at cmt. b.

ing had become entrenched as a factor for deciding injunctions, and Justice Frankfurter described balancing the equities to be among the "usual considerations governing the exercise of equity jurisdiction."[79] After all, the Supreme Court explained the following year, "[w]e are dealing here with the requirements of equity practice with a background of several hundred years of history."[80]

B. The Adoption of Equitable Balancing in Statutory Cases

In 1944 the Supreme Court characterized equitable balancing as a well-established factor for determining whether to issue injunctions in private litigation, but it was not until 1982 that the Court first held that balancing should also be used to determine whether to enjoin violations of federal statutes.[81] In the years between 1944 and 1982, it appeared that the Court considered equitable balancing inappropriate—perhaps even unconstitutional—in determining whether to enjoin statutory violations. Eventually, however, the Court embraced equitable balancing whenever injunctions were sought against the government for violating federal statutes. The Court adopted equitable balancing in statutory cases essentially for the same reasons that state courts had adopted equitable balancing in common law actions. Just as state court judges sought a doctrine that would give them discretion to deny injunctions that they believed would do more harm than good, such as an injunction that shut down a large factory to protect a few dirt farmers, so the Supreme Court sought a doctrine under which it could avoid enjoining violations of federal statutes when the Court perceived that an injunction would do more harm than good. The supposedly ancient doctrine of equitable balancing once again filled that need.

[79] Burford v. Sun Oil Co., 319 U.S. 315, 345 (1943) (Frankfurter, J., dissenting).

[80] Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

[81] See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (holding that equitable balancing should be applied in determining whether to enjoin violations of the Clean Water Act); Yakus v. United States, 321 U.S. 414, 440 (1944) (stating that "in suits in which only private interests are involved" courts exercise their equitable discretion by "balanc[ing] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction").

1. The Court's Rejection of Equitable Balancing When the Government Seeks an Injunction Against Private Parties

In the first cases in which the Supreme Court addressed equitable balancing, the Court ruled that federal courts should not balance the equities when the government seeks an injunction against private parties. *Georgia v. Tennessee Copper* was a public nuisance action brought by the State of Georgia for an injunction to stop air pollution coming into the state from the same Tennessee smelting operation at issue in *Ducktown Sulphur*.[82] Writing for the Court, Justice Holmes stated that the balance of equities might have precluded an injunction if the case had involved private parties, but the Court could not balance the state's interests in protecting its sovereign territory against the smelter's interest in continuing to operate without pollution controls.[83] Granting the injunction without balancing the equities, the Court declared that whether an injunction would do more harm than good was for Georgia to decide, not the Court.[84]

In 1940 the Court first addressed the application of equitable balancing in a statutory context and squarely rejected it.[85] *United States v. City of San Francisco* arose when the United States sought an injunction against the city and county of San Francisco for selling electrical power in violation of the Raker Act, which had granted California the right to dam, divert, and use water from the Hetch-Hetchy Valley in Yosemite National Park, subject to certain conditions. San Francisco argued that, even if its actions violated the conditions imposed by the Raker Act, an injunction should not

[82] Georgia v. Tenn. Copper Co., 206 U.S. 230, 236 (1907). Between the two cases, the Ducktown smelter had changed its smelting method from open air roasting to using smokestacks, which had the effect of protecting the local areas from sulfur dioxide but sending the smoke across the state line to Georgia, where it destroyed forests and polluted streams. See Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 Duke L.J. 931, 943 (1997).

[83] *Tenn. Copper*, 206 U.S. at 237–38 ("The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small.").

[84] Id. at 239 ("Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine.").

[85] United States v. City of S.F., 310 U.S. 16, 30 (1940).

be granted because it was unsupported by the balance of equities.[86] Writing for the Court, Justice Black, a strong opponent of balancing tests in other cases, rejected the invocation of balancing in the statutory context.[87] As Black concluded, balancing was not called for in the face of a clear statutory violation:

> [T]his case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued. The City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted.[88]

Just as the Court had rejected balancing when Georgia sought an injunction, the Court rejected balancing the equities when the United States sought an injunction.[89]

Nonetheless, several years later, the Court suggested that equitable balancing might apply when the government seeks an injunction for statutory violations when it made clear that establishment of a statutory violation did not automatically mandate an injunction, although the Court stopped short of declaring that equitable balancing should necessarily apply.[90] In *Hecht v. Bowles*, the United States sought an injunction against a department store for selling goods at prices higher than those allowed under the wartime Emergency Price Control Act. The store had apparently violated the law inadvertently and, by the time the case reached the Supreme Court, the store had come into compliance. The lower courts had concluded that an injunction was not necessary to ensure continued compliance, but the United States nonetheless argued that an injunction was mandatory in the face of proof of a

[86] Id.

[87] Id. at 30–31. Black famously rejected balancing approaches in constitutional cases. See, e.g., Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring) ("Those who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary.").

[88] *City of S.F.*, 310 U.S. at 30.

[89] Id. at 31 ("The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use—in violation of that policy—of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary.").

[90] Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944).

statutory violation. The Court disagreed, ruling that the statute preserved the courts' discretion to employ "traditional practices" in deciding whether to issue injunctions.[91] *Hecht* did not address whether these traditional practices included equitable balancing, although other cases from the era support this conclusion.[92] Yet *Hecht* made clear that the equitable considerations governing the issuance of injunctions in common law cases must be adjusted in the context of statutory violations. As the Court declared, "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases."[93]

2. The Court's Initial Rejection of Equitable Balancing in Statutory Cases

In 1978, in *Tennessee Valley Authority ("TVA") v. Hill*,[94] the famous snail darter case, the Supreme Court first addressed whether equitable balancing should govern a private party's motion to enjoin the government for violating a federal statute. Just as the Court had rejected balancing in *Georgia v. Tennessee Copper* and *United States v. San Francisco* when the government was the party seeking an injunction, so the Court in *TVA v. Hill* rejected equitable balancing when a private party sought an injunction against the government. *TVA v. Hill* arose when environmental plaintiffs sought an injunction to stop construction of the Tellico Dam on the ground that the project would violate the Endangered Species Act ("ESA") by eradicating the snail darter, a species of fish that lived only in the Little Tennessee River.[95] By the time the case reached the Supreme Court, it had largely been resolved that construction of the dam would violate the ESA, leaving the question of remedy as the main issue before the Court.

Like many other federal statutes, the ESA authorizes injunctive relief without specifying any standard for when injunctions should

[91] Id.

[92] See Yakus v. United States, 321 U.S. 414, 440 (1944) (describing equitable balancing as the norm in private litigation).

[93] *Bowles*, 321 U.S. at 331.

[94] 437 U.S. 153 (1978).

[95] *Hill*, 437 U.S. at 156–61 (1978).

be granted.[96] The United States argued that the traditional doctrine of equitable balancing should apply and that the balance would not justify an injunction because the three-inch-long snail darter was but one of 130 known darter species while the Tellico Dam was a major federal project for which Congress had committed over $100 million.[97] Justice Rehnquist alone agreed that saving an insignificant fish species did not justify sacrificing a $100 million project.[98] A majority of the Court concluded, however, that it was not appropriate for courts to balance the costs and benefits of an injunction as a remedy for a statutory violation because in the ESA Congress had intended "to halt and reverse the trend toward species extinction, whatever the cost."[99]

TVA v. Hill rejected equitable balancing for essentially the same substantive and institutional reasons that convinced some common law courts to reject balancing. First, the Court concluded that balancing would require it to assess and compare the value of seemingly incommensurable interests: a federal hydroelectric project and an endangered fish. The Court relied on separation-of-powers principles in holding that it could not make such a comparison because, as the Court read the ESA, Congress had concluded that endangered species have incalculable value: "Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not."[100] Second, the Court concluded that balancing competing interests amounts to a legislative task and therefore exceeds its judicial role:

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is," it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but

[96] Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1)(A) (2006).

[97] As Justice Stevens later described it, "Griffin Bell, then Attorney General, brought a snail darter in a glass jar into the courtroom to dramatize the de minimis character of the public interest at stake." John Paul Stevens, Learning on the Job, 74 Fordham L. Rev. 1561, 1564 (2006).

[98] *Hill*, 437 U.S. at 213 (Rehnquist, J., dissenting).

[99] Id. at 184 (majority opinion).

[100] Id. at 187–88.

> also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.[101]

Congress, the Court concluded, had already balanced the costs and benefits in favor of preservation, and the courts had no business second-guessing Congress's judgment.[102]

3. The Court's Adoption and Application of Equitable Balancing in Statutory Cases

After the Court rejected equitable balancing in *TVA v. Hill* for injunctions under the ESA, it briefly appeared that equitable balancing might not be required or even allowed before federal courts could enjoin other statutory prohibitions. In *Weinberger v. Romero-Barcelo*, decided four years after the snail darter case, the Court significantly backed away from the reasoning of *TVA v. Hill* and held that courts should not enjoin violations of the Clean Water Act unless the injunction is supported by the balance of equities.[103] Since then, the Court has construed every federal statute that it has examined to require equitable balancing. *Amoco Production Co. v. Village of Gambell* holds that the Alaska National Interest Lands Conservation Act ("ANILCA") requires equitable balancing,[104] and *Winter* extends this trend to the National Environmental Policy Act, holding that injunctions can be issued to order the government to stop violating that statute only when justified by the balance of equities.[105]

Romero-Barcelo not only holds that equitable balancing applies to the Clean Water Act, it also establishes a strong presumption that all federal statutes authorizing injunctive relief should be read

[101] Id. at 194 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[102] Id. at 195 ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'"). As the Court later more bluntly explained, "Congress, it appeared to us, had chosen the snail darter over the dam." Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982).

[103] *Romero-Barcelo*, 456 U.S. at 312, 320.

[104] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987).

[105] *Winter*, 129 S. Ct. at 376.

to require equitable balancing. As in *Winter, Romero-Barcelo* arose when environmentalists sought to stop Navy training exercises based on the allegation that the Navy violated the Clean Water Act by dropping bombs into the waters off Vieques Island in Puerto Rico, polluting the waters without a permit.[106] As in *TVA v. Hill*, the government argued that a balance of equities analysis was required before an injunction could be issued, and this time the Court agreed.[107] Declaring that equitable balancing was a "practice with a background of several hundred years of history,"[108] the Court held that it would presume that federal statutes authorizing injunctive relief required equitable balancing because "we do not lightly assume that Congress has intended to depart from established principles."[109] The strong presumption in favor of equitable balancing is thus based on the principle that statutes should be read to incorporate background legal principles, unless Congress has made clear its intent otherwise.[110]

Applying its newly fashioned presumption in favor of equitable balancing, the Court construed the Clean Water Act not to foreclose balancing.[111] The Court distinguished *TVA v. Hill* on the ground that the Endangered Species Act establishes an absolute prohibition on federal actions that jeopardize endangered species, which the Court construed to signal that Congress intended to deprive courts of their usual discretion to select among available remedies.[112] In contrast, the Clean Water Act authorizes the issuance of permits allowing pollution discharges, which the Court construed to anticipate that permitting agencies would exercise discretion and balancing, suggesting that the courts too should be

[106] *Romero-Barcelo*, 456 U.S. at 307.

[107] Id. at 311–12.

[108] Id. at 313 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).

[109] *Romero-Barcelo*, 456 U.S. at 313.

[110] As the Court has declared, "where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)); see also United States v. Texas, 507 U.S. 529, 534 (1993).

[111] *Romero-Barcelo*, 456 U.S. at 320.

[112] Id. at 314 ("The purpose and language of the statute limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.").

allowed to apply their traditional discretion in determining appropriate remedies for statutory violations.[113]

In *Amoco*, the Court applied the presumption in favor of equitable balancing that it had announced in *Romero-Barcelo* to a case arising under the Alaska National Interests Lands Conservation Act.[114] ANILCA authorizes the Secretary of the Interior to approve oil and gas development in Alaska's outer continental shelf as long as the Secretary has evaluated the effects of development on natural resources used for subsistence by native Alaskans.[115] Several native Alaskan villages sought a preliminary injunction to stop oil development by Amoco, arguing that the Department of the Interior had not fulfilled its procedural obligation to consider the effects of oil development on subsistence resources as required by ANILCA. The Court concluded that, even if the leases were approved in violation of ANILCA, operation of the leases could not be enjoined because of the balance of equities.[116] On one side of the balance, an injunction would protect the plaintiffs by preventing harm to the natural resources they used for subsistence, but the plaintiffs had not shown that oil development would cause them harm; rather, they had only shown that Interior had not properly *analyzed* whether development would damage their subsistence resources.[117]

[113] Id. at 314–16. The distinction *Romero-Barcelo* draws between the supposedly absolute prohibition established by the Endangered Species Act and the discretion embodied in the Clean Water Act finds little support in the terms of the statutes. Both statutes establish blanket prohibitions on certain broad categories of actions in order to protect environmental values—the Endangered Species Act prohibits federal agencies from taking acts that jeopardize endangered species, 16 U.S.C. § 1536 (2006), while the Clean Water Act prohibits discharges of water pollution, 33 U.S.C. § 1311(a) (2006). Both statutes likewise establish permit programs under which administrative agencies can authorize acts that would otherwise violate the prohibition. See 16 U.S.C. § 1539(a) (2006); 33 U.S.C. § 1342(a) (2006). Although both statutes envision the exercise of discretion in determining whether to grant permits, both statutes grant that discretion to executive agencies, not courts. See Michael D. Axline, Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases, 12 Harv. Envtl. L. Rev. 1, 26–27 (1988). What may instead distinguish the two cases is that the statutory violation at issue in *TVA v. Hill* was substantive, while the violation at issue in *Romero-Barcelo* was procedural. Yet the Court has not offered a justification for holding that equitable balancing should not apply to substantive violations but should apply to procedural violations.

[114] 480 U.S. 531, 542 (1987).

[115] Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a) (2006).

[116] *Amoco*, 480 U.S. at 544–45.

[117] Id.

On the other side of the balance, an injunction could cost Amoco the $70 million it had invested in the development project.[118] The Supreme Court ruled that the procedural violation alleged by the plaintiffs did not carry any weight in the balance of equities in the absence of a showing that the violation would cause substantive harm, in that case, damage to subsistence resources.[119] The Court suggested that an injunction would "usually" be required if plaintiffs show that environmental harm would occur without an injunction, but a procedural violation alone, like the failure to obtain a permit in *Romero-Barcelo* or the failure to study the impacts of development on subsistence resources in *Amoco*, carries no weight in the balance of equities.[120]

Winter extends the application of equitable balancing to NEPA and affirms *Amoco*'s conclusion that injunctions cannot be issued for violations of procedural requirements in the absence of proof that the violation is likely to cause substantive environmental harm.[121] *Winter* goes further, however, ruling that even proof of environmental damage is not always sufficient to justify an injunction when the equities on the other side are especially strong, such as the needs of national security. As in *Amoco*, the plaintiffs in *Winter* challenged a procedural violation, the failure of the Secretary of the Navy to issue an environmental impact statement analyzing the impact of the use of mid-frequency sonar on whales prior to naval training exercises involving the sonar. The plaintiffs presented evidence that some whales (the exact number was disputed, as was the extent of the harm) would be harmed by the sonar.[122] The Supreme Court suggested, however, that harm to the whales could not be considered in the balance of equities.[123] Instead, harm to the whales mattered only to the extent that it harmed the plaintiffs, because

[118] Id.

[119] Id. at 544 ("[T]he Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect—preservation of subsistence resources.").

[120] Id. at 545 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").

[121] *Winter*, 129 S. Ct. at 376.

[122] Id. at 371.

[123] Id. at 377–78.

the balance of equities takes into account injuries to the parties, not to the environment.[124] Thus, for harm to whales to carry any weight in the balance of equities, the plaintiffs would have to show that the sonar would harm enough whales that the plaintiffs' opportunities to go whale watching and make nature documentaries would be diminished. Moreover, the Court declared, even if the plaintiffs could show that the use of the sonar would result in diminished opportunities to go whale watching and make nature documentaries, that injury would pale in comparison to the interests on the other side of the balance of equities, the Navy's interest in training sailors, which the Court credited as essential to national security.[125]

In mandating that federal courts can enjoin the government's statutory violations only when an injunction is supported by the balance of equities, the Supreme Court ensured that federal courts would enjoy broad discretion to weigh the policy interests supporting and opposing the issuance of an injunction. For instance, in *Romero-Barcelo*, the Court considered the interest in national security served by bombing training to be very significant, while the interest in requiring water pollution permits was relatively trivial, at least in the absence of proof that the violation caused environmental harm.[126] In the "traditional" doctrine of equitable balancing, the Court found judicial authority necessary to weigh these policy interests and to avoid issuing injunctions that struck the Court as unnecessary, wasteful, or silly.

After *Winter*, it is apparent that the Supreme Court considers equitable balancing to govern all, or practically all, injunctions issued by federal courts. The Court's adoption of equitable balancing is not limited to statutory contexts, as the Court has also ruled that equitable balancing governs a federal court's decision whether to enjoin violations of common law and the Constitution.[127] The Court has also held that equitable balancing should apply in decid-

[124] Id. at 376.
[125] Id.
[126] Weinberger v. Romero-Barcelo, 456 U.S. 305, 315 (1982).
[127] See id. at 312 (holding equitable balancing applicable in federal statutory actions); Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (holding equitable balancing applicable in constitutional litigation); Yakus v. United States, 321 U.S. 414, 440 (1944) (describing equitable balancing as the norm in private litigation).

ing whether to grant both preliminary and permanent injunctions.[128] And the Court has not distinguished between the decision whether to issue an injunction in the first place and the decision of what terms an injunction should include; equitable balancing applies to both decisions.[129] The only modern case in which the Court has rejected equitable balancing is *TVA v. Hill*, and it appears that the principles supporting that decision have little application outside the context of the Endangered Species Act.[130]

II. THE APPLICATION OF EQUITABLE BALANCING IN STATUTORY CONTEXTS CONFLICTS WITH SEPARATION-OF-POWERS PRINCIPLES

As Part I showed, the Supreme Court has falsely presented equitable balancing as an ancient judicial practice, when in fact the doctrine gained acceptance in common law cases only in the early twentieth century. The application of equitable balancing in statutory cases only goes back to 1982, when the Court embraced the practice based on the demonstrably false suggestion that the prac-

[128] See *Winter*, 129 S. Ct. at 381–82 (holding that its conclusion that no preliminary injunction should have been issued would apply equally to a motion for a permanent injunction).

[129] See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 498 (2001) ("To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.").

[130] It is somewhat unclear, however, whether equitable balancing applies when the government seeks an injunction for a private party's statutory violation. Compare *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 495–99 (stating the equitable balancing should apply when the United States seeks an injunction under the Controlled Substances Act), and Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944) (holding that "traditional equitable principles" should determine whether the government was entitled to injunctions under the federal price control statute), with California v. Am. Stores Co., 495 U.S. 271, 295 (1990) ("In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief."). The lower courts apparently have concluded that equitable balancing is not ordinarily required in government-initiated cases. See, e.g., United States v. Marine Shale Processors, 81 F.3d 1329, 1359 (5th Cir. 1996) (declaring that equitable balancing is precluded "when the United States or a sovereign state sues in its capacity as protector of the public interest"); U.S. EPA v. Envtl. Waste Control, Inc., 917 F.2d 327, 332 (7th Cir. 1990) ("[T]he law of injunctions differs with respect to governmental plaintiffs (or private attorneys general) as opposed to private individuals. Where the plaintiff is a sovereign and where the activity may endanger the public health, 'injunctive relief is proper, without resort to balancing.'") (quoting Envtl. Def. Fund, Inc. v. Lamphier, 714 F.2d 331, 337–38 (4th Cir. 1983)).

tice is longstanding. Of course, puffery regarding the history of equitable balancing does not itself make the doctrine illegitimate.[131] Yet the fiction that courts have always balanced the equities in deciding whether to grant injunctions serves to obscure significant separation-of-powers problems. Indeed, the absence of historical support for balancing the equities in statutory cases itself should give rise to separation-of-powers concerns because, in the absence of statutory or constitutional support for one branch's assertion of power, the Court has relied on the "gloss" that history has placed on the separation of powers.[132]

This Part argues that balancing the equities in statutory cases violates separation-of-powers principles. As a general matter, the Court has employed two forms of analysis in separation-of-powers cases: a formalist approach—which asks whether a challenged action is characteristically legislative, judicial, or executive in nature and therefore is constitutionally assigned to a particular branch—and a functionalist approach—which examines whether a challenged action aggrandizes one branch's power.[133] The application of

[131] Thus, even though equitable balancing has been justified by a fictitious history, it is conceivable that Congress has come to expect courts to engage in it when applying statutes authorizing injunctive relief. The preliminary injunction at issue in *Winter* was issued pursuant to the Administrative Procedure Act ("APA"), which empowers courts to enjoin agencies from taking actions contrary to law but does not specify any standards for courts to do so. See 5 U.S.C. § 706(2) (2006). Because the APA was enacted in 1946, after equitable balancing had become accepted as a factor for issuing injunctions in common law actions, see supra notes 81–82 and accompanying text, it may be plausible to construe the APA to call for equitable balancing.

[132] See Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'") (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (declaring that a long history of congressional acquiescence "may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II"); Michael J. Glennon, The Use of Custom in Resolving Separation of Powers Disputes, 64 B.U. L. Rev. 109, 128–34 (1984); Cass R. Sunstein, Minimalism at War, 2004 Sup. Ct. Rev. 47, 68 ("In the domain of separation of powers, historical practices and changes over time are highly relevant.").

[133] The formalist approach is typified by Justice Black's opinion for the Court in *Youngstown*, 343 U.S. at 582–89; Chief Justice Burger's opinion for the Court in *INS v. Chadha*, 462 U.S. 919, 923–59 (1983); and Justice Stevens' opinion for the Court in *Clinton v. City of New York*, 524 U.S. 417, 420–49 (1998). The functionalist approach is typified by the concurring opinions of Justices Frankfurter and Jackson in *Youngstown*, 343 U.S. at 593–628, 634–55; the dissenting opinion of Justice White in *Chadha*,

equitable balancing conflicts with separation-of-powers principles under either approach. Once the false sheen of an ancient pedigree is removed, the application of equitable balancing in statutory cases can be seen for what it is: an assertion of naked judicial authority to choose among competing federal policies. The interests that courts balance in statutory contexts are not merely private interests, as in common law cases, but are interests that Congress has adopted and protected by statutes. Determining the relative priority of federal policies, such as the choice between national security and environmental protection at issue in *Winter*, has long been considered to be legislative in nature.[134] The application of equitable balancing in statutory cases likewise serves to aggrandize judicial power at the expense of the political branches. That equitable balancing serves to aggrandize judicial power can be seen in the fact that the Court's assertion of policymaking power has not proven to be neutral among congressional policies but instead stacks the deck against some statutorily protected interests, especially environmental interests.[135]

A. The Application of Equitable Balancing in Statutory Contexts Involves Naked Policymaking Unrestrained by Law

The Supreme Court has long disclaimed freewheeling "policymaking" authority, and it is curious that Justices who have been among the most vocal critics of improper judicial policymaking

462 U.S. at 967–1003; and Justice Breyer's dissenting opinion in *Clinton*, 524 U.S. at 469–97. See generally Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 489 (1987) (describing the Court's vacillation between formalist and functionalist approaches to separation-of-powers issues).

[134] See TVA v. Hill, 437 U.S. 153, 194 (1978) (declaring that it is "emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation"); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[C]ourts are not at liberty to pick and choose among congressional enactments . . . .").

[135] See, e.g., Mistretta v. United States, 488 U.S. 361, 382 (1989) ("[C]oncern of encroachment and aggrandizement . . . has animated our separation-of-powers jurisprudence . . . ."); Buckley v. Valeo, 424 U.S. 1, 122 (1976) (declaring that the checks and balances inherent in our separation-of-powers scheme serve as a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

have also been the strongest supporters of equitable balancing.[136] Chief Justice Rehnquist, who criticized non-originalism as giving judges a "roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country,"[137] nonetheless was the sole Justice who supported the application of equitable balancing in *TVA v. Hill* and thought that it was his job to decide whether building a dam or saving a fish was best for the country.[138] Chief Justice Roberts, who famously testified that judges should act not like policymakers but "like umpires," wrote the opinion for the Court in *Winter*, which held that national security concerns trump environmental protections.[139] Joining Roberts's opinion in *Winter* were Justices Scalia, Thomas, and Alito, who have criticized balancing tests in constitutional cases as improper judicial policymaking and strongly rejected any judicial policymaking role.[140]

Of course, just as the Court has characterized its lack of policymaking power to be a "truism," so too have most academics dismissed the Court's rejection of judicial policymaking authority as disingenuous.[141] The Court regularly establishes "policy" in several

[136] See, e.g., Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 865 (1984) ("Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."); TVA v. Hill, 437 U.S. at 194 (declaring that it is "emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation."); Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 100 (1958) (discussing "the truism that it is the business of Congress to declare policy and not this Court's").

[137] William H. Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 698 (1976).

[138] See *TVA v. Hill*, 437 U.S. at 211–13.

[139] Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005).

[140] See Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1821 (2008) (Scalia, J., concurring) (describing judicial balancing in dormant commerce clause cases as requiring "quintessentially legislative judgments"); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring) (rejecting a balancing test on the ground that it "turns solely on policy considerations"); Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 360 (2006) ("We are not policymakers and we shouldn't be implementing any sort of policy agenda or policy preferences . . . .").

[141] Compare *NLRB*, 357 U.S. at 100 (discussing "the truism that it is the business of Congress to declare policy and not this Court's"), with Anne Bloom, The "Post-

senses of the term.[142] Courts make fundamental policy choices in construing the Constitution, which entails determining the extent of national and state power in such areas as affirmative action, abortion, and marriage. Statutory construction, too, necessarily involves a degree of judicial lawmaking, as courts must fill in gaps and resolve ambiguities, tasks that are frequently guided by policy concerns.[143] In various contexts, federal courts have power to fashion federal common law, which, like the creation of state common law, undoubtedly amounts to judicial legislation.[144]

Notwithstanding the reality of judicial policymaking, the Court's rejection of policymaking authority expresses a central principle grounded in a formalist conception of separation of powers: the nature of judicial actions, unlike actions by the political branches, must be guided by articulable legal principles. As Justice Scalia has explained:

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as judges make it, which is to say as though they were "finding" it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.[145]

Attitudinal Moment": Judicial Policymaking Through the Lens of New Institutionalism, 35 Law & Soc'y Rev. 219, 219 (2001) ("In the last several decades, the view that American judges are policymakers has become all but axiomatic among political scientists.").

[142] See, e.g., Malcolm M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 5 (1998) (defining policymaking as the "exercise [of] power" by officials "on the basis of their judgment that their actions will produce socially desirable results").

[143] See Guido Calabresi, A Common Law for the Age of Statutes 2 (1982); Richard A. Posner, Overcoming Law 229–36 (1995); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 345 (1990).

[144] See Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 3–4 (1985); Jay Tidmarsh & Brian J. Murray, A Theory of Federal Common Law, 100 Nw. U. L. Rev. 585, 586–87 (2006). But see Martin H. Redish, Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective, 83 Nw. U. L. Rev. 761, 766–67 (1989) (arguing that federal common law violates separation-of-powers principles because it is essentially a legislative task).

[145] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (emphasis omitted); see also Posner, supra note 143, at 235 ("Everyone professionally involved with law knows that, as Holmes put it, judges legislate 'intersti-

Judicial decisions that cannot be justified in terms of legal rules do not conform to rule-of-law principles. As Alexander Hamilton wrote in *The Federalist No. 78*, "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ."[146] Or as Justice Scalia more succinctly put it, the "rule of law" means the "law of rules."[147] Under this conception, improper judicial policymaking occurs when judges decide cases unguided by legal rules.[148]

As the next two sections demonstrate, the application of equitable balancing in statutory cases amounts to exactly the sort of naked judicial policymaking that the Justices comprising the *Winter* majority have long criticized. It requires judges to choose between competing policy interests based on their own view of the strengths of the competing interests, without any rule, standard, or principle to guide their discretion.

1. Balancing the Equities in Statutory Cases Requires Courts to Choose Between Federal Policies

When courts balance the equities in statutory cases, the interests on each side of the case are usually, if not always, supported by congressional policies. Yet equitable balancing provides courts no guidance for choosing between these policy interests. The Supreme Court has elided the problem that in statutory cases balancing the equities means balancing competing policies by portraying what it is doing as merely balancing the parties' interests, declaring that "courts 'must balance the competing claims of injury and must con-

tially,' which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.").

[146] The Federalist No. 78, at 430 (Alexander Hamilton) (E.H. Scott ed., 1898).

[147] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989).

[148] In this way, the principle against judicial policymaking is akin to the nondelegation doctrine, under which executive agencies can legitimately exercise legislative power if they are guided by "intelligible principle[s]." See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). See generally Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. Cal. L. Rev. 405, 473–76 (2008).

sider the effect on each party of the granting or withholding of the requested relief.'"[149] In *Winter*, the Court thus identified the competing interests as "the Navy's ability to conduct realistic training exercises" and the "plaintiffs' ability to study and observe" whales.[150] The Court then purported to compare the strength of the Navy's interests in training sailors against the plaintiffs' interests in going whale watching, concluding that it is obvious that the Navy's interest is weightier.[151] In framing the preliminary injunction decision as weighing merely the parties' competing claims of injury, the Court has sought to characterize equitable balancing as it developed in common law cases, which also focused on the particular interests of the parties.[152]

Yet the interests at stake in cases like *Winter* differ fundamentally from the interests at stake in common law cases because, in the statutory context, the competing interests are protected by statutes. It is not merely the *Winter* plaintiffs who wanted to protect whales; Congress's purpose in enacting NEPA was to protect the natural environment.[153] The plaintiffs in *Winter* were entitled to go to federal court to protect their interests in the environment only because Congress concluded that authorizing private suits would help fulfill the purposes for which it enacted NEPA.[154] By the same token, the Secretary of the Navy did not act on his own in deciding to train sailors in antisubmarine warfare; Congress had directed him to train sailors.[155] Congressional policies thus lay on both sides of the balance of equities. To "balance the competing claims of injury" in *Winter* means balancing competing congressional purposes—Congress's goal of protecting the environment by requiring environmental impact statements and Congress's goal of

[149] *Winter*, 129 S. Ct. at 376 (2008) (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987)).

[150] *Winter*, 129 S. Ct. at 377–78.

[151] Id. at 378.

[152] See, e.g., Restatement (Second) of Torts § 941 (1979).

[153] 42 U.S.C. § 4321 (2006) (declaring the congressional purpose "to promote efforts which will prevent or eliminate damage to the environment and biosphere").

[154] See 5 U.S.C § 702 (2006) (providing a cause of action to any "person suffering legal wrong because of agency action"); 42 U.S.C. § 4332 (2006) (requiring that federal agencies comply with NEPA).

[155] See 10 U.S.C. § 5062(d) (2006) (directing that "[t]he Navy shall develop aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements").

ensuring that Navy personnel are properly trained.[156] In contrast, in common law contexts, the courts, not the legislature, have determined which policy interests are relevant and thus there is no separation-of-powers problem when courts compare the relative weight of these judicially recognized interests.

Every statutory case in which the Court has addressed equitable balancing arose out of apparent conflicts between federal policies. In *TVA v. Hill*, Congress had appropriated $100 million for the construction of the Tellico Dam, which would have eliminated the darter fish, and had also prohibited all federal agencies from taking actions that jeopardize endangered species.[157] Deciding whether to enjoin construction of the dam was tantamount to deciding which of these two congressional commands—build the dam or save the fish—should take priority. The Court concluded that it could not decide the case by "balancing" the competing statutory interests.[158] As the Court concluded, Congress had authority to decide between saving the fish or building the dam; the Court's task was limited to

[156] To be sure, the Court in these cases discusses how the "public interest" would be affected by an injunction, but consideration of the public interest is understood to be a trump factor independent of the balance of equities. The standard formulation of the test for injunctive relief requires courts to consider the "public interest" in addition to considering the balance of equities. See, e.g., 13 James Wm. Moore et al., Moore's Federal Practice ¶ 65.22[3] (Matthew Bender 3d ed. 2009). Yet the conventional formulation of the public interest factor allows the public interest to be used to *restrain* the issuance of an injunction, not to justify it. As the Supreme Court recently explained, "[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must [demonstrate] . . . that *the public interest would not be disserved by a permanent injunction*." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (emphasis added). The public interest has never been understood as a factor that can justify an injunction when the balance of equities does not. In any event, the Court's identification of the relevant public interests is easily manipulated. In *Amoco*, the Court considered the public interest in oil development but not in protecting resources for native Alaskan subsistence. See Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545–46 (1987). In *Winter*, the Court considered the public's interest in national security, but not the public's interest in protecting whales or in having the government make decisions informed by environmental analysis. See 129 S. Ct. at 378.

[157] See Public Works Appropriation Act, 1967, Pub. L. No. 89-689, 80 Stat. 1002, 1014 (1966) (appropriating money to construct Tellico Dam); 16 U.S.C. § 1536(a)(2) (2006).

[158] TVA v. Hill, 437 U.S. 153, 187–88 (1978) ("Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.").

attempting to discern the priority Congress had assigned between these competing interests, not deciding the policy issue itself.

By portraying equitable balancing as involving merely a choice between the parties' competing interests, the Court hides that what it is really doing is choosing between competing statutory interests. In the line of cases in which the Court has addressed how apparent conflicts between statutes should be resolved, however, the Court has recognized that separation-of-powers principles do not allow judges to resolve such conflicts based on their own preferences among the competing statutory interests: "The courts are not at liberty to pick and choose among congressional enactments . . . ."[159] Rather than deciding which statute they prefer, courts must resolve apparent conflicts between statutes by attempting to discern congressional intent through ordinary principles of statutory construction, reading statutes to be consistent where possible, and, where harmonization is not possible, applying the later-enacted statute, a rule that gives preference to Congress's last word.[160] In contrast, in the cases in which it has applied equitable balancing, the Court has simply announced its conviction that one set of statutory interests (national security in *Weinberger v. Romero-Barcelo* and *Winter*, oil development in *Amoco Production Co. v. Village of Gambell*) is more important than another set of statutory interests (protection of the natural environment). Separation-of-powers principles dictate that these policy choices are for Congress to make, not the courts.

2. No Principles Guide Courts in Balancing the Equities in Statutory Cases

The Court's decision to resolve the conflicts in *Romero-Barcelo*, *Amoco*, and *Winter* by purporting to balance the parties' interests, while in reality choosing between competing statutory policies, might not be so troubling if the Court had established a neutral and coherent basis for balancing the competing statutory interests. No rules or even guiding principles have developed, however, for how courts should balance the equities in deciding whether to enjoin statutory violations. Equitable balancing simply instructs judges

[159] Morton v. Mancari, 417 U.S. 535, 551 (1974).
[160] See infra notes 224–27 and accompanying text.

that they may issue an injunction if they think it will do more good than harm, but the instruction to do good rather than bad is no rule.[161] Equitable balancing thus empowers courts to pick the statutory interests they consider most important based on their own policy preferences.

Even in common law contexts, no principles have developed to guide the application of any of the key elements of equitable balancing—the determination of whose interests should be balanced, what interests should be balanced, and what weight the competing interests should be assigned.[162] As one treatise declares, "[i]n balancing the equities . . . the court is not bound by a formula but is free to fashion relief molded to the needs of justice."[163] The absence of any formal principles for guiding the balance of equities is not merely this author's criticism; it derives from the nature of equity, which courts frequently assert eschews formal rules:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.[164]

The absence of any standard to guide the balance of equities has led to what one commentator has described as a "dizzying diversity of formulations," employed to describe how courts balance the equities.[165] Some courts declare that they only consider the interests of the parties, while other courts also consider the interests of the public.[166] Of the courts that consider the public interest, some weigh

[161] See, e.g., Katie R. Eyer, Administrative Adjudication and the Rule of Law, 60 Admin. L. Rev. 647, 662 (2008) ("[I]t would be difficult to characterize a legal system as even properly possessing legal rules . . . in the context of limitless government discretion.").

[162] Equitable balancing is akin to the balancing tests adopted in constitutional cases, about which Professor Aleinikoff concluded that "[n]o system of identification, evaluation, and comparison of interests has been developed." Aleinikoff, supra note 21, at 982.

[163] See 27A Am. Jur. 2d Equity § 78 (2008).

[164] Hecht Co. v. Bowles, 321 U.S. 329, 329–30 (1944).

[165] Leubsdorf, supra note 22, at 526.

[166] Id.

only the *harm* that an injunction would cause the public, while other courts also consider the *benefits* that the public would receive from an injunction.[167]

Just as no rules or principles have developed for deciding what interests should be balanced, no rules or principles have developed to guide courts in comparing them. Courts are free to balance the competing interests as they see fit, considering only the "needs of justice," broadly defined.[168] For instance, the court in *Madison v. Ducktown Sulphur, Copper & Iron Co.* declined to issue an injunction after concluding that it was more important to allow a smelting plant to continue operating than to protect the interests of individual property owners affected by the plant.[169] The Court in *Winter* likewise overturned an injunction against Navy training exercises alleged to harm whales after simply asserting that national security is more important than whale watching.[170] In other cases, courts have sought to resolve whether it is more important to protect jobs or the environment.[171] No principles govern how much weight courts should assign competing interests in economic protection, environmental protection, or national security. Instead, judges simply make ad hoc judgments on how much environmental protection they believe should be sacrificed for national security, or how many jobs they can accept should be lost to protect the environment. In doing so, courts do not usually articulate the value judgments upon which they make their decisions. *Winter* simply declared that the choice between national security and whale watching "does not strike us as a close question,"[172] while *Ducktown Sulphur* similarly declared, in choosing between protecting industrial development and protecting private property, "[w]e

[167] Id. ("Sometimes the injunction must not disserve the public interest, sometimes it must serve the public interest, and sometimes only the equities of the parties count."); David S. Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 Minn. L. Rev. 627, 637 n.42 (1988).

[168] See 27A Am. Jur. 2d Equity § 78 (2008).

[169] See supra notes 52–55 and accompanying text.

[170] *Winter*, 129 S. Ct. at 382.

[171] See Lands Council v. McNair, 537 F.3d 981, 1004–05 (9th Cir. 2008); State ex rel. Guste v. Lee, 635 F. Supp. 1107, 1127 (E.D. La. 1986) ("In essence, the court is faced with the public's interest in the environment on the one hand, and the public's interest in preventing the demise of a 50-year old industry on the other.").

[172] *Winter*, 129 S. Ct. at 378.

think there can be no doubt as to what the true answer to this question should be."[173]

The application of equitable balancing in statutory contexts raises separation-of-powers problems not merely because it requires judges to weigh competing policy interests without standards but because the interests at stake are often seemingly incommensurable or at least deeply problematic for judges to compare.[174] There is no consensus or common metric by which the value of environmental protection, economic development, or national security can be compared. As discussed in Part I, some courts resisted equitable balancing in common law nuisance cases because they considered the values at stake—property rights and economic interests—to be incomparable. These courts resolved the incommensurability problem by declaring that one set of interests—property rights—was absolute and could not be reduced to economic terms.[175] In *TVA v. Hill*, the Supreme Court resolved the incommensurability problem in a similar fashion by concluding that Congress had declared endangered species to have "incalculable" value, thus barring courts from comparing the value of the snail darter with a $100 million dam project.[176] In later cases, however, the Court has overcome the concern that it would be inappropriate for a court to compare the value of federal projects against other federally protected interests.[177] The Court has pro-

[173] Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 666–67 (1904).

[174] Professor Cass Sunstein has said that an interest is incommensurable if we cannot price it without "doing violence to our considered judgments about how these goods are best characterized." Cass R. Sunstein, Free Markets and Social Justice 80 (1997). For general discussions of the problems of incommensurability, see Brett G. Scharffs, Adjudication and the Problems of Incommensurability, 42 Wm. & Mary L. Rev. 1367 (2001); Frederick Schauer, Instrumental Commensurability, 146 U. Pa. L. Rev. 1215 (1998); Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779 (1994); Jeremy Waldron, Fake Incommensurability: A Response to Professor Schauer, 45 Hastings L.J. 813 (1994).

[175] See supra notes 31–37 and accompanying text; see also Bone, supra note 22, at 1135–226 (tracing the demise of the theory of absolute property rights).

[176] 437 U.S. 153, 187–88 (1978).

[177] *Amoco* thus expresses no qualms about judicial balancing of the value of natural resources used by native Alaskans for subsistence against the economic value of oil exploration, Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987), and *Winter* does not hesitate to compare the value of antisubmarine training against the value of whales alleged to be harmed by that training, *Winter*, 129 S. Ct. at 377–78 (2008).

vided no description of the scale it employs to compare such values.

In contrast, Justice Scalia and others have strongly criticized the use of balancing tests in constitutional cases because they give courts no criteria other than their own preferences for identifying and weighing the relevant interests at stake, allowing judges to base their decisions on their own values.[178] As Justice Scalia has asserted, "you cannot decide which interest 'outweighs' the other without deciding which interest is more important to you."[179] The same criticism applies equally when courts balance interests in statutory contexts. Judicial balancing in statutory contexts, no less than in constitutional contexts, can properly be characterized as legislative in nature because it requires comparison of seemingly incommensurable values and therefore lies beyond judicial competence.[180]

[178] Aleinikoff, supra note 21, at 972 ("A frequent criticism of balancing is that the Court has no objective criteria for valuing or comparing the interests at stake.").

[179] Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1821 (2008) (Scalia, J., concurring in part); see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 987 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the "undue burden" test "conceal[s] raw judicial policy choices concerning what is 'appropriate' abortion legislation"); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("Weighing the governmental interests of a State against the needs of interstate commerce is . . . a task squarely within the responsibility of Congress . . . and 'ill suited to the judicial function.'"); Aleinikoff, supra note 21, at 973 ("The balancer's scale cannot simply represent the personal preferences of the balancer, lest constitutional law become the arbitrary act of will today characterized as 'lochnering.'").

[180] For instance, in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008), the Supreme Court rejected an interest-balancing approach to determine the scope of the Second Amendment, concluding that the balance of competing interests had already been conducted by the Framers of the Constitution on behalf of the people. The Court declared that the Amendment "is the very *product* of an interest-balancing by the people—which Justice Breyer would now conduct for them anew." See also Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring) ("Those who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary."). See generally Laurent B. Frantz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1443–44 (1962) (discussing dispute between First Amendment balancers and literalists); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 246–52 (1961).

B. Equitable Balancing Allows Courts to Undermine Statutory Policies

Balancing the equities in common law cases does not threaten to step on the toes of the legislature because the judiciary is the source of the common law. When courts balance the equities in deciding whether to enjoin violations of federal statutes, however, they are acting in a realm in which Congress has declared the relevant policies, dictated standards for conduct, and authorized injunctions for violations of those standards. Congress presumably examined the various interests at stake and determined the appropriate balance of interests.[181] When courts decline to enjoin violations of federal statutes based on their assessments of the balance of equities, they effectively second-guess congressional policies, excusing statutory violations because they consider other policies more important than correcting the violation.[182] This sort of judicial second-guessing is precisely what equitable balancing has meant in environmental cases, the primary statutory area in which the Court has applied the doctrine. In *Romero-Barcelo*, *Amoco*, and *Winter*, the Court expressed its own judgment that the interests served by the environmental statutes are not as weighty as other statutory interests, such as oil development and national security.

To understand how equitable balancing allows courts to undermine the policies of the environmental statutes, it is necessary briefly to summarize two of those policies. First, federal environmental laws express a congressional conclusion that environmental destruction causes harm to a diffuse set of interests.[183] Under the common law, environmental destruction was prohibited only to the

[181] See, e.g., NASA v. Fed. Labor Relations Auth., 527 U.S. 229, 245 (1999) ("We must presume, however, that Congress took account of the policy concerns on both sides of the balance when it decided to enact the IGA . . . .").

[182] See Schoenbrod, supra note 167, at 635 ("It is not at all clear how balancing the equities differs, if at all, from second-guessing the decisions of legislators or others who laid down the law of liability.").

[183] As many scholars have noted, the statutory environmental regime reflects Congress's recognition of the unique nature of environmental harms. See, e.g., Richard J. Lazarus, Restoring What's Environmental About Environmental Law in the Supreme Court, 47 U.C.L.A. L. Rev. 703, 744 (2000) ("What makes environmental law distinctive is largely traceable to the nature of the injury that environmental protection law seeks to reduce, minimize, or sometimes prevent altogether."); Albert C. Lin, The Unifying Role of Harm in Environmental Law, 2006 Wis. L. Rev. 897, 907–08 (2006).

extent that it caused injury to traditionally protected interests, limited principally to property interests.[184] In enacting the modern environmental statutes, Congress concluded that the common law did not adequately protect the environment in part because it did not recognize the unique nature of environmental harm: environmental injury is often physically and temporally distant from the harmful action; environmental destruction often causes noneconomic injury, such as harm to aesthetic or recreational interests; and environmental destruction can harm interests that are nonhuman, such as plants, animals, and ecosystems, wholly separate from any harm to people.[185] Second, the federal environmental statutes embody a policy of risk prevention, under which activities that create significant risks of environmental harm, and not merely activities that actually cause harm, are prohibited.[186] By preventing acts that carry risks of environmental destruction, the modern environmental statutes adopt a much more precautionary approach than the common law, which restrained action only upon proof of actual harm.[187]

[184] See, e.g., Wood, supra note 66, § 789, at 1157 (noting that equity will not issue an injunction unless the complainant demonstrates "actual injury to the property, or to its comfortable enjoyment").

[185] See Lazarus, supra note 183, at 745–46, 748.

[186] Id. at 747 (explaining that due to the uncertainties associated with preventing environmental injury "[t]he inevitable upshot is that environmental laws that seek to prevent harm are directed to risk rather than to actual impact"). For instance, the Clean Air Act directs EPA to set ambient air quality standards at a level which, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (2006); see also Toxic Substances Control Act of 1976, 15 U.S.C. § 2605(a) (2006) (allowing EPA to prohibit chemicals that pose an "unreasonable risk of injury to health or the environment"); Clean Water Act § 307(a)(4), 33 U.S.C. § 1317(a)(4) (2006) (requiring that effluent standards for toxic pollutants promulgated under Clean Water Act shall provide "an ample margin of safety"); Safe Drinking Water Act § 1412, 42 U.S.C. § 300g-1(b)(3)(D)(4) (2006) (requiring that maximum drinking water contaminants "shall be set at a level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety").

[187] See Robert V. Percival, Responding to Environmental Risk: A Pluralistic Perspective, 14 Pace Envtl. L. Rev. 513, 515 (1997) ("The pervasiveness of uncertainty concerning the ultimate effects of environmental pollutants and toxins is the primary reason why the contemporary regulatory state displaced the common law as the first line of defense for public health. The common law's requirement of individualized proof of causal injury is very difficult to satisfy in cases where environmental pollutants cause widely dispersed, latent harm.").

In the paradigmatic case of air pollution from a factory, the common law of nuisance allows the pollution to be challenged only to the extent that it can be demonstrated to cause harm to property interests. In contrast, the statutory regime created by the Clean Air Act recognizes that air pollution creates a risk of a much wider range of harms, including illness, diminished recreational opportunities, reduced enjoyment of the natural world, harm to plants, animals, and ecosystems; and it recognizes that these effects may be felt today or many years from now, both near the source of pollution and far away.[188] To reduce the risk of such harms, Congress authorized the establishment of air pollution thresholds, above which pollution created a significant risk of causing environmental harm.[189] Congress also authorized suits by any plaintiff who can allege harm to any of these widely dispersed interests, including recreational and aesthetic interests that previously did not receive legal recognition.[190] The Supreme Court ruled early on that Congress constitutionally can create standing for harm to personal, yet widely dispersed, interests.[191]

[188] See Shi-Ling Hsu, The Identifiability Bias in Environmental Law, 35 Fla. St. U. L. Rev. 433, 466 (2008) ("For most environmental or ecological harms, which tend to be widespread and diffuse, it is difficult to identify a specific plaintiff or group of persons whom have suffered 'concrete and particularized' harm."); James Krier, Environmental Watchdogs: Some Lessons from a "Study" Council, 23 Stan. L. Rev. 623, 664 (1971) (noting the breadth and diffusion of environmental risks); Lin, supra note 183, at 908 ("[C]ommon law tort provides neither sufficient redress for widespread harms nor adequate mechanisms for anticipatory intervention. To address these shortcomings, the legal system turned to public law—legal structures based on statutes and administrative regulations."); Percival, supra note 187, at 515 ("The rise of the modern regulatory state is largely a product of the difficulties faced by the common law in responding to risks of widely dispersed, latent harm, such as the harms caused by environmental pollutants and toxins.").

[189] 42 U.S.C. § 7409(b)(1) (2006); see also Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 494–96 (2001) (Breyer, J., concurring) (discussing the scope of EPA's authority to determine air quality standards based on considerations of risk).

[190] The citizen suit provision of the Clean Water Act, for instance, provides a cause of action to anyone "having an interest which is or may be adversely affected" by an alleged statutory violation. 33 U.S.C. § 1365(a)(1)–(2), (g) (2006). The citizen suit provisions of the Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2006), and Clean Air Act, 42 U.S.C. § 7604 (2006), employ similarly broad language.

[191] Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

The Court's application of equitable balancing in environmental cases conflicts with both of these sets of statutory policies. First, equitable balancing suggests that the diffuse interests protected by the environmental statutes will not be taken seriously when it comes to granting remedies. Indeed, equitable balancing empowers, if not requires, courts to discount those interests. As applied in *Winter*, equitable balancing only takes into account the interests of the particular parties, weighing the interests of the plaintiffs in receiving an injunction against the interests of the defendants in not being enjoined. Environmental harm carries no weight independent of its effects on the parties. The potential harm to whales factors into the balance of equities only to the extent that harm to whales might deprive the plaintiffs of opportunities to go whale watching and make nature documentaries.[192] Not only does the Court disregard any intrinsic value environmental resources may have, the Court likewise does not consider the effects that a loss of whales might have on anyone other than the plaintiffs. Yet a central premise of the environmental statutes is that the harm from environmentally destructive conduct is distributed among species, among the human population, and across time.

Once the intrinsic value of the natural world and the interests of non-parties are excluded from the balance of equities, the interests that remain on the plaintiffs' side—in *Winter*, the plaintiffs' interests in going whale watching and making nature documentaries—are likely to appear so trivial as to be laughable.[193] Just as the *Winter* plaintiffs' interest in whale watching seems trivial, the same was true in *TVA v. Hill.* Whatever interest the *Hill* plaintiffs had in the continued existence of snail darters—perhaps the interest in enjoying the river in a condition in which native wildlife was present—

[192] *Winter*, 129 S. Ct. at 375, 378 (2008) (agreeing with the Navy that "even if MFA sonar does cause a limited number of injuries to individual *marine mammals*, . . . plaintiffs have failed to offer evidence of species-level harm that would adversely affect *their* scientific, recreational, and ecological interests"); see also Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff."). See generally Lin, supra note 183, at 936 ("The Supreme Court's standing cases, however, have insisted on finding harm to humans, and not just harm to the environment.").

[193] When the Court stated that "we do not question the seriousness" of the interests on the plaintiffs' side, one can almost hear the Justices trying to suppress their laughter at the weakness of those interests. *Winter*, 129 S. Ct. at 378.

can only be seen to pale in comparison to the value of a $100 million hydroelectric project. Yet as Congress recognized in enacting the federal environmental statutes, environmental destruction causes much broader injury than the injury to particular plaintiffs. The loss of whales affects not only the plaintiffs, who want to see whales; there are the interests of all affected whale watchers and documentarians; of oceanographers and marine mammal specialists; of future generations who would like to enjoy and study whales, perhaps even hunt them; as well as the widely diffused interests of everyone who benefits from healthy ocean ecosystems; and finally, there are the interests of the whales themselves, and all affected nonhuman creatures.[194]

In contrast to the widely dispersed costs imposed by environmental destruction, the benefits from a defendant's destructive activities are often much more concentrated. Considering again the paradigmatic case of a polluting factory, the benefits from not installing pollution controls accrue primarily to the factory owners, who save money they would have spent on pollution controls, increasing their efficiency and profits, while the harms from pollution are dispersed widely.[195] Because of the diffuse nature of environmental harm, injury to an individual plaintiff will often be small in comparison to the benefits from the harmful activity. Equitable

[194] See, e.g., NEPA, 42 U.S.C. § 4331(b) (2006) (directing that federal agencies "use all practicable means" to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" and to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice"); Marine Mammal Protection Act, 16 U.S.C. § 1361 (2006) (declaring that "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.").

[195] The court in *Ducktown Sulphur* thus asked how it could justify shutting down a factory that generated millions of dollars and employed hundreds of people in order to address the interests of a few dirt farmers. Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 666–67 (Tenn. 1904). In fact, the widespread environmental destruction caused by the smelting operation was felt in both Tennessee and Georgia and continues to plague the area today. Giehyeon Lee et al., Removal of Trace Metals by Coprecipitation with Fe, Al, and Mn from Natural Waters Contaminated with Acid Mine Drainage in the Ducktown Mining District, Tennessee, 17 Applied Geochemistry 569 (2002).

balancing tips the balance against environmental interests by requiring a court to consider the concentrated benefits to defendants from environmentally destructive behavior (and as a corollary, the concentrated costs of preventing that destruction), while allowing courts to discount the widely dispersed costs from environmental destruction (and as a corollary, the dispersed benefits from preventing that destruction).

This discussion is not intended to suggest that a proper weighing of costs and benefits in *Winter* would lead to a different result. It is hard to quibble with the Court's conclusion that the needs of national security outweigh the need to protect whales. Instead, what I have tried to show is that Congress sought to protect widely dispersed interests in enacting the environmental laws, but *Winter* undermines that objective by ruling that such widely diffused injuries do not count when it comes to obtaining a remedy.[196] Under the guise of applying the balance of equities, the Court has effectively expressed its disagreement with the congressional policy of protecting widely dispersed harms, or at a minimum it has disregarded that policy.

Just as equitable balancing undermines the congressional policy of protecting widely dispersed harms, equitable balancing also conflicts with the statutory policy of preventing actions that carry risks of environmental destruction and not merely actions that cause actual destruction. *Romero-Barcelo* and *Amoco* establish that the balance of equities can tip in favor of an injunction only upon proof of actual environmental degradation, and *Winter* holds that

[196] It might be argued that the traditional test for injunctive relief could consider widely disbursed harms through the consideration of the "public interest." Indeed, the standard formulation of the test for injunctive relief requires courts to consider the "public interest" in addition to considering the balance of equities. See, e.g., 13 Moore et al., supra note 156, ¶ 65.22[3] (identifying the factors courts should consider in issuing a preliminary injunction to include whether the injunction will disserve the public interest). Yet, as discussed supra in note 156, the conventional formulation of the public interest factor allows the public interest to be used to *restrain* the issuance of an injunction, not to justify it. As the Supreme Court recently explained: "According to well-established principles of equity, a plaintiff seeking a permanent injunction must [demonstrate] . . . that *the public interest would not be disserved by a permanent injunction*." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (emphasis added). The public interest has never been understood as a factor that can justify an injunction when the balance of equities does not.

proof of environmental harm is not always sufficient.[197] Yet the environmental statutes mandate action based on assessments of risk, not proof of harm.[198] Congress addressed risk rather than harm because of the uncertainties associated with predicting environmental injuries, and because the consequences of environmental destruction are often catastrophic and irreversible.[199] Yet in applying equitable balancing the Supreme Court has disagreed with Congress and concluded that injunctions should be issued for violations of the environmental statutes only upon proof that an injunction is necessary to prevent actual harm. Risk was enough for Congress, but it is not for the Court.

To be sure, the Court has repeatedly declared that equitable balancing cannot be employed to express judicial disagreement with statutory policies, but it is hard to know what to make of these declarations.[200] Notwithstanding such pronouncements, *Romero-Barcelo* held that the balance of equities precluded an injunction to stop the Navy from violating the Clean Water Act, *Amoco* held that the balance of equities precluded an injunction against the Department of the Interior for violating the Alaska National Interest Lands Conservation Act, and *Winter* held that the balance of equities precluded an injunction to stop the Navy from violating the National Environmental Policy Act.[201] In each of these cases, the Court excused statutory violations because the Court con-

[197] See supra notes 102–30 and accompanying text.

[198] See supra note 186 and accompanying text.

[199] See Lazarus, supra note 183, at 747.

[200] United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 493, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."); see also id. at 497–98 (stating that a district court's choice in the face of a proven statutory violation "is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609–10 (1952) (Frankfurter, J., concurring) ("When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion."); United States v. City of S.F., 310 U.S. 16, 31 (1940) ("The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective.").

[201] According to Professor Plater, *Romero-Barcelo* is the first case when a court employed equitable balancing to override a statutory prohibition. Plater, supra note 27, at 594.

cluded that other federal policies outweighed the policies served by these statutes.

Professor Daniel Farber has sought to reconcile what the Court has said about the separation-of-powers-based limits on equitable balancing with what it did in *Romero-Barcelo* by suggesting that the Court only allowed the government to continue its statutory noncompliance temporarily while it attempted to come into compliance.[202] Under this interpretation, *Romero-Barcelo* is a statutory cousin of *Brown v. Board of Education II*, in which the Court rejected the plaintiffs' argument that an injunction should be issued immediately to end segregation in public schools, instead authorizing temporary noncompliance while the schools moved toward desegregation "with all deliberate speed."[203] Even if *Romero-Barcelo* can be read only to allow temporary noncompliance, however, *Winter* cannot easily be construed this way because the Court not only overturned the preliminary injunction at issue but also declared that a permanent injunction could not be issued.[204] Moreover, the type of statutory violation at issue in *Winter* cannot be remedied after the violation. The point of NEPA's requirement that agencies prepare environmental impact statements is to require that the government look before it leaps; that is, it must consider the environmental impacts of proposed actions *before* committing to action.[205] An environmental impact statement issued *after* the government has already leapt does not serve NEPA's purposes because it neither contributes to informed governmental decisionmaking nor protects the public from environmentally harmful actions.

[202] See Daniel A. Farber, Equitable Discretion, Legal Duties, and Environmental Injunctions, 45 U. Pitt. L. Rev. 513, 524–25 (1984). Although he recognized that *Romero-Barcelo* "is unclear on the critical issue of the extent of equitable discretion," Professor Farber construes the case in this narrow fashion as authorizing judicial discretion only to allow temporary noncompliance. Id. Professor Plater, by contrast, construes the case more broadly as authorizing statutory violations. See Plater, supra note 27, at 594.

[203] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

[204] *Winter*, 129 S. Ct. at 381.

[205] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) ("Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.").

In declaring that equitable balancing cannot be employed to undermine statutory policies, the Court may mean nothing more than that balancing cannot be used to express open disagreement with congressional policies. The Court considered a parallel issue in the constitutional context in *Brown II* and subsequent cases that addressed the scope of available remedies to end school segregation.[206] Just as the Court has stated that equitable balancing in statutory contexts cannot be used to conflict with Congress's expressed policies, so the Court in *Brown II* declared that equitable balancing in constitutional contexts cannot legitimately give any weight to asserted interests that conflict with the constitutional rights at stake.[207] As the Court's application of equitable balancing in statutory contexts shows, however, a prohibition on considering interests contrary to statutory policies still leaves courts with considerable authority to undermine statutory policies by not taking them seriously.

C. The Application of Equitable Balancing in Statutory Contexts is Anomalous in Light of Other Principles of Statutory Construction

The Supreme Court adopted a presumption in favor of equitable balancing to address a particular statutory ambiguity: Congress frequently authorizes equitable remedies for statutory violations without providing any criteria for how courts should exercise that authority.[208] The presumption resolves this ambiguity by establish-

[206] See *Brown II*, 349 U.S. at 300.

[207] Id. at 300–01 (declaring that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them"). Accordingly, in determining how to alleviate segregation, courts could legitimately consider various administrative obstacles to desegregation but could not consider, for instance, public opposition to integration or the supposed educational benefits of segregation. Id.

[208] For instance, Section 11(g)(1) of the Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2006), the provision at issue in *TVA v. Hill*, authorizes any person to bring suit "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof" and provides the district courts with jurisdiction "to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be." The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a) (2006), at issue in *Romero-Barcelo*, employs similar language in granting the district courts jurisdiction "to enforce" the provision of the Act and permits issued under the Act. Section 706 of the Administrative Procedure

ing that courts should employ the supposedly traditional balancing technique unless clear evidence in the statute demonstrates that Congress intended to foreclose balancing. The presumption was adopted based on the principle that statutes ordinarily should be read to incorporate background legal principles,[209] but once it is recognized that equitable balancing is not a traditional methodology for determining whether to grant injunctions, the presumption in favor of equitable balancing should be recognized as anomalous. Unlike other doctrines for addressing statutory ambiguities, which seek to restrain judicial policymaking authority, the presumption in favor of equitable balancing serves to aggrandize judicial power.

The Court has long recognized that statutory construction involves a substantial amount of policymaking power, and it has adopted a variety of doctrines for resolving statutory ambiguities that have as their guiding principle the goal of constraining the courts' policymaking authority.[210] For instance, under the doctrine announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, federal courts defer to administrative agency interpretations of ambiguous statutes, as long as the agency's interpretation is reasonable.[211] *Chevron* serves an important separation-of-powers function by allocating to democratically accountable executive agencies, and not courts, the policymaking authority to determine how ambiguous statutory regimes should be implemented.[212]

Act, 5 U.S.C. § 706 (2006), provides the courts with authority to enforce the National Environmental Policy Act, at issue in *Winter*, providing in seemingly mandatory language that "[a] reviewing court shall—(1) compel agency action unlawfully withheld . . . and (2) . . . set aside agency action . . . found to be . . . without observance of procedure required by law."

[209] As the Court has declared, "where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (quoting Israndsten Co. v. Johnson, 343 U.S. 779, 783 (1982)).

[210] See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 458–59 (1989) (discussing doctrines adopted by the Supreme Court under which, "when statutes have ambiguities or leave gaps, discretionary judgments should be made by the relatively more accountable agency rather than by courts").

[211] 467 U.S. 837, 865 (1984).

[212] See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 634 (1996) (stating that *Chevron* expresses "a constitutional commitment to [federal] policymaking by more, rather than less, representative institutions"); see also 1 Laurence H. Tribe, American

The Court has adopted several other presumptions for resolving statutory ambiguities that likewise seek to limit judicial policymaking power. For instance, the Court has established a presumption against reading ambiguous statutes to empower federal courts to create federal common law.[213] The Court has explained that federal courts' power to make federal common law exists only "in the penumbra of express statutory mandates."[214] Even in these interstitial areas in which federal courts have authority to fill statutory gaps, the Court has declared that federal common law should be guided by congressional policies, not the whims of federal judges.[215] Here, too, the Court fills statutory ambiguity by limiting judicial policymaking power rather than expanding it.

The debate about judicial reliance on legislative history also illustrates the Court's rejection of broad judicial policymaking to resolve statutory ambiguities. On one side, some judges and scholars argue that courts should consult legislative history when construing ambiguous statutes because legislative history may provide insight into the intentions of Congress, thus providing courts with a basis outside their own preferences for determining the meaning of ambiguous terms.[216] On the other side, textualists argue that legislative history is too unreliable a source and is too easily manipulated to provide sufficient authority for resolving ambiguous texts, which

Constitutional Law 994 (3d ed. 2000) (stating that, though the *Chevron* doctrine "is not a rule of constitutional law *per se*, . . . it is nonetheless premised on important separation-of-powers principles"); id. at 625 ("*Chevron* embraces the assumption that if a silent or ambiguous statute leaves an interpreter room to choose among reasonable alternative understandings, the interpretive choice entails the exercise of substantial policymaking discretion."); id. at 626 (stating that *Chevron* "emphasized that our constitutional system favors relatively more accountable agencies, and not relatively less accountable courts, as repositories of policymaking discretion").

[213] City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 317 (1981).

[214] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

[215] United States v. Kimbell Foods, Inc., 440 U.S. 715, 738 (1979) ("[I]n fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy."); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966) ("If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law."). But see Martin H. Redish, supra note 144, at 766–67 (1989) (arguing that federal common law violates separation-of-powers principles because it is essentially a legislative task).

[216] See, e.g., Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 848 (1992) ("Using legislative history to help interpret unclear statutory language seems natural.").

should instead be resolved through formal rules of textual exegesis.[217] Although the two sides disagree about the legitimate sources for resolving statutory ambiguity, both sides agree that courts should rely on external sources with political legitimacy—either the statutory text alone or texts read in conjunction with other indications of congressional intent—for making the policy decisions raised by the construction of ambiguous texts.[218]

The presumption in favor of equitable balancing points in exactly the opposite direction as these other doctrines adopted to address statutory ambiguities. It announces that, when statutes are ambiguous about how courts should decide whether to enjoin statutory violations, courts are empowered to make decisions based on their own ad hoc assessments of the policy interests at stake. Equitable balancing does not require courts to consult external sources for identifying the relevant interests or the weights to assign those interests, but instead authorizes courts independently to weigh the competing values based on their own assessments of the competing policies. Thus, while the Court's usual approach to resolving ambiguities seeks to constrain judicial policymaking power, the presumption in favor of equitable balancing enlarges that power. In this way, too, equitable balancing aggrandizes judicial power at the expense of Congress.

III. INSTEAD OF EQUITABLE BALANCING, THE COURT SHOULD APPLY THE ESTABLISHED PRINCIPLES FOR RECONCILING APPARENTLY CONFLICTING STATUTES

As Parts I and II argued, the application of equitable balancing in statutory contexts is unsupported by history and conflicts with separation-of-powers principles. As this Part shows, the Court does

[217] See, e.g., Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 31–37 (1997).

[218] Additional principles of statutory construction that the Court has developed for addressing textual ambiguities include the presumption against construing federal statutes to preempt state law. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005). For the presumption against the creation of federal common law, see *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981). And for the clear statement of the rule against construing federal statutes to abrogate state Eleventh Amendment immunity, see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238–40 (1985). Unlike equitable balancing, these principles of statutory construction create relatively bright-line rules that take policy questions out of courts' hands.

not need to develop an alternative to equitable balancing for use in statutory cases because it already has one. The Court has developed a set of principles for reconciling apparently conflicting statutory commands, and these principles, designed to discern congressional intent through relatively straightforward principles of statutory construction, would resolve whether to issue injunctions in cases like *Winter* without running afoul of separation-of-powers principles.

The Court addressed *Weinberger v. Romero-Barcelo*, *Amoco Production Co. v. Village of Gambell*, and *Winter* as if they merely involved conflicts between the parties, but these cases are better understood as arising from apparently conflicting federal commands. For instance, *Winter* arose because in NEPA Congress directed that federal agencies analyze the potential environmental impact of proposed actions,[219] while the Secretary of the Navy, acting pursuant to several statutes as well as the President's constitutional power as Commander in Chief, directed that the Navy conduct antisubmarine warfare training without first issuing an environmental impact statement.[220] The plaintiffs argued that the training exercises were required to comply with NEPA, while the Secretary of the Navy argued that NEPA's environmental impact statement requirement should be relaxed because the President had declared an emergency. The other cases in which the Court has invoked equitable balancing, *Romero-Barcelo* and *Amoco*, similarly arose when federal agencies complied with one statutory requirement while neglecting others.[221]

In contrast to the Court's approach in these cases, the Court understood *TVA v. Hill* as a case arising from a clash of congressional

[219] 42 U.S.C. § 4332(C) (2006).

[220] See U.S. Const. art. II, § 2, cl. 1; 10 U.S.C. § 5062(a) (2006) (directing that the Navy "shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea"); 10 U.S.C. § 5062(d) (2006) (directing that "[t]he Navy shall develop aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements").

[221] In *Romero-Barcelo*, the Navy engaged in training exercises pursuant to one set of legal commands, but these commands allegedly conflicted with the Clean Water Act's prohibition on discharging water pollution without a permit. 456 U.S. 305, 308–09 (1982). In *Amoco*, the Secretary of the Interior granted oil and gas leases in the Bering Sea to oil companies under the Outer Continental Shelf Lands Act, but this allegedly had an adverse effect on hunting and fishing by aboriginals under the Alaska National Interest Lands Conservation Act. 480 U.S. 531, 534–36 (1987).

mandates. The Court sought to determine whether the two congressional commands at issue—build the dam and save the fish—could be reconciled and, if not, which command should control. Examining the Endangered Species Act, the Court concluded Congress had established no exceptions to the requirement that federal agencies protect endangered species that would apply to the Tellico Dam project. Nor was there any indication that, in the statutes authorizing the Tellico Dam, Congress had intended to exempt construction of the dam from the Endangered Species Act.[222] Having found that the dam construction would violate the Endangered Species Act and that Congress had provided neither an applicable exception nor an exemption for the dam project, the Court concluded that it had no choice but to issue an injunction.[223]

TVA v. Hill exemplifies the straightforward principles that the Court has developed for resolving apparent conflicts between statutes. As one writer succinctly put it, courts applying these principles simply ask, "[i]s there an irreconcilable conflict between the statutes? If so, the later in time controls to the extent of the actual conflict."[224] In other words, courts first must attempt to harmonize apparently conflicting statutes. As the Court has stated, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[225] In determining whether statutes can be reconciled, courts employ ordinary principles of statutory construction. These principles consider, among other factors, which statute more specifically addresses the issue raised by the case and whether either statute contains any indication of an applicable exemption.[226] Although the Court has adopted a strong presumption

[222] Indeed, to the extent that Congress had considered the question, Congress apparently had been under the impression that the snail darters could be relocated, allowing the dam to be built without eliminating the fish. See TVA v. Hill, 437 U.S. 153, 170–71 (1978) (reviewing the legislative history).

[223] Id.

[224] Bernadette Bollas Genetin, Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules, 51 Emory L.J. 677, 681 (2002).

[225] Morton v. Mancari, 417 U.S. 535, 551 (1974); see also Watt v. Alaska, 451 U.S. 259, 267 (1981) (asserting that the courts should read federal statutes "to give effect to each if we can do so while preserving their sense and purpose").

[226] As the Court has stated:

that statutes should be construed to be consistent, when two statutes cannot be reconciled, the Court has held that the later-enacted statute should be read to repeal an earlier statute.[227]

The rules that the Court has developed for addressing apparent conflicts between statutes are fairly mechanical and do not allow courts to do the one thing that equitable balancing requires: decide which statute embodies policies that the court considers more important. As the Court has declared, "courts are not at liberty to pick and choose among congressional enactments."[228] Yet this is precisely what equitable balancing condones and even requires.

Had the Court in *Winter* applied the principles for addressing apparent conflicts between statutes, the Court would have sought to reconcile the Secretary of the Navy's obligation to train sailors and NEPA's command to study the environmental impacts of proposed federal actions. The plaintiffs argued that the requirement to prepare an environmental impact statement before taking action applies fully to Naval training exercises, while the Navy argued that NEPA's requirements should be relaxed in the face of a presidential declaration of an emergency. This presents a straightforward question of statutory construction. Indeed, the statutory question of whether NEPA allows the President to exempt national security activities from the environmental impact statement requirement was fully briefed to the Court and was the issue that most observ-

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all.

Traynor v. Turnage, 485 U.S. 535, 547–48 (1988) (internal quotations and citations omitted). These principles date back at least to the time of the Constitution. See The Federalist No. 78 (Alexander Hamilton) (stating that where statutes conflict, a court should attempt to read the two statutes "so far as they can, by any fair construction, be reconciled to each other").

[227] See, e.g., Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) ("Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.") (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963)).

[228] *Morton*, 417 U.S. at 551.

ers believed the Court would resolve.[229] It is also a fairly easy question.

There is no obvious conflict between the command to train sailors and the requirement to study the environmental impacts of proposed federal actions, let alone the sort of irreconcilable conflict that would justify a conclusion that the duty to provide military training trumps the duties imposed by NEPA. The Navy can comply with both NEPA and the mandate to train sailors by completing an environmental impact statement before undertaking training exercises. Indeed the military routinely prepares environmental impact statements before taking action, including training exercises.[230] In the absence of a statutory conflict, courts are required to construe each statute as being fully effective, thus requiring the Navy both to train sailors and to prepare environmental impact statements for training exercises.[231]

In *Winter*, the Navy argued that NEPA authorizes the President to exempt military activities from NEPA's requirements upon a declaration of a national emergency, pointing to the text of NEPA, which requires federal agencies to undertake environmental impact analysis "to the fullest extent possible."[232] If the President declares that a national emergency requires that military training exercises be conducted without the delay that preparing an environmental impact statement can entail, the government argued, the Navy could be said to comply with NEPA "to the fullest extent possible" if it issues the impact statement after the exercises had already occurred.[233] The argument for reading NEPA to authorize the President to exempt military activities by declaring a national emergency, however, cannot be squared with text or precedent. Soon after the passage of NEPA, the Court ruled that the requirement

[229] See Brief for the Respondents, supra note 4, at 30–35; Brief for the Petitioners, supra note 3, at 21–34.

[230] A search of the Department of Defense website, http://www.defense.gov, reveals several hundred publicly available environmental impact statements, detailing the anticipated environmental impacts of vital national security programs, including the national missile defense program.

[231] See Smith v. Robinson, 468 U.S. 992, 1024 (1984) (Brennan, J., dissenting) ("[C]onflicting statutes should be interpreted so as to give effect to each . . . .").

[232] 42 U.S.C § 4332 (2006).

[233] Brief for the Petitioners, supra note 3, at 22–26 (discussing the scope and validity of 40 C.F.R. § 1506.11, which authorizes the President to declare an "emergency" and exempt federal actions from NEPA's requirements).

that agencies undertake environmental impact analysis "to the fullest extent possible" means that agencies must fully comply with NEPA and does not support an exemption unless compliance "would create an irreconcilable and fundamental conflict" with another statutory requirement.[234] There is no irreconcilable conflict between the requirement to train sailors and to undertake environmental impact analysis, which can be seen from the military's routine compliance with NEPA.

The text of NEPA does not include an exception for military activities.[235] NEPA thus contrasts with several other environmental statutes, which expressly include such an exception or which authorize the President to exempt military or other activities upon a finding of a national emergency.[236] Rather than exempting military training from NEPA or authorizing the President to exempt training exercises from NEPA, Congress's practice has been to enact legislation that exempts particular activities or projects.[237] That

[234] Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 787–88 (1976).

[235] See, e.g., No GWEN Alliance v. Aldridge, 855 F.2d 1380, 1384 (9th Cir. 1988) ("There is no 'national defense' exception to NEPA. . . . 'The Navy, just like any federal agency, must carry out its NEPA mandate 'to the fullest extent possible' . . . even though the project has serious national security implications.'") (quoting Concerned About Trident v. Rumsfeld, 555 F.2d 817, 823 (D.C. Cir. 1977)); Basel Action Network v. Mari. Admin., 370 F. Supp. 2d 57, 71 (D.D.C. 2005) (holding that NEPA does not require an environmental impact statement for federal actions taken overseas); see also Dep't of Defense, Dir. 6050.7, Environmental Effects Abroad of Major Department of Defense Actions 14 (Mar. 31, 1979) (certified current as of Mar. 5, 2004) (providing that overseas combat activities are not covered by the environmental impact statement requirement).

[236] See, e.g., 16 U.S.C. § 1533(a)(3)(B)(i) (2006) (exempting Department of Defense property from the Endangered Species Act's critical habitat provision); 33 U.S.C. § 1323(a)(C) (2006) (authorizing the President to exempt certain kinds of water pollution from the Clean Water Act's requirement upon a finding that an exemption is "paramount to the interest of the United States"); 42 U.S.C. § 7418(b) (2006) (authorizing the President to exempt federal sources and facilities from compliance with the Clean Air Act if it is "in the paramount interest of the United States"). See generally Stephen Dycus, National Defense and the Environment 16 (Univ. Press of New England 1996); Hope Babcock, National Security and Environmental Laws: A Clear and Present Danger?, 25 Va. Envtl. L.J. 105, 110–20 (2007); Stephen Dycus, Osama's Submarine: National Security and Environmental Protection After 9/11, 30 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 11 (2005).

[237] See, e.g., Fiscal Year 2001 National Defense Authorization Act, Pub. L. No. 106-398, § 317, 114 Stat. 1654, 1654A-57 (2000) (exempting Department of Defense from preparing environmental impact statement for low-level flight training); 42 U.S.C. § 10141(c) (2006) (exempting EPA from NEPA review of criteria for handling spent

practice would make little sense if NEPA already exempts such activities or authorizes the President to exempt them.

The application of equitable balancing in lieu of statutory construction allowed the Court to avoid deciding whether Congress intended to authorize the President to exempt military activities from the reach of NEPA. Equitable balancing empowered the Court to excuse the Navy's statutory noncompliance without even considering whether Congress authorized such an exemption. Yet as the Court has long held, "[w]here the statute contains no exception, the courts cannot create one."[238] By assuming that the Navy violated NEPA and still denying an injunction to end that violation, the Court effectively created the exception that Congress did not provide. The Court allowed the Navy to violate NEPA because, in the judgment of five Justices, complying with NEPA's environmental impact statement requirement would cause more harm than good.[239]

Regardless of which side in *Winter* was correct regarding whether NEPA authorizes an exception for emergencies, it is apparent that the question can be resolved through the application of straightforward principles of statutory construction, without any need to weigh the Navy's interest in training sailors against environmentalists' interests in protecting whales. Resolving the remedial question through straightforward principles of statutory construction is more consistent with the traditional role of courts than naked balancing of competing statutory interests.

Judicial power is kept in check when courts seek to discern and implement congressional intent rather than implementing their own policy judgments. Had the Court reached and resolved the statutory question presented in *Winter*, Congress could have then

nuclear fuel and high-level radioactive waste); 43 U.S.C. § 1652(d) (2006) (exempting construction of Trans-Alaska Pipeline from further NEPA compliance).

[238] Hyde v. Shine, 199 U.S. 62, 78 (1905); see also Bowles v. Russell, 551 U.S. 205, 214 (2007) ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements . . . ."); 50 Am. Jur. Statutes § 432 (1944) ("Where the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself.").

[239] See Lisa Lightbody, Case Comment, *Winter v. Natural Resource Defense Council, Inc.*, 33 Harv. Envtl. L. Rev. 593, 606 (2009) (arguing that *Winter* "may have created a de facto national security exception to NEPA and similar statutes").

evaluated that decision and amended NEPA if it disagreed.[240] As it stands, however, the Court has not decided whether the statute authorizes the President to exempt military activities from NEPA. Instead, the Court has granted itself effective authority to exempt activities from NEPA as a matter of equity, regardless of what Congress intended. Statutory construction expresses more respect for separation of powers than equitable balancing, which aggrandizes judicial authority at the expense of political accountability.

CONCLUSION

This Article has sought to debunk the myth that equitable balancing is an ancient judicial practice, perhaps even an inherent aspect of judging. Equitable balancing is a decidedly modern phenomenon that was first employed after the Civil War and that became accepted in the early part of the twentieth century to give judges discretion to excuse violations of common law duties when courts concluded that a doctrine was needed to avoid issuing economically inefficient injunctions. The application of equitable balancing in federal statutory cases is even more recent, dating back to only 1982. As with the common law adoption of equitable balancing, the doctrine was embraced in statutory contexts to give courts discretion to excuse violations of federal statutes when, in a court's judgment, countervailing policy interests outweigh the interests served by ordering a statutory violation to end.

[240] This is just what happened after *TVA v. Hill*, as Congress amended the Endangered Species Act to create a committee authorized to exempt federal projects from the Act. See 16 U.S.C. § 1536(g) (2006). When the committee opted not to exempt the Tellico Dam project, Congress acted again, enacting an appropriation rider that specifically exempted the project from the Endangered Species Act. 125 Cong. Rec. 23,863-72 (1979); Energy and Water Dev. Appropriation Act of 1980, Pub. L. No. 96-69, 93 Stat. 437, 449–50 (1979). A similar history of congressional response to a federal injunction occurred with regard to another environmental statute in the course of litigation over the impact of the Navy's use of sonar on whales. After a lower court enjoined Naval training exercises for violating the Marine Mammal Protection Act ("MMPA"), Natural Res. Def. Council v. Evans (*Evans II*), 279 F. Supp. 2d 1129, 1188–91 (N.D. Cal. 2003), Congress amended the MMPA to specify precisely the sort of impacts on marine mammals that the Navy could and could not take during training exercise, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 319(a), 117 Stat. 1392, 1433 (2003) (amending the Marine Mammal Protection Act, 16 U.S.C. § 1962(18) (2006)).

Once equitable balancing is recognized as a modern phenomenon adopted to enlarge judicial policymaking authority, it becomes apparent that applying the doctrine in statutory cases raises substantial separation-of-powers problems. Those problems are most acute when a court decides whether to enjoin an executive agency for violating a federal statute. In that situation, the legitimacy of actions by all three branches is on the line because the judiciary must decide whether to order the executive branch to conform to standards set by legislative branch. A court must be careful to ensure that the other branches have acted consistently with their constitutional roles—that Congress did not overstep its authority in enacting the statute or statutes at issue and that the President has implemented congressional commands consistently with both his constitutional and statutory authority. But it is in precisely this situation that the Supreme Court has embraced equitable balancing, which throws separation-of-powers concerns to the wind. Instead of seeking to discern congressional intent regarding the priority of federal policies or to defer to either of the political branches' assessments of competing policies, equitable balancing empowers courts to decide whether to excuse statutory violations based on a judge's own assessment of the relative importance of competing policy interests. The Court's experiment in applying equitable balancing in statutory cases should be abandoned.