

NOTE

EXAMINING PRESIDENTIAL POWER THROUGH THE RUBRIC OF EQUITY

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In this Note I propose a method to examine presidents' actions taken outside the normal bounds of executive power by employing the general rubric of equity, in an attempt to find when the president acts with what I term "practical legitimacy." This would be a new category for executive actions that, while perhaps arguably illegal, are so valuable that we want to treat them as legitimate exercises of executive power. To do so, I first examine the history of equity, noting the many relevant parallels to our modern conception of executive power. In light of these parallels, I argue that the resolution of the dispute over equity's legitimacy warrants application in the executive-power context. I then focus on the rules and standards of one equitable remedy—the preliminary injunction—to fashion a framework by which to test executive action for practical legitimacy. Finally, in an effort to make clear how this novel test ought to be applied, I apply this framework to three historic exercises of questionable executive power: Jefferson's purchase of the Louisiana Territory, Lincoln's suspension of the writ of habeas corpus, and Truman's seizure of the steel mills.

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INTRODUCTION

Americans have long debated the proper scope of executive power.¹ Most reasonable people believe that there are circumstances that allow—indeed, may even compel—the executive to act in ways that at first glance would seem to be at odds with the Constitution, though even these people disagree as to when this can be done, and exactly what justifies it. This in turn raises a number of questions, which the scholarly literature on the subject attempts to answer. Should the resort to something like “prerogative power”² be exercisable only in an emergency?³ If so, what constitutes an emergency?⁴ Is an executive prerogative power contained in the Constitution, somewhere in Article II—perhaps implied in the vesting clause or commander-in-chief clause?⁵ Is this power extraconstitutional, such that its exercise depends on the president throwing himself on the mercy of the people to justify his actions post-hoc?⁶ Or is it more a pragmatic question of institutional conflict, in which the answer lies in examining how well the executive action fits within our concept of separation of powers?⁷

These are interesting, complex questions. But instead of focusing on these questions of why the president can act, this Note focuses on when we think he should. To be sure, the reason why the president has prerogative power goes a long way in determining when he can use it; it sets at least the outer boundaries. At the same time, it seems in reality the distinction between the three modes described above—that conclude either that prerogative power is constitutional, extraconstitutional, or a question of institutional conflict—is not as great as their conceptual differences would

1. See, for example, the discussion of Jefferson and the Louisiana Territory at Section III.A., *infra*. See generally SAMUEL KERNELL & GARY C. JACOBSON, *THE LOGIC OF AMERICAN POLITICS* 242–58 (2d ed. 2003).

2. Mark Elliott defines prerogative power acutely as “a legal form of non-statutory power.” MARK ELLIOTT, *THE CONSTITUTIONAL FOUNDATIONS OF JUDICIAL REVIEW* 172 (2001).

3. See, e.g., James McDonald, *Democratic Failure and Emergencies: Myth or Reality?*, 93 VA. L. REV. 1785, 1792–94 (2007).

4. See, e.g., Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1069 (2008) (“[The] emergency power must, in a constitutional democracy, be tightly circumscribed.”).

5. See, e.g., Harvey C. Mansfield, Jr., *The Modern Doctrine of Executive Power*, 17 PRESIDENTIAL STUD. Q. 237 (1987).

6. See, e.g., LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 248–50 (4th ed., rev., Univ. Press of Kan. 1997); Donald L. Robinson, *Presidential Prerogative and the Spirit of American Constitutionalism*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 114 (David Gray Adler & Larry N. George eds., 1996).

7. See, e.g., George Thomas, *As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government*, 30 PRESIDENTIAL STUD. Q. 534 (2000).

lead us to believe. In any given case, it is quite likely the justifications for a particular executive action would come from a vague clause within Article II, an appeal to the populace, *and* a practical assessment of how the other branches of government would respond.⁸

This Note demonstrates the surprising degree of similarity between the role of executive prerogative power vis-à-vis the Constitution and the historic exercise of equitable power vis-à-vis the common law. It also shows the practical insights that can be gained by applying rules and standards from the law of equity to the analysis of executive prerogative power.⁹ In particular, looking at modern executive power through an equitable lens is a useful way of gauging when the president acts with what I term “practical legitimacy.” The idea behind focusing on practicality in our analysis of legitimacy is that we recognize that some executive actions, though arguably un- or extraconstitutional, are so valuable that we would rather treat them as legitimate exercises of executive power than not have the president act at all.¹⁰ Perhaps if the president’s action rises to the level of practical legitimacy it ought to fall into a third category between the traditional dichotomy of explicit constitutional justification on the one hand and a fall back on extraconstitutional justification gained through *ex post* ratification by Congress or the people on the other. There would be a gray area in the middle, in which the practical legitimacy of the president’s action means that even if he might not be able to claim plausibly to have acted constitutionally he could claim some justification to which the public ought to defer, and would thereby avoid more rigorous public judgment with its attendant hindsight bias.

Certainly, the idea of recognizing unconstitutional executive actions as legitimate will strike some as strange at best, scary at worst. But is there any doubt that presidents are going to continue to push the constitutional boundaries of their power?¹¹ How much better, then, to have a framework

8. For a classic consideration of this, see John P. Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 W. POL. Q. 592 (1952). And add to this list an appeal to precedent and the president’s reliance on it. *See, e.g.*, *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–73 (1915) (“[G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.”).

9. Of course, this is not to say that the relationship between the crown and courts in a thirteenth-century England that predates our written constitution should control our constitutional interpretation of executive power. Nor is it to say that the modern black-letter law of equitable remedies should be employed as a means of interpreting the Constitution. Rather, it is merely to show that running the question of executive prerogative power through an equitable analysis is an informative way of thinking about presidential power in practice.

10. *See* WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) (“[P]ractical [can be defined as] . . . available, usable, or valuable in practice or action . . . [as opposed to] theoretical, ideal, speculative.”).

11. *See, e.g.*, Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/posts/1226441587.shtml> (Nov. 11, 2008, 17:13 EST) (describing the similarly broad executive-power aspirations of Bill Clinton and George W. Bush, and predicting more of the same from Barack Obama). And, can there be any doubt that there are some instances where the public would not only accede to the exercise of such power, but would want to encourage it?

that political scientists, historians, members of the public, and even executive branch staffers and officials themselves can use to evaluate these instances, providing some semblance of rules where there currently are none?¹²

To that end, this Note proceeds as follows: Part I considers the historical relationship between law and equity, argues that there is an important conceptual similarity with modern questions of executive power, and, in light of this similarity, calls for adapting the equity court's resolution of the dispute over its legitimacy through self-limiting principles to the executive-power context. Part II lays out the equity framework, adapting this analysis to the context of presidential power to show what benefits can be gained from doing so. Finally, to show how this equitable test can be used in a foreign context, Part III applies the framework to three historic exercises of executive power: Jefferson's purchase of the Louisiana Territory, Lincoln's limited suspension of the writ of habeas corpus, and Truman's seizure of the steel mills, ultimately concluding that only Lincoln's action meets the test for practical legitimacy.

I. LAW AND EQUITY

The historical relationship between British common law courts and the court of equity bears many similarities to the role executive prerogative power plays in our constitutional system. Section I.A focuses on the history of equity, discussing the source of equitable power and its highly debated initial legitimacy. It also identifies and analyzes the practical role the "law of equity" played in the British judicial system, where, when circumstances demanded, equity provided a flexible escape from an increasingly rigid legal system. Section I.B discusses the relevant parallels between the source of and justification for the historical exercise of equitable power and the current exercise of presidential power in the United States. Specifically, it describes how some once questioned the legitimacy of the king's exercise of power through the equity courts in much the same way that some today question the exercise of the president's power when acting in gray areas. It argues that these parallels warrant applying an equitable analysis to the executive-power context, suggesting that the president might resolve the dispute over the legitimacy of his actions by limiting the deployment of his extraordinary remedies in much the same way that the equity court did: through the adoption and implementation of a self-limiting framework.

12. There are myriad uses for the test. For instance, members of the executive branch could apply it *ex ante* when trying to decide whether to take a particular action. Or Congress could apply it *ex post* in evaluating the propriety of a president's action. Or yet still academics and even members of the public could apply it *ex post* to determine whether particular executive actions were justified. Indeed, though this framework is not a legal one *per se*, in that it could never displace a court's constitutional or statutory analysis, it could even be useful to judges in simply trying to understand the practical dimension of a president's decision to take a questionable action. It essentially calls for a paradigm shift in how we, in whatever role we play, evaluate the propriety of executive actions.

A. Equity in History

1. Evolution of Equity: Source and Legitimacy

Just as with executive prerogative power today, many contemporaries questioned¹³—and many historians continue to question¹⁴—the source and legitimacy of the equitable power historically exercised by British monarchs. English monarchs played an instigating role in the development of the modern common law system. In the sixth century, Ethelbert, King of Kent, promulgated legal rules designed to bring some sense of uniform order to a society governed almost exclusively by customary local laws.¹⁵ The dispute resolution at that time consisted largely of the blood feud. The *Laws of Ethelbert* outlined the legitimate uses of that practice and created many exceptions to it, laying the groundwork for its gradual demise.¹⁶ Five centuries later, William the Conqueror continued the trend of nationalizing the legal system, bringing much of the authority under his royal power.¹⁷ Henry II expanded upon this nationalization in the eleventh century, by which time the judicial system in England was fragmented between an informal court of equity, known as Chancery,¹⁸ and two courts at common law, known as King's Bench and the Court of Common Pleas. Essentially, the king created a relatively uniform common law system but also retained in the monarchy his own ability to adjudicate disputes.

With the Magna Carta in 1215 and the gradual shift of monarchical legislative authority to Parliament and monarchical judicial authority to the common law courts, the continued source of the king's equitable power became highly questionable.¹⁹ In the fourteenth and fifteenth centuries, clashes

13. For example, Lord Justice Coke was one such prominent critic. F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 9 (2d ed. 1936).

14. See, e.g., Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 *AM. J. LEGAL HIST.* 221 (1962).

15. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 142–45 (5th ed. 1956).

16. See generally BILL GRIFFITHS, *AN INTRODUCTION TO EARLY ENGLISH LAW: THE LAWS-CODES OF ETHELBERT OF KENT, ALFRED THE GREAT, AND THE SHORT CODES FROM THE REIGNS OF EDMUND AND ETHELRED THE UNREADY* (1995).

17. Reginald A. Wilkinson, *The Emergence of Restorative or Community Justice in the United States*, in 2 *FRONTIERS OF JUSTICE: CODDLING OR COMMON SENSE?* 52 (Claudia Whitman et al. eds., 1998) (“William the Conqueror developed a legal system for centralizing power and accruing funds.”); see also Yale Law School, The Avalon Project, Statutes of William the Conqueror, <http://avalon.yale.edu/medieval/lawwill.asp>.

18. Historians generally refer to the court of equity during its early period as simply Chancery. This is in distinction to the Court of Chancery, a more regularized version of that body that was established during the reign of Richard II (1367–1400). See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 103 (4th ed. 2002) (“It seems probable that the English jurisdiction was established in its distinct form during the reign of Richard II, since already by 1393 there were complaints of its abuse.”). For a general history of the increasing power of national monarchies in the High Middle Ages, with a focus on England, see R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* 33–35 (7th ed. 1992).

19. See generally H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 *MERCER L. REV.* 919 (1994).

between the Court of Common Pleas and the Court of Chancery became commonplace.²⁰ At times common law and equity would even conflict directly. For example, in 1368, common law judges at Chelmsford voided a commission granted by the Royal Courts, saying that it violated the defendant's due process rights.²¹ Forty years later, a judge on the common law Court of Common Pleas went so far as to foreclose a resort to equity, stating that "the king has committed all his judicial powers to [the common law] courts."²² Apparently the King disagreed: that same year, the Chancery, sitting in equity, stepped in to overturn a common law decision.²³

Against critics, the monarchy argued that the due process statutes Parliament passed throughout this period could not deprive the king of the ability to exercise his duty to make sure that justice was served. To justify their continued role, kings pointed to such sources of power as the royal coronation oath, in which, for example, Edward II swore "to do equal and right justice and discretion in mercy and truth."²⁴ Thus, Edward II argued, the ability to provide equity in contradistinction to the common law courts inhered in the executive by virtue of his sovereign duty, which the parliament and other courts could not touch.²⁵ Similarly, monarchs pointed to practical reasons for the continued role of their equitable power. After all, they argued, they alone had the ability, when "the regular procedures proved deficient[, to] . . . furnish a remedy."²⁶ The argument followed that it must be true, then, that "[t]he king . . . retained an overriding residuary power to administer justice outside the regular system."²⁷

2. *The Equity Escape Route*

The principle virtue of equity was the flexible escape route it provided. As one seventeenth-century chancellor put it, equity was necessary because "men's actions are so diverse and infinite that it is impossible to make a general law which may aptly meet with every particular and not fail in some circumstances."²⁸ By this time, the common law courts had been around a great while, and over the years common law procedure had become increas-

20. See, e.g., BAKER, *supra* note 18, at 108–09. But see W. J. JONES, THE ELIZABETHAN COURT OF CHANCERY 418–22 (1967) (arguing that the Court of Chancery operated relatively cohesively alongside common law courts within the Elizabethan legal system).

21. BAKER, *supra* note 18, at 97 & n.2.

22. *Id.* at 97 (quoting *Chedder v. Savage*, Y.B. Mich. 8 Hen. 4, fol. 12, pl. 13 (1406)).

23. BAKER, *supra* note 18, at 97 & n.4.

24. *Id.* at 98 (quoting *Coronation Oath of Edward II* in 1 STATUTES OF THE REALM 168 (John Raithby ed., 1819)).

25. See BAKER, *supra* note 18, at 97–98.

26. *Id.* at 98.

27. *Id.* It should be noted that it was very much disputed at the time whether "equity" existed outside the legal system, or whether it was a corrective force on the common law *built into* the system. See generally *id.*

28. BAKER, *supra* note 18, at 106 (quoting *Earl of Oxford's Case*, (1615) 21 Eng. Rep. 485, 486).

ingly rigid.²⁹ For instance, it was perfectly normal for plaintiffs wishing to sue defendants for negligence to bring an action in trespass *vi et armis* alleging an intentional, forceful assault upon the body—not because an intentional assault was actually committed, but because they were required to by the Court of Common Pleas’ rules to bring suit.³⁰ The common law courts simply lacked the will to update court procedure to accommodate the many new forms of action then arising.³¹ Indeed, in some cases litigants could not even manipulate the pleas to get into common law courts. For such actions as disputes over ordinary contracts,³² negligence,³³ and nuisance,³⁴ there was for a long time simply no common law remedy at all.

Frustrated litigants were not shut out of the adjudicative system entirely, however. They could³⁵—and increasingly did³⁶—turn to the Court of Chancery, which had the power to issue new writs and hear actions “on the case.”³⁷ Once in court, litigants found that the Chancery also followed different rules. Pleading a case in common law courts often meant reciting established text and “observing strict rules of evidence, rules which might exclude the merits of the case from consideration.”³⁸ In contrast, “[t]he chancellor was free from [these] rigid procedures His court was a court of conscience, in which defendants could be coerced into doing whatever conscience required in the full circumstances of the case.”³⁹ An increasingly complex distinction between matters of law and fact, and with it an

29. BAKER, *supra* note 18, at 106.

30. See, e.g., Buckton v. Tounesende (The Humber Ferry Case), Y.B. 22 Lib. Ass. 4, fol. 94, pl. 41 (1348) translated in PLUCKNETT, *supra* note 15, at 470. This can be distinguished from an action in trespass on the case. See, e.g., The Miller’s Case Y.B. 41 Edw. 3, fol. 24, pl. 17 (1367) (“Writ of Trespass *sur le case*.”), translation paraphrased in BU School of Law, *Legal History: The Year Books*, available at <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=13785>.

31. See A.W.B. SIMPSON, INVITATION TO LAW 65–76 (1988).

32. See 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 184, 222 (1895) (noting that it took common law courts centuries to adapt writs of trespass to enforce ordinary contracts).

33. See, e.g., Beaulieu v. Finglam, Y.B. 2 Hen. 4, fol. 18, pl. 6 (1401) translated in Mark F. Grady, *The Negligence Dualism* (UCLA School of Law 2009 – Working Paper Series), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337275 (including a remarkable line from Thirning, C.J.: “It is better that he should be utterly undone than that the law be changed for him.”).

34. See the discussion on the development of the assize of novel disseisen in BAKER, *supra* note 18, at 423–24.

35. See BAKER, *supra* note 18, at 102 & n.24 (“*nullus recedat a curia cancellariae sine remedio*”; trans., “no one should leave the Chancery in despair” (quoting Y.B. 21–22 Edw. 1, 323 (1284) (Bereford, C.J.))).

36. EDWARD JENKS, LAW AND POLITICS IN THE MIDDLE AGES 143–45 (Burt Franklin Press, 1970) (1898).

37. Generally, if an action were “on the case” it meant that it was not an action sounding in one of the established original writs. See MAITLAND, *supra* note 13, at 360–61, 384.

38. BAKER, *supra* note 18, at 103.

39. *Id.*; see also 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 467 (3d ed., rewritten 1922) (“In early days there were no fixed principles upon which the Chancellors exercised their equitable jurisdiction. The rule applied depended very much upon the ideas as to right and wrong possessed by each Chancellor.”).

increasingly complex and expensive system of procedure,⁴⁰ had no place in the Court of Chancery. And while the Court of Common Pleas was famous for its long docket, “[t]he Chancery was always open It could sit anywhere, even in the chancellor’s private house; and causes could be tried out of court by commission of *dedimus potestatem* to country gentlemen[, and therefore] . . . provide swift and inexpensive justice.”⁴¹

B. Comparisons with Modern Executive Power

The king’s claim of equitable power, and the historical role for a “law of equity” has implications in the modern debate over the source of and justification for executive power, and suggests a means of legitimating some controversial exercises of executive power. The debate over the source and legitimacy of the king’s use of equity is in many ways similar to the modern debate over the source and legitimacy of the presidential prerogative power. The clashes that existed between the courts of equity and common law are not unlike the periodic clashes between the executive and legislative branches when Congress feels that the president is encroaching on its terrain.⁴² The institutions that felt their power was being infringed upon pointed to a lack of an explicit mandate for the monarch’s actions taken under the label of equity. Indeed, they cited language that seemed to suggest that the monarch did not have these powers.⁴³ Many courts and third parties were also critical of the role of equity in the Middle Ages, fearing that the king’s equitable justice was an end run around the newly minted right of due process.⁴⁴ Likewise, members of Congress and other critics today question executive prerogative power on the grounds that it supposedly has no

40. See, e.g., *Fletcher v. Rylands*, (1865) 3 H & C 774, 159 Eng.Rep. 737; *Fletcher v. Rylands*, (1866) 1 L.R. Exch. 265 (Ch.); *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.) (note the number of appeals, culminating at the House of Lords, for what would today be a simple nuisance action); A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW 195–218* (1995) (describing the increasingly prohibitive cost of litigation in seventeenth- and eighteenth-century Britain). Admittedly, as it aged, the Court of Chancery by necessity had to develop its own (less-rigid) version of the common law courts’ procedure, and as a result it became more costly and time consuming to litigate there. See, for example, the amusing illustration of the Chancery case that had gone on so long nobody could remember when it began in CHARLES DICKENS, *BLEAK HOUSE* (Nicola Bradbury ed., Penguin Books, 2003) (1853).

41. BAKER, *supra* note 18, at 103–04.

42. See generally Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997) (describing various battles between Congress and presidents from Washington to Jackson); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667 (2003) (describing various battles between Congress and presidents from Van Buren to Cleveland); Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1 (2004) (describing various battles between Congress and presidents from Harrison to FDR); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005) (describing various battles between Congress and presidents from Truman to George W. Bush).

43. See e.g., BAKER, *supra* note 18 & n.1 (citing 28 Edw. 3, c. 3 (1354), as representative of due process statutes passed in the late Middle Ages, and the Magna Carta of 1215).

44. See, e.g., BAKER, *supra* note 18, at 97–102.

explicit or implied source,⁴⁵ and many have further leveled the charge that the prerogative power infringes on civil liberties such as due process.⁴⁶ And just as the British monarch did to justify his exercise of equitable powers hundreds of years ago, the president often counters these critics by arguing that he has inherent or implied powers vested in his office.⁴⁷

The historic law of equity and the modern presidential prerogative power also share a common functional justification: they both provide for pragmatic alternatives to established procedure in special circumstances. Just as the courts of equity provided “escape routes” from common law doctrine when justice required, the prerogative power allows the president to act outside of what many perceive to be the normal bounds of his power when it is necessary that he do so. Indeed, the use of equity as a flexible alternative to the unbending system of common law justice should remind one a great deal of many justifications for the executive prerogative power.⁴⁸ Just as the common law was perfectly well suited to handle the majority of matters, and equity, even in its heyday, was the exception,⁴⁹ the prerogative power is not touted as a tool to be employed on a regular basis.⁵⁰ Instead, the prerogative power exists to provide the president the ability to effectively opt out of constricting institutional structures when necessary to do so.⁵¹ That is to say, the

45. See, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459, 491–92 (1915) (Day, J., dissenting) (“There is nothing in the Constitution suggesting or authorizing such augmentation of executive authority or justifying him in thus acting in aid of a power which the framers of the Constitution saw fit to vest exclusively in the legislative branch of the Government.”); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 730, 737–39 (2008) (examining the Article II commander-in-chief powers in the context of conflicting congressional intent and reviewing arguments finding those powers generally unavailing, even in a time of war).

46. See, e.g., J. Richard Broughton, *Judicializing Federative Power*, 11 TEX. REV. L. & POL. 283, 301 (2007). See generally Rebecca M. Kahan, *Constitutional Stretch, Snap-Back, and Sag: Why Blaisdell Was a Harsher Blow to Liberty than Korematsu*, 99 NW. U. L. REV. 1279 (2005).

47. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY 78–90* (2007) (describing generally the views of executive power held by George W. Bush, Dick Cheney, Alberto Gonzalez, and David Addington).

48. See, e.g., RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 67, 70 (2006); Mansfield, *supra* note 5.

49. See McKnight, *supra* note 19, at 929.

50. See, e.g., DANIEL P. FRANKLIN, *EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES* (1991) (advocating an “objective standard” to determine when the exercise of presidential prerogative is lawful); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 206 (Thomas I. Cook ed., Hafner Publ’g Co., 1947) (1689) (“[H]e that will look into the history of England will find that prerogative was always largest in the hands of our wisest and best princes, [for it was] visible the main of their conduct tended to nothing but the care of the public.”); David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT’L L. & FOREIGN AFF. 75, 91 (recognizing that some degree of prerogative power might exist, but chastising Bush for his broad interpretation of the executive’s inherent power); Martin S. Sheffer, *Does Absolute Power Corrupt Absolutely?*, 24 OKLA. CITY U. L. REV. 233, 252 (1999) (“[T]here are times in our history when the President . . . must act[] beyond constitutional constraint.”).

51. See, e.g., Letter from Thomas Jefferson to John B. Colvin, in *JEFFERSON: WRITINGS* 1231 (Merril D. Peterson ed., 1984) (“A strict observance of the written laws is doubtless *one* of the highest duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”).

modern executive prerogative power is essentially akin to an extraordinary remedy, something to be used sparingly when the situation requires.

Consequently, just as the rules fashioned by courts of equity properly resolved the historical conflict between the executive and law courts, the limits that are the result of the natural progression of these same equitable principles can be employed to resolve modern disputes over the scope of the executive prerogative power. As Edward II's coronation oath attests to, the king had a royal duty "to do equal and right justice and discretion in mercy and truth" for his subjects.⁵² But as we have seen, the ossified procedural rules employed by the courts of common law meant justice was in fact hard to come by there, especially in novel disputes.⁵³ The creation of a court of equity fused the sovereign's equitable powers with the regularized administration of law. But the equity court did not in turn supplant the common law courts. Instead, the equity court developed limiting rules to govern when it would provide relief.⁵⁴ Medieval chancellors rightly regarded themselves as reinforcing, rather than undermining, the law by providing exceptional remedies for exceptional cases.⁵⁵ And as more litigants began to seek equitable remedies, the Chancery adapted sensibly by moving from what was essentially an ad hoc approach to its equitable jurisdiction, to one that utilized its own set of limiting procedures⁵⁶—over time, actually fortifying the legitimacy of the "law of equity."⁵⁷ To be sure, the precise form of equity's self-limiting principles evolved, at first as a matter of following equitable precedent within the equity court,⁵⁸ and later as a matter of common law when equitable principles were adopted into law by law courts.⁵⁹ It is, after all, the nature of the common law and of equity itself to evolve. But the dis-

52. See *supra* text accompanying notes 24–25.

53. See *supra* notes 29–34.

54. See BAKER, *supra* note 18, at 109–10. For an interesting discussion of the limiting rules established by the turn of the twentieth century for one such equitable remedy, the injunction, see MAITLAND, *supra* note 13, at 354–65. Of course, there are many other equitable remedies with their own limiting rules. For modern examples, take the irreparable-injury rule that the party seeking an injunction must satisfy in order for a court to grant a permanent injunction. Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 639–43 (2008). Or the "exceptionally high standard of proof" and general unavailability of the reformation remedy. John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 568 (1982).

55. See BAKER, *supra* note 18, at 104–05; F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 225–26 (1913) [hereinafter MAITLAND, *CONSTITUTIONAL HISTORY*]; MAITLAND, *supra* note 13, at 6–10.

56. See BAKER, *supra* note 18, at 109–10. See generally MAITLAND, *supra* note 13 (describing the number of complex doctrines created by equity). But even these procedures were still more flexible than those used in the contemporary law courts. BAKER, *supra* note 18, at 110–11.

57. See BAKER, *supra* note 18, at 109–11; MAITLAND, *CONSTITUTIONAL HISTORY*, *supra* note 55, at 466.

58. MAITLAND, *supra* note 13, at 19.

59. See, e.g., *Hill v. C.A. Parsons Ltd.* (1971) 3 All. E.R. 1345, 1359 translated in BAKER, *supra* note 18, at 113–15 & n.93, 202–04 ("[I]t is the common lawyers who now do equity.").

tinguishing feature of a self-constraint on power can still be seen in the equitable remedies provided by American courts today.⁶⁰

Since, as I have argued, the problems associated with the historical development of equity are remarkably similar to the problems associated with the modern exercise of prerogative power, we should expect equity's solution to achieve the same agreeable result in the executive-power context. More specifically, to the extent equity is a guide in determining the scope of the executive prerogative power, we can expect a self-limiting principle similar to that employed by the court of equity in construing its power vis-à-vis courts of law to yield a similar legitimating effect in this new context. Chancellors came "not to destroy the law, but to fulfil [sic] it."⁶¹ Their power in practice was not ascendant⁶²—though without self-constraint, by its very nature it could have been.⁶³ Instead, it stood alongside the power of the courts of law⁶⁴ until it was ultimately legitimated through absorption into law.⁶⁵ Likewise, a president's equitable exercise of his prerogative power need not make Congress irrelevant. By viewing executive power through the lens of equity, we can provide the president with added flexibility to act, and yet still discern limits on the exercise of that power that will increase its perceived legitimacy.

60. See, e.g., DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 7–8 (3d ed. 2002). As Professor Laycock describes, where statutes provide courts the power to grant injunctive relief, justices split as to how best to interpret the phrase "equitable remedies": as remedies available to equity preceding the merger of law and equity, or more broadly as remedies "typically available in equity." *Id.* at 8 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (holding the latter interpretation to be the correct one)); see also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). But this technical difference is not important for our purposes, for even a focus on remedies typically available in equity necessarily brings with it equity's traditional limiting principles. See, e.g., *L.A. Coliseum Comm. v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980) (discussing the role of the "fundamental principle[s]" of equity in the preliminary injunction context).

61. MAITLAND, *supra* note 13, at 17; see also *id.* at 258 ("Chancery never claimed any superiority over the Courts of Common Law.").

62. See *id.* at 17 ("[N]ow and again there had been conflicts . . . [between law and equity; e.g.,] when Coke was for indicting a man who sued for an injunction. But such conflicts as this belong to old days, and for two centuries before the year 1875 the two systems had been working together harmoniously.").

63. It is not difficult to imagine in theory a court of conscience free from law making more rigid courts of law practically obsolete. This is particularly true of such novel equitable remedies as the injunction. After all, the injunctive remedy "was far more flexible, far more generally applicable [than equitable decrees for specific performance], and thereby it obtained not merely certain particular fields of justice, but a power of making its own doctrines prevail at the expense of the doctrines of the common law." MAITLAND, *supra* note 13, at 318; see also BAKER, *supra* note 18, at 103–04. And yet, despite an initially unsure relationship, the two systems ultimately did not collide. See *supra* note 62.

64. See BAKER, *supra* note 18, at 104–10.

65. See, e.g., JOHN MCGHEE, SNELL'S EQUITY 715 (30th ed. 2000) (describing the Common Law Procedure Act of 1854). Notably, even though this statute and its progeny actually gave the law courts broader ability to provide equitable remedies such as the injunction, the courts continued to apply traditional limiting principles. See MAITLAND, *supra* note 13, at 258–60 (discussing the Judicature Act of 1854 and the Judicature Act of 1875); MCGHEE, *supra*, at 715 (citing *Day v. Brownrigg*, (1878) 10 Ch.D. 294, 307) (describing these principles).

II. THE EQUITABLE FRAMEWORK

Eventually, the principles of equity were assimilated into the common law,⁶⁶ along with combinations of rules and standards to govern when equitable remedies could be invoked. Examining executive forays into areas normally left to Congress in terms of equity allows us to borrow some of these established rules and standards, derived over time through equity's use of self-limiting principles,⁶⁷ to set a boundary on this type of executive authority.

The preliminary injunction framework provides the best guidance. Experience suggests that executive action is most often questioned in situations in which time is of the essence and the executive needs to act quickly to prevent a wrongful act from occurring.⁶⁸ This sounds most like a situation in which equity deploys the preliminary injunction remedy to prevent imminent harm before adjudication.⁶⁹

This Part focuses on the rules and standards governing preliminary injunctions, and translates this general framework into one that can be used to analyze the president's exercise of the prerogative power. In particular, we can apply the general rule behind the grant of a preliminary injunction to ask whether the executive action in question was designed to prevent an event from occurring that would disrupt the status quo. If the answer is yes, then we can turn to the standards that govern whether a court should grant a preliminary injunction in the particular case to ask whether the executive was justified in acting outside the normal boundaries of procedure.

A. Preliminary Injunctions

There is, of course, some degree of diversity among common law countries, and even among courts within the United States, when it comes to the rules and standards for granting preliminary injunctions.⁷⁰ Nevertheless, there are enough similarities to make some general conclusions. First, before reaching the question of whether a preliminary injunction is warranted in a particular case, courts make a threshold determination of whether the situation before them is amenable to a preliminary injunction remedy. Sec-

66. In England, the Court of Chancery gradually closed up shop in the mid-nineteenth century due to a series of Parliament bills that fused common law courts with courts of equity. On the earliest of these, see the discussion in BAKER, *supra* note 18, at 114, of the Common Law Procedure Act of 1854. Of course, after incorporation into the common law, equity lost some of what made it unique. *See id.* at 111–13.

67. *See supra* notes 54–65 and accompanying text.

68. *See infra* Part III.

69. The injunction is in many ways the quintessential equitable remedy. *See, e.g.*, John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33 (2007). The preliminary injunction in particular is useful for examining use of the prerogative power because of its unique features: for example, the temporal aspect aligns nicely because in both situations the would-be actor is asking for the ability or justification to act quickly to prevent a damaging result.

70. *Compare, e.g.*, Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1432–35 (7th Cir. 1986), with Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc., 754 F.2d 91 (2d Cir. 1985).

ond, courts go through the gritty analysis of determining whether relevant factors counsel in favor of granting the extraordinary relief.

The threshold rule for preliminary injunctions is that the requested relief be designed to “maintain the status quo and preserve the controversy for a meaningful decision after full trial.”⁷¹ There is a remarkable degree of similarity across American courts,⁷² and even across common law countries,⁷³ with regard to this requirement. Perhaps this should not be surprising. After all, when a court “enjoins” someone, it is “prohibiting” or “restraining” him from acting.⁷⁴ Yet, the focus on preserving the status quo is not merely a matter of semantics; there are practical justifications as well. Because the preliminary injunction is granted before the trial, “if the defendant wins on the merits, there is a certain embarrassment at having to undo an act compelled by the court itself.”⁷⁵ In addition to prescribing caution generally,⁷⁶ this uneasiness supports recognizing a distinction between preventing an act from occurring—an act that might effectively prevent a trial on the matter—and actually mandating that a particular act occur. Unsurprisingly, courts have often said that the latter situation lies outside their equitable powers to grant preliminary injunctions.⁷⁷

71. KENNETH H. YORK ET AL., REMEDIES: CASES & MATERIALS 223 (5th ed. 1992); *see also* ELAINE W. SHOBEN & WILLIAM MURRAY TABB, REMEDIES: CASES AND PROBLEMS 160 (2d ed. 1995) (“A plaintiff must convince the court that an interlocutory order is necessary to preserve the *status quo* pending trial because otherwise irreparable harm will result.”). There is considerable debate about the utility of the status quo rule and a heightened focus on irreparable injury. *See generally* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001); Doug Rendleman, *Irreparability Resurrected?: Does a Recalibrated Irreparable Injury Rule Threaten the Warren Court’s Establishment Clause Legacy?*, 59 WASH. & LEE L. REV. 1343, 1372–83 (2002). But the merit behind continuing to use a “status quo rule” or a heightened threshold determination of “irreparable injury” in preliminary injunction analysis is beyond the purposes of this Note. Rather, this Note is concerned with importing the limits in the preliminary injunction doctrine as they now exist.

72. *See generally* SHOBEN & TABB, *supra* note 71, at 159–71; YORK ET AL., *supra* note 71, at 223–27.

73. *See, e.g.*, I.C.F. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES 446–94 (6th ed. 2001) (describing the “status quo” element of “interlocutory injunctions” in Australia). Furthermore, this feature is not a relatively new one. Courts were talking about the requirement that the remedy sought was to maintain the status quo back when it was referred to in Latin, *statu quo*. *See, e.g.*, *Preston v. Luck*, (1889), 27 Ch.D. 497, 505 (Cotton, L.J.) (“[T]he object of [an interlocutory injunction] is to keep things *in statu quo*.”).

74. *See* BLACK’S LAW DICTIONARY 570 (8th ed. 2004) (defining “enjoin”).

75. YORK ET AL., *supra* note 71, at 229.

76. Because, of course, it can also be somewhat embarrassing for a court to grant a preliminary injunction to a party and then later find for the opponent after trial. Nevertheless, there is a difference—even if just a matter of degree. For example, consider a situation in which the court compels a party not to take action *X*, then finds for him at trial, after which the party can take action *X*. Compare this to a situation in which a court compels him to take action *Y* before trial, then finds for the opponent and has to try to reverse action *Y*. In terms of pure logic, it is actually not unlike the act versus omission distinction in criminal law. *See* Lee, *supra* note 71, at 159–61 (discussing the theoretical economic-model merit of distinguishing cases based on whether or not there was a disruption in the status quo).

77. *See, e.g.*, *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1292 (11th Cir. 2007); *Kikumura v. Hood*, 467 F.3d 1257 (10th Cir. 2006). *But see, e.g.*, *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (“[There is] little

The threshold rule of preliminary injunctions is just that: a threshold—a hurdle the party must jump before the really determinative analysis can begin. After all, showing that a court's preliminary injunction would temporarily alleviate the situation is not the same as showing that the court should actually grant one. This second stage of analysis is not as clear-cut as the first. Here, the court employs standards instead of a firm rule, attempting to balance subjective factors.⁷⁸ Even at this stage, however, courts have largely coalesced around the same basic factors in deciding whether to grant an injunction.

Courts consider four factors when determining whether to grant a preliminary injunction: (1) how serious the potential harm is to the movant, (2) how likely the harm is to result, (3) how the movant's harm without an injunction compares to the opponent's harm with one, and (4) how all this affects the public interest.⁷⁹ In practice, courts give differing weight to the various factors. Some courts talk of following the "traditional test," in which the party seeking the preliminary injunction must show a set number of factors—either all of them,⁸⁰ or a specific combination.⁸¹ Other courts are more flexible, and employ what is called the "alternative test."⁸² Here, the factors are the same, but instead of viewing each one as an up-or-down, all-or-nothing part of the analysis, the court looks at all the factors together on a sliding scale.⁸³ Under this view, for instance, "the greater the potential irreparability of the harm and the clearer the balance of hardships without the order, the lesser the required showing of strength on the merits of the case."⁸⁴

consequential importance to the concept of the status quo . . ."). See generally YORK ET AL., *supra* note 71, at 223–25.

78. Of course, balancing brings with it the possibility of a certain analytical wishy-washiness. See, e.g., Scott A. Freedman, *An End Run Around Antitrust Law: The Second Circuit's Blanket Application of the Non-Statutory Labor Exemption in Clarett v. NFL*, 45 SANTA CLARA L. REV 155, 159 (2004) ("The problem with such an approach, as Justice Harlan noted in his dissent [in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911)], is the 'obvious danger' that the Court's balancing invites the oft-feared result of 'judicial legislation.'"). But wrestling with subjective factors is bound up in the concept of equity. See BAKER, *supra* note 18, at 102–03; *supra* Section I.A.

79. This restatement of the factors is often referred to as the "quadripartite test." See, e.g., *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991) (employing the four parts of the traditional test and finding interim relief appropriate).

80. See, e.g., *id.*

81. See, e.g., *Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 95 (2d Cir. 1985) ("[Moving party] must show: (1) irreparable harm, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tipping decidedly in favor of the movant.").

82. SHOBEN & TABB, *supra* note 71, at 171.

83. See, e.g., *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

84. SHOBEN & TABB, *supra* note 71, at 171. There is diversity within the approaches, too. To take just one example, the Seventh Circuit reduced the alternative test to an equation in the mold of the Hand formula. See *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1432–35 (7th Cir. 1986) (finding that the underlying idea of whether to grant a preliminary injunction is "to minimize errors"). The court employed the following formula: $P \times Hp > (1-P) \times Hd$ to grant, where P is the probability that the plaintiff will prevail at trial, Hp is the harm caused to the plaintiff by a denial of

Whichever method is employed, the court at least theoretically has a significant amount of leeway in determining whether the situation calls for a preliminary injunction. In determining how high to set the bar, the court could easily be pulled in opposite directions. Take for instance the fact that the court does not have the benefit of a full trial when it is making its decision. This lack of information might lead the court to look more favorably upon the proponent's request because it can effectively stop the clock on a potentially wrongful action and thereby preserve the status quo until trial.⁸⁵ Or it might lead the court to look more unfavorably upon the request, for fear that issuing the preliminary injunction will be tipping its hand in one party's favor before even hearing the merits.⁸⁶

In practice courts have by and large showed reluctance to grant requests for preliminary injunctions, limiting the availability of this remedy. Thus, we hear of courts talking about the need for "extraordinary circumstances,"⁸⁷ and saying that merely "some anguish and some economic hardship"⁸⁸ is not enough. Nonetheless, courts are more than willing to use the preliminary injunction when they feel it warranted.⁸⁹ The trick is to find the right balance of factors to solve the "intractable problem"⁹⁰ of preserving the controversy "while protecting the defendant from the severity and harshness of an order granted after less than a full hearing."⁹¹

B. A Framework for Executive Action

The two-part preliminary injunction framework can be employed to examine executive actions taken on matters normally dealt with by Congress. Just as a preliminary injunction is an "extraordinary remedy," the president's exercise of this kind of power is extraordinary in that he is deviating from normal procedure. Nevertheless, surely there are situations that call for this type of action; the task is to find a reasonable, relatively flexible, and normatively appealing way of delineating when that time is.

Modifying the preliminary injunction framework to fit the subject matter of executive action achieves this by providing a two-part test: first, an initial

the injunction, $1-P$ is the inverse of the probability the plaintiff will prevail at trial, and Hd is the harm caused to the defendant by granting the injunction. *Id.* This model was first articulated by a court in *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 388 (7th Cir. 1984) (Posner, J.); see also John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 540-42 (1978) (suggesting this economic framework).

85. See SHOBEN & TABB, *supra* note 71, at 159-60.

86. See YORK ET AL., *supra* note 71, at 223. *But see* Lee, *supra* note 71, at 110 ("[T]he heightened standard is historically and theoretically unsound, and . . . circuits that adopt a uniform standard have the better approach.")

87. *Williams v. State Univ. of N.Y.*, 635 F. Supp. 1243, 1247 (E.D.N.Y. 1986).

88. *Id.*

89. See, e.g., *Invesco Institutional (N.A.), Inc. v. Johnson*, 500 F. Supp. 2d 701 (W.D. Ky. 2007); *Julia M. v. Scott*, 498 F. Supp. 2d 1245 (W.D. Mo. 2007); *Naturalawn of America, Inc. v. West Group, LLC*, 484 F. Supp. 2d 392 (D. Md. 2007).

90. YORK ET AL., *supra* note 71, at 223.

91. *Id.*

threshold rule, and, second, a set of factors to be weighed to determine if the particular action was legitimate. In particular, we can create something akin to a model rule:

- (1) Was the executive action in question designed to prevent an event from occurring that would disrupt the status quo?⁹²
- (2) If so, does a consideration of relevant factors surrounding the decision to act weigh in favor of the president taking such action? Factors to consider include:
 - (i) Was there a substantial likelihood that Congress would endorse the president's action?⁹³
 - (ii) Was there a substantial threat of irreparable damage or injury if the president had not acted?⁹⁴
 - (iii) Did the balance of harms weigh in favor of the president?⁹⁵
 - (iv) Was the president's action taken in the public interest?⁹⁶

Just as it does in preliminary injunction analysis, the first prong sets out a firm threshold rule governing the action. In this case, the president's action must have been designed to prevent a disruption in the status quo. That is to say, to move on to the second stage of the analysis, the president could not have acted to bring about an affirmative change, but rather must have acted to prevent an affirmative change from occurring. This distinction is norma-

92. *Cf., e.g., id.* (“Pretrial injunctions . . . maintain the status quo and preserve the controversy for a meaningful decision after full trial.”).

93. *Cf., e.g., Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991) (taking into account the “likelihood of success on the merits”). This formulation to some degree assumes, as would often be the case, that the president acted in a sphere that is constitutionally entrusted to Congress. Thus, an inquiry into whether or not Congress would endorse the action gets at whether the same result would have come about eventually had the president not acted, or in the case of impossibility at that later point, whether Congress would have acted had it the chance. In this way, the inquiry parallels the preliminary injunction mandate that the movant be able to show a “likelihood of success on the merits.”

By contrast, in those rare instances where the president's use of the prerogative power takes him outside the Constitution altogether, including the powers granted to Congress, the justification for framing the question from Congress's perspective is understandably lessened. In these situations, it would seem logical to inquire instead something like, “Was there a substantial likelihood that *the people* would endorse the president's action?” Even in such a scenario, though, it would not be unreasonable to still look to what Congress would have done, since such an inquiry would be (1) easier to conduct, and (2) in keeping with republican principles since Congress is rightfully considered an agent of the people. On the latter point, see, for example, James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913, 969 (1986) (“Congress is an agent of the people for purposes of enacting [the law].” (quoting Antonin Scalia, Remarks at Bicentennial Institute on Oversight and Review of Agency Decisionmaking (Mar. 19, 1976), in 28 ADMIN. L. REV. 569, 694 (1976))).

94. *Cf., e.g., Guilbert*, 934 F.2d at 5 (taking into account the “potential for irreparable injury”).

95. *Cf., e.g., id.* (taking into account a “balancing of the relevant equities, most importantly, the hardship to the nonmovant if the [preliminary injunction] issues as contrasted with the hardship to the movant if interim relief is withheld”).

96. *Cf., e.g., id.* (taking into account the “effect on the public interest of a grant or denial”).

tively appealing in the context of executive action for a couple reasons. First, because it is rule-like, it provides a relatively clear limit on the types of action the president can take and expect to have legitimated after the fact. In this sense, it gives the executive some degree of notice as to where the outer boundaries of his practical power are.

Second, and principally, our tolerance of extraordinary executive action is rightly limited to those situations where action is most necessary. The “status quo disruption” requirement is a good proxy for the type of necessity with which we should be concerned because it recognizes that the situations most in need of quick action by the executive will be those in which otherwise a bad event would occur that would disrupt the normal course of events before regular action, perhaps by Congress, could be taken. That is to say, the idea from preliminary injunction analysis is almost directly applicable here: the president employs an extraordinary measure when he acts, but he does so legitimately when doing so is necessary to preserve the status quo until such time as action can be taken through normal channels. Under this view, the president essentially steps out of the normal boundaries of his power temporarily when quick action is needed to prevent a bad event from occurring—and then steps back into those boundaries when the initial emergency has subsided.

Finally, at least theoretically, limiting the president’s use of the prerogative power to situations designed to preserve the status quo rather than effecting positive change makes the clean-up from any executive overstepping easier to remedy. From a logical standpoint, the ultimate decisionmaker’s reversal of the initial action is less disruptive in the case where the act simply maintained the status quo rather than deviated from it in some way.⁹⁷ In the former case, a later contrary decision merely puts an end to what was, in effect, a stay, while in the latter case, the decision itself changes the new status quo in an attempt to bring back the status quo ante—which, in reality, might be difficult or impossible to do. In this sense, the “disrupt the status quo” threshold is essential to preserve the ability to judge the president’s action effectively.

If the president’s action meets the first threshold, we can move on to the second part of the analysis to determine if the particular action is justifiable. This part of the analysis is decidedly more flexible than the threshold rule, as it is a standard consisting of four factors relevant to the president’s justification for taking extraordinary action. While the “status quo” element of the initial rule in the executive action context mirrors the rule in preliminary injunction analysis, the second part obviously requires some modification to be of use.⁹⁸ Thus, the factors outlined above⁹⁹ and discussed briefly below represent an attempt to borrow the general idea of preliminary injunction analysis while making it relevant to the new subject matter, all the while

97. See *supra* note 76.

98. See, e.g., *Guilbert*, 934 F.2d at 5.

99. See *supra* text accompanying notes 92–96.

maintaining a focus on the framework's ability to legitimate executive action.

The first factor, whether there was "a substantial likelihood that Congress would endorse the president's action," focuses on the extent to which the early action taken by the executive was expected to differ from the decision that Congress would have taken had that body time to act. This is a relevant consideration because the president's act will appear more proper if it results in the same outcome that would have occurred through recourse to the usual channels; arguably, the result is the same, only the means and timing of the action are different.¹⁰⁰ Notably, however, even a knowing deviation from action Congress would have been expected to take is not dispositive of the question whether the president's action was proper.¹⁰¹ Instead, in this framework, it is just one factor to be taken into consideration in deciding the propriety of the executive action.

The second factor, whether there was "a substantial threat of irreparable damage or injury if the president had not acted," focuses on the likelihood and extent of the damage that would have resulted if the president had not acted. This is an especially relevant consideration, as it hones in on the justification for the president's action. Obviously, a 90 percent chance of apocalypse in absence of the president's action makes the act more justifiable than a 10 percent chance of only a minor inconvenience. In between these poles, it is useful to view this factor as a sliding scale along which the decisionmaker can weigh the probability and degree of severity of the alternative result.¹⁰²

The third factor, whether "the balance of harms weigh[ed] in favor of the president," is related closely to the second. It focuses on a comparison of the positive benefit the president expected to obtain for the public by acting and the expected negative effect that taking extraordinary action would have on the country. Essentially, it attempts to recreate a cost-benefit analysis, taking into account all externalities. On this last point, for instance, while the president might not see encroaching on Congress's power to act¹⁰³ as being particularly harmful, at least in comparison to the threat he felt the need to confront, the effect the president's action had on this balance of power is nevertheless a relevant consideration when balancing the harms.

Finally, the fourth factor, whether "the president's action [was] taken in the public interest," focuses on whether the president acted with the public interest in mind. If adopted as it exists in the preliminary injunction con-

100. See discussion *supra* note 93.

101. *Contra* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

102. The relevant parallel in equity is the adequacy or inadequacy of a damage remedy. There, the concern is whether the potential harm is of the kind that could not be satisfactorily remedied after the fact, thus warranting an extraordinary action in the form of an equitable remedy. Here the concern is whether the potential harm is great enough that it could not be satisfactorily remedied in absence of the president's extraordinary action.

103. See discussion *supra* note 93.

text¹⁰⁴ without any modification, this factor would be related too closely to some of the other factors—particularly the second and third. For instance, the greater the probability and severity of the negative result the president acted to avoid, the greater that action would seem to accord with the public interest. Also, the public interest is certainly taken into consideration as part of an analysis of the “balance of harms.”¹⁰⁵ Thus, to adapt this prong of the preliminary injunction framework to the executive-power context without making it obsolete, it is necessary to deviate a bit from the objective approach of the other factors. The public interest factor can easily be made relevant as its own separate factor by employing it to take into consideration the primary motivation behind the president’s action. And this preservation technique makes conceptual sense because the president’s motivation is itself important. As scholars have noted, it is within the public interest to have the president thinking that he is working in good faith to further the public interest.¹⁰⁶ If, for example, the president acted to stop oil-well workers from striking, that might well have averted a “substantial threat” of “irreparable damage” to the economy and the “balance of harms” could perhaps have been in favor of action. Nevertheless, if the president’s primary motivation for preventing the strike were to, say, increase third-quarter profits for a particular oil company rather than prevent economic turmoil, then the fourth factor could capture this difference in order to weigh against recognizing the president’s action as legitimate.

Certainly, a list of factors is only one part of a standards-based analysis. Just as important is how much weight is given to the factors and how much we should demand of the president to meet the factors. This presents a real problem. Obviously, much of the analysis is in the realm of conjecture. This is made even more so by the desire to focus these factors primarily on a reasonable *ex ante* perception of the president when he was acting.¹⁰⁷ For

104. See, e.g., *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991) (taking into account the “effect on the public interest of a grant or denial”).

105. This could happen in one of two ways. In cases where the president is acting in a sphere constitutionally entrusted to Congress, the public interest is implicated in an analysis of the “balance of harms” because the parties to the “dispute” are both agents of the people, and officers (or offices) in the United States government. And in cases where the president is acting in a sphere not even constitutionally entrusted to Congress, the public interest arguably is implicated even more directly, as the adversarial party would then seem most logically to be the people directly. See generally *supra* note 93.

106. Cf. Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 866 (2007) (“Where the executive is indeed ill motivated . . . constraining his discretion . . . may be sensible. But . . . [w]here the executive is in fact a faithful agent, using his increased discretion to promote the public good . . . then constraints on executive discretion are all cost and no benefit.”). See generally *id.* at 865–913 (discussing the importance of the powerful modern executive having benign motivations, and arguing for various ways the president could credibly signal these motivations).

107. Cf. Jeremy David Bailey, *Executive Prerogative and the “Good Officer” in Thomas Jefferson’s Letter to John B. Colvin*, 34 PRESIDENTIAL STUD. Q. 732, 738 (2004) (“[W]ith the benefit of hindsight, the people may know the circumstances better than the executive did at the time.”). Hindsight balancing can lead to risk aversion, disincentivizing the executive from taking necessary action. See GOLDSMITH, *supra* note 47, at 90–95 (“The Church and Pike investigations of the 1970s and the Iran-Contra scandal in the 1980s taught the intelligence community to worry about what a

example, how is the decisionmaker deciding after the fact to know what the president could have imagined would have resulted had he not acted? This difficulty supports a flexible approach to the factors when analyzing a president's action.¹⁰⁸ After all, these emergency situations almost by definition often force the president to act on limited information without the benefit of a prolonged consideration of his options.

III. APPLYING THE FRAMEWORK

Part III demonstrates how this equitable framework can function in the context of executive power by examining three instances in which the president seemingly stepped outside his usual bounds of power, and applying the modified preliminary injunction framework to each to test for practical legitimacy. This Part seeks to explore the contours of the test proposed in Part II, and to clarify its application to the sorts of executive-power disputes that might arise in the future. In particular, this Part focuses on Jefferson's 1803 purchase of the Louisiana Territory, Lincoln's 1861 limited suspension of the writ of habeas corpus, and Truman's 1952 seizure of the nation's steel mills. Jefferson's case provides an especially apt example of how the initial threshold rule operates, while Lincoln's and Truman's cases show the intricacies of the subsequent standards-based analysis. Ultimately, only Lincoln's action is practically legitimate.

A. *Jefferson and the Louisiana Purchase*

Just fourteen years after the ratification of the Constitution, Jefferson was presented with the option to expand the country's borders westward by purchasing territory "equal in size to the entire United States of that day."¹⁰⁹ What began as authorized negotiations with France and Spain to purchase the city of New Orleans proper and territory in Florida¹¹⁰ turned surprisingly into an invitation to purchase France's entire tract of land west of the Mississippi.¹¹¹ While not authorized by Congress to do so,¹¹² Jefferson made

1996 Council on Foreign Relations study decried as 'retroactive discipline'—the idea that no matter how much political and legal support an intelligence operative gets before engaging in aggressive actions, he will be punished after the fact by a different set of rules created in a different political environment.").

108. Cf. *supra* notes 82–84 and accompanying text.

109. EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803–1812*, at 1–2 (Lawbook Exchange 2000) (1920).

110. JAMES G. WILSON, *THE IMPERIAL REPUBLIC* 103 (2002) (noting that Jefferson authorized Madison to purchase New Orleans and the two Floridas).

111. See BROWN, *supra* note 109, at 8–11; WILSON, *supra* note 110, at 103.

112. Even under the most charitable reading of the Constitution—viewing completion of the purchase as the formation of a treaty—it would seem that that document does not give the president the power to make such a decision unilaterally, without the "Advice and Consent of the Senate." See U.S. CONST. art. II, § 2, cl. 2. Indeed, Jefferson himself was skeptical of his constitutional power to acquire new territories, and expressed the belief that doing so was more a matter of expediency. See Letter from Thomas Jefferson to Albert Gallatin (Jan. 1803), in 10 *THE WORKS OF THOMAS JEFFERSON* at 3 n.1 (Paul Leicester Ford ed., 1905); see also John Yoo, *Jefferson and Executive Power*, 88

what was in essence a split-second decision to accept the French offer, paying the sum of 60 million francs plus the cancellation of 20 million francs of French debt in return for the land.¹¹³

Running this action through the modified preliminary injunction framework, we find that it fails the test for practical legitimacy. Under the framework, we first confront the threshold status quo rule, in which we ask whether “the executive action in question [was] designed to prevent an event from occurring that would disrupt the status quo.”¹¹⁴ And it is here that we find serious complications for any claim Jefferson might make for the practical legitimacy of his actions. To keep the status quo rule as relevant as it is in the preliminary injunction context, it is necessary to take the rule at its plain meaning.¹¹⁵ Doing so here means focusing on whether there was an antecedent situation that the president sought to protect by taking action. There was not. The United States had no rightful claims to the Louisiana territory prior to Jefferson’s purchase,¹¹⁶ so his action in purchasing that land and thereby gaining a rightful claim to it was not an act of status quo preservation. Rather, the act brought about an affirmative change in the status quo by adding new territory.

One possible counterargument is that Jefferson could be seen to have preserved the status quo if we recognize France’s offer itself as the status quo. Under this theory, for instance, a refusal to accept the offer might have meant the opportunity to purchase would be lost, thus disrupting the status quo, and so an acceptance was necessary to prevent this harmful event from occurring. But on closer inspection, this argument is not convincing; this ability to manipulate the definition of the status quo would swallow the rule. If it were the case that a mere offer for something created expectations that could constitute the status quo, nearly any executive action could fit the threshold rule.¹¹⁷ Furthermore, even if France’s offer constituted the status quo, Jefferson’s acceptance did not *preserve* this status quo. After all, the offer, as such, went off the table the moment Jefferson accepted it—and thus

B.U. L. REV. 421, 435–43 (2008) (describing Jefferson’s changing conceptions of executive power in relation to the Louisiana Purchase).

113. Roger K. Ward, *The Louisiana Purchase*, 50 LA. B. J. 331, 334 (2003). This was equal to roughly \$15 million. *Id.* In contrast, the House had appropriated \$2 million for the purchase of the city of New Orleans and Florida. 7 ANNALS OF CONG. 370–74 (1802–03). For a quick but thorough description of the facts surrounding the Louisiana Purchase, see RICHARD WHITE, “IT’S YOUR MISFORTUNE AND NONE OF MY OWN”: A NEW HISTORY OF THE AMERICAN WEST 61–64 (1991).

114. See *supra* text accompanying note 92.

115. See generally Barbara Child, *What Does “Plain Meaning” Mean These Days?*, 3 SCRIBES J. LEGAL WRITING 1, 3 (1992) (“The meaning of terms . . . ought to be determined . . . on the basis of which meaning is [most] in accord with context and ordinary usage . . .” (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring))).

116. The United States did, however, enjoy a “right of deposit” in the city of New Orleans, which it gained from Spain in the Treaty of San Lorenzo of 1796. John Duncan, *Uti Possidetis: Is Possession Really Nine-Tenths of the Law?*, 38 MCGEORGE L. REV. 513, 516 (2007).

117. For instance, if the president were offered a return of American hostages in exchange for nuclear weapons, he could not normally argue that accepting this would be an act designed to prevent a change in the status quo. If, however, the offer of the exchange were itself the status quo, then accepting it might be the only way to prevent a change for the worse.

if the status quo were the *ability* to purchase the land, then that affirmatively changed as a result of Jefferson's action.

Another, and better, possible counterargument is that Jefferson preserved the status quo by purchasing the land from France if the status quo were seen as the United States enjoying a peaceable Western border. This argument would focus on the fact that the Louisiana Territory was, since 1762, a Spanish possession and only officially came into France's possession after the Treaty of San Ildefonso on November 30, 1803.¹¹⁸ As Jefferson stated in his second annual message to Congress on December 15, 1802, "The cession of the Spanish Province of Louisiana to France, which took place in the course of the late war, will if carried into effect, make a change in the aspect of our foreign relations . . ." ¹¹⁹ At the time of France and Spain's negotiations about transferring the territory, one historian notes there was "widespread alarm" at the prospect of "a stronger power [coming] into contact with the United States."¹²⁰ Indeed, along with a desire to expand the nation's territory, it was in part this fear that prompted Congress to authorize negotiations with France to purchase the city of New Orleans and the Florida territories.¹²¹

At the same time, a number of considerations recommend against viewing Jefferson's subsequent action to purchase the entire Louisiana Territory from France as a justifiable act in preservation of this "peaceable border" status quo. For one, just as the case with viewing Napoleon's offer as the status quo, doing so here would mean that Jefferson's action did not *preserve* it. Rather, by purchasing the land, Jefferson changed what might have arguably been a border with a relatively weak military power into no border at all. Second, Jefferson later as much as admitted that, rather than being driven by a desire to preserve a relatively peaceful border, the primary motivation for the purchase was a desire to expand the country's boundaries.¹²² And this was not merely an abstract desire to bring about Western expansion for expansion's sake;¹²³ the action had direct, practical consequences. To take just one, purchasing the land for the United States meant gaining an

118. Roger K. Ward, Comment, *The French Language in Louisiana Law and Legal Tradition: A Requiem*, 57 LA. L. REV. 1283, 1289 (1997). The treaty was negotiated between the countries in secret, with the official turnover taking place on November 30. *Id.*

119. BROWN, *supra* note 109, at 3 (quoting JAMES D. RICHARDSON, 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 343 (1899)).

120. *Id.*

121. *See id.* at 3–11.

122. *See, e.g.*, Bailey, *supra* note 107, at 735–36; WILSON, *supra* note 110, at 103.

123. What would later come to be known in the Jacksonian era as the United States's "manifest destiny." *See generally* Robert W. Johannsen, *The Meaning of Manifest Destiny*, in MANIFEST DESTINY AND EMPIRE 7 (Robert W. Johannsen et al. eds., 1997); Thomas R. Hietala, "This Splendid Juggernaut": *Westward a Nation and Its People*, in MANIFEST DESTINY AND EMPIRE, *supra*, at 48. In the era of the Louisiana Purchase, John Quincy Adams's theory of continentalism seems a more apt fit—though even this theory was predicated on a perception of American power not yet prevalent before the War of 1812. *See* JAMES E. LEWIS, JR., JOHN QUINCY ADAMS: POLICYMAKER FOR THE UNION 142 (2001).

“indisputable right to free navigation of the Mississippi,”¹²⁴ an important trade route, which the United States did not enjoy when Spain controlled the territory.

Finally, it is also difficult to conceive of a border with a relatively nonaggressive foreign country as a status quo subject to the president’s preservation, since it depends on the actions of the foreign power with which we share the border. After all, while the practical reality was that Spain was probably no longer in a position to be militarily aggressive, this was not an “event” that the United States had any legitimate expectation it alone could preserve. Rather, the relatively peaceable nature of that relationship depended on the actions of a foreign power, in this case, Spain; and one need look no further than the contemporary rise of Napoleon in France to see how subject to change the essential ingredients of that relationship was.¹²⁵

While it seems as if Jefferson’s purchase of the Louisiana Territory violates the threshold status quo rule, and thus likely fails to satisfy the framework,¹²⁶ this does not mean that the president as a merely practical matter cannot act. Despite his own (mostly constitutional) qualms with it,¹²⁷ Jefferson apparently felt comfortable acting anyway.¹²⁸ What this does mean, however—in addition to other, more concrete concerns about the constitutionality of his actions¹²⁹—is that his action did not carry with it the presumption of practical legitimacy that fulfilling the modified preliminary injunction framework can provide. As a matter of pure power, unless someone or something stands in his way, the president can take any action within his control. It is when his action is later called into question, then, that the denial of practical legitimacy can have its greatest effect. Essentially, he is reduced to asking the people for their implicit endorsement of his action to bring about an affirmative change in the status quo,¹³⁰ in this case the

124. BROWN, *supra* note 109, at 11.

125. See, e.g., *id.* at 3–4 (describing the distrust Jefferson and many others in the U.S. government had of Napoleon).

126. To be sure, in preliminary injunction cases, many courts applying the bifurcated approach do not technically stop the inquiry with a negative determination of the threshold status quo question. See, e.g., SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096 (10th Cir. 1991). Instead, they often ratchet up the level with which the party must then satisfy the subsequent factors, in effect putting a thumb on the scale in favor of *not* granting the injunction. See, e.g., *id.* See generally Lee, *supra* note 71, at 115–21. The example of Jefferson and the Louisiana purchase, however, is meant to focus on the threshold question, triggering with it a much higher standard than the rest of the framework applies, so that is where the discussion ends.

127. See, e.g., Bailey, *supra* note 107, at 735.

128. See, e.g., WILSON, *supra* note 110, at 103 (“Jefferson’s quick confirmation of Monroe’s bold decision revealed that his enduring desire to expand the country invariably prevailed over some of his most cherished constitutional and his republicanism [sic] beliefs.”); Bailey, *supra* note 107, at 736.

129. Again, this Note is not especially concerned with the question of constitutionality. Rather, the purpose is merely to focus on practical arguments in hopes of determining whether the executive action was “practically legitimate,” which does not necessarily mean it was constitutional: that is a separate analysis.

130. See, e.g., Bailey, *supra* note 107, at 736.

expansion of the country's borders. And in so doing, he subjects himself to public scrutiny, with its infamous hindsight bias,¹³¹ along with all the other complications that having to do so entails.

B. *Lincoln and Habeas Corpus*¹³²

On April 12, 1861, confederate troops in South Carolina, which had recently seceded from the United States, fired upon Union soldiers stationed at Fort Sumter.¹³³ Soon after, recognizing that war with the South was at hand, Lincoln called up volunteer troop regiments in the Northeast to come to the D.C. area to reinforce what had become the de facto border against confederate attack.¹³⁴ These regiments enjoyed safe passage along the train route though most of the area south of Philadelphia until they came to Baltimore.¹³⁵ Maryland was a slave state that had not seceded, though in 1861 it was certainly far from clear that it would not do so.¹³⁶ Baltimore, in particular, contained its fair share of secessionists and others understandably reluctant to be at the center of a war between the North and South.¹³⁷ When the Sixth Massachusetts Regiment entered the city, a riot among Baltimore residents broke out.¹³⁸ In the ensuing battle, a number of soldiers and civilians were killed.¹³⁹ After the riot had subsided, the Baltimore mayor and Maryland governor decided they were not going to take any more chances, and announced that their territory would henceforth be closed to troop movements.¹⁴⁰ Having recruited his own proconfederate militia, Lieutenant John Merryman drove back a regiment of Union troops and burned a bridge to prevent their reentry into Baltimore.¹⁴¹

131. Cf., e.g., *id.* at 738 (“[W]ith the benefit of hindsight, the people may know the circumstances better than the executive did at the time.”).

132. N.B. This consideration is limited to the facts surrounding *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487), not subsequent actions taken by Lincoln.

133. Michael Les Benedict, “*The Perpetuation of Our Political Institutions*”: *Lincoln, the Powers of the Commander in Chief, and the Constitution*, 29 CARDOZO L. REV. 927, 931 (2008).

134. Clay Bland, Jr., *A Constitutional Limitation: The Controversy Surrounding The Military Commissions Act of 2006 and the Writ of Habeas Corpus*, 53 LOY. L. REV. 497, 509–10 (2007).

135. *Id.* at 510.

136. GEORGE WILLIAM BROWN, *BALTIMORE AND THE NINETEENTH OF APRIL 1861 – A STUDY OF THE WAR* 33–34 (2001 ed. 2001) (1887).

137. See Les Benedict, *supra* note 133, at 931–37.

138. BROWN, *supra* note 136, 42–54.

139. *Id.*

140. See Letter from Baltimore Mayor George William Brown to President Lincoln (Apr. 19, 1861), in BROWN, *supra* note 136, at 57 (“[I]t is my solemn duty to inform you that it is not possible for more soldiers to pass through Baltimore unless they fight their way at every step.”). See generally BROWN at 56–57.

141. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 278 (1994); see also Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 688 (2007).

Trying to gauge an effective response, Lincoln discussed with his cabinet the possibility of suspending the writ of habeas corpus.¹⁴² Eventually, on April 27, 1861, Lincoln notified Winfield Scott that he had suspended the writ in the “vicinity of the military line,” and authorized General Scott to round up insurgents.¹⁴³ Merryman was one of those subsequently captured and held at Fort McHenry without formal charges lodged against him.¹⁴⁴ He protested his indefinite imprisonment, and filed a writ of habeas corpus in the circuit court, which fell under the purview of Chief Justice Taney.¹⁴⁵ Taney eventually came down with a decision in *Ex parte Merryman*,¹⁴⁶ in which he delivered a stinging rebuke to the president, declaring Lincoln’s act in suspending the writ unconstitutional.¹⁴⁷

Applying the modified preliminary injunction framework, Lincoln’s suspension of the writ seems to better satisfy the initial threshold rule than Jefferson’s purchase of the Louisiana Territory. In particular, it seems logical to treat Lincoln’s act as one “designed to prevent an event from occurring that would disrupt the status quo.”¹⁴⁸ In Lincoln’s best case, the event would be insurrection in the state of Maryland, and the status quo would be that Maryland was still at that time part of the Union. Even if we were more particular and labeled the event as something such as “the ability to transport Union troops to the border,” Lincoln’s action would pass. To be sure, in this scenario, there had already been a disruption in the status quo (Maryland had already interfered with the ability of Union troops to pass through its territory),¹⁴⁹ and so strictly speaking Lincoln’s act would not be to preserve the status quo as it existed at the precise time he acted.

But there is no need to be *this* rigid when it comes to the rule. After all, this rule is borrowed from the doctrine dealing with preliminary injunctions, and in those cases the party seeking the injunction has often already suffered some disruption of the status quo.¹⁵⁰ In that sense, the party is asking the

142. Les Benedict, *supra* note 133, at 935.

143. Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1286 (2008).

144. *Id.* at 1287.

145. Mark E. Neely, Jr., *The Constitution and Civil Liberties Under Lincoln*, in OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 37, 38 (Eric Foner ed., 2008).

146. 17 F. Cas. 144 (C.C.D Md. 1861) (No. 9,487).

147. *Id.* at 148. For a quick but thorough description of the facts leading up to *Merryman*, see JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 284–89* (1988) [hereinafter MCPHERSON, *BATTLE CRY*]. For a more detailed look at Lincoln’s Civil War policies, see JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* (2008) [hereinafter MCPHERSON, *TRIED BY WAR*].

148. See *supra* text accompanying note 92.

149. See *supra* note 140 and accompanying text.

150. Take, for example, *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C. 1952), *aff’d*, 343 U.S. 579 (1952), in which the plaintiffs, owners of steel companies seized by the government, asked the court to enjoin the government from taking control of their steel mills. At the time of this argument, the government had already taken steps to take control of the steel mills, and the owners had complied. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583–84 (1952).

court to preserve the status quo by in effect recognizing and preserving the status quo that existed before the opponent acted to disrupt it. In essence, this is exactly what Lincoln did here. If the “event” were the ability to use Maryland’s territory for Union troop deployment, then the status quo could well be Maryland’s consistent implied authorization for the president to do so. Maryland’s status as a nonbelligerent state created reasonable and legitimate expectations¹⁵¹ that the president could send troops through in times of war. Its later illegitimate action in effectively denying the president the ability to do so does not, then, destroy the notion of the status quo ante of the president being able to do so, which he could therefore rightfully take action to preserve. Lincoln’s limited suspension of the writ thus seems to pass the threshold rule rather easily.

Following the framework, we next examine whether there was “a substantial likelihood that Congress would [have endorsed] the president’s action.”¹⁵² This is in many ways the most difficult factor because it is premised on discerning the intent of a body with regard to an action it did not take and, indeed, was not asked to take. In some sense, when a president acts without congressional approval, it seems reasonable to presume that Congress would not have approved of the action. After all, one might wonder, if he thought Congress would approve it, then why did the president not simply go to Congress and get authorization? Weighing against the logic of this presumption, however, is the recognition that if the president is forced to act quickly, he might simply lack the time to go to Congress and get express authorization. This is particularly relevant in Lincoln’s case. Lincoln was, after all, confronted with the prospect of a unique and unprecedented civil war. Add to this context a state that is not too partial to the Union cause,¹⁵³ yet in an especially strategic geographic location,¹⁵⁴ telling the president that he can no longer expect to send Union troops through its territory, and it seems the case for an emergency is quite strong. In this scenario, it is probably reasonable¹⁵⁵ to presume that Congress would endorse the president taking action, and while it might be questionable whether this en-

151. Cf. *Nelson v. Nat’l Aeronautics & Space Admin.*, 512 F.3d 1134 (9th Cir. 2008) (discussing reasonable, legitimate expectations in a different constitutional context); *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007) (same).

152. See *supra* text accompanying note 93.

153. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81, 89–90 (1993) (“Secessionist activity was rampant in . . . Maryland, which had voted for Kentucky’s Breckenridge in the presidential election and had a large secessionist minority.”).

154. See, e.g., MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* 66 (2003) (“Confederate partisans like Merryman were common in the border states, but their presence in Maryland—a state that enclosed Washington on three sides—was particularly troubling. If Maryland secessionists could not be subdued, the capital could be cut off from the Union.”); Mark D. Friedman, *Say “Cheese.” Uncle Sam Wants Your Photograph and Fingerprints or You Are Out of Here. Does America Have a Peace Time Constitution in Danger of Being Lost?*, 30 *NOVA L. REV.* 223, 228 (2006) (noting Maryland’s “strategic importance to Washington D.C. in the war effort”).

155. Though probably not “substantially likely.” See *supra* text accompanying note 93.

dorsement would extend to an action as drastic as Lincoln's suspension of the writ, it is not beyond reason that it would do so.¹⁵⁶

Second, we ask whether there was "a substantial threat of irreparable damage or injury if the president had not acted."¹⁵⁷ This seems to be a good factor for Lincoln. Again the context is important; examining this matter from the perspective of the president, it seems that the inability to send troops through Maryland's territory could have disastrous consequences for the impending war effort.¹⁵⁸ A counterargument might be that, if this were the only harm, Lincoln could have averted it by simply ferrying troops to the border through the Chesapeake Bay, which, indeed, Lincoln did as an immediate consequence of the Baltimore riots.¹⁵⁹ But this counterargument is ultimately unpersuasive. For instance, an inability to send troops through Maryland by ground, even when sending troops by water was an option, could very well have been seen by the president as hindering the war effort to a substantial degree.¹⁶⁰ It would have been difficult for anyone to predict the extent of the civil war when Lincoln acted in 1861, and so one could easily have concluded that the restrictions on how troops could be brought to the border with the South could bring about significant, if currently unknowable, damage to the Union cause.

One might also argue that Lincoln might well have been justified in acting, but that he did not need to take as drastic an action as suspending the writ. In this sense, the second factor, with its focus on "irreparable damage," can be seen to incorporate something like a mitigation requirement that would require the president to attempt to keep potential damages to a minimum.¹⁶¹ Critics might argue that Lincoln could have taken action quelling the riot in Baltimore, and restoring order so as to provide safe movement of Union troops without having to resort to suspending the writ. It is, however, unclear just what Lincoln could have done. Certainly, he could have attempted to send in more troops to squelch the rebellion, though this would have probably stoked angry local sentiment even further—and even run the risk that Maryland would join its sister state, Virginia, in seceding.¹⁶² Instead, Lincoln took a measure better aimed at reinforcing Union control in

156. Indeed, Congress ultimately ratified Lincoln's action after the fact, though much later, and suspended the writ in 1863. *See* Les Benedict, *supra* note 133, at 936 n.50 (citing Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755 (1863)).

157. *See supra* text accompanying note 94.

158. *See supra* note 154.

159. Patrick S. Poole, *An Examination of Ex Parte Merryman* (1994), available at <http://mb-faculty.mosesbrown.org/dmacleod/expartemerryman.html>.

160. Again, the strategic importance of Maryland is notable. *See supra* note 154. If it fell to the confederacy, the Union would likely have had to abandon the capital.

161. *See, e.g.,* Zenith Radio Corp. v. United States, 764 F.2d 1577 (Fed. Cir. 1985) (discussing the need for the proponent to mitigate damages in the context of a preliminary injunction); *see also* YORK ET AL., *supra* note 71, at 226 (discussing the common "obligation to mitigate damages").

162. *See* BROWN, *supra* note 136, at 33.

the state quietly.¹⁶³ Given again the extraordinary context of an outbreak of civil war, it makes sense to provide the president with some degree of flexibility in choosing the manner of his response, so long as that response is itself justifiable.¹⁶⁴

Third, we ask whether “the balance of harms weighed in favor of the president.”¹⁶⁵ In some ways, this seems to be a harder standard for Lincoln to satisfy, mostly because of the potential problem his action creates for the balance of power between the president and Congress. We should note yet again, however, that on Lincoln’s side in this balancing equation is the fact that he was confronted with the prospect of a civil war, which doubtless warranted some degree of extraordinary action. On the other side is Congress’s interest in retaining its de facto control over the decision as to whether and when to suspend the writ of habeas corpus.¹⁶⁶

It would not be altogether unreasonable to find that, even on the specific separation of powers question, the balance weighs in favor of the president. For instance, Lincoln claimed that he had the power to suspend the writ of habeas corpus, and the ability to delegate this power to his commanders in the field.¹⁶⁷ Lincoln’s belief that he had the power to do so was not without reasonable grounding. Moreover, there was nothing explicit that said the president did not have this power. Lincoln’s attorney general, Edward Bates, persuaded Lincoln that “the Constitution was vague as to which branch should exercise the power to suspend, and, as the head of a coordinate and co-equal branch, the President had the power to interpret the Constitution.”¹⁶⁸ Lincoln himself pointed to the fact that the Constitution explicitly authorized suspension in cases of rebellion, and argued that “it cannot be believed the framers of the instrument intended that, in every case, the dan-

163. After all, he did not give any notice that he had suspended the writ in the vicinity of the military line in Maryland. See *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487).

164. See *supra* text accompanying note 108.

165. See *supra* text accompanying note 95.

166. Cf., e.g., *Ex parte Merryman*, 17 F. Cas. at 148 (“I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.”). Of course, Congress has its own constraints when it comes to suspending the writ. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). The insurrectionist rebellion in Maryland would seem to fit quite snugly in that clause, however.

167. E.g., Amy Coney Barrett, *Introduction*, 83 NOTRE DAME L. REV. 1147, 1155 n.48 (2008) (“Lincoln authorized Union officers to suspend the writ . . . He did so with an eye toward Baltimore, which . . . was known to be a ‘hotbed of secessionist activity.’”) (citing Paulsen, *supra* note 141).

168. Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex parte Merryman*, 34 U. BALT. L. REV. 11, 21 (2004); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 n.3 (1952) (Jackson, J., concurring) (“Since the Constitution implies that the writ of habeas corpus may be suspended in certain circumstances but does not say by whom, President Lincoln asserted and maintained it as an executive function in the face of judicial challenge and doubt.”). Justice Jackson used Lincoln’s 1861 suspension of the Great Writ as an example of how “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Id.* at 637.

ger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.”¹⁶⁹ To be sure, Justice Marshall seemed to imply in dictum in *Ex parte Bollman*¹⁷⁰ that the suspension of the writ was the providence of the legislature, not the executive—an assumption on which Taney also relied.¹⁷¹ And a structural analysis of the Constitution would seem to put the suspension power in Congress’s domain.¹⁷² But the Suspension Clause’s location in Article I did not necessarily mean that the president did not also have this power through implication in Article II.¹⁷³ Furthermore, even if not technically allowed, Lincoln could probably quite reasonably have believed that, given the context of a civil war, some degree of flexibility in dealing with an emergency brought with it a right for him to suspend the writ when he deemed it absolutely imperative to do so.¹⁷⁴

Of course, Congress’s separation of powers interest is not the only interest that must be weighed against the president’s. Other interested parties would certainly include Merryman and all the others held without formal charges as a result of Lincoln’s suspension. Merryman might well have claimed that, while Lincoln had a number of legitimate harms to consider on his side, Merryman’s civil liberty interests outweighed these interests, so the balance of harms should be held to be in Merryman’s favor. Cutting against this, however, is that Merryman’s was not an absolute claim to this particular civil liberty. For instance, if Congress had suspended the writ under Article I, Section 9, Clause 2 (as it later did in 1863¹⁷⁵), Merryman would have had nothing to complain about. It seems odd to accord an especially weighty interest—one strong enough to trump the civil war emergency on Lincoln’s side—to a civil liberties dispute that boils down to a problem

169. Abraham Lincoln, Message of the President of the United States to the Two Houses of Congress at the Commencement of the First Session of the Thirty-Seventh Congress (July 5, 1861), in U.S. SENATE, 37TH CONG., JOURNAL OF THE SENATE 13 (1st Sess. 1861). See generally HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION, SECOND PART (Phila., C. Sherman & Son 1862), cited in Jackson, *supra* note 168, at 27 n.111.

170. 8 U.S. (4 Cranch) 75, 101 (1807) (“If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.”).

171. See *Ex parte Merryman*, 17 F. Cas. at 148.

172. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *Ex parte Merryman*, 17 F. Cas. at 148–50.

173. See, e.g., MCPHERSON, BATTLE CRY, *supra* note 147, at 288; Jackson, *supra* note 168, at 49–52; Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 MICH. L. REV. 1263, 1292–95 (2004) (reviewing DANIEL FARBER, LINCOLN’S CONSTITUTION (2003)); Paulsen, *supra* note 153, at 91–99 (1993).

174. See, e.g., MCPHERSON, BATTLE CRY, *supra* note 147, at 288 (“Several prominent constitutional lawyers [argued that] . . . suspension was an emergency power to be exercised in case of rebellion [and] the president was the only person who could act quickly enough in an emergency, especially when Congress was not in session.”); Jackson, *supra* note 168, at 49.

175. See *Les Benedict*, *supra* note 133, at 935–41 (citing Habeas Corpus Act of 1863, ch. 81, 12 Stat. 755 (1863)).

merely with the fact that the president suspended the writ, and not Congress.¹⁷⁶

Fourth, we ask whether “the president’s action [was] taken in the public interest.”¹⁷⁷ Here, the point that stands out above all the others is the very weighty public interest in the successful prosecution of a civil war, which would seem to accord Lincoln significant leeway. Again, the proper mode of analysis is from the president’s perspective, and looking at it from Lincoln’s point of view, it would seem that a limited suspension of the writ “in the vicinity of the military line” was designed to further the legitimate public interest in a successful Union war effort, and to curb the outbreak of secessionist rebellion in Union territory. There is a potential problem, however. If Lincoln’s actions were motivated merely to corral partisan opponents and silence his critics,¹⁷⁸ then this would certainly cut against recognizing Lincoln’s actions as practically legitimate. Absent this as a primary motivating factor, however, that partisan opponents were some of those rounded up following Lincoln’s suspension of the writ would seem to get at another question—whether the president acted improperly in those specific instances—rather than the practical legitimacy of his initial decision to suspend the writ.¹⁷⁹

When applying the second prong of the analysis it is necessary to step back a bit and look at all the factors in light of the first part of the second prong: “[D]oes a consideration of [these] relevant factors surrounding the decision to act weigh in favor of the president taking such action?”¹⁸⁰ Applying something akin to the “alternative test” in preliminary injunction analysis, it would appear that the factors, taken as a whole, favor finding Lincoln’s act to suspend the writ as practically legitimate. To be sure, there are lingering issues within most factors, but it seems the reasonable potential that Congress would endorse the president’s actions, the great potential for irreparable damage to the war effort had Lincoln not acted, the debatable separation of powers issue, and the public interest in protecting the Union cut across all the factors and make a finding for the president quite plausible under the circumstances.

176. Of course, as a matter of constitutional law, the distinction means a great deal. Here, however, we are only concerned with the harm to Merryman and others rounded up as a result of Lincoln’s suspension—and that harm would have been the same had it been Congress that suspended the writ. *But cf. infra* text accompanying notes 238–239.

177. *See supra* text accompanying note 96.

178. *See, e.g.,* David Williams, *Civil Liberties, U.S.A.*, in *ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR* 442, 443 (David S. Heidler & Jeanne T. Heidler eds., 2002) (“In trying to suppress dissent, Lincoln and other Republicans were often motivated more by politics than by patriotism. They tended to paint their opponents with a broad brush of treason, and people sometimes suffered arrest and worse for no other crime than being a Democrat.”). *See generally* Poole, *supra* note 159.

179. *See supra* Section II.B (discussing “primary motivation” in context of the fourth factor).

180. *See supra* text accompanying note 92.

C. Truman and the Steel Mills

By December 1951, the collective bargaining agreements that most American steel mills had with the United Steelworkers of America Union were set to expire and no new contract had been negotiated.¹⁸¹ On December 22, 1951, the government intervened in the failed negotiations, with President Truman referring the matter to the Wage Stabilization Board (WSB), which was to issue recommendations to the parties.¹⁸² Both management and the union consented to go before the WSB.¹⁸³ After a series of private and public hearings, the WSB issued its nonbinding report on March 20, 1952.¹⁸⁴ In it, the WSB recommended a series of wage concessions.¹⁸⁵ Given the extent to which the report met its demands, the union promptly accepted the WSB's recommendations while the management refused to sign on, citing an increased cost of production that it could not offset with higher prices due to the government's price stabilization policies.¹⁸⁶ Further attempts at mediation between the two sides proved fruitless, and on April 4, 1952, the union announced that its workers would strike effective 12:01 AM, April 9.¹⁸⁷

On the evening of April 8, Truman issued Executive Order 10340, in which he authorized the Secretary of Commerce to "take possession of all or such of the plants, facilities, and other property" of eighty steel manufacturers listed in the order.¹⁸⁸ This action, the Executive Order stated, was necessary to ensure a "continuing and uninterrupted supply of steel,"¹⁸⁹ "an indispensable component"¹⁹⁰ of our weaponry used in the Korean War. It added, a "work stoppage would immediately jeopardize and imperil our national defense."¹⁹¹ The management complied with the terms of the order but also brought suit seeking a preliminary injunction in federal district court.¹⁹² The district court judge ultimately declared the president's actions illegal

181. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

182. Brief for Plaintiff Companies, Petitioners in No. 744 and Respondents in No. 745 at 5, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Nos. 744, 745) [hereinafter Brief for Plaintiff Companies].

183. Brief for the United Steelworkers of America, CIO, as Amicus Curiae at 11, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Nos. 744, 745) [hereinafter Brief for the Union].

184. *Id.*

185. *Id.*; Brief for Plaintiff Companies, *supra* note 182, at 7.

186. See Brief for Plaintiff Companies, *supra* note 182, at 7–8 ("The recommendations of the Board were not acceptable to the plaintiffs. . . . They would impose staggering increases in costs upon the plaintiffs which they could not absorb without risk to the financial stability of their businesses."); Brief for the Union, *supra* note 183, at 11.

187. Brief for the Union, *supra* note 183, at 11.

188. Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952).

189. *Id.* at 3139.

190. *Id.*

191. *Id.* at 3141.

192. Brief for Plaintiff Companies, *supra* note 182, at 9–10.

and ordered the mills to be returned to the management.¹⁹³ Following this decision, the union again issued a strike call, and the government requested a stay.¹⁹⁴ The district court denied the stay, but the Court of Appeals—by a five-to-four margin—granted it, and the steel mills appealed to the Supreme Court.¹⁹⁵ The Court, in a series of opinions, ultimately decided against the constitutionality of Truman’s action.¹⁹⁶

To determine whether Truman’s action—however unconstitutional—was practically legitimate, we first examine whether Truman’s action was “designed to prevent an event from occurring that would disrupt the status quo.”¹⁹⁷ It seems fairly obvious that Truman’s April 8 executive order authorizing seizure of the steel mills passes this threshold rule. The event was a work stoppage at the steel mills, which, in absence of any executive action to prevent it, was set to take place in a mere matter of hours. Also, the status quo in question was fully operational steel mills, producing steel, a process that requires the workers that were set to strike. It is difficult to see how Truman’s action would not meet this threshold test.

The second-prong analysis is not nearly as friendly to Truman, however. Following the framework, we first look to whether there was a “substantial likelihood that Congress would endorse the president’s action.”¹⁹⁸ This does not seem to be a particularly good factor for President Truman. Importantly, the executive branch surely knew that the matter of work stoppages—even under emergency conditions—was an area in which Congress had made its views well known, and relatively recently at that.¹⁹⁹ The Labor Management Relations Act of 1947²⁰⁰ (hereafter referred to as the Taft-Hartley Act) set out a labyrinthine procedure for the president to invoke when “a threatened or actual strike or lockout, affecting an entire industry or a substantial part [of it] . . . [would] imperil the national health or safety.”²⁰¹ This included a series of injunctions followed by negotiations conducted by the Federal Mediation and Conciliation Service.²⁰² If the parties had still not come to an agreement by the time the series of injunctions had run out, the president was to submit

193. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C. 1952).

194. Brief for Plaintiff Companies, *supra* note 182, at 13 (“Immediately upon the announcement of Judge Pine’s decision, the Union issued a strike call and its members started to leave the mills.”).

195. *Id.*

196. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

197. *See supra* text accompanying note 92.

198. *See supra* text accompanying note 93.

199. *See Youngstown*, 343 U.S. at 639 (Jackson, J., concurring) (“Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure.”). Of course, for his part, Truman seemed to think that Congress’s views on the matter were irrelevant. *See DAVID MCCULLOUGH, TRUMAN 896–901* (1992) (“From his reading of history, Truman was convinced his action fell within his powers as President and Commander in Chief.”).

200. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 120-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–87 (2006)).

201. *Id.* § 176, quoted in *Youngstown*, 343 U.S. at 656 (Burton, J., concurring).

202. Brief for Plaintiff Companies, *supra* note 182, at 19.

a report to Congress for that body to take further action.²⁰³ Furthermore, Congress rejected an amendment to the Taft-Hartley Act that would have permitted government seizures in cases of emergency.²⁰⁴

In response, the president might argue that this does not mean that Congress would not have endorsed his seizure in this particular case—but it would seem to be a difficult argument to make absent specific indications by Congress.²⁰⁵ He might, for instance, point out that the language in the Taft-Hartley Act made clear that its procedures were optional,²⁰⁶ not mandatory, and thus that might have been Congress's way of showing that it might not think those procedures the proper ones in all circumstances. Alternatively, he might point to the lack of an effective emergency procedure under the Taft-Hartley Act,²⁰⁷ arguing that, even though Congress rejected an explicit endorsement of seizures, it could have left it as a permissible alternative when the time for temporary injunctions and further bouts of mediation came to an end. Weighing against these arguments, however, is that, in the absence of anything explicitly contrary from Congress, the only thing beyond mere conjecture that a decisionmaker could go on in an attempt to discern whether Congress would have endorsed the decision is the Taft-Hartley Act. And that act seems stacked against Truman's position.

Second, we look to whether there was “a substantial threat of irreparable damage or injury if the president had not acted.”²⁰⁸ This factor seems to be a mixed bag for the president, but it probably hurts more than helps his case. On the surface, it certainly seems more than plausible to think that there would be a substantial threat of damage if he did not act to prevent the strike. The government's brief in *Youngstown Sheet & Tube Co. v. Sawyer* is peppered with colorful statements about what it thought would have resulted in the event of a strike, from “grave and incalculable harm”²⁰⁹ to “pressing emergency,”²¹⁰ “critical emergency,”²¹¹ and “catastrophic [loss]”²¹²—and

203. *Id.* at 20.

204. *Youngstown*, 343 U.S. at 586 (“When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining.”) (citation omitted).

205. Especially considering that the burden in this factor is clearly on the president: there must have been a “substantial likelihood that Congress would endorse the president's action.” See *supra* text accompanying note 93 (emphasis added).

206. See Brief for the Union, *supra* note 183, at 6.

207. See *id.* at 4–6. But see *Youngstown*, 343 U.S. at 656 & n.2 (Burton, J., concurring).

208. See *supra* text accompanying note 94.

209. Brief for Petitioner at 90, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 745), reprinted in HOUSE OF REPRESENTATIVES, THE STEEL SEIZURE CASE 798 (1952).

210. *Id.* at 93.

211. *Id.* at 92.

212. *Id.* at 93.

there is no reason to doubt that the potential damage would likely have been substantial.²¹³

At the same time, as we saw above in the analysis of Lincoln's suspension of the writ,²¹⁴ it is appropriate when considering whether the injury was "irreparable" to ask if the president could have taken other actions that might have mitigated damages. In Truman's case, it seems there were a number of reasonable alternative actions that Truman could have taken that might have prevented the situation from becoming an emergency requiring seizure of the mills. First, he could have employed the procedures in the Taft-Hartley Act described above.²¹⁵ Instead, Truman chose to create an ad hoc procedure for the matter and authorized the WSB to make recommendations.²¹⁶ Though it is probably unfair to charge this specific knowledge to Truman acting *ex ante*, one problem with this strategy was that, as the government itself later admitted, "the fact that the Wage Stabilization Board had recommended substantial changes . . . made it practically certain that the union would never enter into an agreement calling for no change."²¹⁷ Thus, stepping in with the WSB right away, instead of employing Taft-Hartley's "cooling off" period might very well have made an agreement between the two sides less likely.²¹⁸

Another argument involving Taft-Hartley concerns the fact that, even at a late stage in the game post-WSB, Truman could have invoked the eighty-day cooling off period to prevent the strike and avert the emergency.²¹⁹ Thus, the argument goes, Truman did not need to resort to as drastic a measure as seizing the steel mills on April 8 to avoid a strike on April 9; he could have invoked Taft-Hartley and bought another eighty days during which mediation between the two sides could take place.²²⁰ Truman would likely respond, quite reasonably, that this extra eighty days on top of the previous hundreds of days the two sides had to negotiate would not likely have led to an agreement;²²¹ rather, it would likely have just pushed back the strike date. While this is probably true, it misses a key element in the modified preliminary injunction framework. One of the reasons why we are tolerant of executive forays into areas that are arguably outside the normal scope of the president's power is because we recognize that sometimes it is necessary that the president take these actions in order to confront or stave off an

213. Even the petitioner-steel companies concede as much. *See* Brief for Plaintiff Companies, *supra* note 182, at 6.

214. *See supra* text accompanying notes 161–164.

215. *See supra* notes 200–203 and accompanying text.

216. Brief for Plaintiff Companies, *supra* note 182, at 5; Brief for the Union, *supra* note 183, at 9.

217. Brief of Respondent, *supra* note 209, at 79.

218. *See* Brief for Plaintiff Companies, *supra* note 182, at 7–8.

219. *See* 29 U.S.C. § 176 (2006).

220. *See* Brief for Plaintiff Companies, *supra* note 182, at 20–21.

221. *See generally* Brief for the Union, *supra* note 183, at 9.

emergency.²²² If the president had invoked the statutory cooling off period, he would have had eighty days to go to Congress and work with them to fashion a solution to the problem. In short, there is reason to believe that “[t]he emergency which caused the President to act . . . was created by his own failure to use procedures of the Taft-Hartley Act.”²²³ This would seem to weigh heavily against him.

It does not end there, however. Yet another mitigation argument would focus on the government’s strict maintenance of its “price stabilization policy.” This piece of regulatory machinery listed the exact price, per ton, that American steel companies could charge for the steel that they produced.²²⁴ Throughout the fruitless negotiations, it was quite clear to all parties involved—the management,²²⁵ the union,²²⁶ and the government²²⁷—that the matter preventing a new contract with the union’s wage increases was the government’s firm insistence on no corresponding increase in the price of steel. While it would be difficult to say that the president *should* have changed the Office of Price Stabilization’s policies with regard to the price of steel to avert the strike, that he had the ability to do so does seem to further undercut the claim to “emergency” status.²²⁸

Third, we look to whether “the balance of harms weighed in favor of the president.”²²⁹ On the one hand, the president certainly had reason on his side to claim that a nationwide strike at the steel mills would have harmed our offensive efforts in the Korean War,²³⁰ “our defens[ive] efforts,”²³¹ and our

222. See, e.g., Katyal & Caplan, *supra* note 4, at 1069; McDonald, *supra* note 3. See generally *supra* Section II.B.

223. Brief for the Union, *supra* note 183, at 3; see also Brief for Plaintiff Companies, *supra* note 182, at 19 (“[T]he constitutional right of Congress to provide for emergencies is utterly frustrated by an executive procedure which awaits the creation of the emergency and then insists upon disregarding the means which Congress has provided and using instead a means which is fashioned exclusively by the Executive.”).

224. Brief for Plaintiff Companies, *supra* note 182, at 7.

225. See *id.* at 7–8.

226. Brief for the Union, *supra* note 183, at 14–17.

227. See Brief of Respondent, *supra* note 209, at 81 (“[W]e believe . . . their real complaint is with the denial of a price increase.”); Brief for the Union, *supra* note 183, at 14–17 (“The reason those negotiations have broken down is because we will not agree to a commensurate price increase to offset the labor cost.” (quoting *S. 2999: Hearing Before the S. Comm. On Labor and Public Welfare*, 82d Cong. 150–51 (1952) (statement of Mr. Arnall, Director of the Office of Price Stabilization))).

228. It is also worth noting that there were other options at the president’s disposal. For instance, he could have seized any particular plant that “fail[ed] to comply with obligatory orders placed by the Government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (citing Selective Service Act of 1948, ch. 625, 62 Stat. 604 (1948) (codified as amended at 50 U.S.C. §§ 451–71(a) (2006))). He also could have followed the examples of numerous presidents before him by calling on troops to break up the strike. See Brief of Respondent, *supra* note 209, at 110–12.

229. See *supra* text accompanying note 95.

230. Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952).

231. *Id.*

economy.²³² On the other, the ability of the president to take substantially less drastic actions to alleviate or even possibly eliminate the harm and the emergency would seem to weigh against finding the balance of harms in his favor.²³³

As for the companies, their expected harms seemed to be quite substantial. For one, the president's action meant that, in addition to losing control of their steel mills for as long as "necessary or expedient in the interest of national defense,"²³⁴ they effectively lost to the unions in the battle over whether wages increased, all the while not winning the fight for higher steel prices. In particular, given that the government was planning to negotiate with the union to provide higher wages during the time it maintained control of the mills,²³⁵ it was unlikely that management would be able to return to the bargaining table to lower those wages when it regained control.²³⁶ As to steel price policy, the companies had an important bargaining chip with the government in the form of allowing a walk out and disrupting the nation's steel supply, a chip they were deprived of when the president seized the mills. But, of course, the ability to have the government in a position with its back against the wall is hardly the sort of interest that should weigh in the company's favor.

One more brief fact cutting against the company's position is worth mentioning. Not unlike the argument in the discussion about Merryman's harm discussed above,²³⁷ Congress could have taken the action Truman did in this case,²³⁸ in which event the same harm would have resulted to the steel mills. Is there something particularly pernicious about this harm coming from an action taken by the president, then, rather than by Congress? Here perhaps so. For one, the companies might well have had reasonable expectations of how the strike situation would be handled because of Congress's extensive statutory action in this field, especially the Taft-Hartley Act. And though it is conjecture, the steel companies might even have had an expectation against seizure because they thought Congress would be the decisionmaker, and the steel industry's lobbying efforts guaranteed them enough influence in that body to prevent something as drastic as seizure from passing.²³⁹

232. *Id.*

233. *See, e.g., supra* notes 215–227 and accompanying text.

234. Exec. Order No. 10,340, 17 Fed. Reg. at 3141.

235. *See* Brief for Plaintiff Companies, *supra* note 182, at 12.

236. *See id.*

237. *See supra* text accompanying notes 174–176.

238. *See* U.S. CONST. amend. V, cl. 3 ("Takings Clause"). *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 31, 52 n.53 (1985) (reducing takings doctrine to four simple questions, and discussing temporary takings).

239. *See, e.g.,* Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45 (2006) (describing major industrial works' intense lobbying efforts with regard to 1940s labor legislation).

Finally, though in some ways this closely parallels the analysis under the first standard, Congress also has interests that need to be balanced against the president's in acting. Here, the separation of powers issue does not seem as open to question as it did in Lincoln's suspension of the writ.²⁴⁰ As Justice Jackson noted, Truman would have to rely on the implied powers in Article II, since even his "zone of twilight analysis" showed that "Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure."²⁴¹ Still, the president could plausibly argue that, in light of the emergency situation, whatever speculative harm would arise to Congress with regard to separation of powers does not match the harm that would have resulted had he not acted to prevent the strike.²⁴²

Fourth, we ask whether "the president's action [was] taken in the public interest."²⁴³ This is probably Truman's best factor. It seems quite reasonable to conclude that, from Truman's perspective, his action on April 8 was taken to prevent a major strike that would be damaging to the war effort and the national economy—two areas well entrenched in the public interest. One sticking point for the president might be the charge that his action was motivated not just to avert the strike, but also to provide wage concessions to union workers in the steel industry.²⁴⁴ And maybe that was so. But, unless Truman's *primary* motivation in seizing the mills was to provide these wage increases (which even the steel companies do not claim in their brief²⁴⁵), that his response to an emergency situation allowed him to give some benefits to the union along the way would not seem to undercut the fact that it was taken in the public interest.²⁴⁶

When looking at the four factors as a whole, it is not impossible, but implausible to find that Truman acted with practical legitimacy. Even under the alternative preliminary injunction test, it appears as if Truman only fully satisfies the fourth factor; there are some major complications with all the rest. For one, the existence of the Taft-Hartley Act, which Truman chose not to use, hurts him, particularly under the first and second factors. It seems to show congressional intent where it is difficult to infer otherwise; and, if employed, it could have reduced the damages or made the emergency go away, at least long enough to get Congress involved.

Indeed, while the harm that Truman confronted on April 8 was undoubtedly substantial, his role in possibly turning an otherwise nonemergency matter into an emergency is a major fact cutting against finding practical

240. See *supra* notes 167–174 and accompanying text.

241. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring).

242. After all, three members of the Court were not too troubled by separation of powers concerns. See *Youngstown*, 343 U.S. at 667–710 (1952) (Vinson, C.J., dissenting).

243. See *supra* text accompanying note 96.

244. See, e.g., Brief for Plaintiff Companies, *supra* note 182, at 11–12.

245. See *id.*

246. See *supra* Section II.B (discussing "primary motivation" in context of the fourth factor).

legitimacy for his seizure. However, just as with Jefferson, who failed to meet the threshold rule, failing to meet enough factors to satisfy the second prong of the analysis should not be taken to mean that Truman could not act. Rather, it means merely that by choosing to do so, he operated outside of whatever legitimacy the modified preliminary injunction framework could give him, and therefore subjected himself to full ex post review by Congress or the public.²⁴⁷

CONCLUSION

This Note set out to achieve two goals: first, to show the similarity of the function of equity in history and the function of executive power in the United States; and, second, to show the practical insights to be gained by applying the framework from one such equitable remedy, the preliminary injunction, to questions of executive power. On the first point, we have seen, for example, how the debate over the legitimacy of the King's use of equity vis-à-vis the common law and the King's response that his right to provide equitable justice was inherent or implied in his office parallel similar issues in the current debate over the legitimate source and scope of executive power. We have also seen how, historically, equity was a useful escape mechanism from an unbending common law—just as the extraordinary resort to executive power in times of pressing national emergency has historically functioned as an escape mechanism. On the second point, we have seen how a general framework could be discerned from modern courts' treatments of preliminary injunctions and translated into a workable framework through which to examine questions of executive power. And, finally, we have seen that framework put into practice in a variety of contexts. Jefferson's purchase of the Louisiana Territory highlighted the conceptual rigor of the threshold status quo rule. Lincoln's limited suspension of the writ of habeas corpus and Truman's seizure of the steel mills showcased the balancing of interests that results from the second prong standard-based analysis—with the former showing an action that passes, and the latter showing one that fails.

Throughout it all, the overriding point was to show that the modified preliminary injunction framework borrowed from equity can be used to gauge the practical legitimacy of an otherwise questionable executive action. Finding executive action practically legitimate is, of course, not the same as finding executive action constitutional. At the same time, the rigor of the framework's analysis should mean that the president gains something from passing it. Coupled with a plausible constitutional argument, the finding of practical legitimacy might warrant deferring to the president on the legitimacy of his act, which would allow the president to avoid having to rely exclusively on post hoc ratification. After all, just as problems in the common law at times required resorting to equity, sometimes a president needs

247. Cf. *supra* note 107 and accompanying text.

to act outside his normal bounds of power. There should be a principled yet flexible way of determining when he can legitimately do so.

